STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

FINAL REPORT
INDEX TO PROCEEDINGS AND RESEARCH

JUNE 30, 1977

Seated counterclockwise (beginning at the left): Senator Anthony Calabrese, Craig Aalyson, Katie Sowle, Dr. Warren Cunningham, John Skipton, Edwin Heminger, Senator Paul Gillmor, Senator Oliver Ocasek, Rep. Marcus Roberto, Senator Robert Corts, Charles Fry, Nolan Carson, Jack Wilson, Robert Huston, Joseph Bartunek, Don Montgomery, James Shocknessy, Senator Douglas Applegate, Linda Orfirer (vice-chairman) Richard Carter (chairman), Ann Eriksson (director), Rep. Sam Speck, Ellen Denise (secretary).

A Resolution

BY

MESSRS. OCASEK - MALONEY

Recognizing the members of the Ohio Constitutional Revision Commission for their outstanding contributions to the State of Ohio.

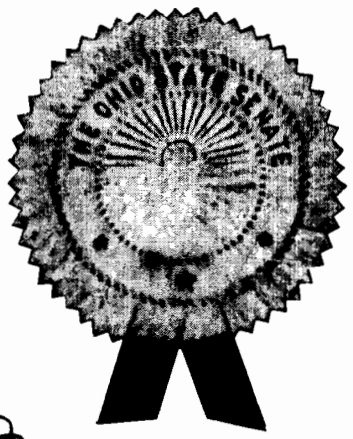
WHEREAS, The members of the Senate of the 112th General Assembly of Ohio are fully aware of the many invaluable contributions of the individuals who have served on the Ohio Constitutional Revision Commission since its creation by the General Assembly in 1969. The Commission, which began its work early in 1971 and expects to complete its efforts in June 1977, two years ahead of schedule, has thoroughly examined the entire Ohio Constitution; and

WHEREAS, Seeking public comment and expert advice, the Commission members, reimbursed only for actual expenses, met monthly, in addition to devoting countless hours of private study to the review of Ohio's Constitution. The work of the Commission has, thus far, resulted in eleven interim reports being submitted to the General Assembly, with the twelfth and final report expected to be completed shortly. These reports have resulted in the General Assembly placing before Ohio's electorate sixteen constitutional amendments, thirteen of which were accepted, to make Ohio's Constitution a living document capable of dealing with twentieth century problems; and

WHEREAS, Deserving of special recognition are Richard Carter, chairman; Linda Orfirer, vice chairman; Ann M. Eriksson, director; and the committee chairmen: John Skipton, Nolan Carson, Katie Sowle, Don Montgomery, Joseph Bartunek, Craig Aalyson, and Alan Norris. The entire membership of the Commission is to be saluted for undertaking the voluminous task of reviewing the Ohio Constitution and researching and recommending changes to the members of the General Assembly and the citizens of Ohio; therefore be it

RESOLVED, That we, the members of the Senate of the 112th General Assembly, in adopting this Resolution, extend well-deserved recognition to the sixty-eight persons who have served as members of the Constitutional Revision Commission for their outstanding service to the State of Ohio; and be it further

RESOLVED, That the Clerk of the Senate transmit duly authenticated copies of this Resolution to Richard Carter, chairman of the Ohio Constitutional Revision Committee; to Ann M. Eriksson, Commission director; to the Columbus Dispatch; and to the Columbus Citizen-Journal.



I, William H. Chavanne, hereby certify that the above is a true and correct copy of Senate Resolution No. 149, adopted by the Ohio Senate, March 31, 1977.

William H. Chavanne, Clerk of the Senate

Oliver Ocasek, President Pro Tempore

Ohio Constitutional Revision Commission

41 South High Street
COLUMBUS, OHIO 43215
TEL. (614) 466-6293

Ann M. Eriksson, *Director*

May 1, 1977

To: The General Assembly of the State of Ohio

The members of the Ohio Constitutional Revision Commission are proud to present this Final Report, two years in advance of time allotted to this task. It represents the culmination of more than six years of dedicated activity, involving numerous committee and Commission meetings and countless hours of private study and work. Arriving at conclusions about needed changes in Ohio's basic governmental document is not an easy task. Each word, each phrase, each sentence has its own historical significance and is interwoven with the remainder of the Constitution and with the whole fabric of state and local government; changes in basic institutions are not lightly proposed. The members of the Commission have taken their job seriously and, not being paid, view this assignment as pro bono publico work of the highest order.

This Final Report contains all of our recommendations -- those that have previously been presented to you, as well as some new recommendations. The entire Constitution has been reviewed. In many instances, no reason was found to recommend changes. In a few, a need for revision seemed evident but sufficient numbers of Commission members could not agree on what change was needed, and so no recommendation is made. The Final Report contains a rationale for all recommendations for the benefit of those interested in pursuing them further.

Commission members have had the satisfaction of seeing significant constitutional changes resulting from their work already take effect -- more appear on the horizon. The record of the Commission's analysis, deliberations, and ideas will offer future constitution-makers in Ohio a basis for the continuing task of providing better government for the citizens of Ohio.

It would be inappropriate to submit this report without acknowledging the assistance of the many individuals and organizations that have helped in this work, but it would be impossible to name them all. A competent staff; consultants, paid, unpaid, and underpaid; experts from within and without Ohio; and, most important, citizens of Ohio who had opinions and knowledge to share with us. We are grateful to all of them.

May 1, 1977

To: The General Assembly of the State of Ohio

Finally, as Chairman of the Commission since its work began, I believe that all members of the Commission, past and present, should be recognized for their dedication toward achieving its goals in a constructive, cooperative, and non-partisan spirit. This entire effort has been an outstanding example of how citizen involvement can make the deomcratic process truly meaningful and effective.

Respectfully submitted,

Richard H. Carter

Richard H. Carter
Chairman

We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence
July 4, 1776

I have likened the Constitution to a work of art in its capacity to respond through interpretation to changing needs, concerns, and aspirations. In a larger sense, all law resembles art for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity and disarray . . . There are, I am afraid, no absolutes in law or art except intelligence.

Paul A. Freund, in "On Law and Justice"

There are no natural limits to constitutional revision, no way to fix a beginning and no inevitable end. It is a continuous process, punctuated and confirmed from time to time by the adoption of amendments, the ratification of a "new" constitution submitted by a convention or the discovery by the courts of new meaning in the old document. Each formal change in the words or the interpretation of a constitution is preceded by a period, long or short, during which a sense of the need for change grows.

John E. Bebout, in "Perspectives in Preparing for Constitutional Revision"

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Ohio Constitutional Revision Commission

Members

Senate

Appointed by the President Pro Tempore:

Charles L. Butts
John T. McCormack
Marcus A. Roberto [1]

Appointed by the Minority Leader:

Paul E. Gillmor
William H. Mussey
Thomas A. Van Meter

House of Representatives

Appointed by the Speaker:

David Hartley
Mike Stinziano
John D. Thompson

Appointed by the Minority Leader:

Richard F. Maier
Alan E. Norris
Michael G. Oxley

Public Members

Craig Aalyson
Joseph W. Bartunek [2]
Nolan W. Carson [2]
Richard H. Carter, Chairman [2]
Robert Clerc
S. Warren Cunningham, II [2]
Charles E. Fry [1 3]
Richard E. Guggenheim [2]
Edwin L. Heminger [2]
Robert K. Huston
Frank W. King [2]
D. Bruce Mansfield
Don W. Montgomery [2]
Linda Unger Orfirer (Mrs. Alexander) [2]
Vice-Chairman
Anthony J. Russo [1 3]
John A. Skipton [2]
Kathryn Dix Sowle (Mrs. Claude)
Paul A. Unger
Jack D. Wilson [2]

Past Members

Senate

Douglas Applegate [3]
Charles P. Bolton
Anthony O. Calabrese
Charles J. Carney [3]
Robert J. Corts
Max H. Dennis [3]
James K. Leedy [3]
William B. Nye [3]
Oliver Ocasek
Robert E. Stockdale
Neal F. Zimmers, Jr.

House of Representatives

Eugene Branstool
Richard F. Celeste
Scribner L. Fauver
William L. Mallory
John C. McDonald [3]
Robert A. Nader
Francine M. Panehal
Donna Pope
J. Barney Quilter [3]
Sam W. Speck, Jr.
James E. Thorpe [3]
Walter L. White [1]
Arthur R. Wilkowski

Public Members

Napoleon A. Bell [2]
Norbert Brockman, S.M. [2]
Q. Albert Corsi
John Duffey [2]
Harold A. Hovey
Charles W. Ingler [2]
Dean G. Ostrum [2]
Frank W. Pokorny [2]
Ray Ross [2]
Oliver Schroeder, Jr. [2]
James W. Shocknessy [4]
Iola O. (Hessler) Silberstein
William W. Taft [3 5]

[1] *Also served as a House of Representatives Commission member*
[2] *Original OCRC public member*
[3] *Original OCRC legislative member*
[4] *Died July, 1976*
[5] *Also served as a Senate Commission member*

May 1, 1977

Ohio Constitutional Revision Commission
Member Biographical Sketches

CRAIG AALYSON September 1973- Columbus

Private practice of law, Larrimer & Larrimer. B.S., U.S. Naval Academy; LL.B., Ohio State Univ. College of Law. Three years in the service. Member: American, Ohio State and Columbus Bar Associations; Franklin County Trial Lawyers Association; Ohio Association of Trial Lawyers; American Trial Lawyers; Professional Ethics Committee, Columbus Bar Association. Chairman, OCRC's What's Left Committee.

DOUGLAS APPLEGATE September 1969 - December 1976 Steubenville

U.S. Congressman, 18th District 1977-. State Senator, 30th District 1969-1976. State Representative 1961-1968. Real estate broker. Former Member: Legislative Service Commission; Finance Commission; Ohio Controlling Board. Member: Jefferson County Young Democrats; Elks; Eagles; numerous other organizations. Recipient: 1965 U.S. Junior Chamber of Commerce America's Outstanding Young Men; National Hemophilia Foundation; Outstanding Legislator (Disabled American Veterans). Nominated: 1967 J.F.K. Award, Ohio's Young Democrat of the Year. Current Congressional Committees: Public Works & Transportation; Veterans Affairs; District of Columbia. Senate Committees included: Agriculture & Conservation; Finance; Ways & Means.

JOSEPH W. BARTUNEK September 1970- Cleveland

Partner, law firm of Bartunek, Bennett, Garofoli & Hill. B.S., Adelbert College, Case Western Reserve Univ. LL.B., Cleveland-Marshall Law School. Judge, Probate Division, Cuyahoga County Common Pleas Court 1964-1970. State Senator 1949-1958 and 1961-1964. Senate Minority Leader 1951-1958. Senate Clerk 1959-1960. Chairman, Cuyahoga County Democratic Executive and Central Committees; Vice-Chairman, Democratic State Executive Committee. National College State Trial Judges, Univ. of Nevada, 1970. Member: Cleveland, Cuyahoga County, Ohio State and American Bar Associations; American Judicature Society; American Trial Lawyers Association. Member Board of Trustees: Cleveland State Univ. (Chairman); St. Luke's Hospital; Cleveland Zoological Society; Catholic Charities Corporation; Judson Association; Greater Cleveland Hospital Association; Community Chest and Legal Aid Society. Chairman, OCRC Education and Bill of Rights Committee.

NAPOLEON A. BELL September 1970 - March 1975 Columbus

Private practice of law, Bell, White, Saunders & Roy. B.A., Mount Union College; LL.B., Western Reserve Univ. Law School. Attorney Examiner, Ohio Industrial Commission 1955-1958. Vice-Chairman, Ohio Board of Tax Appeals. President and Chairman of the Board, Beneficial Acceptance Corporation. Franklin County Democratic Executive Committee; Democratic State Executive Committee; Democratic Party Structure and Delegate Selection Committee. Member Board of Directors: Columbus Area Chamber of Commerce; Central Ohio Boys Scouts; Columbus Urban League. Member: Mount Union College Board of Trustees; Columbus Traffic and Transportation Commission. State Chairman, United Negro College Fund; Chairman, Concerned Citizens of Columbus. Award of Merit: United Negro College Fund; Ohio Legal Center; Mahoning County Youth Club. 1976 NCAA Silver Anniversary Award Honoree.

CHARLES P. BOLTON May 1974 - January 1975 Mentor

Manager, Office of International Trade, Ohio Department of Economic and Community Development (to promote foreign investment in Ohio) 1975-1976. A.B., Harvard College; M.B.A., Harvard Business School. State Senator, 31st District (parts Cuyahoga, Geauga, Lake) 1974. Investment Banker, W.E. Hutton & Co. and Goodbody and Company, New York City 1968-1973. Trainee, Scudder, Stevens & Clark, Boston and Cleveland 1965-1966. Six years in U.S. Army Reserve. Member: Northern District Export Council of Ohio; World Trade Clubs of Cincinnati, Cleveland, Columbus, Dayton and Toledo; Ohio Historic Site Preservation Advisory Board; Interstate Legislative Committee on Lake Erie (Former); Committee to Review Correctional Institutions (Former). Ohio Commodore. Trustee: Lake Erie College; Hawken School.

EUGENE BRANSTOOL January 1975-July 1976 Utica

State Representative, 1st District (Licking) 1975-. B.S., Ohio State Univ. North Fork Local Board of Education (President 1974). Farmer. Member: Licking County Democratic Central Committee; Legislative Land Use Review Committee; Licking County Farm Bureau Federation (Past Vice-President); Licking Soil and Water Conservation District (Past Secretary); Utica Jaycees (Past President); Utica American Legion; Utica Sertoma Club. Named Ohio's Outstanding Young Farmer of 1970. House Committees include: Agriculture & Natural Resources (Vice-Chairman); Economic Affairs & Federal Relations (Aging Subcommittee); Energy & Environment.

NORBERT BROCKMAN, S.M. September 1970 - June 1971 Dayton

Program Director, Bergamo Center, Dayton. A.B. with honors, Univ. of Dayton; M.A., Catholic Univ. Ph.D., Catholic Univ. Board of Trustees Scholar, Catholic Univ. 1957-1960. Summer Lecturer in Government, New York Univ. 1963. Instructor, Political Science, Univ. of Dayton 1962-1965; Asst. Professor 1965-1968; Assoc. Professor 1968-1970; Chairman of Department 1966-1969. Member: Dayton Human Relations Council 1967-1968; Special Committee on Urban Resources 1966-1970; Task Force on Police-Community Relations (Director) 1967-1968; Regional Law Enforcement Planning Committee (Chairman) 1969; Coordinator Law Enforcement Program, Univ of Dayton 1966-1970. Author of many professional publications. Member: American Political Science Association; International Association of Chiefs of Police; American Society for Public Administration; Association for Religion and the Applied Behavioral Sciences.

CHARLES L. BUTTS January 1976- Cleveland

State Senator, 23rd District 1975-. B.A., Oberlin College. Senate Committees include: Rules; Elections, Financial Institutions & Insurance; Ways & Means (Vice-Chairman); Energy & Public Utilities.

ANTHONY O. CALABRESE January 1971-January 1975 Cleveland

State Senator, 22nd District 1957-. Attended Wesley Business School and Cleveland College of Western Reserve Univ. Minority Leader, Ohio Senate 1971-1974. State Representative 1953-1956. Broker and Business Manager. Democratic Precinct Committee-Ward Leader 1944. Member, National Committee of the Democratic Party; State Chairman, Ohio Nationalities Division; Vice-Chairman, Democratic Executive Committee. Awarded Cross of Merit by Republic of Italy 1959. Member: Knights of Columbus; City Club; Cleveland YMCA; National Conference of State Legislators. Recipient: Humanitarian Award, 22nd Senatorial District Civic League 1972; American Service Award for Patriotic Service to Government. Senate Committees include: Energy & Public Utilities; Rules; Agriculture & Small Business (Vice-Chairman); Highways & Transportation.

CHARLES H. CARNEY September 1969-January 1971 Youngstown

U.S. Congressman, 19th District 1971-. Attended Youngstown State Univ.; Honorary Doctor of Humanities, Central State Univ.; Honorary Doctor of Laws, College of Osteopathic Medicine and Surgery, Des Moines Iowa. State Senator 1951-1970. Minority Leader 1969-1971. Member: Mahoning Valley Firemen's Association; Youngstown Catholic Services League; United Fund; Farm Grange; Fraternal Order of Eagles; Knights of Columbus; Loyal Order of Moose; Damon Runyon Cancer Committee. Current Congressional Committees include: Interstate & Foreign Commerce; Veterans' Affairs; Small Business. Subcommittees include: Health & The Environment; Communications; Hospitals; Housing; Commodities & Services; Government Procurement & International Trade.

NOLAN W. CARSON September 1970- Cincinnati

Partner, law firm of Dinsmore, Shohl, Coates & Deupree, Cincinnati 1951-. A.B., Heidelberg College; J.D. with distinction, Univ. of Michigan Law School. Native of Bucyrus, Ohio. State Representative 1961-1962. Chairman, Ohio Elections Commission 1974-. Chairman, OCRC Finance and Taxation Committee.

RICHARD H. CARTER, Chairman September 1970- Fostoria

Chairman, Fostoria Corporation, a financial holding company 1976-. B.S., Yale Univ. (magna cum laude) with membership in Phi Beta Kappa and Sigma Xi honoraries. Engineer, Vought Aircraft Division of United Aircraft 1942-1948. President, Fostoria Corp. 1959. Director, six companies. Charter Member, Business Leadership Advisory Council to Office of Economic Opportunity 1964-1967. Appointed in 1969 to President's Task Force on Improving the Prospects for Small Business. Chairman: Midwest Executive Council of the National Industrial Conference Board; United Community Fund; non-partisan city charter commission. Member: The Young President's Organization, Inc.; Chief, Executive Forum, Rotary International. Honorary Doctor of Laws, 1974 from and Trustee of Wilberforce Univ.

RICHARD F. CELESTE January 1973 - December 1974 Delaware

Lieutenant Governor 1975-. Rhodes Scholar; graduate Yale Univ. Majority Whip, Ohio House of Representatives 1973-1974. State Representative, 5th District 1971-1974. Washington-based officer, Peace Corps. Member U.S. Foreign Service. Executive Assistant to Chester Bowles, President Kennedy's Ambassador to India for four years. Officer and Stockholder, National Housing Corporation, Cleveland firm that builds low cost housing for the elderly. Member: Italian Sons and Daughters of America; American Society for Public Administration; City Club; Cleveland Interfaith Housing Corp. Member of Board: Police Athletic League; Karamu West Side Community House; National Lieutenant Governors Food Policy Committee; Ohio Democratic Executive Committee; Rules Committee, 1976 Democratic National Convention; Governors Task Force on Drug Abuse.

ROBERT G. CLERC July 1974- Cincinnati

Editorial writer, *Cincinnati Enquirer*. B.A. and M.A., Political Science, Xavier Univ, Cincinnati. Served in Army. Intelligence Analyst, CIA, Washington, D.C. Enrolled Soviet and East European Institute, Graduate School of Niagara Univ. Secondary School Teacher, Oak Hills Local School District. Past Chairman, *Cincinnati Enquirer* Middle Management Board and its Executive Committee. Member: Advisory Committee, School of Education and Allied Professions, Miami (Ohio) Univ.

Q. ALBERT CORSI August 1973-May 1974 Cleveland

Special Counsel, Ohio Attorney General 1971-. B.S., Ohio State Univ.; J.D., Cleveland State Univ. Admitted Ohio Bar 1962. Assistant Cleveland Prosecutor 1964-1967. Deputy Director for Legal Affairs, Ohio Dept of Natural Resources 1973-1975. Member Greater Cleveland Bar Association.

ROBERT J. CORTS May 1974 - January 1975 Elyria

Attorney. Graduate: Miami Univ; Harvard Law School. State Senator, 13th District (Huron, Erie, Lorain, Richland) 1969-1974. Lorain County Republican Chairman 1962-1969. Senate Committees included: Finance; Financial Institutions, Insurance & Elections; Judiciary (Vice-Chairman); Transportation & Local Government (Chairman).

S. WARREN CUNNINGHAM, II September 1970- Oxford

Retired Professor, Miami (Ohio) Univ. B.A. and J.D., Univ. of California; Ph.D., Univ. of Washington. Taught at Univ. of California several years. Admin. Assistant county government in Calif, 9 years. Director of Research, Seattle Mayor's Commission on Post-War Planning, one year. Director, Institute of Government, Univ. of Washington, one year. Consultant to Brookings Institute; Associate, Stephen H. Wilder Foundation. Member: American Political Science Association; American Society for Public Administration; National Municipal League; Ohio College Association; Mid-West Conference of Political Scientists; American Academy of Political and Social Sciences; American Association of University Professors. Publications include an analysis of the Ohio State Constitution, from 1851 to 1951.

MAX H. DENNIS September 1969 - September 1973 Wilmington

Attorney. Attended Ohio State Univ. and Univ. of Michigan; LL.B., Washington and Lee Univ. State Senator, 10th District 1963-1976. State Representative 1955-1962. Member: American, Ohio State and local Bar Associations; Elks; Eagles; various Masonic bodies; Rotary. 1973 Outstanding Legislator Award, Ohio Trial Lawyers Association. Senate Committees included: Finance; Elections, Financial Institutions & Insurance; Health & Retirement.

JOHN DUFFEY September 1970 - September 1971 Columbus

Partner, law firm of Topper, Alloway, Goodman, DeLeone & Duffey. B.A. and J.D., Univ. of Michigan; awarded Order of Coif. Associate Professor of Law, Ohio State Univ. 1954-1960. Chairman, Columbus City Planning Commission 1955-1960. Judge, Ohio Tenth District Court of Appeals 1960-1968.

SCRIBNER L. FAUVER August 1976 - February 1977 Elyria

State Representative, 54th District 1973-. Graduate of Dartmouth College; Law Degree, Harvard Law School. Councilman-At-Large, Elyria City Council 1970-1974. President, Elyria City Council 1971. Attorney. Member, Elyria Rotary Club. Trustee, Elyria Memorial Hospital. House Committees include: Energy & Environment; Finance & Appropriations (Human Resources Section).

CHARLES E. FRY September 1969- Springfield

Chairman and Chief Executive Officer, Fry, Inc., Builders. B.S., Ohio State Univ. President, Student Senate; Beta Gamma Sigma; Beta Alpha Psi; Phi Eta Sigma; Athletic and Publications Boards. State Representative 1965-1974. Speaker Pro Tempore 1969-1972. State Senator 1961-1962. Legislative Service Commission. President, National Society of State Legislators. Governing Board, Council of State Governments. Intergovernmental Relations Committee, National Legislative Conference. District Governor, Rotary International. President, YMCA. National Board Member and Local President, OSU Association. Presidents' Club. Vice-Chairman, Ohio Youth in Government Committee. Chairman, Pacesetters.

PAUL E. GILLMOR January 1974- Port Clinton

State Senator, 2nd District 1967-. B.A., Ohio Wesleyan Univ.; LL.B., Univ. of Michigan Law School; also attended Miami Univ. and College of Wooster. Assistant Senate Minority Leader, 112th General Assembly. Judge Advocate, U.S. Air Force. State Representative, Council of State Governments Committee on Suggested State Legislation. Member: Controlling Board; Ohio State, American Bar Associations; Phi Delta Phi legal fraternity; Pi Sigma Alpha National Political Science Honorary; Sigma Alpha Epsilon; Put-Han-Sen Council for Boy Scouts of America (Vice-President); Seneca County Heart Fund (1969 Chairman); Rotary; AmVets; Ohio Farm Bureau. Senate Committees include: Conservation & Environment; Legislative Ethics (Chairman); Finance; Highways & Transportation; Rules.

RICHARD E. GUGGENHEIM September 1970- Cincinnati

Vice-President and Secretary, United States Shoe Corporation, Cincinnati. Univ. of Michigan; Harvard Law School. Admitted to Ohio Bar 1937. Director, Ohio Dept of Liquor Control 1971-1974. Chairman, Ohio Civil Rights Commission 1959-1962. Joined U.S. Shoe 1951. Deputy General Counsel, Economic Stabilization Agency 1950-1951. Attorney, Civil & Anti-Trust Division, U.S. Dept of Justice 1946-1950. Chairman, Ohio Democratic Party Platform Committee 1964-1970. Member: American, Ohio and Cincinnati Bar Associations; Mayor of Cincinnati's Friendly Relations Committee (Former); Cincinnati Civil Service Commission. Former Director, Federal Home Loan Bank of Cincinnati.

DAVID HARTLEY August 1976- Springfield

State Representative, 60th District 1973-. B.A. and graduate work, Univ. of Louisville. Factory worker, International Harvester Company. Member: Clark County Democratic Executive Committee; American Association of University Professors; Civitan; Project Woman (Board of Directors); UAW Local 402. House Committees include: Commerce & Labor; Human Resources (Vice-Chairperson); Transportation & Urban Affairs.

EDWIN L. HEMINGER September 1970- Findlay

Publisher, *The Courier*; Vice-President and Director, Findlay Publishing Company. B.A., Ohio Wesleyan Univ.; MSJ, Northwestern Univ. President, Hancock Historical Museum Association. Director, First National Bank of Findlay. Past President: Findlay Area Chamber of Commerce; Ohio Chamber of Commerce. Past Member, Chamber of Commerce of U.S. Committee on U.S. Government Operations & Expenditures.

HAROLD A. HOVEY September 1970-December 1972 Washington, D.C.

Independent economic and management consultant, Arlington Virginia. B.A., Wabash College; LL.B. and Ph.D., George Washington Univ. Director, Illinois Bureau of the Budget 1973-1975. Director, Ohio Dept of Finance 1971-1973. Associate Professor, Economics and Public Administration, Ohio State Univ. 1970. Chief, Public Policy Economics Division, Battelle Memorial Institute 1967-1970. Previously employed in Washington by: Office of Secretary of Defense; Office of Management and Budget; trade association of electric utilities. Author of books on: U.S. military aid program; planning and budgeting systems; office of Governor.

ROBERT K. HUSTON October 1974- Cleveland

General Solicitor, Ohio Bell Telephone Company. B.S. and J.D., Univ. of Alabama. Joined Ohio Bell in 1945. Military Intelligence, U.S. Army. Assistant to Dean of Men, Univ. of Alabama 1940-1942. Recipient of several scholastic awards. Listed in: Who's Who in Finance and Industry. Member: Cleveland, Cuyahoga County, Ohio and American Bar Associations; a number of professional associations; Table Chairman, First Friday Club of Cleveland; Board of Directors, Chillicothe Telephone Company.

CHARLES W. INGLER September 1970-October 1971 Albany, New York

Associate Chancellor, State Univ. of New York. B.A. in Government and M.A., Oklahoma Univ.; graduate study, Northwestern Univ. Newspaper and radio reporting 1940-1943. Research Assistant, Oklahoma Univ. 1946-1948. Instructor of Political Science, Northwestern Univ. 1950-1951. Research Associate, Council of State Governments 1951-1953. Senior Associate, Cresap, McCormick and Paget, Management Consultants, New York 1953-1954. Assistant Director and Director, Research Staff, Ohio Legislature 1954-1959. Director, Community Research Incorporated, Dayton 1959-1961. Director, Public Affairs, National Cash Register 1961-1971. Chairman, Ohio Interim Commission on Higher Education 1959-1961. Secretary, Board of Trustees; Sinclair Community College; Wright State Univ. Board of Directors, Ohio Chamber of Commerce 1966-1971. Member, Society for College and University Planning. Author of many publications.

FRANK W. KING September 1970- Columbus

Liaison Officer, Office of State Auditor. President, Ohio AFL-CIO 1964-1974. State Representative, Lucas County 1949-1950. State Senator 1953-1969. Democratic Minority Leader 1961-1969. President Pro Tempore, Ohio Senate 103rd General Assembly. Senate Democratic Majority Leader. Toledo City Councilman 1951-1952. Selected Outstanding Senator by: Legislative Correspondents covering General Assembly; all senators as one of two outstanding senators. Member: Bricklayers Local 3, Toledo; Toledo Federation of Teachers Local 250. Former Apprentice Training Coordinator and Instructor of Bricklaying Apprentices, Toledo public school system.

JAMES K. LEEDY September 1969 - January 1972 Wooster

Lawyer. Graduate Muskingum College; LL.B., Ohio Northern Univ. Law School. State Senator, 19th District 1969-1972. Wayne County Prosecuting Attorney, 14 years. Member: Ohio State, Wayne County Bar Associations; Senate Judiciary Committee, four years. Chairman, Joint House-Senate Committee for Revision of Ohio Criminal Code, four years. Senate Committees included: Agriculture, Insurance & Financial Institutions; Commerce & Labor (Vice-Chairman); Environmental Affairs.

RICHARD F. MAIER January 1975- Massillon

State Representative, 48th District 1973-. B.A., Yale Univ. (Phi Beta Kappa) in Political Science; J.D., Michigan Law School. General law practice 1951-. Police Prosecutor, Massillon Municipal Court. Massillon City Solicitor. Involved in many civic groups. Member: Stark Metropolitan Housing Authority (Board of Directors); Massillon Urban League (Former); Executive Committee, Stark County Bar Association (Former); Massillon Rotary Club (Past President). Past President, Massillon Boys Club. Chairman: Ohio Area Council of Boy Scouts of America; Massillon Chapter, American Red Cross. House Committees include: Finance & Appropriations (Education Section); Human Resources (Ranking Minority Member).

WILLIAM L. MALLORY January 1971 - June 1973 Cincinnati

State Representative, 23rd District 1967-. Graduate Xavier Univ. and Univ. of Cincinnati; honorary Doctor of Laws, Central State Univ. Majority Floor Leader. Former School Teacher. Associate Professor, Univ. of Cincinnati. Member: Board of National Federation of Settlement Houses; West End Community Council (Past President); Citizens Committee to Lower Bus Fares and Improve Service (Co-Chairman); Democratic Executive Committee (Vice-Chairman). Recipient: Pioneer Award, Hamilton County; Outstanding Citizen Award, Cincinnati; Special Award from Former Manager Wichman as benefactor of Cincinnati. House Committees include: Rules; Judiciary (Judicial Administration Section).

D. BRUCE MANSFIELD January 1972- Akron

Retired President, Ohio Edison Company. A.B. magna cum laude, Kenyon College; LL.B., Duke Univ. Law School; J.S.D., Yale Univ. Law School; Phi Beta Kappa; The Order of the Coif. Taught Finance and Corporate Law at Temple Univ. Law School and School of Jurisprudence at Univ. of Calif at Berkeley. Senior Attorney, Securities and Exchange Commission. Member Canton law firm of Amerman, Mills, Mills, Jones and Mansfield. General Counsel, Ohio Edison beginning in 1948. Chairman of the Board, Pennsylvania Power Company, a subsidiary of Ohio Edison. Trustee and Vice-President, Akron General Medical Center. Past President and Chairman of the Board, Ohio Chamber of Commerce, and Greater Akron Area Chamber of Commerce. Former President: Edison Electric Institute (the principal national trade association of the investor-owned electric utilities); National Association of Electric Companies. Recipient: 1968 Doctor of Humane Letters, Univ. of Akron; 1971 LL.D., Kenyon College. Trustee Emeritus, Kenyon College. Former President, United Way of Summit County. Member, Akron, Ohio, American Bar Associations.

JOHN TIMOTHY MCCORMACK January 1975 Euclid

State Senator, 31st District 1975-. B.A., Miami Univ. of Ohio; J.D., Cleveland Marshall Law School; attended John Carroll Univ. Attorney, Zellmer & Gruber, Cleveland. State Representative, 18th District 1973-1974. Euclid City Councilman 1970-1971. Former Member: Joint Subcommittee on Prisons; Rehabilitation Study Commission. Member Ohio Bar Association. Senate Committees include: Conservation & Environment (Chairman); Finance (Vice-Chairman); Judiciary.

JOHN C. MCDONALD September 1969 - January 1971 Newark

Partner, law firm of Tingley, Hurd & Emens, Columbus 1972-. Legislative Counsel to the Governor 1971-1972. State Representative, 19th District 1964-1970. House Minority Whip 1967. Democratic Floor Leader 1968-1970. Member House Rules Committee.

DON W. MONTGOMERY September 1970- Celina

President and Chairman of the Board, Celina Group, comprised of 12 affiliated companies. B.A., DePauw Univ., J.D., Columbia Univ. Law School. Life Director and member of Executive Committee, Ohio Chamber of Commerce. Past Board Chairman and President, Ohio Chamber of Commerce. Chairman of the Board, Home Banking Company, St. Marys Director-General: S & L Corporation, Findlay; Telephone Company of Ohio, Marion. Trustee: Ohio Insurance Institute: Griffith Memorial Foundation for Insurance Education. Past President, Insurance Federation of Ohio. Listed in: Who's Who in Insurance; Community Leaders in America. Recipient: Charter Membership, Executive Order of Ohio Commodores. Chairman, OCRC Judiciary Committee.

WILLIAM H. MUSSEY January 1975- Batavia

State Senator, 14th District (southern Ohio from Hamilton to Jackson) 1973-. Attended Ohio State Univ. State Representative 1967-1972. Retired journalist and former co-owner, chain of weekly newspapers, Clermont County area. Served in U.S. Army, 21 years; Major, Ohio National Guard. Member: Joint Land Use Study Committee; Batavia Businessmen's Association (Past President); Ohio Newspaper Association; Batavia Rotary Club (Past President); Batavia American Legion (Former Commander); V.F.W.; Little Miami River Valley Development Association; Batavia Masonic Lodge. Senate Committees include: Energy & Public Utilities; Highways & Transportation; Ways & Means.

ROBERT A. NADER September 1972 - December 1972 Warren

State Representative, 55th District (Trumbull) 1971-. B.A., Adelbert College; LL.B., Western Reserve Univ. School of Law. Former Warren City Councilman 1960-1966. Democratic Precinct and Executive Committeeman. Attorney. Member: Warren Area Chamber of Commerce; Trumbull County Bar Association; Warren City Golf League; Avalon Players Association; Knights of Columbus; Ohio Title Association; B.P.O.E.; Football Officials Association; Warren Equity Company; Trumbull County Law Library Association; Trumbull New Theatre, Inc. House Committees include: Finance & Appropriations (Education Section); Highways & Highway Safety; Rules.

ALAN E. NORRIS January 1973- Westerville

State Representative, 27th District (Franklin) 1967-. B.A., Otterbein College; La Sorbonne; LL.B., New York Univ. Law School. Attorney. House Minority Whip 1973-. Chairman, Ohio American Revolution Bicentennial Commission. Member: Kiwanis (Past President); Masonic Lodge (Past Master); Methodist Children's Home Board of Trustees. House Committees include: Governmental Affairs (Ranking Minority Member); Ethics (Vice-Chairman). Chairman, OCRC Grand Jury and Civil Trial Juries Committee.

WILLIAM B. NYE September 1969 - January 1971 Akron

Director, Ohio Dept of Natural Resources 1971-1974. State Senator, 28th District 1967-1970. State Representative, Summit County At-Large 1965-1966. House Committees included: Conservation & Agriculture; Judiciary. Senate Committees included: Elections; Commerce & Labor; Judiciary.

OLIVER OCASEK January 1971 - January 1975 Northfield

President Pro Tempore, Ohio Senate 1975-. B.S. and M.A., Kent State Univ. honorary Doctor of Laws, Kent State Univ. State Senator. 17th District (Summit County) 1959-. Professor of Education, Univ. of Akron. Author of over 400 laws, many of them in the field of education. Past Member: Ohio Education Association Executive Committee; N.E.A. Executive Committee; N.E.A. Legislative Commission. President, Akron YMCA Board of Trustees. Chairman, Ohio Youth in Government Committee. Member: Executive Committee and Board of Governors, Council of State Governments. Recipient: four outstanding legislator awards, including Assembly of Government Employees. Past President: Young Men's Democratic Club of Summit County; League of Young Democrats of Ohio. Past Vice President: Young Democrats of America; Summit County Democratic Central Committee. Chairman, Senate Rules Committee.

LINDA UNGER ORFIRER (MRS. ALEXANDER), Vice-Chairman September 1970- Cleveland

Associate Director, Health Planning and Development Commission, Federation for Community Planning. Attended Wellesley College; B.A., Western Reserve Univ.; M.P.A., Kent State Univ. Former Director, School-Community Relations, Commission on Public School Personnel Policies in Ohio. Civic activities include: League of Women Voters of Shaker Heights (President); League of Women Voters of Ohio (Director); Finance Committee, Overseas Education Fund, League of Women Voters of the U.S.; Master Plan Committee of Shaker Heights (Secretary); Ohio Local Government Services Commission (Chairman). Chairman, OCRC Local Government Committee.

DEAN G. OSTRUM September 1970 - March 1974 New York

Vice President, Regulatory Matters, Western Electric Company, New York 1974-. A.B., Univ. of Kansas; LL.B., Yale Law School. Private law practice four years. Assistant Attorney General, Kansas, one year. Joined Bell System 1954. Vice-President and General Counsel, Ohio Bell 1963. Member: American, Kansas, Missouri, Texas, Oregon, Washington, Ohio and New York Bar Associations. Former Trustee: Cleveland Bar Association; Metropolitan YMCA; Case-Western Reserve Univ. (Chairman, Board of Overseers); Karamu House; Cleveland Play House; Musical Arts Association. Past President, Cleveland Museum of Natural History. Past Vice-President, Cleveland Federation for Community Planning.

MICHAEL G. OXLEY February 1977- Findlay

State Representative, 82nd District (Hancock, Putnam, parts Henry and Van Wert) 1973-. B.A., Miami Univ.; J.D., Ohio State Univ. College of Law. Attorney. Member: Society of Former Special Agents of the F.B.I.; American, Ohio and Findlay Bar Associations; Rotary International. House Committees include: Governmental Affairs (State Government Subcommittee); Insurance, Utilities & Financial Institutions (Financial Institutions Subcommittee); Judiciary (Judicial Administration Section).

FRANCINE M. PANEHAL January 1975 - July 1976 Cleveland

State Representative, 5th District (Cuyahoga County) 1975-. Attended Baldwin-Wallace College; B.A., Ursuline College. Ward 1 Councilman, City of Cleveland 1971-1973. Cleveland City Planning Commission 1965-1971. Ohio Bell Service Representative 1948-1950. Socony Vacuum Oil 1943-1945. Member: Cuyahoga County Democratic Executive Committee; Aviation Committee, Cleveland City Council (Vice-Chairman); League of Women Voters; Citizens League; Board Member, Cleveland Landmarks Commission. House Committees include: Finance & Appropriations; Governmental Affairs (Vice-Chairman); Urban Crises Committee (Vice-Chairman).

FRANK R. POKORNY September 1970 - January 1975 Cleveland

State Representative for 10 years (Former) and Democratic leader. J.D., Cleveland Marshall School of Law. Former County Commissioner, Cuyahoga County, involved in numerous planning commissions and civic foundations. Commission on Local Government Services. Trustee: Welfare Federation of Cleveland; Board of Greater Cleveland Growth Association. Former President, Criminal Justice Coordinating Council of Greater Cleveland. Director: National Association of County Officials; National Association of Regional Councils; Catholic Big Brothers of Greater Cleveland. Chairman, Law Enforcement Planning Agency.

DONNA POPE January 1975 - July 1976 Parma

State Representative, 12th District 1972-. Republican State Central Committeewoman 1966-1972. Member: Citizens League of Greater Cleveland; National Society of State Legislators; International Platform Association; National Order of Woman Legislators; Cuyahoga County Republican Executive Committee. Listed in: Who's Who in American Women; Who's Who in Government. House Committees include: Governmental Affairs (State Government Subcommittee); Judiciary; Ways & Means.

J. BARNEY QUILTER September 1969 - October 1971 Toledo

State Representative, 47th District (Lucas) 1967-. Speaker Pro Tempore of House 1975-. Attended DeSales College. Director, Public Relations, Toledo Health and Retiree Center, Inc. Member: V.F.W.; American Legion; AmVets; Eagles; Moose; Boys Club; Chamber of Commerce; Lions Club; Knights of Columbus; Toledo Board of Relators; Senior Citizens Board of Trustees; Channel 30 (Toledo) Educational Board of Trustees. Member House Rules Committee.

MARCUS A. ROBERTO January 1973- Ravenna

State Senator, 18th District 1977-. State Representative, 62nd District 1971-1976. B.S. in Education and M.A. in History, Kent State Univ; LL B., Univ. of Akron Law School. Secondary School Social Studies Teacher 1957-1970. Air Force staff sergeant. Former Chairman, House Education Committee (Teacher Education Subcommittee); Former Vice-Chairman, House Ways & Means Committee. Member: Portage County, Ohio and American Bar Associations; Rotary International; American Legion; Grange. Senate Committees include: Conservation & Environment; Education & Health (Vice-Chairman); Judiciary; Ways & Means.

RAY ROSS September 1970 - December 1971 Columbus

Director, United Auto Workers Region 2A (Southern Ohio, Western Pennsylvania and West Virginia) 1949-. Graduate, Springfield Business College. Employed at International Harvester Company, Springfield 1934. President, Local 402, UAW. President, Ohio CIO Council. Vice-President, Ohio AFL-CIO Council until 1968. Chairman, Ohio State UAW CAP Council. First Vice-President, Springfield and Clark County United Appeals Fund, 12 years. Member: Advisory Committee, Ohio State Univ. Labor Education and Research Service; Ohio Citizens Council. Vice-President: Ohio Council for Economic Education; Columbus International Airport Commission.

ANTHONY J. RUSSO September 1969- Mayfield Heights

Vice-President, Shaker House Motor Hotel, Cleveland. Attended Case Western Reserve Univ. President, N.A.C.U.A., Inc. 1972-1975. State Representative 1964-1974. Assistant Minority Leader 1969-1970. Business Consultant 1961-1964. Member: American Legion; Catholic War Vets; Cuyahoga County Democratic Executive Committee; State Democratic Central Committee; Italian American Democratic League;Italian Sons and Daughters of America; Parents Volunteer Association for Mentally Retarded; National Conference on Crime and Delinquency; National Society of State Legislators; American Academy of Political and Social Science; American Judicature Society. Secretary: Ohio Council on State Affairs; Democratic State Convention Platforms Committee, 1958.

OLIVER SCHROEDER, JR. September 1970 - March 1972 Cleveland Heights

Professor of Law, Western Reserve Univ. 1953-. A.B. summa cum laude, Western Reserve Univ; J.D., Harvard Univ. Assistant General Counsel, Cleveland Transit System 1946-1948. Western Reserve Univ. Assistant Professor 1948-1951; Associate 1951-1953; Acting Dean Administrative Affairs 1961-1965. Director, Law-Medicine Center. Councilman, Vice-Mayor and Mayor, City of Cleveland Heights. Member: Scanning Committee, Republican County Central Committee; Republican County Executive Committee. Fellow, World Rule of Law Center. Consultant, U.S. Civil Rights Commission. Member: Inter-American, American, Ohio, Cleveland Bar Associations; American Academy of Forensics; American Association of Law Schools; U.S. Citizens Commission on NATO; Technical Committee, Criminal Code Revision, Ohio Legislative Service Commission; Ohio Crime Commission; Ohio Organized Crime Prevention Council; Greater Cleveland YMCA Board of Trustees; Cleveland Welfare Federation. Chairman: Ohio Program Commission Workmen's Compensation Study; Ohio Workmen's Compensation Advisory Council; Public Safety Study Committee; Cleveland Metropolitan Services Commission. Both author and editor of many publications in the field of forensic sciences and law.

JAMES W. SHOCKNESSY January 1972-July 1976 Columbus

Died July 1976. Attorney. Chairman, Ohio Turnpike Commission 1951-1976. Member and Chairman, Ohio State Univ. Board of Trustees. Twice Delegate, Democratic National Convention. Vice-Chairman, State Democratic Executive Committee. Presidential Elector Trustee; American Cancer Society; Blue Cross of Central Ohio; Mid-Ohio Health Planning Federation. Vice-Chairman, Franklin County Hospital Commission. Co-Chairman, Harvard Law School Foundation. Recipient: 1964 Ohio Newspaper Association's Governor's Award; 1955 and 1964 Columbus *Citizen-Journal's* Top 10 Men. Member: Columbus Sinking Fund; Bar Examiners of Ohio Supreme Court; Ohio Advisory Committee to U.S. Commission on Civil Rights; Transportation Advisory Committee; Ohio Building Authority; Columbus Town Meeting Association; Mount Carmel Medical Association; Wilberforce Univ. Foundation.

IOLA O. (HESSLER) SILBERSTEIN (MRS. BERNARD) January 1972 - May 1973 Cincinnati

Senior Research Associate, Institute of Governmental Research, Univ. of Cincinnati. Former Director, Taft Institute of Government. Former Executive Director, Hamilton County Research Foundation. Former Director, Hamilton County Good Government League. Former Member, Cincinnati City Planning Commission. Recipient: 1974 Ohio Planning Conference Special Award for the advancement of city and regional planning. Author of many publications on government and planning.

JOHN A. SKIPTON September 1970- Findlay

Executive, Marathon Oil Company 1959-. B.S. and J.D., Ohio State Univ. Director of Finance, State of Ohio 1957-1959. Director, Ohio Legislative Service Commission 1953-1957. Former Director Ohio Chamber of Commerce; Former Vice-Chairman Board of Trustees, Medical College of Ohio at Toledo; Former Committee Chairman, Ohio Citizens' Committee on State Legislature; Former Secretary, Ohio Tax Study Commission. Member: Findlay Bar Association; Ohio Republican Finance Committee; American Petroleum Institute; U.S. Public Affairs Council; Findlay and U.S. Chambers of Commerce; Ohio Manufacturers' Association; American Political Science Association; American Academy of Political and Social Sciences; Rotary; Public Affairs Research Council; National Conference Board; Area Council of Boy Scouts (Vice-President). Chairman, OCRC Legislative/Executive Committee.

KATHRYN DIX SOWLE (MRS. CLAUDE) September 1972- Columbus

Assistant Professor of Law, The Ohio State Univ. College of Law. B.A., Wellesley; J.D., Northwestern Univ. School of Law; Order of the Coif. National Secretary, National Law Student Association 1954-1955. Member, Northwestern Univ. Law Review. Research Associate, Corporate Law Project, American Bar Foundation 1956-1957. Law Clerk to Judge Julius J. Hoffman, U.S. District Court for Northern District of Illinois 1957-1958 and 1959-1961. Managing Editor, Journal of Criminal Law, Criminology & Police Science 1961-1963. Vice-President, Woman's City Club, Cincinnati 1968-1969. Lecturer, Communications Law, The Ohio Univ. 1972-1974. Chairman, OCRC Elections and Suffrage Committee.

SAMUEL W. SPECK, JR. January 1973-January 1975 New Concord

State Senator, 10th District 1977-. State Representative, 95th District 1971-1976. B.A., Muskingum College, summa cum laude M.A. and Ph.D., Harvard Univ. Danforth and Woodrow Wilson Fellow. Ohio Men's Inter-Collegiate Oratory Champion. Africa: Rotary Fellow, one year; Ph.D. field research, one year. Associate Professor of Political Science, Muskingum College. Chairman of Dept 1968-1971. Member: American Political Science Association; African Studies Association (Fellow); Ohio Association of Economists and Political Scientists (President 1970-1971); Joint Budget Committee; Legislative Service Commission's Prison Study Committee; Jaycees; Masons. Recipient: 1975 Ohio Conservation Achievement Award; 1971 Outstanding Legislator, Ohio Conservation Society; recognized in 1973 by League of Ohio Sportsmen; 1971 Man of Year, *Cambridge Daily Jeffersonian.* Appointed: African Advisory Council, U.S. Dept of State 1972; Citizens' Task Force on Higher Education 1973. Listed in: Outstanding Young Men in America; Outstanding Educators in America. Senate Committees include: Education & Health; Elections. Financial Institutions & Insurance; Energy & Public Utilities.

MIKE STINZIANO August 1976- Columbus

State Representative, 30th District 1973-. B.A., Ohio State Univ. Member: Ohio Association for Retarded Citizens; National Organization for Women; Open Door Clinic (Former Board of Directors); Columbus Association for the Developmentally Disabled; Columbus Tenants Union; Foundation of Community Urban Services; Columbus Free Access Radion Station; Southwest Area Mental Health Center; City of Columbus Housing Code Revision Commission; Central Ohio Seventh Step Foundation; University Community Association; Italian Village Society; Victorian Village Society; Peace and Justice Committee, Columbus Diocesan Priests Senate; Chairman's Council, Franklin County Democratic Party; Central Ohio Bicentennial Observance Festival Committee; Executive Committee, Ohio Democratic Party. Democratic State Central Committeeman. Recipient: 1974 and 1976 Awards, Columbus Council for Exceptional Children. Outstanding Legislator Awards: Ohio Legislative Correspondents' Association Central Ohio Appalachian Council; Ohio Halfway House Association (1976). House Committees include: Finance & Appropriations (Human Resources Section); Judiciary (Commercial Affairs Section).

ROBERT E. STOCKDALE October 1973 - May 1974 Kent

State Senator, 31st District (Geauga, Portage, Lake, Ashtabula) 1963-1974. B.S. and M.A., Kent State Univ; additional graduate work, Western Reserve Univ. State Representative 1961-1962. Sheriff, Portage County 1953-1957. Ravenna Councilman 1939-1940. Professor, Kent State Univ. Member: Elks; American Legion; Masonic bodies (33 degree); Lions; Red Cross; American Association of University Professors. Senate Committees included: Rules, Finance (Vice-Chairman); Applied Technology & Local Services (Chairman).

WILLIAM W. TAFT September 1969-January 1975 Cleveland

Partner in law firm of Arter and Hadden, Cleveland B.A., Amherst; LL.B., Harvard Law School. State Senator, 26th District 1966-1972. State Representative, Cuyahoga County 1961-1964. Member Cleveland, Ohio State Bar Associations. Former Member Board of Trustees, Cleveland State Univ. Former President, Cleveland Association of Phi Beta Kappa. Senate Committees included: Agriculture, Insurance & Financial Institutions; Finance (Vice-Chairman); Ways & Means.

JOHN D. THOMPSON, JR. August 1976- Cleveland

State Representative, 15th District (Cleveland) 1971-. Attending Franklin Univ. School of Law. Real Estate Certificate, Finn College. Member, Ohio Retirement Study Commission. Real Estate Broker 1961-. Former Public Relations Official, Cleveland Electric Illuminating Co. Former Air Pollution Control Office, City of Cleveland. Insurance Consultant, Metropolitan Insurance Co, 1966-1969. Sub-Foreman, U.S. Steel 1951-1966. Assistant Director Minority Affairs, Ohio Democratic Party. Executive Board Member, Cuyahoga County Democratic Party. Member: Black Elected Democrats of Ohio; Lee Harvard Community Association; Mt. Pleasant Community Council; Masons; El Hassa Shrine. House Committees include: Health & Retirement (Chairman); Insurance, Utilities & Financial Institutions (Insurance Subcommittee); Transportation & Urban Affairs.

JAMES E. THORPE September 1969 - January 1973 Alliance

Attorney. State Representative 1961-1964 and 1967-1974. State Senator 1965-1966. House Committees included: Health & Welfare; Local Government & Urban Affairs; Transportation.

PAUL A. UNGER April 1975- Cleveland

President, The Unger Co (national baker packaging firm headquartered in Cleveland). A.B., Harvard College. Chairman, Cleveland Urban Renewal Task Force 1967. Director, U.S. Trade Commission to Australia and New Zealand 1964. Deputy Administrator , Business & Defense Services Administration, U.S. Dept of Commerce 1962-1963. Directed relief work in Egypt and Yugoslavia after World War II. President: Council of International Programs (Honorary); Neighborhood Centers Association. Member: Cleveland Inner-City Action Committee; National Council for Revision of State Constitutions (Secretary). Delegate, White House Conference on Children and Youth. Board Member: National Federation of Settlements; National Council for Community Services to International Visitors; Cleveland Urban Coalition; National Council on Social Welfare; Cleveland Area Arts Council. Chairman: Cleveland Advisory Subcommittee of U.S. Commission on Civil Rights; Task Force to Save Public Housing. Trustee: PATH Association; Cleveland Minority Economic Developers Council. Headed election campaigns in Cleveland for several presidential candidates.

THOMAS A. VAN METER January 1975- Ashland

State Senator, 19th District 1973-. A.B., Ashland College. Senate Minority Whip, 112th General Assembly. Past Student Body President, Ashland College. Former Congressional Assistant to U.S. Congressman John Ashbrook. U.S. Army Combat Infantry Officer, Vietnam. Reserve Company Commander. Former Executive and Finance Chairman, Ashland County Republican Party. Member: V.F.W.; American Legion; Gubernatorial Task Force on Commission Review (Vice-Chairman); Public Employees Deferred Compensation Board; Pesticide Control Commission; Board of Unreclaimed Strip Mine Lands. Board of Directors: U. Brand Corporation of Ashland; Independent Colleges and Universities. Vice-Chairman Platform Committee, Republican State Convention. Former Member: Education Review Committee; Education Assessment Committee; Rapid Rail Transit Study Committee; Select Committee on PUCO; Select Committee on Hiring and Layoff Procedures of State Employees; Ashland College Board of Trustees. Senate Committees include: Commerce & Labor; Elections, Financial Institutions & Insurance; Energy & Public Utilities; Finance.

WALTER L. WHITE September 1969 - January 1972 Lima

State Senator, 12th District (Allen, Auglaize, Hardin, part Logan, Mercer, Shelby, part Wyandot, part Darke) 1973-. Ohio Northern Univ.; Oberlin College; Ohio Northern Law School; B.A. and J.D. Member law firm of Bowers, White and DeMeo, Lima. State Representative 1957-1972. Assistant House Majority Leader 1968-1972. Assistant Prosecuting Attorney, Allen County eight years. Member: Bar Associations; Rotary Club; Allen County Historical Society; Ohio Kidney Foundation; Ohio Society for Prevention of Blindness. Former Member: Ohio Retirement Study Committee; Juvenile Justice Task Force; Legislative Service Commission; Ohio Tax Study Commission. Senate Committees include: Judiciary; Local Government & Urban Affairs; Ways & Means.

ARTHUR R. WILKOWSKI January 1972 - August 1972 Toledo

State Representative, 46th District 1969-. B.S., Bowling Green State Univ; J.D., Univ. of Toledo Law School. Partner, law firm of Wilkowski & Bloom. U.S. Commissioner, Northern Ohio, Western District 1967-1968. Assistant Lucas County Prosecutor, 1963. Assistant Law Director, Toledo 1961-1962. Secondary School Teacher 1951-1959. Member Toledo Bar Association. House Committees include: Economic Affairs & Federal Relations (Housing Subcommittee); Reference; Ways & Means; Ethics (Chairman).

JACK D. WILSON September 1970- Piqua

Certified Public Accountant. Engaged in public accounting since graduation, U.C.L.A. 1948. Piqua City Commissioner 1957-1977. Mayor, City of Piqua 18 years. Past President: Ohio Mayors' Association (1967); Ohio Municipal League (1970). Member: Governor Gilligan's Citizens Task Force on Tax Reform 1970-1971; Ohio Commission on Local Government Services. Atomic Energy & Environmental Quality Committees, National League of Cities 1960-1977.

NEAL F. ZIMMERS, JR. January 1975 - January 1976 Dayton

State Senator, 5th District (parts of Montgomery and Miami) 1975-. B.A. in Government, Denison Univ; LL.B. with honors, George Washington Law School. Legislative Assistant to U.S. Congressman Rodney Love. Prosecutor, Federal Trade Commission, Washington D.C. Attorney. Judge, Montgomery County Court 1968-1974. Chairman, Consumer Protection Advisory Council, City of Dayton. Member: Jaycees; Dayton "Y" Athletics Club; American, Ohio and Dayton Bar Associations; Kiwanis Club; Dayton Agonis Club; Ohio County Judges Association (Executive Board); Ohio County Court Judges Association; Northeast YMCA (Past Director); Greenmont Village Housing Authority (Past Board Member); Visiting Lecturer in Government, Denison Univ.; Supervisory Council on Crime and Delinquency of Dayton; County Volunteer Probation Department; National Conference on State Legislatures; Educational Review Commission; Council of State Governments. Recipient: 1974 Outstanding Young Man of the Year Award, Ohio Jaycees. Senate Committees include: Education & Health; Energy & Public Utilities (Chairman); Highways & Transportation; Judiciary; Ethics.

Staff
Biographical Sketches

Ann M. Eriksson, the Director of the Commission, served as Assistant Director and Chief of Legal Services for the Legislative Service Commission from 1967-1971. She graduated from Dickinson School of Law, and summa cum laude from Wilson College in Pennsylvania. Mrs. Eriksson has been active in the American Association of University Women, and served as President for the Central Ohio Chapter of the American Society for Public Administration, which selected her Outstanding Public Employee of Central Ohio in 1967. A member of the Ohio State Bar and the American Bar Associations, Mrs. Eriksson is listed in Who's Who of American Women.

Julius J. Nemeth is a staff attorney for the Commission, receiving his J.D. from Georgetown University, and graduating cum laude from Youngstown University. Prior to joining the Commission staff, Mr. Nemeth was an Assistant Attorney General for the State of Ohio, and law clerk for the Seventh District Court of Appeals in Youngstown. He is a member of the Columbus and Ohio Bar Associations, the American Judicature Society, and is listed in Who's Who in Ohio.

Brenda Susan Buchbinder began as research associate for the Commission in 1973. A graduate in Philosophy from The Ohio State University, Ms. Buchbinder was employed by the Attorney General in the transportation department, and as a graduate assistant in Philosophy at O.S.U. She also serves as fiscal officer for the Commission.

Andrea Jane Ralston has been secretary for the Commission since the fall of 1975. A Columbus native, Mrs. Ralston graduated from DePauw University with a B.A. in English Literature. She was previously employed as a secretary by the Hon. Chalmers Wylie, the Protestant Episcopal Church, and as editorial assistant at O.S.U.

Ellen H. Denise retired as secretary and fiscal officer for the Commission in the spring of 1976. Mrs. Denise was employed by the State of Ohio for 24 years - serving as a secretary to the Director of the Legislative Service Commission for 18 years. She received her B.A. from Wellesley College.

Nancy Ellen Gertner served as research associate for the Commission from 1972-1973. An honors graduate of Goucher College, Mrs. Gertner majored in Political Science where she was a student government representative.

CONSULTANTS

Professional

Judy Avner
Washington, D.C.

Norman Elkin
Chicago, Illinois

Craig Evans
Columbus, Ohio

James W. Farrell, Jr.
Cincinnati, Ohio

Jefferson B. Fordham
Philadelphia, Pennsylvania

Hon. Roy O. Gulley
Springfield, Illinois

James Hanson
Columbus, Ohio

W. Donald Heisel
Cincinnati, Ohio

Iola Hessler
Cincinnati, Ohio

Sara Hunter
Cleveland, Ohio

Eugene L. Kramer
Cleveland, Ohio

Hon. Robert Leach
Columbus, Ohio

Hon. Henry Lewis
Carmi, Illinois

Roger McDonough
Princeton, New Jersey

Donald M. McIntyre
Chicago, Illinois

Dr. Alice M. Padawer-Singer
New York, New York

Susan Stine
Boston, Massachusetts

Albert Sturm
Blacksburg, Virginia

John P. Wheeler, Jr.
Roanoke, Virginia

Kenneth Wolfe
St. Louis Park, Minnesota

Student Researchers

Bruce Cryder
Columbus, Ohio

Susan Eisenman
Columbus, Ohio

Donn Ellerbrock
Columbus, Ohio

Clara Hudak
Columbus, Ohio

George Rothschild
Columbus, Ohio

William Spratley
Columbus, Ohio

Susan Swain
Cincinnati, Ohio

Clerical

Lynda Bedell
Columbus, Ohio

Monica Knipfer
Columbus, Ohio

Suzanne Parrett
Columbus, Ohio

Index

Leslie Bitman
Mayfield Village, Ohio

Katherine L. T. Bost
Cleveland, Ohio

Debra W. Johnson
Warrensville Heights, Ohio

Sandra Kerka
Brooklyn, Ohio

Ashley Nugent, chief indexer
South Euclid, Ohio

Mary L. Sindelar
Brooksville, Ohio

Patricia Sweeney
Shaker Heights, Ohio

The Ohio Constitutional Revision Commission

The 108th General Assembly (1969-1970) created the Ohio Constitutional Revision Commission and charged it with these specific duties:[1]

(A) studying the Constitution of Ohio;

(B) promoting an exchange of experiences and suggestions respecting desired changes in the Constitution;

(C) considering the problems pertaining to the amendment of the Constitution;

(D) making recommendations from time to time to the General Assembly for the amendment of the Constitution.

Although there is no legislative history in Ohio from which the rationale for specific legislation can be ascertained with certainty, it is not difficult to reach conclusions about the reasons for the passage of this legislation. The decades of the 50's and 60's saw intense interest in the role of state and local government in the federal system and part of this interest focussed on state constitutions. Examination of these constitutions, many of which dated from the mid- or latter-19th century, revealed that they restricted operations of state and local governments in ways that prevented growth and the provision of services needed by people in the modern age, and that they included statutory details, many of which had become seriously obsolete. An examination of Ohio's Constitution, adopted by the people in 1851 and amended more than 100 times since then, became part of a well-documented trend.

Another reason for the creation of the Commission at that particular time was realization that Ohio voters would face the question: "Shall there be a convention to revise, alter, or amend the Constitution?" at the general election in November, 1972. Ohio constitution-makers in 1851 followed Thomas Jefferson's philosophy that each generation should have an opportunity to choose its own form of government, and provided that the question of calling a convention should be placed on the ballot every twenty years. Anticipating the convention question, the General Assembly also instructed the Commission, if a convention were called by the voters in 1972, to report its recommendations with respect to the organization of a convention to the General Assembly (which has the responsibility to pass enabling legislation if a convention is called) and to report its recommendations for constitutional amendments to the convention. Thus, the Ohio Commission was viewed by the General Assembly that created it as serving two purposes -- a preparatory body to a convention, if a convention should be called, and a revisory body to study the Constitution and advise the General Assembly with respect to needed changes.

Two important citizen organizations, the National Municipal League and the League of Women Voters had been instrumental in promoting state constitutional study and, where appropriate, revision or the adoption of a new constitution. Materials published by the National Municipal League, including the League's Model State Constitution, have been studied and used extensively by the Commission. In Ohio, the League of Women Voters was prominent among the groups that encouraged the General Assembly to create a study commission. The League has studied many aspects of the Ohio Constitution, published useful background materials available not only to its own members but to the public, and taken an active role in educating voters on constitutional issues. Another group active in urging the creation of the Commission was the Citizens for a Modern Ohio Constitution, a group of citizens in both public and private life who believed that Ohio's Constitution needed serious study.

Two other projects in Ohio in the late 60's and early 70's were geared toward examining constitutional issues and providing information to Ohio voters in 1972. The Stephen H. Wilder Foundation commissioned the Institute of Government Research, at the University of Cincinnati to make a systematic study of the Ohio Commission, and that Report, written by W. Donald Heisel and Iola O. Hessler, was published in 1970 under the title "State Government for Our Times: A New Look at Ohio's Constitution". It was very helpful in the work of the Commission. The Wilder Foundation had authorized the publication of a similar report in 1951, entitled "An Analysis and Appraisal of the Ohio State Constitution, 1851-1951", prior to the question of calling a convention appearing on the ballot in 1952. The 1951 report was prepared by twelve members of the Social Science Section of The Ohio College Association.

[1]*Am. Sub. H.B. 240. See Appendix L*

The second project was sponsored by the Center for Urban Regionalism at Kent State University, with financial support from the Greater Cleveland Associated Foundation. A conference in November, 1969, attended by faculty members and students from 29 Ohio colleges and universities, was followed by the commissioning of papers on specific topics related to constitutional revision. These papers were published in 1972 by The Kent State University Press in the book "Political Behavior and Public Issues in Ohio", edited by John J. Gargan and James G. Coke, of Kent State University. These papers, also, proved most helpful in the work of the Commission.

The General Assembly created a Commission composed of thirty-two members, 12 of whom are members of the legislature chosen, three each, by the four legislative leaders, and an additional twenty nonlegislators chosen by the twelve legislators. The first meeting of the legislative members was held in January, 1970, and the twenty public members were chosen at a meeting in September, 1970. Mrs. Ann M. Eriksson was named Director and staff were employed, and the Commission's study of the Ohio Constitution began in earnest in February, 1971.

The Commission elected Mr. Richard H. Carter as Chairman and Mrs. Linda Orfirer as Vice-Chairman. In his remarks accepting the chairmanship, at the February meeting, Mr. Carter stated that the sizeable task of constitutional revision in Ohio would call for the best efforts of all Commission members and emphasized the nonpartisan nature of the job. He also noted that a major chore of public education lay ahead if the Commission's work is to be successful. Four committees were created in order to establish a format and procedures for Commission operations.

The Organization and Administration Committee was originally chaired by Senator Applegate and later by Senator Ocasek. This committee reviewed the Commission budget, handled subject-matter committee assignments, and prepared Rules for Commission consideration.

The Committee on Liaison with Governmental and Public Groups was chaired by Representative Fry. This committee was made a number of recommendations with respect to contacts with governmental and other organizations. As a result of these recommendations, letters explaining the organization and purposes of the Commission were sent to all members of the General Assembly, the head of each state department or agency and the Chief Justice of the Ohio Supreme Court. In addition, professional and business organizations were contacted.

The Public Information Committee was chaired originally by Mr. Ross and later by Mr. Heminger. The committee made several recommendations to the Commission, including proposing information meetings for members of the Commission to acquaint them with the problems of constitutional revision generally, standards for the content and drafting of state constitutions and information on the various subjects undertaken for study by the Commission or its committees. The committee also proposed meetings or seminars to be held for the purpose of providing public information on subjects of Commission study or for explaining Commission recommendations to the public and offering an opportunity for public comment or testimony. Later, a monthly newsletter was instituted to provide public information about the activities of the Commission.

The Subject Matter Committee was chaired by Senator Taft. This committee recommended that the Commission be divided into four committees to begin studies of four different constitutional topics as follows: The Legislature, the Executive Branch, Local Government, and Finance and Taxation. This plan was adopted by the Commission, and the Subject Matter Committee then indicated to each committee the particular portions of the Constitution which appeared to fall within the scope of the committee assignment.

Pursuant to its statutory duties, the Commission, early in its deliberations, considered "the problems pertaining to the amendment of the Constitution", particularly whether it was necessary to seek an amendment to the Constitution to broaden the purposes for which subsequent amendments could be placed before the voters. After a review of the amending provisions of the Ohio Constitution (Article XVI), precedents, and court interpretations of these provisions and precedents, the Commission reached a consensus that its work could be effectively accomplished within the present constitutional provisions, and an amendment to the amending procedures need not be sought.

The Commission then proceeded to the specific task of studying the Constitution and proposing recommendations for amendments to the General Assembly. The four original subject matter committees were organized with Mr. Pokorny serving as chairman of the Committee to Study the Executive Branch; Mr. Skipton, chairman of the Legislative Committee; Mr. Duffey, chairman of the Local Government Committee; and Mr. Carson, chairman of the Finance and Taxation Committee. Several changes in Commission membership resulted in reducing the number of subject matter committees to three by combining the Legislative and Executive Committees into one under the chairmanship of Mr. Skipton, and the resignation of Mr. Duffey brought the Local Government Committee under the leadership of Mrs. Orfirer.

As the three original subject matter committees completed their work, additional committees were established to study the remaining topics in the Constitution. The Education and Bill of Rights Committee was chaired by Mr. Bartunek; the Judiciary Committee by Mr. Montgomery; the Elections and Suffrage Committee by Mrs. Sowle; the What's Left Committee by Mr. Aalyson; and the Committee to Study the Grand Jury and Civil Trial Juries by Representative Norris.

Speakers were invited to Commission meetings during 1971 to share with Commission members and the public their experiences in consitution-making efforts in other states, to give a general overview of the Ohio Constitution, and to explain generally accepted standards of a "good" state constitution and compare provisions of the Ohio Constitution with these standards. These speakers included such distinguished persons as Dr. John P. Wheeler, Jr., of Hollins College, Virginia, who had an active role in recent constitutional revision in several states, including Maryland and Virginia; Dr. Harvey Walker[2], retired Ohio State University political science professor and a noted Ohio constitutional expert; and Dr. Albert L. Sturm, University Research Professor of Political Science at Virginia Polytechnic Institute and State University, a national expert on state constitutional revision.

The Honorable John J. Gilligan, Governor of Ohio, addressed the Commission at its May, 1971, meeting. The Governor emphasized the importance of the work of the Commission and indicated his concept of the task ahead with these words:

> Thus, what you here today have been charged with by the people of Ohio is a responsibility perhaps far deeper and far more significant than many had anticipated. I would urge you then to start with this question: if we had no kind of government at all, what kind of government would we construct in Ohio? What kind of government would we create that would protect our liberties and yet enable us to solve the massive problems we face? That, I suggest, you might regard as your task. Not to paste and patch and mend but to start afresh with the fundamental question of what kind of basic framework should we have for our society? Having made that decision, the second decision follows, how? -- whether all in one big gulp and one big jump we achieve it or do we achieve it piecemeal over a long period of time? Unless we know where we want to get how will we ever recognize whether or not the steps that we take along the way are in the direction of our final goal or just up some kind of constitutional blind alley? A lot of us are going to be waiting for the answers you'll be producing.

Dr. Sturm[3] commented on the general nature of a state constitution, and on some common ideas of standards of excellence expressed in writings on state constitutions, as follows:

> All American state constitutions as fundamental laws embody the basic principles of political democracy such as popular sovereignty and especialy limited government, which is implemented through the familiar tripartite separation of powers, checks and balances, the bill of rights, and other limitations, particularly on the legislature. State constitutions set forth the basic structural framework of government in varying detail, and they contain both positive and restrictive provisions for the exercise of governmental powers. They define boundaries, specify suffrage qualifications and the manner of conducting elections, and provide methods for amendment and revision. Much of their verbiage is accounted for by articles reflecting the complexity and diversity of functional growth--local government, finance, education, highways, corporations, welfare, health, and other areas of governmental activity.

[2]*Dr. Walker's sudden death in the Spring of 1971, was noted with sadness by members of the Commission.*

[3]*An address prepared for Delivery at an Open Meeting of the Constitutional Revision Commission, September 16, 1971, mimeographed.*

Unlike the makers of the Constitution of the United States, the framers of state organic laws traditionally have been far more concerned with limiting government than with enabling and vitalizing it as an effective instrument for accomplishing social objectives. In essence, state constitutions are bundles of limitations on the states in the exercise of residual powers. They have been far less flexible than the federal document. The Constitution of the United States has been adapted to changing times and needs mainly by statutory and executive elaboration and judicial interpretation, with only twenty-six formal amendments during 182 years of effective operation. In contrast, the states have relied far more on formal amendments.

. . . . . *General Documentary Characteristics:* Consistency with the Constitution of the United States; inclusion only of fundamental matters, excluding substance of a detailed or temporary nature that is essentially statutory, use of clear, direct, simple language readily intelligible to the average citizen, and arrangement of contents in logical order; and, conversely, avoidance of obscure and technical phraseology ("legalese"), inconsistencies, obsolete provisions, and poor organization.

In November, the Commission co-sponsored with the Ohio State University College of Law and the Ohio Municipal League, a local government seminar, focusing on a number of problems of local government with emphasis on their constitutional aspects. Papers from the seminar were published as a Local Government Symposium in the Ohio State Law Journal in 1972, Vol. 33, No. 3. Many outstanding speakers participated in this seminar, headed by Jefferson B. Fordham, retired Dean of the University of Pennsylvania Law School and formerly Dean of the Ohio State University College of Law. Dr. Fordham is a leading national expert on local home rule, and contributed to an examination of many provisions of the Ohio Constitution when the question of calling a convention was on the ballot in 1952.

The Commission determined, after discussion of the convention question, that it should not take a position on whether or not a convention should be called, and proceeded with its studies of the Constitution according to schedule. As had happened in 1932 and 1952, the question of calling a convention was defeated at the polls in 1972; 62% of those voting on the question voted "no".

Each subject matter committee met approximately monthly; studied research materials prepared by staff and consultants on the topic under consideration; invited public comment on the issues before it; solicited opinions and testimony from experts on the subject; and finally formulated recommendations to be presented to the Commission. The statute creating the Commission required that 2/3 of the members agree before a recommendation becomes a Commission recommendation to the General Assembly, thus requiring a substantial consensus, of necessity eliminating strictly partisan considerations, for a Commission recommendation.

The Rules adopted by the Commission required that all Commission and committee meetings be open to the public, and that at least one opportunity for public testimony be offered on all proposed recommendations before their submission to the General Assembly.

The Commission has attempted to inform and educate the public on constitutional matters, as well as to solicit information and opinions, by issuing press releases of Commission meetings inviting public attendance and testimony, by mailing information about both committee and Commission meetings, research materials, brief summaries of meetings, copies of reports, and a monthly newsletter, to all who requested such materials, and by mailing the monthly newsletter to a larger group of persons and organizations, including all the news media in the state.

Several principles discussed and agreed to early in Commission operations guided the work of the committees and the Commission. It was agreed that the Commission would take no position, either for or against, on constitutional issues and questions other than Commission recommendations. With respect to the question of recommending changes solely for the purpose of improving language or arrangement, it was agreed that such changes would be avoided, although both language improvement and rearrangement have been recommended where they serve the purposes of improving understanding, clarity, and logic of arrangement. The principles of drafting that have been followed are those enunciated in the "Bill Drafting Manual" of the Ohio Legislative Service Commission.

The first report was presented to the General Assembly early in 1972 and covered the organization, administration, and procedures of the General Assembly. It resulted from the work of the Legislative-Executive Study Committee. It included substantive changes such as constitutionally requiring annual sessions and permitting the General Assembly leadership to call the Assembly into special session, as well as the elimination of obsolete language such as requiring bills to be "read" on three separate occasions before passage and replacing this requirement with a requirement for three considerations of each bill. Among the important substantive recommendations in the first report was one for the joint election of the Governor and Lieutenant Governor and replacing the duty of the Lieutenant Governor to preside over the Senate with provision for establishing clearly executive responsibilities for that office.

All of the recommendations in the first report were incorporated in a single resolution and introduced into the General Assembly in 1972. Several sections were eliminated in the course of legislative action on the resolution, but most were retained and placed on the ballot in May of 1972. In considering the various ways of presenting the recommendations to the voters, Commission members studied court decisions interpreting the language of Section 1 of Article XVI of the Constitution: "When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately." Commission members viewed all the recommendations in the resolution as relating to the same subject, and therefore properly submitted as one amendment. However, the proposal was challenged and the Ohio Supreme Court concluded (*State ex rel. Roahrig, et al. v. Brown* (1972), 30 Ohio St. 2d 82) that it did violate the "one amendment" rule of Section 1 of Article XVI and it was ruled off the ballot. Subsequently, the proposals in the first report were reintroduced in the General Assembly as four separate amendments, and three of them, including the bulk of the recommendations relating to strictly legislative matters, were placed on the May, 1973 ballot. The most important of the three (legislative organization and procedures) was adopted; the two defeated issues would have repealed sections that the Commission considered obsolete but which, because of the ballot language used to present them to the voters, apparently were viewed as substantive matters by the voters. The fourth, which was the joint election of Governor and Lieutenant Governor, was not adopted again by the General Assembly and placed on the ballot until June of 1976. Only two proposals in the first report have never reached the ballot -- one dealing with an extraordinary majority of the General Assembly necessary to create new courts or judgeships, which has been included in the Judiciary Report, and one proposing the payment of expenses to legislators.

Early in 1973, the second report was presented to the General Assembly, dealing with State Debt. The third report dealt with the problem of presenting constitutional amendments to the voters in a fair and objective manner and language that they could understand, without the inclusion of unnecessary and confusing detail and legalese. It proposed the creation of a Ballot Board to prepare ballot language, and standards for contents of the ballot language and for information to be supplied to the voters. It was placed on the ballot by the General Assembly in May, 1974, and adopted by the voters. Subsequent reports, in the order in which presented, were: Taxation, The Indirect Debt Limit, The Executive Branch, Elections and Suffrage, Local Government, Initiative and Referendum, Judiciary and The Bill of Rights. The recommendations and explanatory material from all eleven reports will be found in the Appendix.

This Final Report contains those recommendations not previously presented to the General Assembly, covering Education, Corporations, Public and Private Employees and Employment, Apportionment, Militia, Public Institutions, Grand Juries and Civil Trial Juries, and miscellaneous matters.

Working closely with the legislative leadership and with the legislative members of the Commission, the Commission has attempted to have its proposals introduced in the General Assembly and placed before the voters for voter action. The greatest amount of legislative action on Commission proposals was during the 1975-1976 session, after nine of the eleven reports had been submitted. As of this writing, sixteen amendments emanating from Commission recommendations have gone to the voters and thirteen have been adopted. The sixteen included proposals relating to General Assembly organization and procedures and creation of the Ballot Board (noted above), joint election of Governor and Lieutenant Governor, gubernatorial succession and disability,

clarification of taxation provisions, removal of restrictions on the right to vote and clarifications of election provisions, expansion of industrial development revenue bond purposes, removing the "indirect" debt limit restrictions on local government, and others. Among the significant recommendations of the Commission that the General Assembly has considered but not yet submitted to the voters are proposals for a flexible state debt limit, increasing the powers of county government, and permitting limited classification of counties, removing some barriers to adoption of county charters and clarifying provisions for the adoption of county and municipal charters, changes in the initiative and referendum provisions to simplify and increase citizen understanding of these processes, and changes in the structure of the judicial system, notably to provide for a unified trial court. Several proposals are pending in the 112th General Assembly, and may be placed on the November, 1977 ballot.

As 1976 drew to a close, it was apparent to Commission members, twelve of whom had been members of the Commission since its beginning, that the primary task of the Commission -- a comprehensive study of the Ohio Constitution with recommendations for amendments to the General Assembly -- would be completed within the next few months. Although the statutory date for completion of the Commission's work and expiration of the terms of the members was July 1, 1979, the Commission determined that little justification existed for continuing after its task was completed and that it would present a Final Report to the General Assembly two years earlier than originally planned. The research documents and all Commission and committee meeting summaries are being printed in limited quantities for placement in libraries across the state where they will be readily available for public inspection and study. It is hoped, of course, that the recommendations, materials, and the discussions of the Commission and its committees will continue to be of value to the General Assembly and to all interested in Ohio's Constitution for many years to come.

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Sen. Ocasek - Chairman
Mr. Carter
Mr. Duffey
Mr. Guggenheim
Mr. King
Mr. Ostrum
Mr. Skipton
Sen. White

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Mr. Brockman
Mr. Cunningham
Rep. Mallory
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Mr. Schroeder
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Mr. Ross - Chairman
Mr. Bell
Sen. Dennis
Mr. Montgomery
Mr. Pokorny
Rep. Quilter
Mr. Wilson

Liaison with Government and Public Officers

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Mr. Bartunek
Sen. Calabrese
Mr. Carson
Mr. Hovey
Mr. Ingler
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Subject-Matter

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Sen. Gillmor
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Sen. Roberto
Mrs. Sowle

Ohio Constitutional Revision Commission
Summary of Recommendations for Amendments to the Constitution

Article I. BILL OF RIGHTS

1. Permit denial of bail prior to trial if the offense charged is a felony committed while the accused was released on prior bail.
2. Repeal provision permitting comment on failure of an accused to testify.

Education and Bill of Rights Committee, Mr. Joseph Bartunek, chairman
Report No. 11, Appendix K, Page 437

3. Require one probable cause hearing in every felony case before a court of record or a grand jury but not both (except in capital cases) and give both the prosecutor and the accused the option of choosing a grand jury; permit presence of counsel in grand jury room to advise a grand jury witness on privileges; require state to present any evidence it has tending to negate guilt of person accused.

Grand Jury and Civil Trial Juries Committee, Representative Alan Norris, chairman
Final Report, Page 33

Article II. LEGISLATIVE

1. Rewrite sections dealing with procedures for enactment of laws and gubernatorial veto, including the following substantive changes: eliminate the requirement that a bill must be read on three different days and require, instead, consideration of a bill on three different days; prohibit passage of a bill until it has been reproduced and distributed to members of the house in which it is pending, and require that copies of amendments be made available if requested; eliminate the requirement that bills which have passed be signed "publicly" by the presiding officers and require, instead, that they simply be signed, and that the signing is for the purpose of certifying that the procedural requirements for passage have been met.
2. Require the General Assembly to meet annually.
3. Permit the presiding officers of the two houses to call the General Assembly into special session (in addition to the authority, already in the Constitution, of the Governor to call special sessions).
4. Permit adjournment of one house of the legislature for five days (instead of two) without the consent of the other.
5. Make corrective changes in sections dealing with filling vacancies and organizing each house.
6. Require both houses of the General Assembly to choose presiding officers from their own membership and designate the presiding officers the President of the Senate and the Speaker of the House of Representatives.

Adopted by voters in May, 1973 and June, 1976

7. Repeal a section prohibiting persons guilty of a specific felony from holding public office.

Rejected by voters in May, 1973

8. Permit payment of allowances for reasonable and necessary expenses to members of the General Assembly.

Legislative/Executive Committee, Mr. John Skipton, chairman
Report No. 1, Appendix A, Page 96

9. Remove ineligibility of member of the General Assembly to be appointed to a public office created or the compensation of which was increased during his term, for the period of the term to which he was elected and for one year thereafter.

What's Left Committee, Mr. Craig Aalyson, chairman
Final Report, Page 38

10. Remove section dealing with county boundaries to Article X.

Local Government Committee, Mrs. Linda Orfirer, chairman
Report No. 8, Appendix H, Page 278

Article II INITIATIVE AND REFERENDUM

Remove the initiative and referendum provisions from Article II to a new Article XIV. The three basic features of the present provisions, direct constitutional initiative, indirect statutory initiative, and referendum are retained. The required number of signatures on petitions is changed from a percentage of voters at preceding gubernatorial elections to a fixed number, specified in the resolutions for each method, and other modifications have been made to make procedures less cumbersome, including removal of the requirement that the full text of a proposal be printed as part of the petition, but the solicitor is required to carry a copy for public inspection. The resolution requires that initiated laws contain only one subject, and repeals an obsolete provision prohibiting the use of the initiative to pass certain types of property laws. The requirement that a certain portion of signatures on petitions must be secured from ½ of the counties is removed. The ballot board is required to prepare a summary for printing on the petitions, and the ballot language and an explanation of each issue that is on the ballot, and initiative and referendum matters are permitted to appear on a primary election ballot as well as at a general election.

Elections and Suffrage Committee, Mrs. Katie Sowle, chairman

Report No. 9, Appendix I, Page 343

Article II OTHER

1. Permit General Assembly to provide for worker compensation for occupational disease and injury either through a state fund or through private insurance.

What's Left Committee, Mr. Craig Aalyson, chairman

Final Report, Page 44

2. Repeal provision for eight-hour day on public works.

What's Left Committee, Mr. Craig Aalyson, chairman

Final Report, Page 49

3. Permit General Assembly to regulate prison labor.

What's Left Committee, Mr. Craig Aalyson, chairman

Final Report, Page 50

Article III EXECUTIVE BRANCH OF GOVERNMENT

1. Require the joint election of Governor and Lieutenant Governor; remove Lieutenant Governor as presiding officer in the Senate and provide for executive and administrative duties for Lieutenant Governor.

Adopted by voters in June, 1976

Legislative/Executive Committee, Mr. John Skipton, chairman

Report No. 1, Appendix A, Page 96

2. Repeal sections dealing with gubernatorial disability and the filling of vacancies in that office, and the enactment of new sections in that article relating to the same subject. Authorize the Lieutenant Governor to assume the office of Governor when the latter vacates the office or becomes disabled, and provide for succession to the office of Governor should the Lieutenant Governor become incapable, first by the President of the Senate and second by the Speaker; establish a procedure for the determination of gubernatorial disability and confer jurisdiction upon the Supreme Court to determine all questions concerning succession; clarify the distinction between succeeding to the office of Governor when it becomes vacant and serving as Governor when the Governor is unable to discharge the duties of office by reason of disability; require election of Governor and Lieutenant Governor when a vacancy occurs in both offices prior to expiration of the first 20 months of a term; extend disability and succession provisions to cover a Governor-elect.

Adopted by voters in November, 1976.

Legislative/Executive Committee, Mr. John Skipton, chairman

Report No. 6, Appendix F, Page 222

3. Require declaration of election results of six elected state executive officials to be made to the next regular session of the General Assembly and removes obsolete provisions.

Adopted by voters in November, 1976
Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 7, Appendix G, Page 253

Article IV. JUDICIARY

1. Consolidate all trial courts into the Common Pleas Court and authorize the General Assembly to create additional courts with special subject-matter jurisdiction and statewide territorial jurisdiction; require the state to pay the expense of the judicial system; authorize the Supreme Court to provide for subject-matter divisions of Common Pleas Courts, other than probate, by rule subject to amendment or rejection by the General Assembly; require the Court to develop criteria and advise the General Assembly on the need for additional judges and changes in judicial districts; make other changes in the administration of the court system.

Judiciary Committee, Mr. Don Montgomery, chairman
Report No. 10, Appendix J, Page 371

2. Repeal requirement of a 2/3 legislative majority to increase or decrease the number of judges and to establish courts.

Legislative/Executive Committee, Mr. John Skipton, chairman
Judiciary Committee, Mr. Don Montgomery, chairman
Reports No. 1 and 10, Appendices A and J, Pages 96 and 371

3. Repeal obsolete provision which requires a 2/3 legislative majority to create a commission to dispose of accumulated business of the Supreme Court.

Rejected by voters in May, 1973
Included in two reports as Article IV, 2, above

Article V. ELECTIVE FRANCHISE

1. Reduce the voting age to 18, eliminate the six month state residency requirement and repeal the prohibition against voting by persons living on military reservations, all in accord with federal constitutional provisions or court decisions; repeal an obsolete and unnecessary section granting voters privilege from arrest, and clarify a section granting the General Assembly power to deny the privilege of voting or eligiblity to office to any person convicted of a felony.

Adopted by the voters in June, 1976
Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 7, Appendix G, Page 253

2. Repeal a provision denying the franchise to idiots and insane persons, and substitute a provision granting the General Assembly power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 7, Appendix G, Page 253

3. Repeal constitutional requirement for perfect rotation of candidates' names on the ballot and give the General Assembly flexibility to devise methods of giving candidates "reasonably equal treatment" on the ballot in a manner appropriate to the voting procedure used.

Adopted by the voters in November, 1975
Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 7, Appendix G, Page 253

Article VI. EDUCATION

No recommendations for amendments.
Education and Bill of Rights Committee, Mr. Joseph Bartunek, chairman
Final Report, Page 52

Article VII. PUBLIC INSTITUTIONS

Repeal obsolete provisions relating to directors of the penitentiary and trustees of other benevolent institutions and filling vacancies in such offices.

What's Left Committee, Mr. Craig Aalyson, chairman

Final Report, Page 71

Article VIII. STATE DEBT and PUBLIC WORKS

1. Establish a constitutional debt formula, replacing the $750,000 limit, based on an average of state revenues, by which the state, by a three-fifths (3/5) vote of the General Assembly, could incur debt for capital improvement purposes. The proposed formula would in effect limit the amount of money which could be spent to repay such debt to six per cent (6%) of the base, which is the average of the revenues of the state, as defined in the Constitution, for the then preceding two fiscal years. The proposed formula would also limit the amount of the principal of new debt which could be issued in any fiscal year to eight per cent (8%) of the base, and require that a specific part of the total be repaid every fiscal year.
2. Continue the authority of the state to contract debt outside the debt limit to repel invasion, suppress insurrection, and defend the state in war.
3. Authorize short-term borrowing by the state to meet appropriations and require that money borrowed for this purpose be repaid within the fiscal year in which it is borrowed.
4. Require voter approval in a referendum for incurring debt outside the debt limit or for purposes other than capital improvements.
5. Require the General Assembly to prescribe the methods and procedures for evidencing, refunding, and retiring state debt, and to provide for its full and timely payment and to perform certain functions of a technical nature in connection with the state's bonded debt, and impose certain duties on the Treasurer of State in regard to it.
6. Permit that state debt be contracted, and the credit of the state be extended, only for a public purpose declared by the General Assembly in the law authorizing such debt or use of credit.
7. Continue the authority of the state to issue revenue bonds in the manner and for the purposes enumerated in present Section 2i of Article VIII.
8. Continue to prohibit local governmental entities in this state from becoming stockholders in, raise money for, or lending credit to, a joint stock company, corporation or association unless permitted to do so by law.
9. Repeal specific debt-authorizing sections, many of which are now obsolete.
10. Repeal unnecessary provisions relating to the Sinking Fund and the Commissioners of the Sinking Fund.

Finance and Taxation Committee, Mr. Nolan Carson, chairman

Report No. 2, Appendix B, Page 150

11. Repeal the provision relating to the Superintendent of Public Works.
12. Expand the purposes for which the state may issue industrial development bonds, to include situations in which the issuance of such bonds helps to preserve existing jobs in Ohio. Also, the present prohibition against

the issuance of such bonds for public utilities would be modified to the extent of permitting issuance of such bonds for public utilities for the purpose of financing facilities used primarily for pollution control.

Adopted by the voters in November, 1974
Finance and Taxation Committee, Mr. Nolan Carson, chairman
Report No. 2, Appendix B, Page 150

Article IX. MILITIA

No recommendations for amendments.
What's Left Committee, Mr. Craig Aalyson, chairman
Final Report, Page 72

Article X. COUNTIES AND TOWNSHIPS

1. Enact a section giving Ohio counties limited powers of local self-government. The proposal gives counties the power to adopt and enforce local self-government measures within the county, including local police and sanitary regulations, permits the General Assembly to limit, by general law, the local self-government powers of counties; prohibits counties from adopting measures that are at variance with general laws enacted by the legislature; provides that, in case of conflict with the exercise of powers by a municipal corporation in the county, the municipal corporation would prevail over the county; prohibits counties from levying taxes unless specifically authorized by the General Assembly.
2. Amend section providing the procedures for elections of county charter commissions and the framing and submission to the electors of proposed county charters and amendments; reduce the number of required petition signatures from 10% to 6%; establish procedures for submitting a proposed charter or amendment to the board of elections for determination of sufficiency of signatures and placement on the ballot; specifically permit public office holders to be members of charter commissions, specify the vote necessary by the commission for submission of a proposed charter or amendment; establish procedures for repeal of a charter; permit a charter commission to resubmit or revise and resubmit, one time only, a charter that had been defeated at the polls, and make other changes to clarify and simplify procedures.
3. Permit the General Assembly to classify counties by general law for purposes of organization and government. The purposes of each classification must be set forth in the law creating the classification, and no classification may contain less than two counties or more than four classes of counties.
4. Permit a county charter, regardless of its provisions, to become effective if adopted by a majority of the voters voting thereon in the county. The present requirements for other majorities depending on the provisions in the charter would be removed.

Local Government Committee, Mrs. Linda Orfirer, chairman
Report No. 8, Appendix H, Page 278

Article XI. APPORTIONMENT

No recommendations for amendment
What's Left Committee, Mr. Craig Aalyson, chairman
Final Report, Page 74

Article XII. TAXATION

1. Require state to pay principal, as well as interest, on state debt as due; add references to estate tax, as well as inheritance tax, in relevant constitutional sections.
2. Consolidate into one section separate sections authorizing the General Assembly to levy income, inheritance (estate), franchise taxes, and prohibiting an excise tax on food for human consumption off the premises where sold; remove the limitation of $20,000 as the maximum amount of exemption permitted under the estate law.

Adopted by the voters in June, 1976
Finace and Taxation Committee, Mr. Nolan Carson, chairman
Report No. 4, Appendix D, Page 192

3. Repeal debt prohibition
   Finance and Taxation Committee, Mr. Nolan Carson, chairman
   Report No. 2, Appendix B, Page 150
4. Revises the "indirect debt limit" which presently prohibits bonded indebtedness from being incurred or renewed by the state or any political subdivision unless the legislation provides for levying and collecting, annually, by taxation an amount sufficient to pay the interest and to provide a sinking fund for the redemption of bonds at maturity. The "indirect debt limit" has arisen by court interpretation of Section 2 of Article XII, prohibiting levying ad valorem property taxes in excess of one percent of property value without a vote of the people in the taxing district, read in conjunction with Section 11 of Article XII, to limit the bonded indebtedness of the state or subdivision to within one percent of property value (10 mills). The proposal continues the guarantee of Section 11, requiring timely payment of principal and interest on general obligation debt, and requires money to be set aside from lawfully available moneys of the subdivisions sufficient amounts for payment if sufficient provision is not made. Reference to the state is eliminated from the section since the present constitutional debt limit is a sufficient barrier to the state incurring debt; the sinking fund requirement is eliminated, since most bonds today are serial bonds. The proposal would specifically state that the tax limitation of Section 2 is not a debt limit and reinforces the provision that the General Assembly may provide for political subdivision debt limitations, and specifically states that the new section does not authorize the levy of any ad valorem property tax other than as authorized by Section 2 of Article XII, without a vote of the people, thereby prohibiting violation of the one percent tax limit by construction of the new section.

Rejected by the voters in June, 1976
Local Government Committee, Mrs. Linda Orfirer, chairman
Report No. 5, Appendix E, Page 219

Article XIII. CORPORATIONS

1. Replace corporation sections in Article XIII with a single section to be placed in Article XV, simplifying language and removing unnecessary provisions from the Constitution.

What's Left Committee, Mr. Craig Aalyson, chairman
Final Report, Page 81

2. Remove specific provision that jury to try corporation right-of-way cases must be "of twelve men".

Education and Bill of Rights Committee, Mr. Joseph Bartunek, chairman
Report No. 11, Apendix K, Page 437

3. Repeal section relating to municipal corporations and include provisions in Article XVIII.

Local Government Committee, Mrs. Linda Orfirer, chairman
Report No. 8, Appendix H, Page 278

Article XV. MISCELLANEOUS

1. Repeal of sections 2, 5, and 8 to eliminate obsolete and unnecessary provisions. Section 2 granted authority to contract public printing to the lowest responsible bidder or to have it done directly in the manner prescribed by law, and required all stationery and supplies to be purchased as provided by law. Section 5 prohibited duelists from holding public office. Section 8 granted authority to establish a bureau of statistics in the office of the Secretary of State.

Adopted by the voters in November, 1976
Legislative/Executive Committee, Mr. John Skipton, chairman
Report No. 6, Appendix F, Page 222

2. Require a person appointed to office to become a resident of the state when assuming the office and eliminate requirement that an appointee be an elector when appointed.

What's Left Committee, Mr. Craig Aalyson, chairman
Final Report, Page 87

Article XVI. AMENDMENTS TO THE CONSTITUTION

1. Create an Ohio Ballot Board to draft the ballot language and explanations for constitutional amendments submitted to the voters by the General Assembly, and require the language on the ballot, which need not contain the entire text or a condensed text of the proposal, to properly identify the substance of the proposal.
2. Require the General Assembly to file constitutional amendments with the Secretary of State at least 90 days before the election at which they are to be submitted and require the Ballot Board to prepare and file the ballot language and an explanation of the proposal with the Secretary of State 75 days before the election.
3. Give the Ohio Supreme Court exclusive, original jurisdiction in cases challenging the adoption or submission of a constitutional amendment to the voters and limit the time within which such suits can be brought.
4. Provide for preparation of arguments for and against proposed constitutional amendments and for publication in newspapers for three weeks prior to the election.
5. Require the General Assembly to provide for other dissemination of information about proposed amendments.

Adopted by the voters in May, 1974
Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 3, Appendix C, Page 187

Article XVII. ELECTIONS

Repeal provisions regarding terms of office and filling of vacancies in executive, legislative, and judicial offices that are duplicated elsewhere or obsolete, and remove ambiguous language in order to clarify the provision that the Governor does not fill a vacancy in the office of the Lieutenant Governor.
Adopted by the voters in June, 1976
Elections and Suffrage Committee, Mrs. Katie Sowle, chairman
Report No. 7, Appendix G, Page 253

Article XVIII. MUNICIPAL CORPORATIONS

1. Make changes in the municipal charter sections similar to those in the county charter section with respect to procedure for repeal of charters, to permit public office holders to serve on charter commissions, to permit resubmission of a defeated charter one time, to reduce the percentage of petition signatures from 10% to 6% to place a charter commission question on the ballot, and other changes to clarify language, and to remove ambiguities.
2. Permit the issuance of municipal utility bonds to improve the utility, in addition to its present authority to use such bonds for acquisition, construction and extension; permit issuance of anticipatory notes; permit the sale of transportation or solid waste management utility services outside the municipal boundaries without limit; and make optional instead of mandatory the mortgage and franchise aspects of the bonds. The proposal allows refunding of notes or bonds, including general obligation bonds, by revenue bonds.
3. Eliminate duplication from the constitution concerning the power of the legislature to control municipal taxes and debts.
4. Add to the constitutional requirement that the General Assembly provide by general law for the incorporation and government of municipal boundaries, provision for consolidation, division, dissolution, and alteration of boundaries in cities and villages.
5. Rearrange sections to place in logical order.

Local Government Committee, Mrs. Linda Orfirer, chairman
Report No. 8, Appendix H, Page 278

RECOMMENDATIONS NOT PREVIOUSLY REPORTED

Article I, Section 5
Trial by Jury

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.

Commission Recommendation

The Commission 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 not less than three-fourths of the jury in civil cases was added. The section was reviewed by the Bill of Rights Committee, which recommended no changes in it. The Committee to Study the Grand Jury and Civil Trial Juries reviewed the section only with respect to civil juries and considered whether the 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. Also discussed were 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. Discussed in connection with "ideal" jury size was the possible relationship between jury size and the outcome of a case.

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.

Suggestions for change ranged from one 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 one that perhaps even more types of cases should be tried by juries than at present (because jurors most often represent a cross-section of, and the good sense of, the community). There was 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 Commission 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.

Related to the right to trial by jury guaranteed by Section 5 of Article I is the prohibition, in Section 19a of the same article, against a limit on the amount of damages recoverable for wrongful death. Consideration of the implications of Section 19a led to a broader discussion both in the committee and in the Commission, of the desirability of state constitutional provisions which would: (1) permit the General Assembly, by law, to limit the amount of damages recoverable in a civil action (such as product liability or malpractice); 2) permit an appellate court to alter the amount of a jury verdict which is inadequate or excessive; or 3) permit the General Assembly, by law, to limit or abolish the recovery of punitive damages. With respect to the limitation or abolition of punitive damges, research indicates that this would probably be possible now, without the need for a constitutional amendment. With respect to the limitation of damages recoverable in a civil action, the present state of the case law does not permit a definitive answer, although there does not appear to be a federal constitutional block against it. With respect to granting the appellate court power to alter the size of a jury verdict in a case involving unliquidated damages where the only error is the amount of such verdict, it is possible that such a provision might be held to contravene, or be inconsistent with, the right to jury trial and to due process. While the Commission recognizes these as problem areas and appreciates the valid concerns expressed with regard to them, the Commission also believes that a proper resolution of the questions raised demands more research

and deliberation than the Commission was able to devote to them. Therefore, it makes no recommendation on Section 19a of Article I or the desirability of constitutional provisions such as enumerated above. The Commission does suggest, however, that further study of these areas by the General Assembly would be appropriate.

The committee received additional suggestions relating to juries, 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. It was 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.

Article I, Section 10
Grand Juries; Trials

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.

Commission Recommendation

The Commission recommends that Section 10 of Article I 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

The study of the topics of the grand jury and the civil trial jury was referred by the Commission, at the suggestion of the Bill of Rights Committee, to a special committee established for that particular purpose.

Section 10 of Article I was adopted in its present form 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 Commission recommends the deletion of the first sentence of Section 10, referring to the grand jury, because that subject is covered in a separate section, a new Section 10A, in this report. The remaining provisions of Section 10 would then deal only with an accused's rights at trial and certain trial court procedures.

The provision in 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 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 provisions offends the Fifth Amendment right against self-incrimination. The Commission, therefore, endorses and renews the previous recommendation.

Article I, Section 10A

Commission Recommendation

The Commission recommends that a new Section 10A be enacted to read 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

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 military exemption language is altered ("armed forces of the United States" is substituted for "army and navy") only to make sure that every branch of the service is exempted. The Commission was advised that lack of specificity on this point has raised some questions in the past.

The adoption of the proposed Section 10A would have four principal effects:

1. To make the information (or complaint) 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 preent 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 and Background of Grand Jury Provision

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 had some characteristics 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 constitutional right to indictment by a grand jury is limited to such crimes, even though a grand jury may investigate, and indict for, misdemeanors also.

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 state requires indictment in all felony cases.[1]

Rationale of Changes

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, it appears to be 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.

[1]*For a wide-ranging discussion, see the papers published in "A Symposium - The Grand Jury", 10 Am. Crim. L. Rev., No. 4 (Spring 1972).*

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 for the recommendation 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 recommendation 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 to a secret indictment, just as at present. However, a change would have to be made to accommodate the situation in which the state elects to proceed by information (or complaint) and the accused has not had an opportunity to elect to proceed in this manner 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 (and complaints) 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 appropriate court of common pleas.

Law enforcement officials indicate that the option of initiating felony prosecutions by complaint, as well as by information, should be specifically sanctioned in the Constitution. A change in the recommendation to this extent would be fully consistent with the original intent of the Commission. The rationale in relation to prosecution by information would, of course, be equally applicable to a prosecution initiated by complaint.

Since the proposed language for Section 10A 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 requirement that the prosecutor 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. And granting 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 Commission, 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 been regarded not 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 *Escobedo 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 to Study the Grand Jury and Civil Trial Juries examined the question of the grand jury. The testimony presented before the committee 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 are some classes of cases in which the grand jury could serve a useful purpose. These include cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve 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 interest of justice unless the facts reveal that prosecution is warranted.

The committee further concluded that the Constitution should not 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 alternate method, the committee was further of the view that the 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. The Commission fully shares these views.

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 is the Commission's view 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. Some 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 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 recommendation 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 be at the same time 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 on 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. We conclude that the granting of this right has become appropriate for inclusion in the Ohio Constitution.

In addition to the principles set forth in the recommendation, the Commission, through its study committee, received several other suggestions relating to grand juries. 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, we conclude that they are more properly matters to be disposed of by statute or court rule.

Article II, Section 4
Legislator Eligiblity to Appointive State 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.

Commission Recommendation

The Commission recommends the amendment 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.~~

Comment

The Commission recommendation for repeal of the final paragraph of Article II, Section 4 is aimed at removing from the Constitution language that no longer serves the purpose for which it was intended, and is considered to have a detrimental effect on appointing qualified persons to public office. At the time the provision was originally placed in the Constitution, the legislature had extensive appointive powers, and legislators might create or increase the salaries of offices and then appoint themselves to those offices. The legislature's power to appoint has been substantially reduced. Today, when salaries are increased to compensate for inflation, as is often the case, members of the general assembly are precluded from being appointed to those offices, although otherwise qualified, by the constitutional language proposed for repeal.

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.

The second paragraph 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 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, United States Senators 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, it extended the prohibition on assuming civil office to elected and appointed offices, but was limited to appointed offices after several delegates expressed sentiments that if voters elected a person to the legislature with specific instructions to create an office, and later asked that representative to assume the office, the constitutional provision as proposed would thwart the will of the electors. The original 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." This language was removed after one delegate objected that the clause placed an unconstitutional restriction on congressmen in conflict with Sections 3 and 4 of Article I of the U.S. Constitution which authorize the general assembly to choose senators and authorize state legislatures to pass laws regarding congressional elections. The section was approved by the Convention in substantially the same form as it appears in Section 4 today.

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 to be 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. 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 taked '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. Thus, the appointive powers of the legislature were substantially eroded by the constitutional changes noted above.

The present language prohibits members of the general assembly from being appointed to 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. The Commission believes that the dangers of the General Assembly using its 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 that are elective and by subsequent limitations on the power of the General Assembly to make appointments. The Commission believes that the section can now operate to prevent securing qualified persons for positions of responsibility merely because the salary of the office has been recently increased. The danger of legislative abuse, in the Commission's opinion, is no longer substantial, and the Commission therefore recommends repeal of the language.

In the process of reviewing this section, one member of the Commission noted that the language of the first paragraph contains an element of ambiguity that could lead to legislator abuse, in that a member of the General Assembly could assume a second public office in the middle of his legislative term and not resign his position in the General Assembly until immediately prior to the end of his term. The Commission does not view this interpretation as the intended meaning of the section.

Article II, Section 20
Compensation of Officers

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 offices; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

Commission Recommendation

The Commission recommends no change in Article II, Section 20. A minority report, which does contain a recommendation, follows.

History and Background of Section

Section 20 of Article II dates back to the 1851 Constitution, when, after considerable debate, the provision prohibiting salary changes during term was adopted by the Convention, primarily to prevent graft and pocket lining. The 1802 Constitution prohibited changing the salaries of judges and the Governor in Article II, Section 6 and Article II, Section 8, respectively. Debate at the 1851 Convention centered around Section 20 being unnecessary in light of similar prohibitive provisions in the executive, judicial and legislative articles, and as being poorly worded in that it covered more than one subject, i.e. it both granted and restricted legislative power. (A similar prohibition against in-term salary changes for legislators is now found in Section 31 of Article II and for Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, and the Attorney General in Section 19 of Article III. Separate provisions for judges, in Section 6 of Article IV, prohibit diminishing compensation during term.) The section was at one time stricken from the legislative committee report, but was later reintroduced and endorsed by the Convention after it was assured that the provision would have no effect on officers compensated on a fee basis and would apply only to in-term pay raises.

Ten other states prohibit increases or decreases or both in compensation for all state officers after their appointment or election.[1] A majority of states expressly prohibit such in-term changes for executive officers, legislators and judges. The Federal Constitution also contains prohibitions on in-term salary decreases for federal judges and increases or decreases for the executive. The Model State Constitution prohibits in-term pay increases for legislators only.[2]

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). It does not apply to municipal and school district officers. *State ex rel. Perry v. Board of Education*, 12 Ohio Cir. Dec. 333 (1901). The primary source of the legislature's power to fix terms and compensation for state officers is the general legislative power of Section 1 of Article II; 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 Gen. v. Neilbling*, 6 Ohio St. 40 (1856). The section applies to local officers such as county officers, if not otherwise "provided for" in the Constitution.

Comment

The Commission, 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, although there would be no constitutional mandate to so act. Recently, Ohio voters failed to ratify 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 Commission on behalf of the county commissioners, indicated that Section 20 effectively discriminates against some commissioners, elected for staggered terms, since a newly elected officer may earn a higher salary than a commissioner remaining in office, depending on when legislation enacting salary increases is adopted. The What's Left Committee recommended to the Commission language removing this discriminatory effect by requiring all persons holding the same office to receive the same pay, but the recommendation was not approved by the necessary 2/3 of the Commission, and is the subject of the minority report. Language prohibiting salary decreases during term and permitting increases was also rejected by the Commission.

One reason for not changing the section is that persons seeking office are aware of the salary when they run for election or are appointed, and should be satisfied with that salary during their term of office. Others feared that officers might exert more pressure on legislators for salary increases if they could receive the increase during term.

[1]*Columbia University, Index Digest of State Constitutions, 1959 (updated periodically).*
[2]*G. Braden and R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis (1969).*

Minority Report
Article II, Section 20

The undersigned members of the Constitutional Revision Commission recommend 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 offices; 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 amendment was recommended to the Commission by the What's Left Committee, in order to remove the inequity of persons serving in the same office at different rates of compensation. It would not apply, however, to legislators. For those persons elected or appointed to offices with staggered terms, the result is that officers who assume office before a pay raise may earn less than a newly-elected or appointed officer. The Committee suggested that the language would apply to such office as Public Utilities Commissioners, Industrial Commissioners, County Commissioners and others. There was some opposition to the recommendation because it did not cover certain officers: senators and county auditors. Senators (legislators) are prohibited from receiving in-term compensation changes under Article II, Section 31. It was noted that judges, who are elected for staggered terms, were recently enabled to receive in-term compensation increases by constitutional amendment. The recommendation was defeated when originally presented to the Commission meeting by a vote of 13 in favor, 3 against, and 3 abstentions, and the What's Left Committee then suggested a simple amendment prohibiting only in-term decreases. The Committee suggested that it was important to prohibit in-term decreases, since the legislature could use this as a lever to drive a person from office by severely reducing his salary. The change would have permitted increases during term for the county auditors, who might be in office when a pay raise was approved. (Two county commissioners are elected at one election, and the third county commissioner and county auditor are elected two years later.) This recommendation was also rejected by the Commission by a vote of 15 in favor, 11 opposed. Finally, the Committee returned to the Commission with its original recommendation, which was defeated by a vote of 19 in favor, 3 opposed.

This minority report is presented in order to transmit to the General Assembly support of a recommendation to permit in-term pay raises to permit persons serving in the same office to receive the same salary.

Joseph W. Bartunek
R. H. Carter
Robert Clerc
Warren Cunningham
William H. Mussey
Mike G. Oxley
Katie Sowle
John D. Thompson
Jack D. Wilson
Craig Aalyson
Paul Gillmor

Article II, Section 33
Mechanics' Liens

Present Constitution

Section 33. Laws may be passed to secure 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.

Commission Recommendation

The Commission recommends no change in Section 33 of Article II.

History and Background of Section

The mechanic's lien provision was introduced by the 1912 Constitutional Convention, after a decade of legal disputes concerning the constitutionality of Ohio statutes granting persons who furnish labor or materials to construct or repair a structure a claim for payment against the structure or real estate itself. *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U.S. 128 (1891) defined the lien 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."

Originally statutes were enacted granting the right to a lien to laborers and suppliers contracting directly with the owner. Common law permitted an artisan or mechanic to assert a claim against personal property on which he labored, but did not permit a lien against real estate and structures thereon to benefit the laborer or supplier of material. The latter right is entirely dependent on a statute granting the right to a lien, setting forth its terms and conditions and the owner's right of protection against the lien. In 1894, the Ohio statute was amended extending the benefit to subcontractors, laborers, and suppliers who did not contract directly with the owners. The Ohio Supreme Court held this statute unconstitutional in 1896 in two cases; *Palmer & 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 but failed to pay some material suppliers. The Court held that the statute interfered with the owner's rght to contract freely, in violation of Article I, Section 1 of the Ohio Constitution, and that the owner did not have adequate protection against liens: both methods of protection offered by statute - waiting four months (the time in which liens could be filed) to pay a contractor, or requiring the contractor to file a bond against such claims - could increase the owner's cost under the contract. A Federal Court found the statute not unconstitutional; however, it 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 L. Ed. 778 (1904).

At the 1912 Constitutional Convention, Section 33 was proposed to make the mechanic's lien statute constitutional by authorizing the general assembly to pass laws to secure the lien. Since the adoption of the section by the people, it has remained unchanged. The general assembly promptly enacted a new mechanics lien law, now Chapter 1311. of the Ohio Revised Code. Few constitutional questions have been raised in the course of litigation concerning 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 their validity.

Comment

The Commission felt that Section 33 of Article II should be retained, since the effect its repeal could have on existing statutes is unknown. No suggestions for changing the section were made to the Commission.

Article II, Section 34
Employee Welfare

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.

Commission Recommendation

The Commission 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 the subject of some debate by Convention delegates, with attention given almost exclusively to the minimum wage clause. Proponents of the measure cited the inhumane conditions which prevailed in industry at that time as evidence that the state needed to take some remedial action. Court decisions in some states indicating that the power of the legislature to regulate labor conditions was questionable were noted. The rationale behind Section 34 was to make explicit the power of the legislature to pass such laws.

Debate about the constitutionality of minimum wage legislation concerned the Fifth and Fourteenth Amendments to the U.S. Constitution, and was resolved in *West Coast Hotel Co. v. Parrish* 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330 (1937), which upheld the minimum wage laws. In Ohio, the constitutionality of the first minimum wage laws (G.C. 154-45d to 154.45t) was upheld in *Walker v. Chapman*, D.C. Ohio, 17 F. Supp. 308 (1936). 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). The original minimum wage laws, enacted in 1933, applied only to women and minors, and the law itself did not establish a minimum wage, but permitted an actual minimum wage to be set by administrative action. These laws were repealed in 1973, and replaced by legislation which establishes a minimum wage and is applicable to all workers in Chapter 4111. of the Ohio Revised Code.

Article II, Section 35
Workers' 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.

Commission Recommendation

The Commission recommend that Section 35 of Article II be amended 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, 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~~ 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 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 Commission's recommendation for Section 35 of Article II would permit the General Assembly to allow the payment of worker compensation claims directly by the employer, through the state fund, or through another system of insurance. Other changes proposed in the section are not substantive in nature - changing "workmen" to "worker", which is in accord with current practice, and changing "per centum" to "per cent", which is in accord with Ohio bill-drafting procedures.

Ohio is one of six states (Nevada, North Dakota, Ohio, Washington, West Virginia, and Wyoming) having a state "monopolistic" or "exclusive" workmen's compensation system, in which 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 worker 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.

After the adoption of Section 35 in 1912, the statute 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 to purchase indemnity insurance in 1917 in the case of *State ex rel. Turner v. U.S.F. & G.*, 96 Ohio St. 250. However, 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 licensing, in Ohio, of an insurance company to transact such insurance. Subsequently, a self-insuring employer who had entered into a 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 *Thorton 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 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, if adopted by the Ohio Supreme Court in an appropriate case, could operate to prohibit the General Assembly from permitting insurance coverage other than through the state fund, and it is this result that the Commission wishes to preclude by recommending the amendment of the section as set forth above.

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 has 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 prepared to pay the large award without hardship to his industry.[1] The traditional defenses were modified in Ohio between 1851 and 1910, although the employee still had to resort to court action in order to obtain compensation.

[1]*Ohio State Law Journal, vol. 19, "The Ohio Compensation System" by James L. Young, p. 542..*

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 was challenged and the New York Court of Appeals (*Ives v. South Buffalo Railway Company,* 201 N.Y. 271, 1911) sustained 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 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 upheld the constitutionality of the statute, emphasizing the voluntary nature of the act. In the 1912 Constitutional Convention, a proposal was offered to include a workmen's compensation provision in the Ohio Constitution. The sponsor noted:

> 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 ..... 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 per cent 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.

The What's Left Committee, joined in its discussion of the workmen's compensation section by several experts, considered several matter but recommended no changes in the section. Subsequently, the Committee to Study the Grand Jury and Civil Trial Juries noted that a jury trial may be had in appeals in workmen's compensation cases only if the case involves an injury and not if the case involves an occupational disease. In the latter instance, the administrative decision is final. The committee recommended an amendment to permit an appeal to court and jury trial in any worker compensation case. This recommendation, however, was not adopted by the Commission.

[2]*Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912, p. 1346.*

Article II, Section 35
Minority Report

The undersigned object for several reasons to the proposal of the Constitutional Revision Commission that Section 35 of Article II of the Ohio Constitution be amended to authorize the General Assembly to extend to private insurance carriers the right to provide worker's compensation coverage in Ohio.

Best's Insurance Digest states that the return of fifty-five cents of each premium dollar to the ultimate beneficiaries is considered acceptable performance within the insurance industry. The Ohio State Worker's Compensation Fund pays approximately $1.15 in benefits for each dollar it collects from employers. The difference comes from investment income earned on reserves, advance premium deposits and surplus funds. Worker's compensation coverage by private insurance carriers portends a diminution in benefit dollars to injured workers.

The suggested amendment was proposed and adopted at one of the last regular meetings of the Constitutional Revision Commission, at a time when the Commission was under considerable pressure to wind up its work. No opportunity was afforded interested parties of advance notice so as to enable them to appear and present different views. Although the "What's Left" Committee of the Commission had long been constituted and, over a period of many months, had, from time to time, considered possible amendments to Section 35 of Article II of the Ohio Constitution, the proposal under discussion was not submitted to that committee for review. It is almost as though the author of the proposal, by waiting until the last moment to submit it, had intended that result.

The recommended amendment to Section 35 of Article II would drastically alter the worker's compensation system of Ohio to the detriment, we believe, of the injured worker as well as the system. The clear objective of the proposal is to benefit a very special interest group, the insurance industry. History has demonstrated that in the casualty field the insurance companies tend to opt for the so-called "preferred risks," leaving the "bad risks" to their own devices. If legislation were enacted under the proposed amendment, it could result in insurance companies soliciting the good, or high profit, risks and leaving the culls to the State Insurance Fund. The predictable result would be insolvency of the Fund or a sharp increase in premiums to high risk employers.

Craig Aalyson
Marcus Roberto
Anthony J. Russo

I concur to the extent of agreeing that an opportunity to hear different views should have been afforded.

Katie Sowle

Article II, Section 37
Public Works, Hours of Labor

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.

Commission Recommendation

The Commission recommends the repeal of Article II, Section 37.

Comment

Section 37 originated in the 1912 Constitutional Convention, which proposed the language to specifically circumvent earlier court decisions holding laws limiting the hours of work and specifying a minimum wage unconstitutional.[1] As originally proposed by the Convention, the 8-hour day was extended to the construction, maintenance and operation of public improvements. The final form of the section limited the rule to the construction of public improvements. *State v. Peters*, 112 Ohio St. 249 (1925), examined the difference between the original Convention proposal and the section as adopted and held that the language as adopted should not be broadened beyond the natural import of the language.

In an early case relating to Section 37, *Stang v. City of Cleveland,* 94 Ohio St. 377 (1916), the court held the constitutional provision not self-executing but that the legislature could not affirmatively make lawful a workday of more than eight 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 17-1, which implemented the eight-hour day, excluding police and firemen.

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".[2] After the repeal of the law no new implementing legislation for Article II, Section 37 was passed, and the constitutional provision is, at the present time, inoperative. Apparently the legislature, realizing the inherent difficulties in Section 37, which refers to a six-day work week that is incompatible with the hours of construction workers, chose to resolve the problem by repealing the law.

The Commission recommends the repeal of Article II, Section 37 in view of the lack of legislative support for its purpose, because it believes that the section contains statutory material, and because the authority it contains is provided by Section 34 which is recommended for retention.

[1]*City of Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197 (1902), Bramley v. Norton, 50 N.P. 183 (1897).*
[2]*Legislative Service Commission Analysis, Sub. H.B. 436 (1969).*

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.

Commission Recommendation

The Commission recommends that Article II, Section 41 of the Ohio Constitution be amended as follows:

Section 41. Laws ~~shall~~ MAY 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.~~

Comment

The proposed amendment of Section 41 of Article II is intended to give the General Assembly broader discretion to regulate the employment of prisoners in Ohio's correctional institutions. Under the present language, competition between private industry and convict labor is absolutely prohibited. The legislature is handicapped in its ability to provide meaningful employment for prisoners incarcerated with no immediate expectation of release. Recent statutory enactments have made some prisoners eligible for employment on "work-release" furloughs; however, the Department of Rehabilitation and Corrections indicates that the constitutional provision could be interpreted to restrict these work-release programs. The proposed amendment of the section would permit regulation of work-release at the discretion of the General Assembly, without governance by constitutional guidelines.

History and Background of Section

The constitutional provision regulating the employment of prisoners was adopted by the 1912 Constitutional Convention, and has not been amended since the voters approved it. The section governs 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".

Statutory authority for letting contracts to private industry for convict labor dates from 1863[1] when penitentiary wardens and directors were permitted to enter into such contracts to serve the state's interests and prisoners' welfare. The statute was amended in 1867 authorizing such contracts to business and manufacturers to provide for hard labor by each convict according to his sentence, as would best serve the state's interest. The contract system was abolished in 1884, and prisoners were to be "employed by the State and in such a way as to in the least possible manner interfere with or affect free labor."[2] The practice did not cease, and an amendment in 1885 allowed direct employment by the state subject to legislative funding, and also provided for the employment of prisoners on the "piece" or "process" plan, where penitentiary managers would supervise prisoners when manufacturers or others agreed to furnish machinery and materials for their employment. 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."[3] The act prohibited penitentiary and reformatory managers 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 . . ."

Delegates to the 1912 Constitutional Convention who supported an amendment to the Constitution prohibiting letting contracts to private industry for convict labor argued that statutory controls had proven ineffective. Some said this was so because they were limited to the contracting of labor in the penitentiaries 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. The view espoused by organized labor urged that prison 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 out to other men. Spokesmen for busines interests observed that some manufacturers had practically been driven out of business by the competition of goods made by cheap convict labor. In opposition to a constitutional provision the position was advanced that Section 41 was purely statutory in character. Objections were raised about the inconsistency of having a prohibition against work whereby the product could be sold, and the requirement that goods for sale be marked "prison made". The marking provision, explained its drafters, was so worded to apply to goods manufactured outside the state and sold in Ohio, without constitutionally conflicting with interstate commerce. An exception was added by amendment on selling "prison made" goods in Ohio for those disposed of to the state, political subdivisions, or public institutions managed or controlled by the state. It was adopted on final reading 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.

Several attempts have been made in recent years to amend the portion of Section 41 abolishing prison contract labor, 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 day parole system, returning to the institution at night. Joint resolutions were adopted by the Ohio House of Representatives in 1967 and 1969 which would have amended Section 41 to expressly permit work-release for 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. Both were indefinitely postponed in the Senate.

Advocates of work-release have claimed that such programs cut the cost of institutionalizing persons because they help pay the costs and their families are not solely dependent on the public welfare system, and they contribute to the prisoner's rehabilitation by providing re-entry into society. In 1969 legislation was passed

[1] *60 Ohio Laws 29 (March 24, 1863)*
[2] *81 Ohio Laws 72 (March 24, 1884)*
[3] *98 Ohio Laws 177 (April 14, 1906)*

permitting the establishment of work-release programs by the Common Pleas Court, in conjunction with all other courts in the county or separately where agreement cannot be reached. The law was limited to prisoners under suspendable sentence in a county or city jail or workhouse and required approval of the sentencing judges.[4] In 1972, work-release was extended to certain prisoners in the state penal institutions. Section 2967.26 of the Revised Code 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, provided that no prisoner is eligible who has served less than one-third of the period required to be served before parole eligiblity.

About eight states have constitutional prohibitions against contracting out prison labor.

Rationale for Change

In its testimony before the Commission, 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. Another issue raised in their testimony was that the present provision constitutes an absolute prohibition against competition between prison labor and private labor. The Department spokesman stated that this prohibition incapacitates the Department's ability to provide valuable work experience for inmates.

The Commission concurs with the Department's belief that, in some areas, permitting employment of prisoners would prove valuable. In those cases, the regulation of competition should lie with the General Assembly, through the statutes, rather than be locked into a constitutional provision. For this reason, the Commission recommends the amendment of the first sentence of Section 41 to contain a general statement authorizing the legislature to pass laws providing for and regulating the employment of penal inmates. The implementation of guidelines is left to the legislature. Repeal of the rest of the section is recommended because the Commission considers the language to be statutory in nature. The amendment removes the reference to penal institutions "in the state". It was felt that this limitation is not necessary, and could hinder a movement currently being contemplated by some penologists to create penitentiaries that would house convicts from given geographical areas and not one particular state.

Article VI
Education

Present Constitution

Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

Section 2. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

[4]*Ohio Revised Code Section 5147.28*

Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Section 5. To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Such laws and guarantees shall not be subject to the limitations or requirements of Article VIII or of Section 11 of Article XII of the Constitution. Amended Substitute House Bill 618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No. 284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

Commission Recommendation

The Commission recommends no changes in Article VI.

History and Background of Article VI

The Federal Constitution does not place the responsibility for education on the federal government, and most states, including Ohio, have explicitly stated their responsibility for education in their constitutions. All but 12 state constitutions contain a separate article entitled "Education" and many also contain education provisions in other articles.[1] Only three states do not constitutionally mandate the General Assembly, the state, or some political subdivision, to maintain, support, promote, cherish or establish a uniform, thorough and efficient public or common school system.[2]

Prior to the establishment of Ohio's statehood and its first Constitution in 1802, ordinances governing the Northwest Territory extolled the virtues of education and set aside specific parcels of land for educational purposes. Ohio's first Constitution contained two provisions related to education:

> Article VIII, Section 3. " . . . But religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience."
>
> Article VIII, Section 25. "That no law shall be passed to prevent the poor in the several counties and townships within this state from an equal participation in the schools, academies, colleges and universities within this state, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges; and the doors of the said schools, academies and universities, shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made."

The legislature originally encouraged education by passing a large number of specific acts to meet special needs and circumstances of particular districts. The first general school act authorizing civil township trustees to submit the question of organizing school districts to a popular vote, was not passed until 1821.

[1] *Hawaii Constitutional Convention Studies, Article IX: Education (Public Education), Legislative Reference Bureau, 1968. p.3.*

[2] *Iowa, Massachusetts, New Hampshire.*

Control of schools was local and fragmented until 1838, when the office of State Superintendent of Common Schools was created. In that year, the creation of township and county superintendents and sub-districts gave a degree of organization and leadership to the school system. The office of superintendent, which involved primarily clerical duties, was abolished in 1840 and for the next 14 years the duties of school administration were given to the Secretary of State. In 1847, the Akron Law established the first free graded schools in Ohio and provided for the election of six directors of common schools. The law was extended, in 1849, to all municipalities having at least 200 inhabitants.

At the 1850-1851 Constitutional Convention, delegates called for a statewide system of education and an end to the passage of laws concerned only with local school districts. The failure of the legislature to assume leadership may have prompted the Convention to consider including in the fundamental law such provisions as one recalling money from the Surplus Revenue Fund for educational finance and one creating a school fund to provide revenue of $1,000,000. Other provisions considered would have made six months the minimum school year; established segregated schools unless rejected by popular vote; secured common schools from control by religious groups; mandated the legislature to provide for the election of a superintendent of common schools; and authorized the election or appointment of assistant superintendents.

The Convention finally adopted the following as the Education Article (Article VI) of the Ohio Constitution, and it was ratified by the electorate in 1851:

> Section 1. The principal of all funds arising from the sale, or other disposition of lands or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants or appropriations.
>
> Section 2. The general assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state.

The General Assembly, in 1853, passed an act providing for the "reorganization, supervision and maintenance of common schools". The act reestablished the office of superintendent under the title State Commissioner of Common Schools, to be elected to a three-year term. The provisions of this act remained in effect until 1912, when, by constitutional amendment, the State Commissioner of Common Schools was replaced by a superintendent of public instruction to be appointed by the governor to a four-year term.

Between 1853 and 1913, there was a reorganization of school district leadership through several legislative enactments, and the administrative power of the commissioner began to increase. School consolidation and mandatory school attendance for children between 8 and 16 years of age were some of the developments that augmented the commissioner's power. Programs for teacher certification and instruction of teachers, and the establishment of high schools were achieved during this time. The adoption of the School Code of 1904 represented a major step in common school governance. It provided for four classes of school districts: city, village, township and special, and for boards of education for the districts and governance solely by the respective boards. The law required boards to fix rates of taxation necessary for school levy, to present bond issues to the electors, issue bonds, manage property, and otherwise administer the school system. The law emphasized centralization and consolidation rather than township control. This trend was continued in 1906 with the adoption of the State Aid System for Weak School Districts. Standards were set in order to receive financial aid, and the commissioner was responsible for administering the fund as provided by law and with the approval of the state auditor. Political pressure was brought to bear on the state commissioner, who was an elected official, by some legislators who sought aid for their districts, perhaps influencing delegates to the 1912 Constitutional Convention in their decision to have the commissioner appointed by the governor rather than elected.

Several aspects of education were debated at the 1912 Convention. Persons representing local districts fought for retention of power by those units while others spoke in favor of state control, promoting the idea that the department of education was second in importance only to the governor's office, and the head of so vital a department must be provided for in the Constitution. Delegates generally agreed that an appointed superintendent was less subject to political pressure than one who was elected. There was some indecision as to whether or not the term of office should expire at the same time as the term of the Governor who appointed him. Representatives of local boards of education demanded that members of those boards be elected from the district to be governed. Two amendments to Article VI were adopted by the 1912 Convention, opening the door for state control and consolidation:

> Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.
>
> Section 4. A superintendent of public instruction to replace the state commissioner of common schools, shall be included as one of the officers of the executive department to be appointed by the governor, for the term of four years with the powers and duties now exercised by the state commissioner of common schools until otherwise provided by law, and with such other powers as may be provided by law.

In 1913, the State School Survey Commission was formed at the Governor's request to study state schools. The survey resulted in the passage of the New Rural School Code in 1914, which established a system of 88 county superintendents elected by county boards of education, with powers and duties provided by law. Certification requirements were increased, and the county board was given power to consolidate school districts and to divide the county district into supervision districts for the purpose of improving instruction. The effect was a clearer network of responsibility and feedback for the superintendnet than the previous maze of locally controlled units. In 1917, a State Board of Education was created in accordance with an act of Congress providing federal aid for vocational education. The Superintendent of Public Instruction was named head of the Department of Education several years later, and the authority of the department to administer state aid was of vital importance during the economic depression in the 1930's. The State Department of Education, formally created in 1921, was authorized by the code to recommend standards for primary and secondary education to the superintendent, as well as standards for teacher certification through professional schools and colleges.

The first school equalization fund, which became operative in 1925, was ineffective due to inadequate revenue sources. In 1932, a study of school finance was undertaken, revealing that "in its program for public education Ohio has placed responsibility on the local districts and forced the property tax to bear nearly all the tax burden, which amounted to 97 per cent of the cost of education. Only about four per cent was paid from the state treasury."[3] In 1935, a School Foundation Law was adopted, guaranteeing each school district a foundation up to a certain level for each pupil and the local district could use its own discretion as to how much it wanted to tax itself to augment the subsidy. The funds necessary to meet a foundation program were derived from a levy of 3 mills on the tax duplicate of the school districts and a uniform payment by the state to every district, ranging on a 9-month basis from $15.30 per kindergarten pupil in average daily attendance to $49.50 per high school pupil. The continued financing of education by the foundation act gradually became inadequate over the next two decades, and the number of school age children increased at a rapid rate.

[3]*Pearson, Jim B., and Fuller, Edgar, Editors. Education in the States: Historical Development and Outlook, National Education Association of the United States, Washington, D.C., 1969. p. 949.*

In 1953, a School Survey Commission made a comprehensive study of the state's educational system, and recommended a complete overhaul of the foundation program to provide a "competent teacher for every 30 pupils, in both elementary and high schools".[4] The Commission recommended that there be an elected State Board of Education composed of citizens having staggered terms of six years. The creation of a constitutionally authorized State Board of Education had been proposed, unsuccessfully, periodically between 1850 and 1939. In 1953, the legislature proposed an amendment to Section 4 of Article VI which was adopted in that year. The amendment read:

> Article VI, Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Legislation regarding the board of education and superintendent of public instruction was enacted by the legislature in 1955, creating a board with one member elected from each congressional district.

In 1965, Section 5 was added to Article VI, completing the education provisions in that article. The section, which authorizes state guarantees of student higher education loans, is the only reference to higher education in the Constitution, other than authorization for higher education bonds in Article VIII, and reads as follows:

> Article VI, Section 5. To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Amended Substitute House Bill No. 618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No. 284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

Article VI is discussed by topics rather than by section in the following commentary.

I. Goals of an Educational System

Ohio's Constitution contains two provisions setting forth the state's obligation to provide an educational system:

> Article I, Section 7. Religion, morality and knowledge . . . being essential to good government, it shall be the duty of the General Assembly . . . to encourage schools and the means of instruction.

> Article VI, Section 2. The General Assembly shall make such provision, by taxation, or otherwise, as from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; . . .

The Commission's Education and Bill of Rights Committee considered provisions that establish a purpose or goal for the educational system before recommending that no changes be made in these sections.

An example of such a constitutional provision is in the Illinois Constitution (1970):

[4]*Pearson and Fuller, op. cit., p. 963. "Competence" appears to refer to certification requirements in effect at that time.*

Article X; Section 1. GOALS - FREE SCHOOLS

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools throughout the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

History and Background

The Federal Constitution is silent on the subject of education, and the power to provide a system of public education is, therefore, reserved to the states. Although the authority to provide a system of education rests with the states, the Federal Constitution, by court interpretation, requires non-discriminatory application of public educational systems. As a result, some "goals" of an educational system, while not stated as such in constitutional or statutory law, must be assumed by the states as a result of the equal protection and due process guarantees of the Fourteenth Amendment to the U.S. Constitution, evolving from Supreme Court decisions.

The first such decision was in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which affirmed the "separate but equal" doctrine. The case dealt with a Louisiana statute requiring railway companies carrying passengers in their coaches in that state, to provide equal, but separate, accommodations for the white and colored races. The petitioner was seven-eighths Caucasian and one-eighth of African descent, who objected to being seated in the car reserved for colored people. The Court upheld the statute, stating: " . . . the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment".[1] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), rejected the doctrine of "separate but equal" as applied to education, and the Supreme Court held that where a state has undertaken to provide educational opportunity, it must be made available to all on equal terms. The Court said: "[We believe that] segregation of children in public schools, solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive(s) the children of the

[1]*Plessy v. Ferguson, 163 U.S. 537 (1896), p. 548.*

minority group of equal educational opportunities . . . We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[2]

Most of the earlier education cases centered around discrimination against Negroes. Recently, other groups have claimed that they are being deprived of an equal education by state law. Handicapped persons have traditionally been excluded from the regular public school system. Two lower court decisions in this decade have affirmed the rights of these persons to an education equal to that of "normal" students in the state. In *P.A.R.C. v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (1971), the court required free public education suited to their needs for all retarded children on the basis of the Fourteenth Amendment equal protection clause requiring equal educational opportunity for all children. The principle established in *P.A.R.C.* was extended to all children labelled mentally retarded, emotionally disturbed, behavioral problems or hyperactive in *Mills v. D.C. Board of Education*, 348 F. Supp. 866 (1972). Other minority groups have made claims that because of various cultural handicaps or characteristics, the school system was denying them equal educational opportunity. In *Serna v. Portales Municipal Schools*, (U.S.D.C., N.M. 41 U.S.L.W. 2304, Nov. 11, 1972), the court found that the schools ignored the needs of Spanish-speaking students, and that even though the concentration of Spanish-speaking students resulted from *de facto* segregation, the education being offered the Spanish in the "equal" facilities was a denial of the equal protection clause of the Fourteenth Amendment. *Lau v. Nichols*, 414 U.S. 563, 94 S. Ct. 786 (1973) held that the San Francisco school system's failure to provide all non-English-speaking Chinese students with special compensatory instruction in the English language did not violate the Fourteenth Amendment.

One writer has summarized the present law as follows:

> The Supreme Court of the United States has recognized that 'education is perhaps the most important function of the state and local governments . . . and (i)t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education'. (*Brown v. Board of Education,* 347 U.S. 483 (1954)). However, since the right to a public education is not secured by the Constitution (*Fleming v. Adams,* 377 F. 2d 975 (10th Cir. 1967 cert. denied 389 U.S. 898 (1967)) and remains unrecognized as a fundamental interest. (*San Antonio Independent School District v. Rodriguez,* 93 S. Ct. 1287 (1973)), it exists only insofar as it is granted by state legislatures. Yet once a state undertakes to provide public education, it must be equally available to all citizens since the right becomes subject to both the equal protection and due process guarantees of the 14th Amendment. *(Brown v. Board of Education,* 347 U.S. 483 (1954))[3]

Comment

Several proposals were presented to the Committee to make the state responsible for the education of all children or of all persons to the limits of their capacities through a system of equal educational opportunity. The people who testified represented groups interested primarily in particular kinds of persons; for example, children with learning disabilities and handicaps. The Education Review Committee, charged by the General Assembly to study school finance, the administration of elementary and secondary education, and the policies and practices of school districts, commented on the goals and objectives of education in Ohio in its final report, noting that two goals are to correct the inequality of educational opportunity resulting from unequal distribution of resources for public schools, and to ensure high quality instructional programs to meet the individual needs of all Ohio students.[4] That Committee, however, did not propose a constitutional amendment concerning goals.

[2]*Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), p. 493.*
[3]*R. Stephen Shibla, Dickinson Law Review 77:577-84, September, 1973.*
[4]*Education Review Committee Report (Pursuant to Amended Sub. H.B. 86, 110th G.A. of Ohio), December 15, 1974. p. 1.*

The Commission, following the recommendation of its Education and Bill of Rights Committee, recommends that no change be made in the constitutional provisions relating to goals of education. Recommendations for change were often directed at particular groups and presented the problem of having unknown consequences for the future of education in Ohio. The Commission believes that the present language in Article VI is adequate, and that the Ohio Constitution should not contain specific provisions concerning who should be educated and for what purposes, since these are properly legislative matters. The Commission believes that the legislature is the proper forum for debates among various groups attempting to have the system extended.

II. Educational Governance: Elementary and Secondary Education

The ability of the state to meet the educational needs of the citizens and to comply with the constitutional mandate to "secure a thorough and efficient system of common schools throughout the state" may depend, in part, upon the structure created for the governance of education. Educational governance is comprised of a complex network of relationships among various associations, state and local educational agencies, executive officials, the legislature, and citizen groups. In addition to the formal structure of governance, other factors are significant, including the working relationships among various groups and political situations.

Some elements of the educational structure are in the Ohio Constitution. Article VI, Section 4 provides for the state board of education to be selected in such manner and for such terms as provided by law, and the law provides for an elected board. The superintendent of public instruction is to be appointed by the state board of education, and the respective powers and duties of the board and superintendent to be prescribed by law. The Commission reviewed structural questions in order to determine whether any changes should be made in the constitutional provisions regarding education.

A survey of characteristics of state boards of education and chief state school officers was compiled from *State Departments of Education, State Boards of Education, and Chief State School Officers,* published by the U.S. Department of Health, Education and Welfare, and containing data current to September, 1972. A comparison of the methods of selection of boards, departments, and the chief state school officers, was based on this source and other commentary, and included opinions on the advantages and disadvantages of the various processes. Selection of boards and departments of education is accomplished chiefly by three methods: election by the people or their representatives, in partisan or non-partisan elections; appointment by the Governor; and ex-officio membership. The chief state school officers may be selected by popular vote, or appointment by the Governor or by the state board of education. An additional source evaluating structural aspects of educational governance was the Educational Governance Project, operating at the Ohio State University. The project, begun in 1972, was directed to conduct a national inquiry to expand the knowledge of how states determine public school policy, and to develop alternative models for educational governance to be considered by policy makers and other persons. The project was completed in June, 1974.

In one publication by the Educational Governance Project, "Possible Alternative Models for State Governance of Elementary and Secondary Education", seven models of educational governance were presented, and each model was evaluated with respect to the relationships and influence which resulted from particular kinds of structures, e.g., elected vs. appointed state board of education. The model points out that when the state board of education is appointed by the governor, the advantages include "1. Articulation with other governmental services; 2. Access to policy-making resources of Governor; 3. Electoral accountability of policy makers; 4. Public discussion of major issues; 5. Representation of a diversity of issues." The model entails weakening the influence of educator organizations and strengthening the influence of non-educator organizations, the governor's office and the legislature. The advantages of the model in which the state board of education is elected in a non-partisan election and the chief state school officer is appointed by the board (as in Ohio) are: "Insulation from partisan politics, representation of "the public', not special interests; special emphasis on

education and assurance of its state level advocacy; utilization of professional expertise; continuity in educational policy; efficiency in decision making." The model is claimed to weaken the influence of the governor, legislature and non-educator organizations, and strengthen the impact of educator organizations. An issue which has been raised concerning the ability of the voters to select "experts" for an office, applies to the selection of the state board of education and the chief state school officer. It is claimed that the public does not possess the knowledge to choose the most expert people for the office by the electoral method, and that appointment by the Governor or by professionals should result in the selection of better-qualified people for the job.

The powers and duties of the state board of education and superintendent of public instruction are found in Title 33 of the Ohio Revised Code. The state board of education is comprised of one member elected from each congressional district (presently 23), elected for six-year terms with approximately one-third of the members elected every two years. Each member of the state board is to be a qualified elector residing in the territory composing the district from which he is elected. Members are prohibited from holding any other public position of trust or profit or being employed by any institution of education. The Governor is empowered to fill a vacancy until the next general election at which members to the state board of education are regularly elected.

The board is empowered to exercise, under the acts of the legislature, general supervision of the system of public education in Ohio. It is granted broad and comprehensive powers to exercise policy formation, planning and evaluative functions for schools and adult education in accordance with law; to administer educational policies of the state relating to public schools and public school matters. Specific powers are granted to the state board of education to administer and supervise the allocation and distribution of all state and federal funds for public school education; to prescribe minimum standards for elementary and high schools; and to require a general education of high quality. Specific powers are granted to coordinate the state system by reporting requirements, classification, standards, courses of study, etc. The state board of education is empowered to grant certification to teachers, a function which has been delegated to the superintendent of public instruction and the division of teacher education and certification of the Department of Education. The board retains power for maintaining classes for the blind and deaf.

The board of education is authorized to appoint the superintendent of public instruction, and to fix his compensation, which may not exceed the compensation of the chancellor of the Ohio board of regents. The superintendent serves at the pleasure of the board. He is secretary to the state board of education and is executive and administrative officer of the board in its administration of all educational matters and functions placed under its control. The superintendent is charged with directing, under rules and regulations adopted by the board, the work of all persons employed in the state department of education, which consists of the state board of education, the superintendent of public instruction, and a staff of clerical, professional and other employees. The department's function is to carry out and administer directives and policies of the board and the superintendent, and is organized as provided by law or by order of the state department of education. As secretary to the state board of education, the superintendent has no vote on matters acted upon by the board, but he may be called upon to express opinions and make recommendations to the board.

Comment

No persons appeared before the committee or the Commission to propose amending the Constitution to provide a different method of selecting the state board of education or superintendent of public instruction. Dr. Martix Essex, the Superintendent of Public Instruction, made several proposals to the committee for other constitutional provisions. They were: reorganization and elimination of small, inefficient school districts; permit state taxation of public utility property for statewide distribution of receipts; recodification of school laws periodically (e.g. every 20 years); place technical schools under the supervision of the state board of education; equalize assessments in all counties, with annual adjustments in valuation due to inflation and other factors; make the fiscal year compatible with the school year.

The Education and Bill of Rights Committee voted to recommend no changes in the constitutional provisions regarding governance of elementary and secondary education. The Commission concurred in the committee's view that the changes proposed were legislative in nature, and that there was no constitutional hindrance to the legislature dealing with any of the matters suggested.

III. Educational Governance: Public Higher Education

University governance has received much attention in constitutional conventions over the past two decades. Public colleges and universities have been growing at a rapid rate, and, in spite of a recent decline in student enrollment, institutions of higher education have expanded and become more specialized, demanding a sizeable amount of money, land and other resources. Higher education competes with many other institutions for operating resources, and public colleges and universities have been under increasing pressure to "stream-line" their operations in order to prevent unnecessary duplication of university functions, and to maximize the productivity of a limited amount of resources. In the face of demands for greater statewide coordination of public institutions of higher education, and demands being made on these institutions by private and public industry, state and federal government, to train manpower for highly specialized industries, many feel that institutional autonomy is being threatened.

Two basic issues have emerged in the area of governance of higher education.

1. should the system of public higher education be regulated by some statewide agency to insure maximum efficiency of the system as a whole; and

2. how can institutional autonomy be preserved so that each institution is free to develop itself, its own goals and purposes?

The Ohio Constitution contains no provision relating to the governance of the system of higher education nor relating to individual institutions, except for capital improvements and the system of student loan guarantees in Article VIII and Article VI, Section 5, respectively. The third basic issue, therefore, is whether the Constitution should include provisions relating to individual institutions of higher education and governance of the system as a whole.

History and Background

The pattern which higher educational governance has followed in Ohio and other states has been one of completely autonomous institutions from colonial days through the 19th century, moving to the creation of institutional governing boards and then to voluntary arrangements among the governing boards, ending with the creation of statewide coordinating boards beginning in the 1950's and still continuing today.[5] "Coordinating boards vary between those with a majority of institutional members with advisory powers to those composed entirely of public members with some policy-making powers. The Ohio Board of Regents created by the 105th General Assembly is a coordinating board of the latter type."[6]

In Ohio, the first effort at cooperation among existing state universities resulted in the formation of a voluntary cooperative group known as the Inter-University Council (I.U.C.). This agency, formed in 1939, consisted of five state universities, and was jointed by Central State University in 1951. For over 20 years, the I.U.C. was the key agency in the universities' relationship with state government. Prior to its formation, each school developed, submitted and lobbied for its own programs and appropriations, with little regard for other institutions. The I.U.C. was able to present a more unified front on behalf of the member institutions as well as to regulate the activities of its membership.

[5]*Pliner, Emogene, Coordination and Planning (Baton Rouge: Public Affairs Research Council of Louisiana, 1965.).*
[6]*Tucker, Joseph B., "The Politics of Public Higher Education in Ohio" in Political Behavior and Public Issues in Ohio, Coke and Gargan, eds. Kent State University Press, 1972, p. 247.*

"Politics of Public Higher Education in Ohio" describes the failure of the alliance to continue to solve adequately the problems plaguing higher education as leading to the creation of the Board of Regents in 1963, and the failure is attributed to several factors: failure to agree on dividing appropriated money among members of the Council; and failure to agree on the creation of additional institutions, particularly two-year campuses. Council members who were the presidents of the colleges that formed the I.U.C. continued to act on behalf of their own institutions rather than on behalf of the Council, and bargained among themselves as well as with the Governor and Director of Finance. Business managers of the universities played an active part in lobbying for their institutions.[7] The Inter-University Council was relatively inactive for several years after the creation of the Board of Regents, since the latter agency was given responsibility for the coordination of higher education in Ohio. Recently, the I.U.C. has assumed a more active role. It brings together representatives of the 12 universities and the Medical College at Toledo to discuss issues of common concern to the institutions, and to make recommendation to the Board of Regents and to the legislature when a concensus of opinion is reached among the representatives.

The Board of Regents is composed of nine members appointed by the Governor with the advice and consent of the senate, and members serve for nine-year terms without compensation. The chancellor is appointed by the board which prescribes his duties, to serve at its pleasure. The Board of Regents is assigned specific duties and responsibilities by statute, which attempt to prevent the kind of self-serving actions that characterized the I.U.C. by prohibiting persons with an interest in an institution of higher education from serving as a member of the board. The board is required to report to the Governor and to the General Assembly, and retains many advisory and study powers as well as several crucial policy making powers, such as the power to approve or disapprove the establishment of new branches, community colleges and technical institutions, and the power to approve or disapprove new degrees and new degree programs. The board is authorized to review the appropriations requests of the public community colleges and state colleges and universities and to submit to the legislature its recommendations in regard to the biennial higher education appropriations for the state.

Comment

The Ohio Constitution contains no provision for a state coordinating or governing board for higher education, and is virtually silent on the matter of public higher education except for references dealing with capital improvements programs and student loan guarantees.

University governance concerns at four constitutional conventions (Hawaii, Maryland, New York, and Michigan) raises several questions concerning constitutional status for higher education.

> Should the constitution contain provisions on the method of selecting the governing board? If so, what kind? Should some degree of autonomy be granted to segments of the higher educational system? If so, how much and to what institutions? Should the constitution provide for a statewide coordinating board? If so, how much power should it have?[8]

In public testimony before the Commission's Education and Bill of Rights Committee, two points of view were expressed. The Chancellor of the Ohio Board of Regents proposed no changes in the Constitution regarding higher education governance, stating his belief that authority presently exists to continue the process of development of higher education by the Board of Regents. A representative of the American Association of University Women proposed adding to Article VI a provision establishing a Board of Regents with powers and duties to be provided by law, adding that the importance of post-secondary education in Ohio merits inclusion of a provision in the state constitution.

[7] *op. cit., Tucker.*

[8] *Gove, Samuel J. and Welch, Susan, "The Influence of State Constitutional Conventions on the Future of Higher Education", Educational Record 50 (Spring, 1969), p. 206.*

The Committee felt that including a provision dealing with higher education giving the Board of Regents constitutional rather than legal status would have no result other than making it harder to change. The Commission concurred that under the proposal, whatever problems now exist with the Board of Regents would continue, and decided that the board should neither be written into the Constitution nor prohibited by it.

Section 5 of Article VI states, in part, "it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education." No testimony advocating changes in this section was received and the Commission concluded that the program is operating satisfactorily under the present constitutional provision.

IV. State Aid to Nonpublic Schools
The Religious Issue

The Ohio Constitution contains two provisions which are of immediately concern to state aid to nonpublic schools.

> Article I, Section 7. No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent and no preference shall be given, by law, to any religious society . . .

> Article VI, Section 2. No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state . . .

The First Amendment to the Federal Constitution provides: "Congress shall make no law respecting the establishment of religion . . . " This clause has been applied to the states through the Fourteenth Amendment to the Federal Constitution. (*Cantwell v. Connecticut*, 310 U.S. 296 (1940)) Federal decisions have evolved a three-pronged test of the constitutionality of a state statute providing aid to nonpublic schools. As stated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): 1) it must have a secular legislative purpose; 2) its main effect must neither advance nor inhibit religion, citing *Board of Education v. Allen*, 392 U.S. 236 (1968); and 3) it must not foster an excessive entanglement between government and religion, citing *Walz v. Tax Commission*, 397 U.S. 664 (1970). To determine the issue of excessive entanglement between government and religion, the court examines the character and purpose of the institutions benefitted, the nature of the aid provided by the state, and the resulting relationship between the government and religious authority. On this basis, the Supreme Court in *Lemon* invalidated Pennsylvania and Rhode Island statutes providing for salary supplements to nonpublic school teachers.

History and Background

An Ohio statute passed in 1967 granted aid in the form of educational funds to local school districts for "services and materials to pupils attending nonpublic schools within the school districts for guidance, testing and counseling programs . . . audio-visual aids; speech and hearing services; remedial programs, educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils . . . " and for programs of nonreligious instruction other than basic classroom instruction, with these services to be provided for nonpublic school pupils on the same basis as they are provided for public school students. The section withstood constitutional challenge in the Ohio Supreme Court under the First Amendment of the United States Constitution and Article VI, Section 2 of the Ohio Constitution in *Protestants and Other Americans United for Separation of Church and State v. Essex*, 28 Ohio St. 2d 79, 57 Ohio Op. 2d 263, 275 N.E. 2d 603 (1971), but was repealed in 1971 and replaced with other provisions.

In *Wolman v. Essex*, 342 F. Supp 379 (1972), a federal district court held that that portion of the Ohio Revised Code authorizing grants to reimburse parents for a portion of the tuition paid for a nonpublic school education (Section 3317.062) violates the establishment clause of the First Amendment by failing to provide sufficient

mechanisms to insure these public moneys will not ultimately be used for religious purposes. Section 3317.062 was repealed in 1975, when a new section dealing with distribution of payments for special programs was enacted that authorized money to be paid to school districts for the purchase and loan of textbooks, instructional materials; speech and hearing diagnostic services; medical, dental, and therapeutic psychological services; and guidance and testing and remedial services to persons attending nonpublic schools. The statute was challenged in another lawsuit in 1975. No decision has yet been reached on the constitutionality of the statute by the U.S. Supreme Court.

State aid to nonpublic educational institutions, including institutions of higher education, in the form of pupil transportation, tax exemptions, driver education and certain services and materials have been tested in the courts and upheld against challenges to their constitutionality. In a recent Pennsylvania case, *Meek v. Pittinger*, 43 U.S.L.W. May 19, 1975, the U.S. Supreme Court held that acts providing all children enrolled in nonpublic elementary and secondary schools meeting compulsory attendance requirements with auxiliary services (counseling, speech and hearing therapy, testing and psychological services) and direct loan of instructional materials and equipment (maps, phonographs, films, projectors, recorders) violate the establishment clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. The Court upheld the constitutionality of the textbook loan provision of the act.

In *Roemer v. Board of Public Works of Maryland*, 44 U.S.L.W. 4939 (June 21, 1976), the U.S. Supreme Court upheld a Maryland statute authorizing payment of state funds to private institutions of higher learning operated by a religious group in the state that meet certain minimum criteria and refrain from awarding "only seminarian or theological degrees". The assistance program is administered by the Maryland Council for Higher Education which requires that funds not be used for sectarian purposes by eligible institutions, after determining which institutions are eligible on the basis of their not awarding "primarily theological or seminary degrees". The four institutions in question were held to be not pervasively sectarian although affiliated with the Roman Catholic Church. The court also found that aid was in fact extended only to "the secular side," having taken cognizance of the statutory prohibition against sectarian use, and the Council's administrative enforcement of that prohibition.

Comment

The Commission did not receive testimony from advocates or opponents of altering the constitutional provisions regarding state aid to religious schools. The Commission was aware that any such amendment, if it is to be viable, must be within the scope of permissible action under the Federal Constitution, as expounded by federal decisions. Therefore, if the provisions were changed in the direction of removing or liberalizing the prohibition, the amendment would be overshadowed by an attack on a law authorized by such amendment on the gounds of the Federal Constitution.

The Commission recommends no change in the present constitutional provisions set forth in Section 7 of Article I and Section 2 of Article VI.

V. Financing Elementary and Secondary Education

The Ohio Constitution's provisions concerned with financing elementary and secondary education are the following:

> Article VI, Section 2. The General Assembly shall make such provisions, by taxation, or otherwise . . . as will secure a thorough and efficient system of common schools throughout the State . . .
>
> Article VI, Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds.

History and Background

Most states, including Ohio, finance elementary and secondary education from two sources: local property tax, and state funds, generally not derived from a property tax. Funds are channeled through a "foundation" program designed to provide "equalization" by guaranteeing a minimum per pupil expenditure by the school district. The bulk of school finance comes from state and local funds, but federal funds account for part of the financial resources for education.

The supreme courts of several states, prior to 1973, held that a school financing system that depends for a major part of its funds on the local real property tax, may be unconstitutionally unequal because of great disparities among school districts in tax burdens or per pupil wealth available for taxation. In some instances, where violation of "equal protection guarantees" in state and federal constitutions were cited, the courts held that education was such a fundamental right that states were obliged, under "equal protection" to offer equal educational opportunity to all. None of the decisions spelled out exactly how the states should achieve this goal.

In 1973, the United States Supreme Court in *San Antonio Independent School District v. Rodriguez et al., 93 S.* Ct. 1278, ended speculation that the Texas school finance system, and, by comparison and implication, those of other states as well, would be found in violation of the Fourteenth Amendment Equal Protection Clause. The Court did not so hold. Prior to *Rodriguez*, the leading decision was a 1971 California case, *Serrano v. Priest*, 5 Cal. 3d. 584, 487 P. 2d 1241, in which the California Supreme Court held the school finance system in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. Article IX, Section 6 of the California Constitution mandates the legislature to provide for the annual levying of school district taxes by city and county government in amounts not to exceed the maximum rates authorized by the legislature to produce enough revenue as the governing board in each school district determines is required for the function and support of the schools. The Court held that a funding system dependent on local property taxes results in wide disparities in revenue, and violates the equal protection clause. It discriminates against the poor "because it makes the quality of a child's education a function of the wealth of his parents and neighbors". The *Serrano* decision led some states to alter their provisions for school finance.

Although *Rodriguez* resolved the issue of whether the Federal Constitution was being violated by the Texas method of school finance, at least one state supreme court has held a school finance system unconstitutional on the basis of state constitutional provisions almost identical to those of the Ohio Constitution. In *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 187 (1972), the Court found the New Jersey school finance system unconstitutional, holding the state's constitutional provisions require "equal protection of the laws" and the legislature is mandated to provide "for the maintenance and support of a thorough and efficient system of free public schools."

Comment

The Commission's Education and Bill of Rights Committee considered whether the Constitution should be changed to mandate equal educational opportunity. Former Governor Gilligan, addressing another of the Commission's committees on March 29, 1972, mentioned the problems of school finance equalization and proposed including language "which would compel the state to equalize financial resources for the education of each child in the primary and secondary school system. . . " He recommended no specific language, and indicated that the Constitution should contain general language to provide "equal educational opportunity" to all children.

Testimony before the Commission proposed no changes in the constitutional provisions regarding school finance. The Commission concurred in the Education and Bill of Right's Committee's consensus that inclusion of specific language to deal with the problem of school finance would undermine the Commission's philosophy of retaining a constitution stating only general principles and guidelines. A system of school finance poses

unique problems because so many factors are involved, many of which are legislative, economic, and geographical considerations, and, being subject to change, are not likely to be more adequately provided for in the Constitution than by the language presently contained in that document. The legislature has assumed an active role in dealing with school finance issues, and the Commission believes that the legislature is the appropriate body to deal with this question.

VI. School and Ministerial Lands

School and ministerial lands (lands set aside for religious purposes) were held by the state in trust in accordance with land grants made by Congress in the 18th century. Revenue from the lands set aside for school and ministerial purposes was derived from leases. The revenue proved to be meager as a result of two factors. One, in order to invite settlers to come to Ohio in the early years of its statehood, the government offered land in fee simple at such a low price, that it was more profitable for the settler to buy the land outright and improve it for himself, than to lease the land, and improve it for the township. Secondly, there was much conflicting legislation passed about how the land ought to be leased. Long leases prevented the revaluation of the land for 99 years or longer. As property values increased, rents remained unchanged.

Sale of school lands by the state was begun in 1827, and a fund for the support of common schools was established in that year. The Auditor of State was made superintendent of the fund which consisted of moneys paid into the treasury from the sale and leasing of land for the support of schools donated by Congress, and some donations and legacies made into the fund. This money was pledged for payment at 6% interest, and was known as the "irreducible debt". The sale of ministerial lands was authorized by Congress in 1833, and the state was required to invest the money from the sale of the land "in some productive fund" the proceeds to be applied annually to the support of religion in the respective townships. The legislature provided for the administration and distribution of ministerial funds by three locally elected trustees in proportion to membership in various religious societies in the townships.

In 1851, Article VI, Section 1 was adopted, stating:

> The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants, or appropriations.

In 1917, the adoption of the Garver Act gave the Auditor of State the responsibility for administration of land and distribution of funds for both school and ministerial lands. Receipts from the state's management of school lands were paid into the School Lands Trust Fund, of which the annual interest was divided among various boards of education. Proceeds from the ministerial lands were paid into the Ministerial Lands Trust Fund. Hence, funds in the "irreducible debt" represent funds received from the sale of school and ministerial lands prior to 1917, as well as money received from the sale of land set aside for state universities and from gifts, bequests and endowments to Ohio, Ohio State and Miami Universities.

In 1917, when the Auditor of State became administrator of the school and ministerial lands, the Auditor invested money derived from the lands, and paid out the interst, all at state expense. Revenue derived from the use of ministerial lands was divided among the relgious denominations based on the number of members living in the townships.

In 1968, the Supreme Court of the United States handed down several decisions throwing doubt on the constitutionality of such church-state relationships, and the Auditor of State ceased making annual payments to religious societies. That year, the Auditor requested Congress to allow the state to dispose of school and ministerial lands and to pay the proceeds entirely to school districts, thereby eliminating the ministerial and school land programs. The Ohio Constitution was amended in 1968 to read:

> Article VI, Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to the State for educational and religious purposes shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

The amendment, and subsequent legislation, enabled the General Assembly to distribute the principal as well as the interest of the funds to the schools, and the irreducible debt was abolished. The sale of ministerial lands according to their 18th century value, as required by statute, cost the state more money to appraise the land than it could receive from the sale. Section 501.09 of the Revised Code has been amended to insure that the state will rid itself of ministerial lands by making the payment of rent an offer to purchase and requiring the Auditor to accept the offer. A large amount of school land is still held by the state. The Auditor has veto power over a school board's request for the sale of school lands, guarding against a sale in the interest of private persons but not the inhabitants of the school districts.

No reason to alter the Constitution with regard to these lands or the funds were offered to the Commission.

General References

State of New York, Temporary State Commission on the Constitutional Convention, Volume No. 6, "Education", 1967.

Legislative Reference Bureau, Education (Public Education), Hawaii Constitutional Convention Studies, Volume 1, 1968.

John Kaplan, "Plessy and Its Progeny", reprinted in Challenges to Education, Emanuel Hurwitz, Jr., and Charles A. Tesconi, Jr., Dodd, Mead & Company, Inc., 1972.

R. Stephan Shibla, Dickinson Law Review 77: 577-84, September, 1973.

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.

Commission Recommendation

The Commission recommends that Article VII, Section 1 of the Ohio Constitution be retained without change.

History and Background of Section

Section 1 of Article VII was part of the 1851 Constitution. It requires the state to foster and support welfare institutions for the "insane, blind, and deaf and dumb." The 1873-1874 Constitutional Convention lengthened the section, providing for further specifics. It read:

> 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 Girls' 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 proposed Constitution was not approved by the electorate. No changes in Article VII were considered at the 1912 Constitutional Convention. Thus the section remains unchanged from the 1851 language.

By a fairly recent count, 20 state constitutions provide for the establishment and support of institutions for the mentally handicapped and disabled, 19 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, for example, states in Article VII, Section 5: "The legislature shall provide for public welfare." A survey of other state constitutions indicates that the issue of public welfare is dealt with in two ways: four states'[1] provisions contain a more extensive enumeration of recipients in the public welfare system: six state constitutions[2] broaden the constitutional statement into something beyond provisions for institutional-type systems. A study by the Temporary State Commission on the Constitutional Convention in New York contains an extensive discussion of whether the constitution should state any policy with respect to social welfare.[3] Proponents of a specific welfare provision argue that the provision would provide basic support for legislation and assurance of minimum programs, while opponents hold such a provision superfluous since the state could, under its inherent police powers, provide for social welfare.

In addition to state constitutional provisions dealing with public institutions and public welfare, state responsibility in this regard has been determined, to some extent, by federal court decisions concerning 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 persons needing care are currently in a state of evolution. Some lower federal courts have declared that persons committed to an institution 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). A U.S. District Court in Ohio held that "the state, upon committing an individual until he gains his sanity, incurs a responsibility to provide

[1] *Indiana, Kansas, Montana, North Carolina.*
[2] *Alaska, Hawaii, Louisiana, Missouri, Montana, New York.*
[3] *Mental Health, 1967.*

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'Connor v. Donaldson*, 422 U.S. 563 (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 provisions of the Ohio Revised Code, Section 5122.27 grants a right to 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. This includes both voluntary and involuntary residents, and public and private facilities. Involuntarily committed patients, under Chapter 5123, are entitled to the least restrictive environment.

Comment

Several proposed amendments to Article VII, Section 1 were considered. The What's Left Committee worked with an ad hoc committee of persons from various social welfare agencies concerned with the rights of the handicapped and aged, sponsored principally by the Law Reform Project at The Ohio State University, to draft language which would have extended the state's commitment to the handicapped and disabled beyond mere custodial care. 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, and would have applied to juveniles, prisoners, the aged and the developmentally (physically and mentally) disabled. The Committee felt, however, that the "least restrictive manner appropriate . . . " language was unclear and ambiguous, and raised many problems of 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, the Committee believed it not feasible to treat juveniles, aged, prisoners, and developmentally disabled under the same language since each class of persons had special needs. The Committee was also concerned that 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 What's Left Committee recommended the following language to the Commission as a substitute for Article VII, 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."

The Committee's proposal had three major objectives: (1) to state a generalized commitment on the state's part to provide facilities and services to the disabled and handicapped -- while leaving it up to the General Assembly to decide the scope of the state's commitment; (2) civil commitment would be limited to protecting persons from harm to themselves or others; (3) those persons civilly confined under the "harm" standard are guaranteed the right to treatment or habilitation.

The proposal was the subject of extensive debate in the Commission. Among the principal objections was the "disability or handicap" were not defined in the provision, and might broaden the state's responsibility beyond the intent of the provision. The question of the state's financial responsibility was explored at length. Would the state be required to provide more than custodial care to those civilly confined persons who would not benefit from other care? Since the "right to treatment" was now a constitutional right, what would be the remedy if the state could not afford to provide habilitation or treatment for civilly confined persons? Would they have to be released? To lessen some of the ambiguity, the proposal wa amended as follows:

> Facilities and treatment for persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered by the State. Such persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to appropriate habilitation, treatment, or care.

The proposal was approved by a majority of the Commission, but did not receive the necessary 2/3 and therefore did not become a recommendation. The major objections to the revision appeared to be grounded in the uncertainty of the state's obligation as a result of the language. The inclusion of "right to treatment" language in the provision seemed to some members to open the way to a greater burden on the state than the state could assume.

Minority Report
Article VII, Section I

The undersigned recommend to the General Assembly the amendment of Article VII, Section 1 as follows:

> Section 1. FACILITIES AND TREATMENT FOR PERSONS WHO, BY REASON OF DISABILITY OR HANDICAP, REQUIRE CARE, TREATMENT, OR HABILITATION shall be fostered by the STATE. SUCH PERSONS SHALL NOT BE CIVILLY CONFINED UNLESS, NOR TO A GREATER EXTENT THAN, NECESSARY TO PROTECT THEMSELVES OR OTHER PERSONS FROM HARM. SUCH PERSONS, IF CIVILLY CONFINED, HAVE A RIGHT TO APPROPRIATE HABILITATION, TREATMENT, OR CARE.

Since 17 members approved of the above language. we believe that it should be presented to the general assembly even though without Commission endorsement.

With respect to the first sentence, it states essentially the same principle as the present Constitution, substituting more modern, less stigmatizing language for "insane, blind, deaf and dumb" and "institutions". By itself, and by removing "support", it is not viewed as requiring a right to specific services or facilities, such as a right to classrooms for the learning disabled or a right to an intensive treatment center.

The second and third sentences grant more substantive rights, and we believe that these propositions, articulated by federal courts over the last ten years as constitutional principles, should be included in the Ohio Constitution. They have already been articulated in Ohio statutes. Dean Michael Kindred of the O.S.U. College of Law summarized the intent of the language in his testimony to the Commission: "The statement that one finds most commonly in the right to treatment cases is that a mental hospital without hospital is nothing more than a prison. And if a person is going to be placed in a prison, he should be convicted through the criminal process. . . If we view a commitment process that is less rigorous than the criminal commitment process, that is the civil commitment process, and we put them in places called hospitals, then I don't think that it is too much to say that the logical conclusion of that is that they must have treatment. And this is what the courts have said, that if you want to put them in prison, put them in prison. But if you are going to put them in hospitals, they have a constitutional right to treatment."[1]

[1]*Dean Michael Kindred, Testimony before the Ohio Constitutional Revision Commission October 5, 1976. pp. 18-19 of Commission Minutes*

We believe that the Ohio Constitution should contain a statement of the state's commitment to care for those who are unable to care for themselves, to offer them facilities and treatment to better their conditions, and in cases where a person has been deprived of his civil liberty because he may cause harm to himself or others, to guarantee him the right to appropriate care, treatment or habilitation. The proposed language is supported as the most acceptable statement of these purposes.

Craig Aalyson
R. H. Carter
Warren Cunningham
Tim McCormack
William H. Mussey
Linda U. Orfirer
Katie Sowle
John D. Thompson
Paul A. Unger

Article VII, Sections 2 and 3
State Institutions, Appointment of Directors and Trustees

Present Constitution

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 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.

Commission Recommendation

The Commission recommends that Sections 2 and 3 of Article VII be repealed.

Comment

The Commission concluded, after reviewing the What's Left Committee study of public institutions, that Sections 2 and 3 of Article VII are obsolete. No substantive change in the governance of state benevolent institutions or the penitentiary is intended by the Commission recommendaton for repeal.

History and Background of Sections

Sections 2 and 3 of Article VII were adopted by the 1850-1851 Constitutional Convention and have not been amended since their approval by the electorate. In the original Ohio Constitutional of 1802, nearly all 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 1850-1851 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 1873-1874 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 such an office no longer exists. In only one case is there a statutory provision concerning trustees of benevolent institutions. Section 5909.02 of the Revised Code provides for a five-member board of trustees to the Ohio Soldiers' and Sailors' orphans home, to be appointed by the Governor with the advice and consent of the Senate.

Section 3 provides for filling vacancies in the offices mentioned in Section 2. That section is obsolete since, as noted above, such offices have, for the most part, been abolished. A more recent constitutional provision, Article II, 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 house is in session, and when a vacancy occurs and the Senate is not in session, the Governor may make such appointment pending Senate confirmation.

Repeal of Sections 2 and 3 in Article VII is recommended to remove these two obsolete and unnecessary provisions from the Constitution.

Article IX, Sections 1,3,4,5
Article III, Section 10

Militia

Present Constitution

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.

Section 3. The governor shall appoint the adjutant general, and such other officers and warrant officers, as may be provided by law.

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.

Section 5. The General Assembly shall provide, by law, for the protection and safekeeping of the public arms.

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.

Commission Recommendation

The Commission recommends no changes in Article IX, Sections 1, 3, 4, and 5, and Article III, Section 10.

History and Background of Sections

Every state constitution contains a provision dealing with the military, usually providing that the governor is commander-in-chief of the state's military forces. Extensive constitutional provisions on the military date to the time when states were responsible for home defense because the national government did not assume full responsibility for defense due to the fears concerning a standing army. The provision in Section 1 of Article IX of the Ohio Constitution, providing that all citizens are subject to enrollment in the militia expresses the principle that the state would be prepared, through its militia, to defend itself against attack. The provision reflects the traditional concept of citizen service in the militia, with every man[1] being responsible for the defense of the state. This concept was especially prominent before a system of national defense was developed in the United States, and still remains in most state constitutions.

[1]*In earlier history, only men had the privileges and duties of citizenship.*

Section 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 originally more detailed than it is now, 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 equality for all races. The 1874 Convention proposed 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, but this was not adopted. Other debate at the 1874 and 1912 Constitutional Conventions concerning the militia dealt mainly with the inclusion of the word "white" in the article[2] but the stipulation remained until 1953, when Section 1 of Article IX was amended to remove reference to "*white*" males. Section 2, dealing with the elected officers of the militia 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 to permit the use of retired regular army officers in the Ohio Defense Corps, as requested by the Adjutant General.

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 be necessary only in consideration of a possibility of major disaster in a state at a time when the national guard could not be activated or was already called into federal service.

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.[3] That report stated that only the last two sections of Article IX have any permanent value - Section 4, giving the governor the power to call forth the militia to executive 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 5, requiring the General Assembly to provide by law for the protection and safekeeping of the public arms.

Representatives of the Adjutant General's office testified in favor of retaining the constitutional provisions dealing with the militia without change. They stated that the constitutional provisions 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 Commission 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. The Commission, therefore, recommends retention of Article IX, Sections 1, 3, 4, and 5, and Article III, Section 10, without change.

[2]*Negroes served in the Ohio National Guard from 1870 on, and the word "white" was removed from the statute in 1878, although it remained in the Constitution until 1953.*

[3]*Stephan H. Wilder Foundation, An Analysis and Appraisal of the Ohio State Constitution 1851-1951. pp. 41-42.*

Article XI
Apportionment

Present 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 is 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 the 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 in 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 preceeding 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.

Commission Recommendation

The Commission recommends no changes in Article XI.

History and Background of Article

Article XI of the Ohio Constitution provides a method for establishing the boundaries of districts for the election of representatives and senators to the Ohio General Assembly and establishes standards for drawing the boundaries. The number of representatives is fixed at 99, and the number of senators at 33; each senate district is composed of three house districts. All districts are single member districts. Apportionment of senate and house districts may only take place every 10 years, following the federal decennial census, by a constitutionally-designated group of persons: the Governor, Auditor of State, Secretary of State, and two persons of opposite parties chosen by the legislative leaders. The two appointees were legislators when apportionment

took place following the 1970 census. The Constitution establishes standards for the formation of House of Representative districts: population requirements; compact districts composed of continguous 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; and if a county must be divided, preference 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.

The Ohio Constitution does not deal with the task of creating congressional districts, which 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 a state is entitled is determined only once every 10 years, following the federal census.

A constitutional provision on apportionment dates from 1851, when Article XI was adopted providing for decennial reapportionment, by dividing the population of the state as shown by the federal census by one hundred for the House and thirty-five for the Senate to establish the ratio of representation in each branch of the legislature for the succeeding 10 years. Every county having a population equal to one-half ratio was given one representative in the House. Whole counties were combined to form both House and Senate districts and additional representation was awarded one or more sessions during the 10-year period to take care of population over the ratio. In 1902 the formula was amended to grant each county at least one representative in the House, and the provision allowing House districts consisting of more than one county fell into disuse. The 1851 apportionment article placed the responsibility for determining the ratio of representation, and the number of representatives and senators to which each county or district was entitled with the Governor, Auditor, and Secretary of State, "or any two of them" (Section 11) to be completed at least six months prior to the October election.

The current constitutional provisions in Article XI represent a substantial revision of the apportionment article in 1967, during the "reapportionment revolution" of the 1960's that began in 1962 with the Supreme Court decision in *Baker v. Carr*, 369 U.S. 186. In that case, 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.

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 2 (of the Federal Constitution), that Representatives 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 five 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 objectives. 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. Many commentators observed that mathematical precision based on population may have the effect of increasing the practice of gerrymandering, by cutting across natural and political boundaries. More recent cases indicate that the Court will permit greater deviation from mathematically "ideal" districts in state legislative districts than it will in congressional districts, but numbers are still emphasized.

In the extensive commentary on substantial equality in legislative and congressional districting, two solutions are suggested.[1] One is 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 non-legislative board, commission, or other agency with either primary or secondary (advisory to the legislature) responsibility for legislative districting. In 25 states, such a non-legislative body exists to deal with legislative apportionment. Congressional redistricting continues to be done exclusively by the legislature in all states but Montana, where the non-legislative body is given that responsibility. Of the 25 states, 13 place primary responsibility on the legislature for legislative apportionment, with the non-legislative 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.

Comment

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, 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 10 years, and that the composition of Ohio's present apportionment body should be changed. Several organizations and individuals interested in the subject participated in committee discussions and made suggestions. The Commission considered two recommendations to amend Article XI: the one proposed by the What's Left Committee attempted to minimize partisanship, the one proposed by Mr. John McElroy, counsel to the Republican Party, accepted the partisan nature of apportionment, but opened the proceedings and plan for public review and comment.

The apportioning persons are considered of primary importance in the apportionment provision. One of the first conclusions reached by the committee was that the three elected executive officials presently designated by the Constitution should not be on the apportionment board. The committee proposal provided for a five member apportionment commission, with four members appointed by the legislative leaders of both parties in the General Assembly. The fifth member, who would be chairman, and would be a key person, would be selected by majority agreement of the four; if they fail to agree, the secretary of state would select the chairman by lot from nominees submitted by the commission. All meetings, including those to nominate a chairman and draw the apportionment plan, would be open to the public, and at least four weeks would be provided for public inspection of a tentative plan, in order to provide for public comment and input before final adoption of the plan. Under the present constitutional language, the public does not see the plan until after it is approved by the apportioning persons. Elected or appointed public officers other than members of the General Assembly could serve as members of the apportionment commission, which, in addition to redistricting for state legislators every 10 years, would be responsible for districting for the election of United States congressional delegates. The proposal was defeated by the Commission by a vote of 13 in flavor, 13 opposed, and 2 passes.

[1]*Terry B. O'Rourke, "Reapportionment - Law, Politics, Computers", reprinted in American Enterprise Institute for Public Policy Research, 1972.*
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.

The Commission also rejected Mr. McElroy's alternative. That version retained the apportioning persons now specified in the Constitution; the governor, auditor, secretary of state, and two persons chosen by the legislative leaders, and made two major changes in the present apportioning procedures: it provided for a staff and staff director to formulate an apportionment plan, who would be appointed on the same partisan basis as the members themselves, and the proceedings and plan would be open to public inspection before the plan is adopted. The proposal would permit the legislature to provide for the apportioning persons to be responsible for districting for the election of U.S. congressional delegates. The Commission vote on the substitute proposal was 19 in favor, 10 opposed, and 1 pass.

Apportionment
Article XI
Minority Report

The undersigned persons support the amendment of Article XI, Section 1 of the Ohio Constitution as follows:

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. EACH MEMBER MAY NOMINATE ONE OR MORE PERSONS, OTHER THAN A MEMBER, TO SERVE AS A FIFTH MEMBER, WHO SHALL BE CHAIRMAN OF THE COMMISSION. THE FIFTH MEMBER SHALL BE SELECTED BY THE AFFIRMATIVE VOTE OF AT LEAST THREE OF THE FOUR MEMBERS. IF THEY HAVE NOT SELECTED THE FIFTH MEMBER BY MAY 1, EACH MEMBER SHALL, AT A MEETING OF THE COMMISSION CALLED BY THE SECRETARY OF STATE AS SOON AS POSSIBLE AFTER THAT DATE, SUBMIT TO THE SECRETARY OF STATE IN WRITING THE NAME OF ONE PERSON, WHO WAS PREVIOUSLY NOMINATED, TO BE THE FIFTH MEMBER. THE FIFTH MEMBER SHALL BE CHOSEN BY LOT BY THE SECRETARY OF STATE AT SUCH MEETING FROM AMONG THE NAMES SO SUBMITTED. FAILURE TO SUBMIT A NAME IS DEEMED A WAIVER OF THE RIGHT TO SUBMIT A NAME. ELECTED OR APPOINTED PUBLIC OFFICERS OTHER THAN MEMBERS OF THE GENERAL ASSEMBLY MAY SERVE AS MEMBERS 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 OTHER 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.

Comment

The principal features of this minority proposal are as follows:

1. The Apportionment Commission replaces persons designated by the present constitutional provision: Governor, Auditor, Secretary of State, and two persons chosen by the House and Senate minority and majority leadership. The proposed Commission consists of five persons: the majority and minority leaders in the House and Senate each select one, and a fifth member, who shall be chairman, is selected by the four members. If they cannot agree on a chairman, the Secretary of State will select the chairman by lot from names of persons previously nominated submitted by the four members prior to the lottery meeting.

2. Elected or appointed public officers other than members of the General Assembly may serve as members of the Commission.

3. The Commission will be assisted in the preparation of an apportionment plan by staff, and the General Assembly is required to appropriate funds to support the work of the Commission.

4. The first plan published by the Apportionment Commission is a *tentative* plan. At least four weeks are provided during which the Commission shall consider comments, criticisms, and alternate proposals submitted by any person or group to the tentative plan.

5. All meetings of the Apportionment Commission are open to the public. Communications to the Commission, criticisms, plans, alternate proposals, etc., relating to the adoption of the tentative and final plans are open to public inspection and must be retained for 180 days after the completion of the Commission's work.

6. The Apportionment Commission shall be responsible for dividing the state into districts for the election of representatives to the United States Congress.

This recommendation was developed by the What's Left Committee after much study of apportionment and discussion with knowledgeable persons. The proposal is designed to lessen the influence of partisan politics as much as possible, by emphasizing a bi-partisan approach. The recourse of the lottery, for the selection of the chairman if the four members cannot agree, is intended to provide strong incentive for the members of both parties to come to some agreement on a fair and competent person to be chairman, rather than leave that important position to chance. The extensive requirements dealing with publication and public inspection of both the tentative and final plans, as well as the opportunity for public input, are intended to make the process as open as possible. As it is presently done, apportionment is a very closed process giving the public the opportunity to comment only after the plan is adopted.

Craig Aalyson	Warren Cunningham	Don Montgomery	Paul Unger
Nolan Carson	Charles Fry	William H. Mussey	Thomas A. Van Meter
Dick Carter	Robert Huston	Katie Sowle	

Article XIII
Corporations

Present Constitution

Section 1. The General Assembly shall pass no special act conferring corporate powers.

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

Section 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her . . . .

Section 4. The property of corporations, now existing or hereafter created shall forever be subject to taxation, the same as the property of individuals.

Commission Recommendation

The Commission recommends the repeal of Article XIII, Sections 1, 2, 3, and 4, and the enactment of Article XV, Section 2 as follows:

Article XV, Section 2. CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED AND EMPOWERED, AND CORPORATIONS SO FORMED IN THIS STATE OR ELSEWHERE MAY BE CLASSIFIED, REGULATED, AND TAXED ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED. STOCK OWNERSHIP THEREIN SHALL NOT CREATE INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS IN EXCESS OF THE STOCKHOLDER'S UNPAID STOCK SUBSCRIPTION.

Effect of Change

The Commission recommends the enactment of a new section of the Constitution dealing with corporations, which would retain those provisions of the first four sections in Article XIII which the Commission believes should be retained in the Constitution, and the remaining language of those sections, which is statutory in nature, would be repealed. Only the first sentence of Section 3 is discussed in this portion of the report and the remainder is discussed together with Section 7. The new section would become Article XV, Section 2, a section which is now vacant.

Comment

1. General Laws

Prior to 1851, all corporations in Ohio, including municipal corporations, were specially chartered by the legislature, in accordance with a provision in the 1802 Constitution providing for applications to the legislature and granting letters of incorporation to associations of persons "regularly formed . . . and having given themselves a name." Between 1802 and 1850, an increasing number of business associations were formed and the legislature found that much of its time and energies were consumed with the process of incorporating. Legislative abuses of the process -- logrolling, special privileges, lack of uniformity -- led to the adoption, in 1851, of many of the corporation provisions of the present Article XIII. Section 1 and the first phrase in Section 2 require corporations to be formed under general laws and prohibit the conferring of corporate powers by special act. At the same time, Section 6 was enacted requiring the General Assembly to provide for the organization of cities and incorporated villages by general laws. (This section is considered in a separate report by the Commission's Local Government Committee.)

The 1850-1851 Convention added Article II, Section 26 to the Constitution: "All laws, of a general nature, shall have a uniform operation throughout the State . . . " The Commission considered whether it was necessary to retain a provision requiring general corporate laws in view of Article II, Section 26, and concluded that the latter does not prohibit special acts. The Commission believes that the requirement of general laws governing the formation and granting of powers to corporations should be retained in the Constitution and recommends replacing the following language in Sections 1 and 2 of Article XIII: "The General Assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws . . . .; with the following:

CORPORATIONS . . . MAY BE FORMED AND EMPOWERED . . . ONLY UNDER GENERAL LAWS . . .

2. Alteration and repeal of corporation laws

In 1819, the U.S. Supreme Court held that a corporate charter, once granted by the legislature, was a contract between the state and the corporation and could not be revoked or altered by subsequent legislative action unless the charter specifically reserved these rights to the state. (*Dartmouth College v. Woodward*, 17 U.S. 518) The 1850-1851 Convention, in order to counteract the effect of this decision, added to the Ohio Constitution the provision in Section 2 that laws under which corporations may be formed may, from time to time, be altered or repealed. Corporations already in existence were not affected by the provision, but all corporations formed after 1851 are subject to the conditions of the constitutional provision. Since the *Dartmouth College* case is apparently still applicable, the Commission believes that the constitutional language should be retained. The constitutional provision proposed by the Commission now reads:

CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED AND EMPOWERED . . . ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED REPEALED.

3. Municipal Corporations

In 1851, Section 6 was written into Article XIII to restrict the General Assembly to providing for municipal corporations by general laws. Section 1 of that article, prohibiting the conferring of corporate powers by special act has also been interpreted to apply to municipal corporations. The 1912 Constitutional Convention wrote Article XVIII dealing solely with municipal corporations, and although there was discussion at the Convention of repealing Section 6 in Article XIII, that action was not taken.

The Local Government Committee of the Ohio Constitutional Revision Commission studied Article XIII, Section 6 and recommended it for repeal. In considering the relationship of the remainder of Article XIII to municipal corporations, the Commission felt it should be made clear that municipal corporations are dealt with exclusively by Article XVIII, and constitutional language with respect to other corporations should not be

construed to apply to municipal corporations. The Commission recommends the addition of the language "not governed under Article XVIII of this Constitution" to make this distinction clear. The provision now reads:

> CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED AND EMPOWERED . . . ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME BE ALTERED OR REPEALED.

4. Regulation

At the 1912 Constitutional Convention, there was general agreement that the General Assembly should regulate and classify corporations (as it had, in fact, been doing) and that the legislature should enact a "blue sky" law similar to one already enacted in Kansas to prevent the sale of fraudulent securities, whether issued by domestic or foreign corporations, to Ohio citizens. The second sentence of Section 2 was added by the Convention. "Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

Some delegates believed that the General Assembly already possessed the power to pass laws regulating the sale of stocks and securities, while others felt that a specific grant of authority should be in the Constitution. The authority of the General Assembly to pass laws regarding classification might be more questionable than other regulation, since the Supreme Court of Ohio had earlier held the General Assembly's classification of cities unconstitutional. However, constitutional provisions relating to equal protection of the laws and due process have led the courts to require that classification be reasonable, related to the purpose for which made, and that all entities falling into the classification be treated fairly and equally.

The Commission concluded that the second sentence is surplusage -- in that it does not confer on the General Assembly any power it does not already possess by virtue of its general legislative power under Article II, Section 1. The Commission proposes to replace this sentence with the word "regulated" to preclude any question of the legislature's authority in this regard. In addition, the words "corporations so formed in this state or elsewhere" are included to make it clear that the legislature possesses sufficient authority to regulate and classify foreign and domestic corporations.

The third sentence of Section 2, also added by the 1912 Convention, reads: "Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual." Prior to the Convention, the Supreme Court had twice struck down statutes regulating bulk sales not in the regular course of the seller's business, as violating provisions of the Bill of Rights protecting the right to own and dispose of property. The Convention added this sentence to the section specifically to overcome the effects of those decisions. The Commission does not believe that the provision is useful today as a basis for commercial regulation. Even if it still has constitutional validity, the Commission believes, since it relates to entities other than corporations, it is misplaced. The Commission recommends its repeal. The Commission proposal now reads:

> CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED AND EMPOWERED, AND CORPORATIONS SO FORMED IN THIS STATE OR ELSEWHERE MAY BE CLASSIFIED, REGULATED . . . ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED.

5. Taxation

Section 4 was added by the 1850-1851 Constitutional Convention in reaction to prior legislative policies exempting the property of particular corporations or kinds of corporations from taxation. The section reads: "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the

property of individuals." The section does not authorize the levy of any tax, but states the general principle of equity that corporate property shall be treated like individual property for taxation purposes.

The Commission believes the section unnecessary since Section 2 of Article XII states this principle in more specific terms by requiring uniform taxation of real property, permitting classification of personal property for tax purposes, and permitting the General Assembly to determine exemptions. However, since Section 4 appears to confirm power to tax corporate property, repeal might somehow diminish this power. Therefore it recommends adding "taxation" to the proposed new section outlining in general terms legislative power over corporations; "corporations . . . may be classified, regulated, and *taxed* . . ." so that the section now reads:

> CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED AND EMPOWERED, AND CORPORATIONS SO FORMED IN THIS STATE OR ELSEWHERE MAY BE CLASSIFIED, REGULATED, AND TAXED ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED.

6. Stockholder liability for corporate obligations

The first sentence of Section 3 in Article XIII reads: "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." The original 1851 section permitted additional liability of each corporate stockholder, over and above the stock owned by him and any unpaid amount due thereon, to a further sum at least equal to the worth of the stock. The last provision, the "double" or "superadded" liability, was deleted in 1903, added for banking corporation shareholders in 1912, and again deleted in 1936 .

The word "dues" was used as a synonym for "debts". The Commission recommends the deletion of the first clause, since it considers it surplusage and clearly within the powers of the General Assembly to provide under the general authority to regulate corporations. The Commission recommends retention in the Constitution of the present provision which prohibits "double" or "superadded" liability, and recommends a second sentence for the proposed new section as follows:

> STOCK OWNERSHIP THEREIN SHALL NOT CREATE INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS IN EXCESS OF THE STOCKHOLDER'S UNPAID STOCK SUBSCRIPTION.

Article XIII
Section 5

Present Constitution

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Commission Recommendation

This section was referred to the Committee studying the Bill of Rights for its review and recommendations in conjunction with its study of Article I, Section 19.

Comment

Section 5 of Article XIII, was added to the Constitution in 1851 and has not been altered. When read together with Section 19 of Article I, the eminent domain provision of the Bill of Rights, many parallels in language may be found, and a few differences. Some of the specific provisions, such as that requiring a jury to determine compensation, were added to the Constitution for the same reasons that similar provisions in Section 19 of Article I were added -- to prevent abuses of power that had occurred prior to 1851, depriving landowners of their property without just or adequate compensation.

The Commission recommended that the two sections be studied together because of the similarity of their subject matter. (The Commission recommendation for Article XIII, Section 5, retaining the section in amended form, but removing the phrase "of twelve men", is contained in the Bill of Rights Report #11.)

Article XIII
Sections 3 and 7

Present Constitution

Section 3. . . . No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker" or "banking", or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

Section 7. No act of the General Assembly authorizing associations with banking powers, shall take effect, until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election.

Commission Recommendation

The Commission proposes the repeal of the second sentence in Article XIII, Section 3 and the repeal of Article XIII, Section 7 as obsolete and unnecessary constitutional material.

Effect of Change

By proposing the repeal of Section 3, Article XIII (the second sentence) and Article XIII, Section 7, the Commission does not intend to diminish or substantively affect the power of the legislature to regulate domestic and foreign banks, and considers the present constitutional provisions as not conferring any authority on the legislature that it doesn't already possess by virtue of its plenary powers.

Comment

The banking provision in Section 3 permits the General Assembly to regulate foreign banking corporations wishing to do business in Ohio, subject to the interstate commerce clause of the Federal Constitution and other provisions of the federal laws. The Commission is of the opinion that this power is within the plenary legislative power of the General Assembly without this sentence, and proposes its repeal as unnecessary.

Section 7 of Article XIII was added to the Ohio Constitution in 1851 as a compromise between advocates of the gold standard and advocates of an easy money policy. The compromise was to require submission to the people for their decision on acts authorizing associations with banking powers. The term "acts authorizing associations with banking powers" was apparently intended to apply only to authorizing banks of issue, and was so construed by the Ohio Supreme Court. There are currently no laws in effect in Ohio submitted to the people in accord with this provision. Nor is it likely that the state will enter into the business of authorizing banks of issue, in light of federal dominance in this field. The Commission, therefore, recommends repeal of this section as unnecessary.

Article XV, Section 1
Seat of Government

Present Constitution

Section 1. Columbus shall be the seat of government, until otherwise directed by law.

Commission Recommendation

The Commission recommends no change in Article XV, Section 1.

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:

> 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.

Columbus was made the state capitol by law in 1809. At the 1851 Constitutional Convention, the Committee on the Legislative Department proposed a substitute for Article VII, Section 4 as part of the legislative powers article, naming Columbus as the seat of government. The Committee on Drafting included the section in Article XV, dealing with miscellaneous matters.

The Debates of the 1873-1874 and 1912 Constitutional Conventions show no indication that changing the seat of government was contemplated.

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.

The Commission considers Article XV, Section 1 to be a satisfactory provision in its present form and recommends that it be retained without change.

Article XV, Section 3
Publishing an Accounting of Public Money

Present Constitution

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.

Commission Recommendation

Article XV, Section 3 of the Constitution is recommended for retention without change by the Commission.

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. A constitutional provision on this matter was first considered by the 1851 Constitutional Convention. As originally proposed, the Constitution would have required an accounting of receipts and expenditures of public money to be published annually, specifying the names of persons receiving the money and the amounts received. There was some debate about whether the reporting should be made only by public officers or by all persons since 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. A motion to remove the

requirement for annual publication was agreed to, and the section was adopted by the Convention and later by the electorate, and has remained in that form.

There does not appear to have been any litigation concerning this section of the Constitution, and there appeared to be no reason to alter it or repeal it.

Comment

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 the Commission believes the section should be retained.

Article XV, Section 4
Qualifications of Public Officers

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.

Commission Recommendation

The Commission recommends the amendment of Section 4 of Article XV 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.

Comment

The Commission proposal would retain the requirement that elected officers must possess the qualifications of an elector, but appointed officers need only assume residency in the state prior to taking office. The revised section specifically makes reference to that section of the Constitution where the qualifications of an elector are set forth, Article V, Section 1. These qualifications include residency for periods of time determined by law.

History and Background of Section

Article XV, Section 4 first appeared as a constitutional requirement in 1851, and has been amended since then several times. The original section read "No person shall be elected or appointed to any office in this state, unless he possess the qualifications of an elector." At the 1912 Constitutional Convention this section and its correlative elector section in Article V were amended. A clause was added to Section 4: "provided that women who are citizens may be appointed as member of boards 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 added language was 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. Prior to 1913, suffrage was limited by Article V, Section 1 to white males meeting stipulated age and residency requirements. The Convention amended the section deleting "white" and "male", but the voters approved only the deletion of the word "white", and women were denied the franchise until the Nineteenth Amendment to the U.S. Constitution was adopted in 1920 prohibiting denial of the franchise to U.S. citizens on account of sex. Article V, Section 1 of the Ohio Constitution was amended in 1923 to reflect this change, and in 1953, Section 4 of Article XV was amended to delete the 1912 provision concerning women which had been made obsolete by the constitutional changes in 1920 and 1923. In 1957, an amendment which would have entirely repealed Section 4 was narrowly defeated by the voters.

Section 4 of Article XV makes the qualifications for public office depend on elector status, which is spelled out in Article V, Section 1 of the Ohio Constitution. That section presently states that electors must be eighteen years old and comply with the applicable state, county, township, and ward residency requirements as prescribed by law in order to vote. Ohio has no other age requirements for public office, nor for specific public offices, other than Section 4 of Article XV. Section 3 of Article II requires members of the General Assembly to have resided in their districts one year preceding their election. An exception is made in Article XI for a reapportionment year.

Two questions specifically considered by the Commission were whether there should be higher qualifications in terms of age, citizenship, and residency for some state offices, for example, Governor, and whether all candidates for state office, whether appointed or elected, should be required to be qualified electors. With regard to the first question, the Commission concluded that the present requirements were sufficient for candidates for elective office, and that even though an 18 year old may have a more difficult time convincing voters of his capabilities for office than an older, more experienced candidate, the voters should make that decision. Regarding the second question, the Commission felt that the present constitutional language prohibits the state from availing itself of highly qualified candidates who may reside in other states. People are more mobile today than in 1851, and a person who might otherwise be the best person for the job is either excluded unless he is an Ohio elector or must obtain elector status before he can be appointed. It was generally agreed that candidates for elective state office should be required to be electors, but that candidates for appointive state office need not be so required. The present requirement for appointive officers was replaced with language that merely requires such candidates to be a resident of the state of Ohio at the time they take office, thus permitting hiring qualified candidates from outside the state.

Article XV, Section 7
Oath of Office

Present Constitution

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.

Commission Recommendation

The Commission proposes no change in Article XV, Section 7.

Comment

The concept underlying Section 7 of Article 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 latter provision deviated from the earlier version only in the omission of the phrase "of trust or profit" which had formerly modified the world "office".

Most 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 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. 645 (1851). In that case, the question before the court concerned whether or nor certain county 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.

Research indicated no problems arising from the language in Section 7, and the Commission favored retaining the section for that reason, and also agreed 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.

Article XV, Section 10
Civil Service

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.

Commission Recommendation

The Commission recommends that no change be made in Article XV, Section 10.

Comment

The 1912 Constitutional Convention adopted Section 10 of Article XV with little debate and 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. The concept of the reformers had two parts -- (1) 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; (2) 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.

The General Assembly enacted a comprehensive civil service law in 1913, covering employees of the state, counties and cities, as required by the Constitution. In addition, employees of city school districts were included. Civil service was divided into classified and unclassified service, with the unclassified service including the specified "exempt" persons and categories (e.g., elected officials, court bailiffs, heads of principal departments, boards and commissions appointed by the governor, their secretaries, boards of elections) and the classified, or competitive, service included all the rest. All persons in the city school districts were exempt except nonteaching school employees. Since then, the civil service has been expanded, and the number and variety of unclassified positions has increased.

The Commission considered several constitutional issues concerning Article XV, Section 10, including whether a constitutional provision was necessary, whether the provision should be general or detailed, what governmental units are covered or exempt, and merit and fitness requirements. *Green v. Civil Service Commission*, 90 Ohio St. 252 (1914) supported the view that there is little question that the state legislature has full power to provide for a merit civil service system if it so desires, whether or not mandated or authorized by the Constitution. As with other constitutional provisions that give the General Assembly powers it already possesses, Section 10 could be removed from the Constitution without destroying the state's civil service system. However, merely because the provision could be removed without diminishing legislative power does not mean that it should be removed, since it mandates the General Assembly to act in a field in which it might otherwise fail to act. In addition, there might be some question as to whether charter cities could be required to maintain a merit system in the absence of the constitutional requirement.

The Commission noted that the language of the section could be improved upon, but that, in itself, was not important enough to warrant changing the section. In the absence of difficulties arising from the section, and not hearing from any persons advocating change in the section, the Commission recommends retention of Article XV, Section 10 as it presently stands.

Article XVI, Sections 2 and 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.

Section 3. At the general election to be held in the year one thousand nine thousand 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.

Commission Recommendation

The Commission recommends that Article XVI, Sections 2 and 3 be retained in the Constitution without change. Section 1 of Article XVI was the subject of the Commission's third report to the General Assembly.

History and Background of Sections

The Ohio Constitution provides several methods for amending, revising or changing the Constitution. Article XVI, Section 1, recently amended by the electorate to simplify ballot language and procedures, 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 voters for their approval. Amendments may be placed on the ballot by initiative petitions, as set forth in Article II, Section 1a. Article XVI, Section 2 provides for the General Assembly to call a constitutional convention. Section 3 requires a mandatory referendum on the question of calling a constitutional convention every twenty years.

The 1802 Constitution provided for the calling of a constitutional convention by the General Assembly at its discretion, with the restriction that the Constitution could never be revised to permit slavery or involuntary servitude in Ohio. No other method of amending the Constitution was provided. At the 1851 Constitutional Convention, two additional methods of amending the Constitution were proposed. Article XVI, Section 1 permitting legislatively-adopted 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 calling a constitutional convention by the General Assembly in basically the same form as the provision in the 1802 Constitution. The wisdom of providing three methods of amending the Constitution (the constitutional initiative was not adopted until 1912), and the size of the delegation to the constitutional convention were the subjects of debate. The 1802 Constitution provided for the number of delegates to equal that of the General Assembly membership, and some considered the number too large. The number of delegates was limited to the members of the House of Representatives in the final draft adopted by the Convention.

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 1873-1874 Constitutional Convention considered a substitute for Article XVI, retaining the methods of legislatively proposed constitutional amendments and legislatively proposed constitutional conventions but deleting the section requiring the mandatory submission of the question of calling a constitutional convention to the people every 20 years. One delegate commented that the pressure for the 1873-1874 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. The substitute for Article XVI did not receive a sufficient number of votes to be adopted by the Convention, and in the proposed Constitution of 1874 that was rejected by the people, Article XVI remained unchanged. 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.

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 a majority of those voting in the election to a majority of those voting on the question. Another major change was the elimination of party position on the ballots. Constitutional amendments were to be printed on ballots separately from the party ticket so they could be considered on their merits. Delegates to constitutional conventions were to be nominated only by nominating petitions and voted for on a separate, non-partisan ballot. Debate continued on 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. Since these changes proposed by the 1912 Convention were adopted by the voters, Sections 2 and 3 in Article XVI have not been amended.

Thirty-eight states provide specifically for calling a constitutional convention in their constitutions. All but one of the remaining twelve have held at least two constitutional conventions, suggesting an inherent right to call conventions by the legislature in the absence of specific constitutional authorization.[1] The convention referendum provisions are of two types. In twelve 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 a provision permitting the legislature to initiate the convention call. Of these twelve states, six have self-executing provisions, and six, including Ohio, require further legislative action. A problem theoretically might arise if the people voted in favor of a convention and the legislature refused to act. In Ohio, the people have not approved calling a constitutional convention since 1912, and this potential difficulty has not arisen. Some states require a majority vote of all those voting in an election to carry the convention question. Ohio, in 1912, amended its constitution to require only a majority of those voting on the question.

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 1873-1874 Convention submitted a new constitution to the voters, which was defeated, and the 1912 Convention submitted 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.

In some states, a limited constitutional convention has been used to circumvent a more difficult amendment procedure, that requires action by two successive legislatures to place amendments on the ballot. Limitations

[1]*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).*

on a convention may be approved by the voters at the convention call, or set by the convention itself, when it chooses to limit its proposals to amending the existing constitution. It is not known whether the Ohio constitutional provisions regarding calling a constitutional convention prohibit or permit a limited convention, since no such efforts have been made in Ohio.

Sections Not Studied by a Committee

The following sections in Article II were not referred to a committee for study, and no recommendations are made concerning them: Sections 23 and 24 (impeachment); 38 (removal of officers from office); 39 (expert testimony in criminal trials); 40 (land registration).

Article II
Sections 23 and 24

Sections 23 and 24 of Article II establish impeachment as a method of removal from office in Ohio and prescribe who is subject to impeachment. Section 38 authorizes the General Assembly to establish statutory methods for removal of officers in addition to any constitutional methods which may be provided. The existing constitutional methods are removal by impeachment under Section 23 of Article II and by concurrent resolution of the General Assembly under Section 17 of Article IV, the latter being applicable only to judges.

Article II, Section 23 states:

> The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the Senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted, without the concurrence of two-thirds of the Senators.

And Section 24 states:

> The Governor, Judges, and all State officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

These sections can be traced to the Ohio Constitution of 1802 and were adopted in their present form as original parts of the Constitution of 1851. These sections are modeled after the Federal Constitution, which also provides for impeachment, in the following language:

> The House of Representatives . . . shall have the sole power of Impeachment. (Article I, Section 2)
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose they shall be on or affirmation . . . and no person shall be convicted without the concurrence of two thirds of all members present. (Article I, Section 3)
>
> Judgments in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law. (Article I, Section 3)
>
> The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (Article II, Section 4)
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; . . . (Article III, Section 2)

Neither the Federal Constitution nor the Ohio Constitution defines what constitutes a "misdemeanor" sufficient to subject the offender to impeachment, but there appears to be agreement that the constitutional meaning of

the word is something broader than a misdemeanor as defined by statute. The Federal Constitution specifically lists treason and bribery as examples which the Ohio Constitution does not, but there is no reason to conclude that these crimes would not qualify as grounds for impeachment in Ohio. There is also a question as to whether the judgment of either the Ohio Senate or the Senate of the United States in an impeachment proceeding is subject to judicial review, since there never has been a determination of this question.

To the knowledge of the staff, the only reported Ohio cases on impeachment have involved judges. The Judiciary Committee of the Commission, in fact, undertook a detailed review of impeachment in the study of methods of judicial removal. See Research Study No. 32 (February 5, 1974). That committee recommended that the impeachment provisions of the Ohio Constitution (which have counterparts in approximately 40 other state constitutions) be retained, while recommending the repeal of Article IV, Section 17 (concurrent resolution of the General Assembly). The Commission adopted this proposal, stating that impeachment was "a powerful and historic tool for maintaining public confidence in the judiciary as well as other state officers", urging that it remain available. (Part 10, The Judiciary, page 58). Thus, while the Commission has not passed on the specific question of whether to recommend the amendment or repeal of Sections 23 and 24 of Article II, it has endorsed the retention of impeachment as a constitutional means of removing unfit individuals from office.

No suggestions for changes in these sections have been made to the Commission.

Article II
Section 38

Article II, Section 38 was adopted as a part of the 1912 revision of the Constitution. Section 38 is a mandatory direction to the General Assembly to provide statutory methods for the removal of officers. The provision reads:

> Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

The thrust of Section 38 is that all officers should be subject to removal from office for moral turpitude and other statutorily stated causes, and that such removal need not be accomplished by impeachment or, in the case of judges, by the address-like proceeding of Article II, Section 17. Section 38 was the 1912 Convention's response to the then-current movement for provisions for recall of public officers by vote of the electorate. The section places upon the General Assembly the affirmative duty of establishing statutory methods for removing any officer for misconduct. The provision singles out "misconduct involving moral turpitude" as cause for statutory removal, but does not limit the General Assembly in denominating other types of misconduct as causes for removal. Section 38, while in part the result of dissatisfaction with the removal procedure under Article IV, Section 17, includes the procedural safeguard of that provision by requiring that any removal made possible by statute shall be "upon complaint and hearing". The last clause of Section 38 states that removal methods created pursuant to the amendment are supplemental to impeachment and any other constitutionally created removal procedures.

Much of the debate on the several proposals which resulted in Section 38 was directed to judicial removal, but, as can be seen from the provision as adopted, the Convention also sought to establish more expeditious procedures for the removal of all holders of public office.

In response to the mandate of this section the General Assembly has adopted three statutory methods of removal. The first method, applicable to all public officers including judges is set forth in Sections 3.07 to 3.10 of the Revised Code. The second method, applicable to judges only, is set forth in Sections 2701.11 and 2701.12 of the

Revised Code. These statutes establish much more specific procedures and grounds for removal than those which are stated in the Constitution.

A third removal method, Section 3.04 of the Revised Code, deals with securing the advice and consent of the Senate to remove an officer appointed by the Governor with senatorial advice and consent. It is not clear from reading Section 3.04 whether or not it was enacted pursuant to Section 38 of Article II.

The removal of Section 38 from the Constitution might undermine the validity of these statutes, which are the most common basis for removal proceedings in those instances where formal action is necessary. The continued existence of the statutory methods was assumed by the Commission in its recommendation for repeal of Article II, Section 17. (Part 10, The Judiciary, pages 59-63). No amendment of Section 38 appears indicated, and a recommendation that it be repealed would be inconsistent with the prior Commission position on Section 17.

Article II
Section 39

This section reads:

> Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.

This section was adopted in 1912. Its original purpose was to limit the use of medical expert testimony, but the word "medical" was deleted by the committee which prepared the proposal (No. 322) for consideration by the Convention, thus broadening its scope. *Debates,* page 1314. The immediate event that precipitated interest in including the provision in the Constitution was that a statute permitting the judge to appoint a designated number of expert witnesses in a criminal trial in which mental incapacity was a defense had recently been declared unconstitutional by the Supreme Court of Michigan. *People v. Dickerson*, 164 Mich. 148 (1910). *Debates*, pgs. 1418-1422. That Court took the position that the appointment of witnesses "is in no sense a judicial act", that it limited the number of witnesses contrary to the common law tradition, and that the particular vice of the Michigan statute was that it did not require the judge to inform either the prosecution or the accused of the names of the appointed experts or the reasons for their selection.

There was a strong feeling at the Convention that expert testimony, especially medical expert testimony, in a criminal trial ought to be limited. As one delegate bluntly put it: "I say the ordinary medical expert is not worthy of belief, and I want to cross-examine him with great care before I accept him as a witness at all. He is a special pleader seated in a witness box." *Debates*, page 1836. There was also a strong feeling that, no matter who else the prosecution or the defense called, the court ought to have the power to appoint some disinterested experts. To prevent a *Dickerson*-type result in Ohio, Section 39 was proposed. (Parenthetically, the statute which presently governs the appointment of experts to testify on the question of insanity as a defense in a criminal trial in this state is Section 2945.40 of the Revised Code. Except that it allows the judge to make the appointments, this statute contains none of the alleged infirmities of the statute invalidated in *Dickerson.*)

Even at the time of the debate leading up to the adoption of Section 39 by the Convention, there was an expression of doubt as to whether the provision was necessary. *Debates*, pgs. 1421, 1817, 1835. One delegate called it "absolutely unnecessary." *Debates*, page 1836. Some courts in other jurisdictions had also taken views contrary to that of the Michigan Supreme Court. The more recent view seems to be that the regulation of witnesses is perhaps more of a judicial function than either a constitutional or legislative one. Some aspects of a witness' relationship to a criminal proceeding are, in fact, regulated by the Ohio Criminal Rules. It seems unlikely that a statute such as 2945.40 of the Revised Code would be declared unconstitutional today if Section 39 were repealed. However, there appears to be no compelling reason to recommend that this be done.

Article II
Section 40

Section 40 of Article II reads:

> Laws may be passed providing for a system of registering, transferring, insuring and guaranteeing land titles by the state or by the counties thereof, and for settling and determining adverse or other claims to and interests in, lands the titles to which are so registered, insured or guaranteed, and for the creation and collection of guaranty funds by fees to be assessed against lands, the titles to which are registered; and judicial powers with right of appeal may be law be conferred upon county recorders or other officers in matters arising under the operation of such system.

This section was proposed and adopted in 1912 to legitimize in Ohio what is commonly called the Torrens system of land registration. This method of establishing clear title to land and noting interests therein is named for Sir Robert Torrens, who first proposed it in the mid-nineteenth century. It came into extensive use in Australia and in other parts of the British Empire, and, to a lesser extent, in the United States.

The essence of the system is that title to a parcel of real estate is initially established by an action in a court of competent jurisdiction which in the appropriate case orders a named public official to issue a certificate of registration covering the property. The original certificate is kept on file in the office of the official. From the time of the issuance of the certificate, it serves as conclusive proof of the condition of the title, and anything which is not noted on it can not affect the rights of a purchaser or lender. Thus, for example, registered land can not be acquired by adverse possession or prescription, nor does a lien attach to it until it is noted on the certificate. The rights of those who are not known at the time the original certificate is issued but whose rights in the property are nonetheless cut off by such issuance are theoretically protected by a fund administered by the state and financed from fees collected in the registration process. The aim of Torrens systems is to make dealing in real property as simple as dealing in personal property.

Ohio enacted its first Torrens law in 1896. S.B. 306, 92 O. Laws 220. Under this statute suit was brought in probate court, and the county recorder was authorized to issue the certificate of registration and was empowered to determine the validity of liens presented for notation on it. This law was declared unconstitutional in *Guilbert v. State*, 56 Ohio St. 585 (1897). The Court held, among other things, that the law violated the "due course of law" provision of Section 16 of Article I; that it violated Section 19 of Article I, in that it permitted the taking of private property for a use which was not public without compensation as required by that section; and that it violated Section 1 of Article IV in that it attempted to confer judicial power on the county recorder.

Interest in the Torrens system continued despite the setback suffered in *Guilbert*. Section 40 of Article II was proposed specifically to meet the objections which formed the basis of the *Guilbert* decision. After the adoption of this constitutional provision, the General Assembly enacted the Registration of Land Titles Act, formerly Ohio General Code Section 8572-1 *et seq.*, and now Chapters 5309 and 5310 of the Revised Code. The extent to which this statute has been used is not known, and it appears recently to have fallen into disuse. However, there is an indication that the registration of land was a favorite method of assuring clear title to land surrounding large cities during the boom of the 1920's, and that a large minority of Ohio counties have some registered land. James C. Maher, "Registered Lands Revisited", 8 West. Res. L. Rev. 162 (1957).

The validity and meaning of the Registration of Land Titles Act has been established through a series of cases. Torrens systems of land registration exist in a few other states apparently without specific constitutional authorization. It may be that changing concepts of due process, of property rights, and of public purpose would result today in an outcome different from *Guilbert* in the absence of Section 40, in Ohio. However, there appears to be no compelling reason either to alter the section or to urge its removal from the Constitution.

APPENDIX A

Part 1

Administration, Organization, and Procedures

of the

GENERAL ASSEMBLY

December 31, 1971

RECOMMENDATIONS

ARTICLE II

Section 4

Present Constitution

No person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to, or have a seat in, the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia.

Commission Recommendation

No member of the general assembly shall, during the term for which he was elected, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to 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.

Commission Recommendation

The Commission recommends the amendment of Section 4 of Article II as follows:

Section. 4. No ~~person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to, or have a seat in, the General Assembly~~ MEMBER OF THE GENERAL ASSEMBLY SHALL, DURING THE TERM FOR WHICH HE WAS ELECTED, HOLD ANY PUBLIC OFFICE UNDER THE UNITED STATES, OR THIS STATE, OR A POLITICAL SUBDIVISION THEREOF; but this provision ~~shall~~ DOES not extend to ~~township officers, justices of the peace,~~ 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.

The Commission recommends the concurrent repeal of Section 19 of Article II.

History and Background of Section

The proposed amendment of Section 4 of Article II includes a consolidation of Sections 4 and 19 of Article II. Section 4 originated in the Convention of 1851.

Section 19 was preceded by Section 20 of Article I of the Constitution of 1802, which provided:

> 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.

Section 19, as adopted in 1851, expanded the ban against a legislator's being appointed to civil office that was created or the emoluments of which were increased during his term to extend it "for one year" after term. The section as revised in 1851 provides 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.

Section 19 is patterned after Section VI of Article I of the United States Constitution, providing in part:

> No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

The compatibility of one public position with another has been the subject of innumerable Attorney General opinions and court decisions. Under Section 4 of Article II the Attorney General and the courts have had to make determinations of whether the holders of various public positions were eligible to membership in the General Assembly by deciding whether the other position held was "an office under the authority of the United States" or "a lucrative office under the authority of this state." The term "eligibility" for this purpose has been used interchangeably with the term "compatibility." The opinions and decisions have articulated various tests for determining whether a particular position is an office, as opposed to a "mere employment."

Often cited as a good exposition of what constitutes an office as opposed to employment is an 1892 Ohio Supreme Court decision, dealing not with Section 4 or 19 but with Sections 1 and 2 of Article X, then requiring all county officers to be elected. Being challenged was a statute providing for appointment by the clerk of courts of a stationery storekeeper for Hamilton county, giving him the duty to purchase and have charge of various office supplies, fixing an annual salary to be paid from the county treasury, and requiring bond. The Court held that this constituted an office to be filled by appointment and therefore conflicted with the then provisions of Article X. The Court stated the test in the following terms:

> "It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but *for such time as denotes duration and continuance, with independent power to control the property of the public,* or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." *State ex rel. Brennan,* 49 Ohio St. 33, 38 (1892) (Emphasis added)

In addition to the office-employment distinction, Section 4 has called for the determination of whether a particular office under authority of the state was a "lucrative" office. Illustrative of the ambiguity of this term and the inconsistency involved in its application are the following opinion summaries. Statutory "compensation and mileage" for a delegate to a constitutional convention made the office a lucrative one. 1911 Ohio Atty. Gen. 49. Membership on a township board of education was termed a lucrative office, without citation or rationale. 1912 Ohio Atty. Gen. 11. The position of village health officer was lucrative because statutes authorized the village council to establish a salary and provided that if a municipality failed to establish a board of health, the state board could appoint such an officer and fix his salary. 1912 Ohio Atty. Gen. 10. Membership on village board of education is not a lucrative office because statute provided no compensation. 1912 Ohio Atty. Gen. 13. County coroner holds lucrative office because statutes provide for "fees." 1914 Ohio Atty. Gen. 687. Member of city board of education was not lucrative despite statutory provisions for "compensation"—not to exceed $3 per meeting, so the legislative intent was to pay expenses only. 1955 Ohio Atty. Gen. 684.

Furthermore, when is an office established "under authority of this State"? In 1964 the Ohio Attorney General said that by force of Section 4 an appointive officer of a charter city is ineligible to serve as a member of the General Assembly because charter cities are authorized under Section 7 of Article XVIII. 1964 Ohio Atty. Gen. 879.

Early in its deliberations the committee concluded that so many occasions for interpreting Section 4 have arisen that a clarification of the section is in order. Among alternatives considered was a provision similar to one included in the new Illinois Constitution that provides:

> No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity for the term during which he is in attendance as a member of the General Assembly. Section 2(e) Art. IV, III. Const.

Another was to substitute the term "public office" as a more concise and better understood term than office "under the authority of" the state or federal government.

The committee favored the second alternative. Public employment would not be a disability. Public officers, whether or not compensated, could not serve in the General Assembly. In choosing a provision prohibiting members from holding "any public office under the United States, or this state or a political subdivision thereof," without further qualification, the committee decided that it was making more certain the eligibility of larger numbers of public servants.

As first proposed Section 4 of Article II read simply as follows:

NO MEMBER OF THE GENERAL ASSEMBLY SHALL, DURING THE TERM FOR WHICH HE IS ELECTED, HOLD ANY PUBLIC OFFICE UNDER THE UNITED STATES OR THIS STATE OR A POLITICAL SUBDIVISION THEREOF.

This version eliminated the exception under present Section 4, that the provision does not extend to "township officers, justices of the peace, notaries public, or officers of the militia."

Among questions raised in committee was whether the prohibition against eligibility to the General Assembly should apply to officers of the Armed Services reserves. The present exception for "officers of the militia" has been applied to the state militia. By statutory definition this term includes the Ohio National Quard but it does not include a commissioned officer in the United States Armed Forces.

A very recent federal court decision involved the prohibition of Article I, Section VI, Clause 2 of the United States Constitution that no person holding any office under the United States shall be a member of either house during his continuance in office. In *Reservists Committee to Stop the War v. Laird,* 323 F. Supp. 833 (1971) a federal district court held that this provision makes a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office. The specific question was whether a Reserve commission is an office under the United States, and Judge Gesell ruled that it was. The framers of the Constitution, he wrote, "erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States. Moreover, given the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress is not inconsequential." The judge declined to issue an order requiring the 118 Senators and Representatives holding commissions in the reserves, standby or retired, to give them up immediately and said that he expected his decision to be appealed.

The committee examined comparable provisions in other state constitutions and found a common exception from incompatibility provisions to be an officer in the national guard or in a reserve component of the armed

forces of the United States. Pa. Const. Art. 2, Sec. 6; Calif. Const. Art. IV, Sec. 13; Mich. Const. Art. 4, Sec. 8; New York Const. Art. 3, Sec. 7; Mo. Const. Art. 3, Sec. 12. The committee also concluded that its purpose in recommending amendment was to allow large numbers of public servants to aspire to the General Assembly. Failure to include a military exception, it reasoned, could impose unexpected burdens. The ultimate determination of the federal question involved in *Reservists Committee* may have a bearing upon the application of Section 4 of Article II of the Ohio Constitution if the exception is not made as explicit as possible. Furthermore, the committee could find no rationale for eliminating the present exception for officers of the militia. The Ohio Attorney General has ruled that the exception does not apply to an officer in the United States Armed Forces, and both the Attorney General and the Ohio Supreme Court have interpreted the express exemption for the *state* militia to mean that federal military office is incompatible under Section 4 and compatibility statutes.[1] The committee decided that an exception for the state militia that covers the Ohio National Guard but not reserve components is without justification. The committee's position is that if one class of officers is to be excluded, no logic applies to not excluding the other. Upon this basis the committee decided to expand the exception to include holders of commissions in the United States armed forces. The term "reserve component" was rejected as unduly restrictive in view of the possibility that reserves will be eliminated.

Present Section 4 also excepts application of its provisions to township officers, justices of the peace and notaries public. The Commission recommends elimination of the exemption of township officers as one without current grounds because the Commission considers the holding of *any* public office as incompatible with General Assembly membership. The term "justices of the peace" is clearly obsolete because the office has been abolished. Finally, the Commission has retained the exemption for notaries public. Notaries are defined by case law in Ohio as public officers for several other purposes,[2] and therefore the exception on this point is appropriate to retain.

Effect of Change

In recommending revision of Section 4 of Article II the Commission recognizes that it cannot eliminate the necessity of interpretation through application of the prohibition on a case by case basis. Therefore the Commission examined the tests that have been established by judicial decision in order to set forth in this commentary the attributes of public office that it has intended to adopt by use of the term.

A public officer, as defined by Ohio cases, means an individual who has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions of government, concerning the public, assigned to him by law. 44 Ohio Jur. 2d *Public Officers* 484. A frequently reiterated test of an office is that the holder "is invested by law with a portion of the sovereignity of the state." Public office connotes one who is in a policy making position.

The *Brennan* case cited above emphasized that public office is characterized by *duration and continuance* of authority and *independent power to control public property.* 49 Ohio St. 33, 38. In that case, the Court noted further that "emolument, though an ordinary incident, is not a necessary one . . ." and cited holdings that membership on a board of health and presidency of a city council were offices although no pay attached to either.

An often cited case of 1857 held that the exercise of the power of appointment and removal of state officers and the filling of vacancies which may occur in state offices "is a high public function and trust, and not a

[1] 1917 Ohio Atty. Gen. Ops. 1087; *State ex rel. Cooper v. Roth,* 140 Ohio St. 377 (1942)
[2] *State ex rel. Atty. Gen. v. Adams,* 58 Ohio St. 612 (1898); *State ex rel. Smith v. Johnson,* 12 Ohio App. 2d 87 (1967)

private, or casual, or incidental agency; and the officers of a board so created by statute, to exercise these public functions, are vested with official state power and hold a public office." Here no fees, salary or other compensation attached to the exercise of the statutory duties, but the court disposed of argument on this point by holding, although compensation is a usual incident to office, "that it is a necessary element in the constitution of an office is not true." *State v. Kemon*, 7 Ohio St. 547, 549.

A bond and oath are generally though not always required as a pledge for the faithful performance of the duties of public office. The fact that no oath of office is prescribed does not preclude the position from being a public office.[1]

The Commission also recognizes that the General Assembly will have the authority to define public office for purposes of the constitutional provision. When the legislature creates an office, by its description of that office it determines whether it is a public office. The General Assembly has by statute, defined certain types of positions prohibited to members of the legislature, and its authority to do so in the future would not be altered by the proposed revision of Section 4. Section 101.26 of the Revised Code, as last amended in 1965, reads as follows:

> No member of either house of the general assembly except in compliance with this section, shall:
>
> (A) Be appointed as trustee, officer, or manager of a benevolent, educational, penal, or reformatory institution of the state, supported in whole or in part by funds from the state treasury;
>
> (B) Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;
>
> (C) Accept any appointment, employment, or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.
>
> Any such appointee, officer, or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer, or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office, or employment shall forthwith resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. This section does not apply to members of either house of the general assembly serving an educational institution of the state, supported in whole or in part by funds from the state treasury, in a capacity other than one named in division (A) of this section, school teachers, township officers, notaries public, or officers of the militia.

The committee considered adding to the Constitution a provision to cover the general area of conflict between the private interests and public duties of members of the General Assembly. However, the committee concluded that the matter of ethics, if it should be incorporated in the Constitution, should be considered in the broader context of public officers generally and therefore recommended to the Commission that the topic of conflict of interest and ethics be referred to the committee of the Commission charged with studying public officers generally.

The second paragraph of Section 4 represents a transfer of the provisions of Section 19 of Article II in slightly revised form. The transfer is recommended because the subject matter of each section is related to the other. Section 19 prohibits appointment of a legislator to an office either

[1] 44 Ohio Jur. 2d *Public Officers*[8]

created or the "emoluments of which . . . have been increased" during his term. Modern constitutions commonly combine this prohibition with provisions governing compatability of office with membership in the legislative branch.

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 provisions 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." According to Black's Law Dictionary, the term "emolument" means profit arising from an office or employment and includes, besides salary or fees, any perquisite, advantage, or gain. 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.

Rationale of Change

The Commission seeks to minimize the interpretation problems that have plagued the Ohio Attorney General and the Ohio courts in applying the prohibitions of Section 4 to specific fact situations. It has replaced ambiguous terminology with the more concrete, better understood term of "public office." The Commission recognizes that this term may be the subject of constitutional definition as the Commission continues its review of the Constitution. It has attempted in this Report to describe its understanding of the attributes of public office as articulated by judicial decision. The Commission further recognizes that the legislature by creating a particular public position determines whether that position is a public office. The Commission has rewritten Section 4 in such a way as to reduce the number of incompatible positions.

The Commission reasoned that Sections 4 and 19 of Article II belong together and suggests this change as a part of its general overhaul of Article II for the purpose of consistency and readability.

Intent of Commission

The revision of Sections 4 and 19 of Article II is essentially nonsubstantive. Purposes of the revision are corrective, as described in the discussion of the effect of the changes proposed and the rationale for their proposal. The wisdom of prohibiting public conflicts is acknowledged by the retention of these two sections in modified and combined form. The object of the Commission was to delete illogical and obsolete exceptions and terminology and facilitate interpretation of the substantive provisions.

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[1]Burns, John *The Sometime Governments*, Bantam Books, Inc., p. 166

ARTICLE II

Section 5

Present Constitution

No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 5 of Article II, which reads as follows:

Section 5. No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury.

History of Section and Background of Section

The second clause of this section, prohibiting membership in the General Assembly by persons holding public money until accounted for and paid, had its origin in Section 28 of Article I of the Ohio Constitution of 1802. The prohibition against the holding of any office by persons convicted of embezzlement was adopted by the Convention of 1851. The Debates of the Convention carry little debate on either clause and none that reveals the particular evils at which they may have been aimed.

Prohibitions comparable to Section 5 appear in a dozen or so state constitutions, but, as in Ohio, have a nineteenth, rather than a twentieth, century origin.

Effect of Change

In its deliberations the Commission faced two questions: (1) whether removal of Section 5 would enable the General Assembly to enact more restrictive measures for eligibility to office than are prescribed by this section; and (2) whether removal would deny to the General Assembly the power to restrict eligibility. It concluded that the repeal of Section 5 of Article II does not affect in either manner the authority of the General Assembly to prescribe eligibility standards for public office or membership in the General Assembly. Section 5 can be viewed as a redundancy in view of Section 4 of Article V, which recognizes the power of the General Assembly to prescribe qualifications for voting and for holding office, as follows:

> The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

Moreover, Section 4 of Article XV provides:

> No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.

The General Assembly's authority to enact more restrictive qualifications has been recognized in statutes declaring as ineligible for elector status persons convicted of a felony in this state and persons who have been imprisoned in the penitentiary of any other state under sentence for the commission of a crime punishable in Ohio by penitentiary imprisonment.[1]

Rationale of Change

Section 5 is considered unnecessary in view of other qualifications that have been established for holding public office and becoming a member

[1] Sections 2961.01 and 2961.02 of the Revised Code

of the General Assembly and because of the inherent power of the legislature to regulate eligibility to office by statute, within the constitutional framework governing elector status. Presence in the Constitution of statutory material is undesirable because of the rigidity it affixes to the public policy of a past period in history. The essential framework of state government must be provided in the Constitution, but details are better left to experience and legislation.

It is within the province of the legislature to adopt statutory requirements in conformance with changing times and mores and to adopt specific definitions of the coverage intended. The inclusion of such statutory material in the fundamental law may, through judicial or even legislative interpretation of its terms, operate to restrict legislative competence to deal with qualifications for officeholding under unforeseen and unpredictable circumstances.

Intent of Commission

By proposing the removal of Section 5 of Article II as an obsolete provision on a subject better left to statute, the Commission does not intend to expand or limit the authority of the General Assembly to enact laws governing eligibility to office.

ARTICLE II

Section 6

Present Constitution

Each House shall be judge of the election, returns, and qualifications of its own members; a majority of all the members elected to each House, shall be a quorum to do business; but, a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law.

Commission Recommendation

Each House shall be judge of the election, returns, and qualifications of its own members. A majority of all the members elected to each House shall be a quorum to do business; but, a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law.

Each House may punish its members for disorderly conduct, and, with the concurrence of two-thirds of the members elected thereto, expel a member but not the second time for the same cause.

Each House has all powers necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

Commission Recommendation

The Commission recommends the amendment of Section 6 of Article II as follows:

Section 6. Each House shall be judge of the election, returns, and qualifications of its own members~~,~~ a. A majority of all the members elected to each House~~,~~ shall be a quorum to do business; but, a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law.

EACH HOUSE MAY PUNISH ITS MEMBER FOR DISORDERLY CONDUCT, AND, WITH THE CONCURRENCE OF TWO-THIRDS OF THE MEMBERS ELECTED THERETO, EXPEL A MEMBER BUT NOT THE SECOND TIME FOR THE SAME CAUSE.

EACH HOUSE HAS ALL POWERS NECESSARY TO PROVIDE FOR ITS SAFETY AND THE UNDISTURBED TRANSACTION OF ITS

BUSINESS, AND TO OBTAIN, THROUGH COMMITTEES OR OTHERWISE, INFORMATION AFFECTING LEGISLATIVE ACTION UNDER CONSIDERATION OR IN CONTEMPLATION, OR WITH REFERENCE TO ANY ALLEGED BREACH OF ITS PRIVILEGES OR MISCONDUCT OF ITS MEMBERS, AND TO THAT END TO ENFORCE THE ATTENDANCE AND TESTIMONY OF WITNESSES, AND THE PRODUCTION OF BOOKS AND PAPERS.

History and Background of Section; Rationale of Change

Section 6 of Article II is included in the resolution for the sole purpose of organization and rearrangement of material in Article II.

The origins of both Sections 6 and 7 of Article II can be found in Section 8 of Article I of the Constitution of 1802, which provided:

> The senate and house of representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and elections of its members, and sit upon its own adjournments; two-thirds of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members.

In the development of the Commission's recommendation that the presiding officer of each house be elected from its membership, the committee at first considered an amendment to Section 8 of Article II for this purpose. The placement appeared logical—Section 8 presently requires that each house choose its own officers. However, when the proposed amendment to Section 8 was debated before the full Commission, it was recommitted to committee for further study because of conflicts with Section 16 of Article III, a section that designates the Lieutenant Governor as President of the Senate.

Upon reconsideration the committee re-examined Section 8 of Article II and decided that the section already contains provisions on two widely differing subjects. That portion of Section 8 dealing with choice of officers is logically related to the subject matter of Section 7 of Article II —organization of each house—and has been transferred in the amendment to Section 7 of Article II.

The remaining provisions of Section of Section 8—right of punishment and expulsion and powers to obtain information, through committee or otherwise—are further powers of each house, the subject of Section 6, and are therefore transferred from Section 8 to Section 6. It is to effect this transfer that Section 6 is included in the proposals.

Effect of Change

The effect of the change is to transfer provisions from Section 8 to Section 6. However, the Commission has included one language change in the portion transferred. Section 8 says that a member can be expelled upon "concurrence of two thirds." Whether this percentage is intended to be applied to total membership or to members present is not specified. In the transfer of this provision from Section 8 to Section 6 the Commission has interpreted the intent of this section to require concurrence of two-thirds of the membership.

Intent of Commission

The Commission intends no substantive change in proposing the inclusion of Section 6 of Article II in its recommendations. The revision came about because of the change affecting presiding officers. It represents a step toward improved organization of Article II.

ARTICLE II

Section 7

Present Constitution

The mode of organizing the House of Representatives, at the commencement of each regular session, shall be prescribed by law.

Commission Recommendation

The mode of organizing each house of the general assembly shall be prescribed by law.

Each house shall choose its own officers, including a presiding officer to be elected from its membership, who shall be designated in the senate as president of the senate and in the house as speaker of the house of representatives.

Each house may determine its own rules of proceeding.

Commission Recommendation

The Commission recommends the amendment of Section 7 of Article II as follows:

Section 7. The mode of organizing ~~the House of Representatives,~~ EACH HOUSE OF THE GENERAL ASSEMBLY ~~at the commencement of each regular session,~~ shall be prescribed by law.

EACH HOUSE SHALL CHOOSE ITS OWN OFFICERS, INCLUDING A PRESIDING OFFICER TO BE ELECTED FROM ITS MEMBERSHIP, WHO SHALL BE DESIGNATED IN THE SENATE AS PRESIDENT OF THE SENATE AND IN THE HOUSE AS SPEAKER OF THE HOUSE OF REPRESENTATIVES.

EACH HOUSE MAY DETERMINE ITS OWN RULES OF PROCEEDING.

History and Background of Section

The section in its present form was adopted as part of the Constitution of 1851. In the prior Constitution, Section 8 of Article I, in part a comparable provision, had read as follows:

> The senate and house of representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and elections of its members, and sit upon its own adjournments; two-thirds of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members.

Why the Convention of 1851 made this change and failed to include the Senate in its provision for organizing at the commencement of the session is clear when the original purpose of Section 7 is understood. Debates of the Convention reveal that a section was proposed to be added to the report on the legislative department as follows:

"On the first day of each session of the General Assembly, the Secretary of State shall call the House of Representatives to order, and preside until a Speaker be elected." 2 *Debates* 214 (Dec. 31, 1850). The original proposition to amend had been: "That it is expedient so to amend the constitution as that the Secretary of State, or some other State officer, elected by the whole people, shall preside over the House of Representatives at the commencement of each session, until they shall have elected a speaker." 1 *Debates* 71 (May 14, 1850).

Arguments in favor of creating the office of Lieutenant Governor in the Convention of 1851 were "that the Lieutenant Governor might be made an ex officio presiding officer of the Senate, thus securing a prompt and effective organization of that body." Reference was frequently made in debate over creation of the new office to "all the difficulty touching organization which had taken place in the past." The difficulty would be obviated in the House, it was assumed, by the proposal to have the Secretary of State preside for purposes of organization. One opponent of creating the new office of Lieutenant Governor argued in favor of having the Au-

ditor of State act in the same capacity as was proposed for the Secretary of State until the President of the Senate was elected. 2 *Debates* 301 (June 5, 1850).

When it came to considering the proposal for amending the report on the Legislative department by adding provision for organization of the House by having the Secretary of State preside, opponents argued that "the mode of organizing the Legislature should be left to that body." One spokesman for the opposition said that he understood that the idea had been borrowed from New York where by custom the Secretary of State acted in such a fashion but that the matter should be handled by legislative not constitutional enactment. 2 *Debates* 214 (December 31, 1850). A motion to have the "senior member present" call the house to order was defeated before the section, virtually in present form, was adopted as follows: "The mode of organizing the House of Representatives at the commencement of each session *and until a Speaker is elected,* shall be prescribed by law." The underlined language had been removed in the final report of the Convention's Committee on Revision, Arrangement and Enrollment, and there was no discussion on this point.

Effect of Change

The effect of the amendment proposed in the first paragraph of Section 7 of Article II is to include the Senate in a constitutional provision which presently authorizes only the House of Representatives to organize, and to remove a phrase concerning the time for organization that refers to the "commencement of each regular session."

The original omission of the Senate from Section 7 is historically understandable from a reading of the Debates of the Convention of 1851 on this point. However, because the General Assembly has long prescribed the mode of organizing both House and Senate by statute, supplemented by rule, this portion of the amendment of Section 7 is seen as one of logic, to conform practice to constitutional language. It is an amendment of form, not substance. The removal of the phrase relating to time of organization is also viewed as nonsubstantive. Its retention could only cause confusion when considered in conjunction with the recommendation for Section 8 of Article II that calls for two regular sessions of each General Assembly.

The second and third paragraphs of Section 7 are in capitals, indicating that they are new matter in this section. However, they represent in part a transfer of language from existing Section 8 of Article for purposes of rearrangement only, to give to the section and to Article II a more logical and consistent order. The transfer of the requirement that "each house shall choose its own officers" and the provision that "each house may determine its own rules of proceeding" come directly from present Section 8 because of their obvious relationship to the organization of each house. The remainder of present Section 8—having to do with the right to punish and expel members and setting forth powers to obtain information—are further powers of each house, the subject of present Section 6, and are in logical sequence to the present provisions of that section. The transfer of this portion of present Section 8 to proposed Section 6 is accordingly made a part of the Commission's recommendation.

Part of the new matter in proposed Section 7 is new. The Commission recommends expansion of the requirement that each house shall choose its own officers by defining officers as including "a presiding officer to be elected from its membership, who shall be designated in the Senate as President of the Senate and in the House as Speaker of the House of Representatives."

The Commission recommends that Article II be amended in such a way that the presiding officers of the General Assembly would have the authority to convene that body in special session. Such authority would be

in addition to the Governor's authority. A new Section 8, containing some present language of Section 25 on the subject matter of legislative sessions, conferring legislative power to convene in special session and placing the power to do so in "presiding officers" is therefore a corollary of this part of the recommended revision of Section 7. Section 7 would define the term "presiding officers" for the purposes of the power proposed in new Section 8.

Section 16 of Article III makes the Lieutenant Governor the President of the Senate, gives him a vote when the Senate is equally divided, and provides that in case of his absence or impeachment or when he shall exercise the office of Governor, the Senate shall choose a President pro tempore. The Commission recommends amendment of Section 16 of Article III to give the Lieutenant Governor duties in the executive rather than the legislative department of state government, as indicated in the recommendation affecting and commentary following Section 16 of Article III below.

In transferring that portion of Section 8 dealing with the authority of each house to choose its own officers, the proviso "except as otherwise provided in this Constitution" has been deleted by the Commission in this recommended revision of Section 7 because that proviso was intended to apply to the designation of the Lieutenant Governor as President of the Senate. Debates of the Convention of 1851 reveal that on January 3, 1851 the proviso was added by amendment, and the originator of the motion explained his motion as follows: "It was to avoid the inconsistency which would exist by the adoption of this Report, in view of a provision made in the Report of the Committee on the Executive Department, which had been agreed upon in Committee of the Whole, and probably would be agreed upon in the Convention, namely that the Lieutenant Governor would be president of the Senate, thereby constituting him one of the officers of the Senate, which might create some confusion." It was in order to avoid that confusion that he had offered the amendment. The amendment was adopted. 2 *Debates* 240 (January 3, 1851). The proviso should come out if the Commission's recommendations with regard to the Lieutenant Governor are followed.

Rationale of Change

Two reasons exist for the substantive change proposed for Section 7 of Article II. One relates to the ability of the legislative branch to control its own destiny. In the House of Representatives the membership selects the Speaker. Why should not the Senate select its presiding officer? For the Lieutenant Governor to play a legislative role is viewed as detracting from legislative independence of the executive branch of government. One commentator has written:[1]

> "The use of the Lieutenant Governor as the president of the state senate or of a unicameral legislature seems to be an imitation of the example of the national government. This intermingling of legislative and executive functions often has proven unsatisfactory, at both national and state levels. It should be clear that if the talents of an administrator are required, they will be found only by fortunate accident in one whose experience lies entirely outside of that field. On the other hand, the presidency of a legislative body requires legislative talents, and the president should be chosen by that body from among its own members by a majority vote."

A second reason for recommending that the presiding officer of the Senate be elected from its membership is the Commission's proposal for joint nomination and election of the Governor and Lieutenant Governor. In the Commission's view, election of the Lieutenant Governor with the

[1]Walker, Harvey, "Office of the Lieutenant Governor: Authority and Responsibility," 42 Social Science 142 (June 1967)

Governor recognizes his position as an executive official of state government and supports its opposition to retaining administrative leadership by an executive official over one body of the legislative branch of government. The trend toward tandem election and toward greater recognition of the Lieutenant Governor as understudy of the Governor is discussed in the commentary following the Commission's corresponding recommendations for amendment of Article III.

Discussion about this amendment by the Committee disputed the long accepted parallel between state senates over which the Lieutenant Governor commonly presides and the United States Senate over which the Vice-President presides, noting the differences in make-up of the two bodies and the disparity of purpose served by the federal and state senates. Each state has two senators in the United States Senate, regardless of size; there is nothing equal about the constituency represented by any Senator. On the other hand, the Ohio Senate must be apportioned just as the Ohio House, and Senators must represent equal constituencies. Giving the executive a deciding vote in the Ohio Senate even though so circumscribed that it is seldom used, really means that the will of a majority of the people as represented in that body could be thwarted by an outside vote.

Intent of Commission

By its proposed amendments to the first and third paragraphs of Section 7 the Commission intends to make no substantive change in present practices. The third paragraph is transferred from present Section 8 with no change other than grammatical.

By its proposed amendment to the second paragraph of this section the Commission intends retention of the authority of each house to choose its own officers, but without exception in the Senate. Its rationale for recommending that the presiding officer be a member elected from that body is more fully developed in commentary following proposed new Section 8 that would allow presiding officers together to convene the legislature in special session. If the portion of Section 7 requiring that the presiding officer of the Senate be elected from its membership is not adopted, the Commission would recommend that Section 8 specify the officers by name.

ARTICLE II

Section 8

Present Constitution

Each house, except as otherwise provided in this constitution, shall choose its own officers, may determine its own rules of proceeding, punish its members for disorderly conduct; and, with the concurrence of two-thirds expel a member, but not the second time for the same cause; and shall have all powers, necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

Commission Recommendation

Repeal and enact new section

Each general assembly shall convene in first regular session on the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday, and in second regular session on the same date of the following year. The governor or the presiding officers of the general assembly may convene the general assembly in special session by a proclamation and shall state in the proclamation the purpose of the session.

Commission Recommendation

The Commission recommends the repeal of present Section 8 and the enactment of a new Section 8 of Article II to read as follows:

Section 8. EACH GENERAL ASSEMBLY SHALL CONVENE IN FIRST REGULAR SESSION ON THE FIRST MONDAY OF JANUARY IN THE ODD-NUMBERED YEAR, OR ON THE SUCCEEDING DAY IF THE FIRST MONDAY OF JANUARY IS A LEGAL HOLIDAY, AND IN SECOND REGULAR SESSION ON THE SAME DATE OF THE FOL-

LOWING YEAR. THE GOVERNOR OR THE PRESIDING OFFICERS OF THE GENERAL ASSEMBLY MAY CONVENE THE GENERAL ASSEMBLY IN SPECIAL SESSION BY A PROCLAMATION AND SHALL STATE IN THE PROCLAMATION THE PURPOSE OF THE SESSION.

History and Background of Section

This new Section 8 bears no resemblance to present Section 8 of Article II. Section 8 will be a vacant slot if the General Assembly adopts the Commission's recommendations to transfer the portions of existing Section 8 having to do with the right of each house to choose its own officers and determine its own rules of proceeding to Section 7 (see commentary following Section 7) and the portion having to do with punishment and expulsion of members and powers to obtain information, through committees or otherwise, to Section 6. Section 8 is presently composed of two widely differing subjects, and the disparity is removed by separating the two subjects and combining them with related provisions. The subject matter covered by proposed new Section 8 is partly covered by existing Section 25 of Article II, a section that calls for the commencement of regular sessions biennially.

1. **Annual Sessions**

The present provision for legislative sessions originated in Section 25 of Article I of the Constitution of 1802, which provided:

> The first session of the general assembly shall commence on the first Tuesday of March next; and forever after, the general assembly shall meet on the first Monday of December, in every year, and at no other period, unless directed by law, or provided for by this constitution.

Innumerable pages of the Debates of 1851 were devoted to reporting discussion about the question of annual versus biennial sessions. Opponents of biennial sessions argued that the proposal before the Convention weakened too rapidly the powers of legislation, making the executive and judicial branches of government too strong and the legislative body entirely too weak. Proponents urged that the limitations adopted elsewhere in the legislative article empowered the legislature to enact only some general laws, and hence, "there is no necessity of meeting here every year, for they would not have a large amount of business to transact."[1] Public opinion, it was asserted, favored the change. Too much legislation and too frequent alterations of the law were evils that other delegates wanted to combat by adopting a biennial plan. Much of the general debate about restricting the legislature centered about the question of how frequently it should be empowered to assemble. The Convention adopted and the present Constitution carries the following provision:

> Section 25. All regular sessions of the General Assembly shall commence on the first Monday of January, biennially. The first session, under this constitution, shall commence on the first Monday of January, one thousand eight hundred and fifty-two.

The General Assembly began meeting biennially in the odd-numbered years following a 1905 constitutional amendment which changed the election of state and county officers to even-numbered years. The Ohio Supreme Court held that by implication Article XVII amended the provision of Section 25 calling for regular sessions to begin in the even-numbered years. *State v. Creamer*, 83 Ohio St. 412 (1911). The new provision for biennial sessions was disregarded by the Ohio General Assembly from 1857 to 1895 by the use of the adjourned session or recess device.

One of the changes effected by state constitutional revision of the 19th century was the shift from annual to biennial sessions. By 1900 43 states, including Ohio, had abandoned annual sessions, most by constitutional

directive. Currently the pendulum is swinging the other way. The Book of the States for 1970-71 reported 26 states as meeting annually. By statute the Ohio General Assembly has provided for annual meetings since 1968.[1]

2. **Special Sessions**

The only provision in the Ohio Constitution for the calling of a special session is Section 8 of Article III, empowering the Governor to convene the General Assembly in special session and limiting the business to be transacted to that named in the call or subsequent gubernatorial proclamation.

A number of states in recent years by constitutional amendment have allowed the legislature to call itself into session after adjournment. The Book of the States for 1970-71 reports 17 states as having such a provision. Both of the newest states in the union, Alaska and Hawaii, make provision for the legislature to convene itself in special session.

In its recent evaluation of the 50 state legislatures, the Citizens Conference on State Legislatures postulated that legislatures must be functional, accountable, informed, independent and representative as necessary conditions of fulfilling their responsibilities. On the criteria of independence Ohio received a rank of 40, putting it among the bottom 10 states in terms of the control of its legislature over its own activities and independence of the legislative branch from the executive branch of government. The C.C.S.L. Report points out: "At least 33 of the 50 state legislatures must be faulted on the question of independence because they lack the power to call a special session." [2]

Effect of Change

Proposed new Section 8 of Article II calls for annual sessions of the General Assembly and by calling for the convening in "first regular session" in the odd-numbered years and "in second regular session" in the following year specifies that *one* General Assembly convenes in *two* regular sessions. The practice of numbering General Assemblies would not be changed. The proposal does not restrict the subject matter of business to be transacted in either session.

Present Section 25 of Article II fixes the "first Monday of January" as the day for the commencement of regular sessions. Because New Year's Day periodically falls or could be celebrated on the first Monday of January, the proposed section authorizes a meeting on the succeeding day if the first Monday is a legal holiday. In such case the second session would commence on the same *date* in the following year.

Proposed new Section 8 also permits either the Governor or the presiding officers of the General Assembly to call a special session by proclamation and requires the purpose of the session to be set forth in the proclamation. By stipulating that the calling of a special meeting be by "proclamation" the Commission favors encouraging specificity in the call without constitutionally restricting the subject matter of business to be transacted.

Rationale of Change

1. **Annual Sessions**

The Commission favors constitutional recognition of annual sessions because it would conform the Constitution to current practice. Annual sessions are recommended by most authorities in state government and the legislature itself seems to recognize the necessity of meeting every year. The Commission regards the proposal as an important element in

[1]Section 101.01 of the Revised Code
[2]Citizens Conference on State Legislatures, Report on an Evaluation of the 50 State Legislatures (1970) p. 23.

strengthening the power of the legislative branch and insuring its ability to deal with problems as they arise.

Constitutional recognition of annual sessions does not require that unfinished business carry over from the first to the second session of a single two-year legislature. The Commission confronted this question in its deliberations and concluded that the General Assembly would have the continued authority to determine its own policy on this matter. Whether the provision would require a *sine die* adjournment at the end of the first year and a new beginning in the second year was another point of inquiry. The section is regarded as sufficiently broad for the General Assembly to make the determination. Specifically rejected were suggestions to limit the second year session to fiscal or other matters. The Commission did not favor constitutional limits on time or subject matter.

Under present Section 25 regular sessions commence on the first Monday of January, and the Constitution makes no exception for the years in which New Year's Day is celebrated on the same day. The committee considered and rejected an alternative calling for session commencement on the second Monday in January to avoid the holiday meeting because the Constitution otherwise provides that the Governor and other state officers take office on the second Monday in January. In deference to the dignity of the separate branches the committee felt that the gubernatorial inauguration and convening of the legislature should not fall on the same day. If the legislature meets a week earlier, it is organized and ready to transact business on the day that the Governor takes office. From a practical standpoint joint convention and inauguration would cause problems of congestion and detract from public exposure and recognition of the legislature.

The committee preferred the certainty of setting a regular time for convening to the suggestion in the Model State Constitution and elsewhere that the legislature meet annually "as provided by law."

2. Special Sessions

Questions examined by the committee in its deliberations on this topic were the following: (1) Should the power to call a special session be exclusive for the Governor, be exclusive for the General Assembly, or be given to both? (2) Should the scope of a special session be limited? (3) If the General Assembly is to have the power to call a special session, by what means is the power to be exercised?

Some states require that a given percentage of the membership must sign a petition or otherwise call for or acquiesce in a request for a special session. Alaska and Hawaii permit the calling of special sessions upon request of two-thirds of the membership, and the Model State Constitution adopts such an approach by authorizing legislative leaders to call a session at the written request of a majority of the members of each house. Kansas, Maryland, and North Carolina adopted variations of this plan by amendments passed in 1970.

The new Illinois Constitution, effective July 1, 1971, allows leaders of the two houses to issue a proclamation for the calling of a special session and includes no petition or request requirements as a prerequisite for the call. This broad power had the greatest appeal to the committee, which reasoned that the power of the Governor and of the legislature through its leadership should be equal. The only limitation favored was that a proclamation be issued, stating the purpose of the call, and this was favored to encourage specificity.

The Commission discussed at length the term "presiding officers" to designate leadership for purposes of the call. The membership agreed that presiding officers of both houses would have to concur before the call could be made.

Upon re-referral of the special session proposal from the Commission to the committee to explore further the suggestion that a percentage of the membership rather than the leaders be entitled to call a special session, the committee reviewed the subject and rejected any such amendment. It reasoned that with constitutionally recognized annual sessions special sessions would tend to be even more extraordinary. The constant circulation of a proliferation of petitions requesting special sessions for various purposes could be an undesirable result of such a plan. At other times the necessity of obtaining enough signatures in a short period of time could unduly complicate or delay the call. For these reasons the committee upon reconsideration again favored permitting legislative leaders to act unrestricted by petition or request requirements. The Commission adopted the proposal when it was presented a second time, with the reservation understood that if the General Assembly does not adopt its recommendation concerning the election of the Senate's presiding officer from among its membership (See Section 7 of Article II), the provision in Section 8 for the calling of special sessions "by presiding officers" must be amended. The necessary amendment would authorize the convening of special sessions by the Speaker of the House of Representatives and the President pro tempore of the Senate.

Intent of Commission

The purpose of Section 8 is to combine the Commission's recommendation for constitutional recognition of annual sessions and to give the power to the General Assembly to convene itself in special session. The object of the section is to allow the General Assembly unlimited authority to deal with problems as they arise. The Commission does not necessarily contemplate any procedural revision of the present practice of meeting annually. Its recommendation allowing the legislature to convene should the need arise implements the Commission's thesis that the General Assembly should operate under powers that enable it to conduct its business in an orderly and efficient manner. The Commission acted upon the conviction that there are no well-founded arguments to support artificial restrictions on the legislature's ability to meet and consider the problems of the people of this state. The legislature no less than the Governor should have the power to assess the necessity of convening to act upon such problems.

ARTICLE II

Section 9

Present Constitution

Each House shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either House, the vote shall be taken by yeas and nays, and entered upon the journal; and no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto.

Commission Recommendation

Each House shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either House, the vote shall be taken by yeas and nays, and entered upon the journal.

Commission Recommendation

The Commission recommends the amendment of Section 9 of Article II as follows:

Section 9. Each House shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either House, the vote shall be taken by yeas and nays, and entered upon the journal~~, and no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto.~~

The portion of this section which is stricken through is not recommended for repeal; rather, it is suggested that this portion be transferred to a new Section 15 which consolidates all the procedures for enactment of laws.

History and Background of Section

A journal keeping provision similar to that contained in Section 9 may be found in the constitutions of almost all of the states. The United States Constitution requires each house to keep a journal of its proceedings "and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." U. S. Const. Art. I, Sec. V. Similarly, the Model State Constitution would allow a voice vote on the passage of bills unless a record vote is demanded by one-fifth of members present.

Some people favor adding a state equivalent of the Congressional Record because of the need for greater indicia of legislative intent. Debate transcripts meet such a need and allow the news media to report legislative activities more accurately. In the proposed New York Constitution of 1967 (not adopted) each House was to be required to keep a journal and a transcript of its debates, the former to be published and the latter to be available to the public. The Illinois Constitution of 1971 adopted this very plan. Ill. Const. Art. IV, Sec. 7 (b). Another approach is that taken by the Constitution of Puerto Rico, which requires the keeping of journals and, in addition, the publication of legislative proceedings "in a daily record in the form determined by law." P. R. Const. Art. III, Sec. 17.

However, in an annotation to the Illinois Constitution of 1870, prepared for the Illinois Constitution Study Commission, authors George D. Braden and Rubin G. Cohn caution: "It is certainly sound to advocate that verbatim transcripts of debates be made and, at the very least, that they be available to the public, but it should not be necessary to put the requirement into the Constitution."

The Commission has adopted this view in not proposing further revision of Section 9 of Article II to incorporate a provision mandating verbatim transcripts. Such a matter is considered to be more properly the subject of statute or rule. Such minute procedural details improperly clutter the fundamental law. The practice and mode of recording legislative intent are better governed by the needs and practices of a particular era.

The provision of Section 9 which reads "and no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto" is transferred to Division (A) of a new Section 15, and is discussed there.

Effect of Change

Section 9 calls for the keeping of legislative journals and in a second compound sentence provides for entering yeas and nays in the journal. The final portion of that sentence prohibits the passage of laws in either house without the concurrence of a majority of the members elected thereto. This final independent clause is clearly divisible from the provisions that precede it and relates more closely to the subject matter of proposed new Section 15, a composite of procedural rules governing the enactment of legislation. The effect of amending Section 9 is to transfer the majority vote requirement to Section 15 without change in substance. As amended, Section 9 will continue to require that journals be kept, that yeas and nays be entered therein at the desire of any two members, and that the yeas and nays on the passage of every bill be journalized.

Rationale of Change

The amendment proposed is one of rearrangement only, so that related procedural rules appear in one section of Article II. The deleted provision

is discussed in commentary following Section 15, where procedural rules are consolidated.

The remainder of Section 9 has to do with the keeping of journals and votes shown therein. According to the Book of the States for 1970-1971, in at least 40 states daily journals are required, and in seven of these states a daily journal is maintained in typed form, followed by the printing of a journal at the close of the session. This source also reveals that in most states with daily journals, the daily journal shows all votes taken. Some states reported a requirement that all votes on final passage be shown. Roll calls on final passage are shown as constitutionally mandated in most states. Some states call for a roll call on final passage at the request of a fraction of the members present in each house. Six states reportedly require the request of 1/5 of the members present, two, 1/10 of the members present, and one, 1/6 of that number.

It is noted above that the Model State Constitution allows voice votes by providing, "A record vote, with yeas and nays entered in the journal, shall be taken, on any question on the demand of 1/5 of the members present." M.S.C. Sec. 4.12. Five of the states that report a mandatory roll call on request of 1/5 of members present are shown as also requiring the journalization of yeas and nays upon a 1/5 demand.

Section 9, on the other hand, requires the taking of yeas and nays and their entry in the journal on the passage of every bill. The committee saw no reason to change the present rule. In its view, legislative records should minimally show roll call votes on legislation, and the rule is better maintained as a constitutional requirement than relegated to rule.

Intent of Commission

The intent of the Commission in recommending amendment of Section 9 is the consolidation of constitutional rules governing passage of bills in proposed Section 15. Such a consolidation necessitates moving a portion of Section 9 to the new section, and Section 9 is readily divisible for this purpose. No change in the meaning or application of Section 9 is intended.

ARTICLE II

Section 11

Present Constitution

A vacancy in the Senate, or a vacancy in the House of Representatives occurring after May 7, 1968, for any cause, including the failure of a member-elect to qualify for office, shall be filled by appointment by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled by temporary appointment, as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election. No person shall be appointed to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An appointment to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as

Commission Recommendation

A vacancy in the Senate or in the House of Representatives, for any cause, including the failure of a member-elect to qualify for office, shall be filled by election by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled temporarily by election as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election. No person shall be elected to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An election to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as the case may be, affiliated with the same political party as the person last elected

Present Constitution—Continued

the case may be, affiliated with the same political party as the person last elected to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members of the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of appointment to the person so appointed and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so appointed shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so appointed.

Commission Recommendation—Continued

to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members elected to the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of election to the person so elected and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so elected shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so elected.

Commission Recommendation

The Commission recommends the amendment of Section 11 of Article II as follows:

Section 11. A vacancy in the Senate~~,~~ or ~~a vacancy~~ in the House of Representatives ~~occurring after May 7, 1968~~, for any cause, including the failure of a member-elect to qualify for office, shall be filled by ~~appointment~~ ELECTION by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled TEMPORARILY by ~~temporary appointment,~~ ELECTION as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election. No person shall be ~~appointed~~ ELECTED to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An ~~appointment~~ ELECTION to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as the case may be, affiliated with the same political party as the person last elected to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members ~~of~~ ELECTED TO the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of ~~appointment~~ ELECTION to the person so ~~appointed~~ ELECTED and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so ~~appointed~~ ELECTED shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so ~~appointed~~ ELECTED.

History and Background of Section

Prior to November 7, 1961 Section 11 read as follows:

All vacancies which may happen in either House shall, for the unexpired term, be filled by election, as shall be directed by law.

After November 7, 1961 and prior to May 7, 1968 the procedures set forth in the present section applied only to vacancies in the Senate. Vacancies in the House were to be "filled by election as shall be directed by law."

The section as it presently stands was adopted by the electorate on May 7, 1968 by a vote of 1,020,500 for and 487,938 against.

Effect of Change

This recommended revision of Section 11 of Article II is corrective only, to make the phraseology of the section consistent with other sections of the Constitution. The Ohio Constitution calls for various majorities for legislative action on specific matters. For example, passage of bills over gubernatorial veto, under Section 16 of Article II, calls for a vote of "three-fifths of the members elected" to each house. Emergency laws under Section 1d of Article II require a two-thirds vote. Most such provisions call for a specified vote of the members "elected" to each house. None takes into account the filling of vacancies by "appointment," a term used in present Section 11 of Article II. The "appointment" there provided involves action by the members of the house affiliated with the same political party as the person last elected to the vacant seat. The substitution of "election" for "appointment" and "elected" for "appointed," makes no substantive change in Section 11, calling for collective action by vote, and does eliminate possible conflict between the section as it stands and at least ten other constitutional provisions. See present sections 1d, 6, 9, 16, 23, and 29 of Article II, sections 15 and 17 of Article IV, and sections 1 and 2 of Article XVI. Some provisions make reference to a particular majority without specifying the number to which it applies, and the Commission has in such instances recommended change for further consistency. For example, Section 8 of Article II calls for concurrence of "two-thirds" of each house for expulsion of a member without specifying the number to which the two-thirds applies, and the Commission has recommended in the proposed new Section 6 (to which it recommends transfer of the provision) that the percentage apply to "members elected."

Rationale of Change

The purpose of this amendment is corrective. It is one of form, not substance, to eliminate inconsistencies between the definition of election and appointment by using a more precise term in the provision prescribing procedures for the filling of legislative vacancies, and to forestall litigation that could result from various conflicts in language. These possible conflicts result from an amendment of Section 11 in 1961 and 1968 that did not include other sections which make reference to "elected" members without taking into account the new procedures for filling of legislative vacancies by "appointment."

The Commission considered but rejected the less detailed approach of the Model State Constitution which would provide: "When a vacancy occurs in the legislature, it shall be filled as provided by law." M. S. C. Sec. 4.06. It concluded that because the voters of Ohio had upon two occasions so recently adopted the present procedures, the Commission could assume that they represent the wishes of the electorate.

Intent of Commission

By proposing the substitution of terms in Section 11 of Article II the Commission intends no substantive change in the procedures involved in filling legislative vacancies and regards the change as one of "housekeeping" only.

ARTICLE II

Section 14

Present Constitution

Neither House shall, without the consent of the other, adjourn for more than two days, Sundays excluded; nor to any other place than that, in which the two Houses shall be in session.

Commission Recommendation

Neither House shall, without the consent of the other, adjourn for more than five days, Sundays excluded; nor to any other place than that in which the two Houses are in session.

Commission Recommendation

The Commission recommends the amendment of Section 14 of Article II as follows:

Section 14. Neither House shall, without the consent of the other, adjourn for more than ~~two~~ FIVE days, Sundays excluded; nor to any other place that than in which the two Houses ~~shall be~~ ARE in session.

History and Background of Section

The only difference between the language of Section 14 of Article II and its predecessor provision found in Section 15 of Article I of the Constitution of 1802 is that the original provision did not exclude Sundays. The section without the exception was included verbatim in the original report of the 1851 Convention's Committee on the Legislative Department, and the amendment to insert the language "Sundays excluded" was adopted without recorded debate.

The prohibition against either house adjourning for more than a certain number of days without consent of the other is a common provision in state constitutions with time periods on adjournment varying. Of forty-nine states with bicameral legislatures, all but two limit the power of one house to adjourn without consent of the other. As in present Section 14 of Article II, three days is a common limitation. Such restrictions are apparently intended to preclude the leadership of either house from acting in an irresponsible manner with reference to adjournment.

Effect of Change

The proposed revision of Section 14 of Article II would expand from two to five days the time period for which either house of the General Assembly could adjourn without consent of the other house.

Rationale of Change

The reasons for recommending expansion of the constitutional time period for which either house may not adjourn without consent are twofold. In the first place, the practice is to meet in first formal session of the week on Tuesday. In order to comply with the constitutional rule both houses must hold "skeleton" sessions on Monday. Such sessions may include as few as two members, although the journal records a session and might be subject to challenge on this point. Moreover, a requirement that is being observed through the device of a technicality deserves reconsideration. When the general assembly adopts procedures to circumvent the literal language of the Constitution the credibility is affected. The pattern of Monday holidays further complicates this token compliance with the constitutional requirement.

Secondly, the Commission holds that each house ought to have greater flexibility in following its own schedule. In recent years legislative operations have illustrated the desirability of having one house in session for a period of time to consider a major issue while the other house may wish to recess for that time. With the legislature meeting annually, whether by adjourned sessions under the present provisions of Section 25 of Article II or in regular annual sessions as proposed in new Section 8 (which the Commission recommends as a substitution for present Section 25), separate

operations of the two houses without restrictive constitutional limitations appear more likely to be essential.

In its deliberations, the committee considered eliminating the section as archaic. However, it recognized some value to retention of the constitutional provision if revised to accord with practice. Relegation to rule would give more opportunities for irresponsibility.

The only other proposed change in the section, from "shall be" to "are" is not substantive. It is intended to make the section speak in the present tense and thus to conform with the drafting rules followed by the General Assembly.

Intent of Commission

The Commission views this proposed revision of Section 14 of Article II as purely administrative, to conform the Constitution to modern day practices. The General Assembly frequently adjourns on Thursday and does not wish to return until the following Tuesday. If the limit upon the time for which one house could adjourn without consent of the other were extended from two to five days the need for unnecessary skeleton sessions on Monday would be eliminated. The Commission favors reasonable limitation upon independent action and prefers constitutional certainty on this point to coverage by legislative rule.

ARTICLE II

Section 15

Present Constitution

Bills may originate in either House; but may be altered, amended, or rejected in the other.

Commission Recommendation

Repeal and enact a new section

(A) The general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house. Bills may originate in either house, but may be altered, amended, or rejected in the other.

(B) The style of the laws of this state shall be, "Be it enacted by the general assembly of the state of Ohio."

(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending, and every amendment been made available upon a member's request.

(D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

(E) Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.

Commission Recommendation

The Commission recommends the enactment of new Section 15 of Article II to read as follows:

Section 15. (A) THE GENERAL ASSEMBLY SHALL ENACT NO LAW EXCEPT BY BILL, AND NO BILL SHALL BE PASSED WITHOUT THE CONCURRENCE OF A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE. BILLS MAY ORIGINATE IN EITHER HOUSE, BUT MAY BE ALTERED, AMENDED, OR REJECTED IN THE OTHER.

(B) THE STYLE OF THE LAWS OF THIS STATE SHALL BE, "BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO."

(C) EVERY BILL SHALL BE CONSIDERED BY EACH HOUSE ON THREE DIFFERENT DAYS, UNLESS TWO-THIRDS OF THE MEMBERS ELECTED TO THE HOUSE IN WHICH IT IS PENDING SUSPEND THIS REQUIREMENT, AND EVERY INDIVIDUAL CONSIDERATION OF A BILL OR ACTION SUSPENDING THE REQUIREMENT SHALL BE RECORDED IN THE JOURNAL OF THE RESPECTIVE HOUSE. NO BILL MAY BE PASSED UNTIL THE BILL HAS BEEN REPRODUCED AND DISTRIBUTED TO MEMBERS OF THE HOUSE IN WHICH IT IS PENDING, AND EVERY AMENDMENT BEEN MADE AVAILABLE UPON A MEMBER'S REQUEST.

(D) NO BILL SHALL CONTAIN MORE THAN ONE SUBJECT, WHICH SHALL BE CLEARLY EXPRESSED IN ITS TITLE. NO LAW SHALL BE REVIVED OR AMENDED UNLESS THE NEW ACT CONTAINS THE ENTIRE ACT REVIVED, OR THE SECTION OR SECTIONS AMENDED, AND THE SECTION OR SECTIONS AMENDED SHALL BE REPEALED.

(E) EVERY BILL WHICH HAS PASSED BOTH HOUSES OF THE GENERAL ASSEMBLY SHALL BE SIGNED BY THE PRESIDING OFFICER OF EACH HOUSE TO CERTIFY THAT THE PROCEDURAL REQUIREMENTS FOR PASSAGE HAVE BEEN MET AND SHALL BE PRESENTED FORTHWITH TO THE GOVERNOR FOR HIS APPROVAL.

This recommendation includes the repeal of present sections 15, 17, and 18 of Article II and the amendment of Sections 16 and 9 of Article II.

The proposed new section is a composite of the procedural requirements for bill passage as contained in existing sections 9, 15, 16, 17, and 18 of Article II. The format proposed follows modern constitutions in combining in one section all elements pertaining to enactment of legislation.

History and Background of Division (A)

Division (A) contains the requirement not presently specifically enunciated in the Ohio Constitution that no law shall be enacted except by bill. Such a provision is commonly included in legislative articles. Its inclusion in division (A) represents the addition of new language, but the concept of enactment of laws by bills is not new. Present Section 16 of Article 1I refers to the passage of "every bill" and sets forth the procedure to be followed "before it becomes a law."

Present Section 9 of Article II is the source of the second clause of division (A) of Section 15 that "no bill shall be passed without the concurrence of a majority of the members elected to each house," and the corresponding amendment to remove this provision from Section 9 is included in the recommendations.

The portion of Section 9 relevant to this discussion originated in 1851. The purpose of prohibiting passage without majority concurrence was stated in debates:

> "It would be potent to stop the absquatulation of members which had of late years been carried on to so great an extent under the name of 'pairing off.' The people lived for thirty years under the old Constitution without any necessity arising for a provision like this, requiring a majority of all the members elected to pass a bill, because, during all that time, members felt it to be their duty to be always in their seats attending to the interests of the State. But, within a few years past, 'reform' has been introduced into the modes of legislation as well as into social life, and that reform was, when a member wished to be absent, for his pleasure or on business, to 'pair off' by which means they have felt licensed to go homme during a session and neglect their duties.[1]

[1] 1 *Debates* 229 (May 29, 1850)

Effect of Change

In the transfer of the clause from Section 9 to this new Section 15 a slight language change was made, for purposes of grammatical construction only. Section 9 provides, " no *law* shall be passed, in *either* House, without the concurrence of a majority of all the members elected thereto." As transposed, the provision reads: "no *bill* shall be passed without the concurrence of a majority of the members elected to *each* house." Emphasis added in both instances for the sake of comparison.) No change in meaning is effected.

Rationale of Change

The intent of moving the described clause from Section 9 to new Section 15 is to consolidate the constitutional provisions that affect legislative procedure in the enactment of legislation. Testimony considered by the committee suggested adding an exception to the provision calling for a majority vote to read "except as otherwise provided in this Constitution." The suggestion noted that Section 1(d) of Article II calls for a two-thirds vote of all members for the passage of emergency laws. However, in proposing the incorporation of language from present Section 9 to proposed Section 15 the committee intended no substantive change. Section 9 contains no exception for special majorities provided in other parts of the Constitution. The committee reasoned that Section 9 sets a minimum vote for the passage of bills and is not inconsistent with Section 1(d) and other special sections calling for extraordinary majorities in specific situations. The committee was reluctant to add exceptions to the language as it now stands. References to other parts of the Constitution are better made as specific as possible. The introduction of this exception could introduce an unintended ambiguity.

The second sentence of Division (A) of Section 15 comes without change from existing Section 15 of Article II.

The latter derived without alteration from Section 16 of Article I of the Constitution of 1802. The only recorded discussion of this section in the Debates of 1851 was of an amendment, adopted without dispute, that removed a proviso, initially offered to the delegates of the 1851 Convention, "that all bills providing for the raising of revenue or for any appropriation of public money, shall originate in the House of Representatives."

History and Background of Division (B)

Division (B) of Section 15 comes without change from existing Section 18 of Article II.

The latter came without change from Section 18 of Article I of the Constitution of 1802. Debates of 1851 reveal no discussion of its purpose or merits.

Effect of Change

No change in meaning results from the transposition.

Rationale of Change

The reason for transferring this language is to effect a consolidation of all bill enactment procedures into one section.

History and Background of Divisions (C) and (D)

Divisions (C) and (D) of proposed Section 15 are based on procedural requirements that are presently incorporated in Section 16 of Article II, but the revision in one instance represents a sweeping departure from the present constitutional rules, as explained below.

Section 16 as adopted in 1851 read as follows:

Section 16. Every bill shall be fully and distinctly read, on three different days, unless, in case of urgency, three-fourths of the house,

in which it shall be pending, shall dispense with this rule. No bill shall contain more than one subject, which shall be clearly expressed in its title; and no law shall be revived, or amended, unless the new act contains the entire act revived, or the section or sections amended; and the section or sections so amended, shall be repealed.

Amendments in 1903 and 1912 affected only the second paragraph of the section, having to do with gubernatorial veto, and are discussed in commentary following amended Section 16.

Like present Section 16 of Article II, predecessor Section 17 of Article I of the Constitution of 1802 required that every bill be read on three different days in each house unless a three-fourths vote dispensed with the rule. The Convention of 1851 added the one subject requirement and the provision that "no law shall be revived, or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections so amended, shall be repealed," the prohibition against re-enactment and repeal by reference.

Debates of the Convention of 1851 disclose that the object of the prohibition was to provide some means by which the people might know what was law and what was not law. Discussion alluded to the then common practice of repealing "at one general sweep" all laws coming within the purview of the repealing act, without specific reference.

Effect of Change

Divisions (C) and (D) of Section 15 are divisible into three discussion topics for purposes of explaining some changes made in the proposed procedural section. These topics are :(1) the Commission's recommended variant of the three-reading rule; (2) the Commission's recommended retention of the one subject rule; and (3) the Commission's recommended retention of the prohibitions against re-enactment and repeal by reference.

Division (C) of Section 15 represents a deliberate departure from the "three reading" rule. It substitutes a requirement that the bill be "considered" by each house on three different days, subject to a two-thirds rather than three-fourths vote to dispense with the requirement. Moreover, every individual "consideration" of a bill (or action suspending the requirement) would have to be recorded in the journal. The terms "considered" and "consideration" are necessarily ones for which the legislature must provide a definition, but the committee reasoned that the term "reading" raises a similar problem of interpretation. Division (C) does not attempt a detailed description of every legislative action taken because such a description would be not only difficult but would unduly restrict the legislature in its application of the requirement.

As an added restriction upon undue haste and as an added element of assuring that legislators be familiar with measures that they are voting upon, the Commission incorporated a corollary to its proposed new three day rule by providing:

> "No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending, and every amendment been made available upon a member's request."

The one subject rule and prohibitions against re-enactment and repeal by reference from present Section 16 have been transferred to Section 15 with but one inconsequential style change—to divide the compound sentence that contained both subjects into two sentences.

Rationale of Change

Division (C) of Section 15 rejects the traditional "three reading" rule because, like the drafters of the Model State Constitution, the Commission regards it as an archaism. The present requirement that bills be "fully and distinctly read" on three different days is virtually never observed in

Ohio. Constitutional provisions governing bill reading are standard in state constitutions. However, although they appear in varying forms in the constitutions of the 50 states, a 1970 report of the Council of State Governments reveals that the practice of reading bills in full is extremely rare.

The original reasons for the three reading rule appear to have been the absence of printing and the inability of some members of state legislatures to read and therefore become informed about matters on which they were obliged to vote. These reasons no longer exist, so that in the view of some, reading requirements could be removed entirely from state constitutions. Neither the United States Constitution nor the Model State Constitution mentions "reading." However, because of the desirability of maintaining safeguards against hasty consideration of legislation, the committee hesitated to recommend abandonment of a requirement calling for action upon three separate days.

To conform fundamental law with practice, a number of states have revised the requirement by specifying that the reading shall be "by title only." The committee rejected such a solution, however, as the continuation of an outmoded requirement in only slightly more palatable terms. The rationale for the original rule, in its view, is to check undue haste in the enactment of legislation, and it sought a more realistic provision for requiring that three days elapse between introduction of a bill and its passage.

The committee chose to require that the bill be "considered." This term was challenged in deliberations as being too broad. The committee's response, upon consideration of the objection, was that the term is one that will necessitate legislative interpretation, in much the same fashion as the term "reading" has required legislative application. The Constitution does not require that a bill be read before the full house, as opposed to a committee, and the legislature has had to make a determination by rule as to the meaning of the constitutional rule.

Another approach, adopted in New York and endorsed by the Model State Constitution, is to provide that no bill becomes law unless printed and available to members, in final form, three days prior to final passage. New York Const. Art. III section 14; Model State Constitution, section 4.15.

Comment attached to the 6th edition of the Model State Constitution provision notes that undue haste is checked by the requirement that the printed bill be on members' desks for three days before final legislative action. Such a rule, at first glance, has appeal. However, the M.S.C. solution ignores floor amendments, and the New York provision contains the specific prohibition that "upon the last reading of a bill, no amendment thereof shall be allowed." Floor amendments, for purposes of conforming bills with the rules of code revision, as well as for substantive purposes, are common in Ohio. To enable them to continue to be used would require some procedure for special leave to dispense with the requirements of such a provision as is incorporated in the Model State Constitution, and it is for this reason that the New York and Model approach were rejected. Instead, a modified form was proposed to the Commission as follows: "No bill may be passed until the bill and each amendment thereto has been reproduced and distributed to members of the house in which it is pending."

Some members of the Commission felt that as originally proposed the requirement was unnecessarily far-reaching in view of the number of amendments, corrective and otherwise, that might be involved, and that adequate protection for the right to be informed would be afforded by revising the language in the form proposed, guaranteeing reproduction and distribution of all bills before passage and the availability of every amendment upon a member's request.

The committee in its deliberations acknowledged that the bill distribution requirement could cause some delays. It concluded, however, that a minimum guarantee should be inserted in the Constitution to protect the right of a member upon demand to have before him the text of a measure under consideration. The relative ease with which material can be reproduced and distributed keeps such a requirement from being an unduly burdensome one. The frequency of large floor amendments is not great. Finally, the possibility of delay is a small price to pay for constitutional recognition of the right to be informed. As amended, the section limits amendment distribution to a member's request, and in this form the Commission views the requirement as both fair and feasible.

To the suggestion offered in submitted testimony that the same protection was better incorporated in legislative rule, the committee responded that if the protection is in the Constitution, it cannot be suspended, and a minority of one could always invoke the rule by raising a point of order.

The final substantive change has to do with the vote required to dispense with the constitutional requirement for consideration on three different days. The Ohio Constitution includes provisions for extraordinary majority votes for various specific purposes, including the requirement for a two-thirds vote to pass emergency bills and to dispense with public hearings, a three-fifths vote for overriding vetoes, and the three-fourths vote required in Section 16 to dispose with the complete reading of bills. The committee in its review of these various provisions considered recommending a standard or uniform extraordinary vote. The two-thirds vote comes close to a standard provision in Ohio and elsewhere. No justification was apparent for the larger percentage requirement that attaches to the three reading rule, and the committee decided to recommend its lowering to accord with other special majorities. See Section 16 for its rationale with respect to retaining the requirement for a three-fifths vote to override gubernatorial vetoes instead of recommending the raising of such a requirement to a two-thirds vote.

The requirement that no bill shall contain more than one subject which must be expressed in the title, as provided by present Section 16, has been retained in Division (D). This requirement can be found in most constitutions. The New England states are an exception to the general rule. Purposes of the rule, according to one commentator[1] are threefold: (1) to prevent logrolling, a practice in which unrelated matters are combined in one bill for the sole purpose of gaining the necessary support to secure their passage; (2) to prevent the attachment of "riders" to popular measures; (3) to facilitate legislative procedures. If only the third purpose were involved, suggests this author, the matter could clearly be relegated to legislative rule.

The commentator cited above points out that, while such provision has been invoked in hundreds of law suits across the country and over the years, only rarely has legislation been invalidated under the "one subject" or "title" provision. Courts have broadly construed "subject," finding that if an act has "unity," the purpose of the one subject rule is satisfied. Some courts have insulated laws from attacks on this score by invoking the "enrolled bill" theory, refusing to impeach a legislative act by extrinsic evidence. Ohio courts in many instances over the years have termed the "one subject" and "title" provisions as "directory" and not "mandatory" and have, in this manner, repudiated challenges to legislation based upon the requirements of Section 16. *State ex rel. Attorney General v. Covington,* 29 Ohio St. 102 (1876).

Testimony submitted to the Commission challenged the justification of retaining in the Constitution provisions which courts have termed "directory only." In *Gibson v. State,* 3 Ohio St. 475 (1854) the Ohio Su-

1 Rudd, Millard H., "No Law Shall Embrace More Than One Subject," 42 Minn. L. Rev. 250 (1958)

preme Court refused to look behind an enactment to establish compliance with the three reading rule, holding the provision merely directory. The one subject rule was similarly classified in *Pim v. Nicholson,* 6 Ohio St. 176 (1876).

In considering various constitutional limitations on legislative procedure in the Ohio Constitution the committee did not reject *a priori* all provisions which the courts have labeled as directory. Courts have recognized some provisions as having been intended to operate upon bills in their progress through the General Assembly and have acknowledged that such rules are important as rules of proceeding although the only safeguard against their violation is regard for an oath to support the Constitution. The committee's response to suggested removal of such requirements was that in some instances they provide a minimum guarantee for an orderly and fair legislative process. Their inclusion in the Constitution instead of legislative rule is in part, at least, for the protection of a temporary minority whose rights may not be suspended by a majority willing to disregard traditional procedures.

Conceding that the one subject rule is indirect and partial in its effect upon logrolling (by not affecting the practice where two or more bills are used for the same purpose) the Minnesota commentary concludes that: "(1) the rule must still be considered a significant deterrent to successful logrolling because, by forcing a coalition to use more than one bill, the rule increases the probability that the coalition will not attain all its objectives; (2) there is greater strength to the rule when it is in the constitution and not merely the subject of rule; and (3) although involved in much litigation, the one subject rule has rarely been the sole issue and has succeeded in invalidating an insignificant amount of legislation." The Commission concluded that the rule should be retained for these reasons.

The requirement that the one subject of a bill "be clearly expressed in its title" is generally included with the one subject rule. Reportedly having its origin in a 1795 act of the Georgia legislature, deceptively titled and allowing substantial grants of public property to private persons, the rule has been said to serve two purposes. These are: (1) to prevent surprise and fraud; and (2) to invalidate all or portions of legislation misleadingly titled. The rule has been termed "directory" in Ohio and has not invalidated legislation. However, the Commission favored retention of the rule as a minimum guarantee of a fair legislative process.

Finally, the committee discussed at length the purpose served by the provision that "no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed."

The purpose of such a provision is to prevent passing laws or repealing laws by reference only. The reader cannot know with certainty under such circumstances what is the law and what is not the law. The Debates of the 1851 Convention reveal a great deal of struggle over the phraseology. The object stated (see History and Background above) was to preclude uncertainty, particularly on the part of an inexperienced or untrained person. The first try was apparently not considered sufficiently explicit. It read, "no law shall be revised or amended, by reference to its title, but in such case the act or part of an act revised or amended, shall be engrafted into the new act and published at length."

Legislative draftsmen have come to understand the variety of purposes served by the final language, adopted in 1851 and retained in proposed Section 15. If a law has expired by its terms or has been repealed or declared unconstitutional, it cannot be made viable by referring to it without setting forth the exact language of the law or former

law. A question raised in committee discussion involved the possible inconsistency of using the term "law" and the term "act" in the same sentence. However, if the provision were changed to read "no act shall be revived" for purposes of consistency, an unintended result might follow. One meaning of the section is now regarded as clear—that it prevents the revitalizing of a lapsed appropriation item. A substitution of "act" for "law" could be interpreted as meaning that the prohibition would not continue to apply to the carrying forward of a particular appropriation item, prior to the lapsing of the appropriation "act." The revival portion of the section applies to appropriation acts and other special acts, in addition to acts containing codified sections, and it is for this reason that the prohibition on revival and amendment is written in terms of no "law." Moreover, the use of "act" in the existing section is considered similarly specific and unambiguous.

The required inclusion of the "section or sections amended" in the new act applies in some instances to Revised Code sections and in other instances to sections of special acts that carry no Revised Code sectional designations. For example, in an amendment to an appropriation act, the entire section that contains the item to be revised must be set forth in full. The same rule applies to an uncodified section in any special act. An act that enacts or amends Revised Code sections always contains a Section 1, or enacting section, in addition to the codified sections. A subsequent act that revises one or more of the Revised Code sections need not contain that Section 1. In such case the entire act is not being amended, but only the *law* which happens to be the Revised Code section or sections revised, and they must be repeated in full.

The committee concluded that interpretation problems relative to this provision have long been considered settled. Other state constitutions were examined, but none appeared to state the prohibitions with greater clarity. Therefore, the only change made in transposing the one subject rule and the reference by amendment provision is one of style, to divide the two thoughts into two separate sentences.

History and Background of Division (E)

The origin of the requirement that bills be signed is the provision in Section 17 of Article I of the Constitution of 1802 that "every bill having passed both houses, shall be signed by the speakers of their respective houses." The provision in its present form was embodied in Section 17 of Article II of the Constitution of 1851, reading as follows:

> The presiding officer of each House shall sign, publicly in the presence of the House over which he presides, while the same is in session, and capable of transacting business all bills and joint resolutions passed by the General Assembly.

At one time the signing by presiding officers was regarded as essential to the bill's authenticity. *State v. Kiesewetter,* 45 Ohio St. 254 (1887) is still cited as authority for the proposition that Section 17 is mandatory, not merely directory, as Ohio courts have found other constitutional procedurial limitations to be. The bill in question in that case had received the necessary majority and was intended to be passed. However, it had not been signed by either presiding officer nor filed with the Secretary of State. The Court viewed the signing of bills by presiding officers in open session as certifying procedural performance, and authenticating the act. Such a step was regarded as essential to reliance on the enrolled bill.

In the *Kiesewetter* case the Ohio Supreme Court distinguished cases from Kansas and Nebraska, where the enactment in question lacked the

required signature of a presiding officer but had been signed by the Governor and enrolled in the office of the Secretary of State. In Ohio, at that time, the Governor took no part in the approval or authentication of laws. The Nebraska case involved language identical with section 17 and achieved an opposite result. *Cottrell v. State*, 9 Neb. 125 (1879). The Kansas constitutional provision required that bills and resolutions passed by both houses "shall, within two days thereafter, be signed by the presiding officers and presented to the Governor." Noncompliance with this provision did not invalidate the statute challenged in *Leavenworth County v. Higgenbotham*, 17 Kan. 62 (1876). A contrary result, reasoned the court in the Kansas case, would mean that the "legislature may pass a bill over the veto of the Governor, but they cannot pass a bill over the veto (so to speak) of the Lieutenant Governor so as to make the bill become a valid law."

In *Ritzman v. Campbell*, 93 Ohio St. 245 (1915) the Ohio Supreme Court adopted the view that the enrolled bill is conclusive as to the contents of an act where a one word variance was claimed. The Court reiterated the rule that courts will consult the legislative journals as appropriate evidence whenever an issue of fact is raised as to whether any bill received less than the constitutional majority required. The latter requirement, said the Court, is a "mandatory" one. Refusing to look beyond the enrolled bill for the purpose of establishing the fact that a discrepancy in content existed between the enrolled bill and the bill as it might appear on inspection of the journals, the Court reasoned, in part, that an enrolled bill is accorded conclusive effect because of the attestation of the presiding officers of the General Assembly. Among constitutional provisions referred to in the opinion as mandatory were the requirements of Section 17 for the signing of bills by presiding officers.

Now, however, the Governor participates in the legislative process, and the *Ritzman* dicta does not take this into account. The preferable rule, in the Commission's view, is not one that invalidates legislation for failure of a presiding officer to sign, but one that uses the signatures of the presiding officers as a mere certificate to the Governor that the act has been considered the requisite number of times and been adopted by the constitutional majority. An incorporation of the requirements of Section 17 for the signing by presiding officers with provision for approval by the Governor (as is found in proposed Section 15) would vary the rule and rationale of the two cited cases.

Effect of Change

The Commission recommends the repeal of Section 17 of Article II and the enactment in its place of a provision, inserted as Division (E) of procedural Section 15, that calls for signing by presiding officers and specifies that the purpose of signing is "to certify that the procedural requirements for passage have been met."

Rationale of Change

The committee regarded the act of signing bills as essentially administrative in nature and not one that need be witnessed. At one time many provisions existed in the law requiring a ritual of execution —the sealing of contracts and other documents, for an example. They came into being at a time when few could read and have little validity today. Many have been eliminated as unnecessary.

Consequently, the committee recommended to the Commission the elimination of the provision for public signing before the house when in session and capable of transacting business. Present practices do not

accord with the requirements of Section 17 that the house before which bills be signed be "capable of transacting business" in that bills are routinely signed before a "skeleton" session. This means that frequently only one other member is present when the presiding officer signs bills.

Testimony given to the Commission agreed with the committee's thesis. Sections dealing with legislative procedure, said the League of Women Voters, are better stated in terms of broad principles with specifics left to statutory law. An out-of-date provision such as Section 17 should be revised or eliminated. Certainly a provision that is not being followed to the letter of the fundamental law deserves examination, and if the purposes for which it was adopted are no longer being met, it should be amended or eliminated.

The committee at first proposed to the Commission an amendment to Section 17 that would have simply allowed the presiding officer to sign a bill at any place and time during session. The provision for signing bills while the respective house "is in session" was retained for the purpose of requiring that all bills be signed before adjournment *sine die*. The committee pointed out that it sought to prevent the practice common elsewhere of delayed signing, where months may elapse after the end of a legislative session before bills are transmitted to the Governor for approval.

Some witnesses giving testimony to the Commission questioned the meaning of the term "session." A definition problem arises because "session" can refer to the daily assembly of a legislative body or it can mean anytime before adjournment *sine die*. The latter meaning was intended by the committee in its initial presentation. Wrestling with this dual meaning problem upon re-referral, the committee examined anew its view of the purpose of having bills signed. It was agreed that the act serves a certification and not an authentication function. Concern over the possibility that a bill might be lost in the legislative process suggested that a journalization requirement would be appropriate but that recording in the journal could be required regardless of whether the act of signing occurred in the chamber. The committee noted that such a ministerial act as the signing of legislation is not covered by the Model State Constitution.

The Commission agreed with the committee's second presentation of the provision governing signing, embodied in Section 15 and stating the purpose served by the act. References to "session" had been eliminated, and the Commission adopted an amendment calling for presentation "forthwith" to the Governor for his approval.

The signing of bills is regarded as the final step in the legislative process before an enacted bill is transmitted to the Governor. For this reason Section 15 ends with the provision for signing, and Section 16, with amendments proposed, covers the procedure involved after a bill has been so transmitted.

Intent of Commission

The intent of the Commission in proposing enactment of Section 15 is to consolidate procedural steps involved in the passage of legislation, modernize outdated requirements, improve style, clarify the purpose to be served by each step involved in the legislative process, and accord constitutional requirements with current practices.

The Commission does not contemplate drastic changes in procedure as the result of these changes. The presiding officer will be able to sign bills in his office instead of being required to sign them in chamber. From a practical standpoint, this is the only major change foreseen.

ARTICLE II

Section 16

Present Constitution

Every bill shall be fully and distinctly read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending, shall dispense with the rule. No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed. Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass it, it shall become a law notwithstanding the objections of the governor, except that in no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all such cases the vote of each house shall be determined by yeas and nays and the names of the members voting for and against the bill shall be enterel upon the journal. If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it srall become a law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him, with his objections in writing, in the office of the secretary of state. The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, srall be void, unless repassed in the manner herein prescribed for the repassage of a bill.

Commission Recommendation

If the governor approves an act, he shall sign it, it becomes law, and he shall file it with the secretary of state.

If he does not approve it, he shall return it with his objections in writing to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to the second house vote to repass it, it becomes law notwithstanding the objections of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all cases of reconsideration the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner prescribed by this section for the repassage of a bill.

Commission Recommendation

The Commission recommends the amendment of Section 16 of Article II as follows:

Section. 16. ~~Every~~ ~~bill~~ ~~shall~~ ~~be~~ ~~fully~~ ~~and~~ ~~distinctly~~ ~~read~~ ~~on~~ ~~three~~ ~~different~~ ~~days,~~ ~~unless~~ ~~in~~ ~~case~~ ~~of~~ ~~urgency~~ ~~three~~ ~~fourths~~ ~~of~~ ~~the~~ ~~house~~ ~~in~~ ~~which~~ ~~it~~ ~~shall~~ ~~be~~ ~~pending,~~ ~~shall~~ ~~dispense~~ ~~with~~ ~~the~~ ~~rule.~~ ~~No~~ ~~bill~~ ~~shall~~ ~~contain~~ ~~more~~ ~~than~~ ~~one~~ ~~subject,~~ ~~which~~ ~~shall~~ ~~be~~ ~~clearly~~ ~~expressed~~ ~~in~~ ~~its~~ ~~title,~~ ~~and~~ ~~no~~ ~~law~~ ~~shall~~ ~~be~~ ~~revived,~~ ~~or~~ ~~amended,~~ ~~unless~~ ~~the~~ ~~new~~ ~~act~~ ~~contains~~ ~~the~~ ~~entire~~ ~~act~~ ~~revived,~~ ~~or~~ ~~the~~ ~~section~~ ~~or~~ ~~sections~~ ~~amended,~~ ~~and~~ ~~the~~ ~~section~~ ~~or~~ ~~sections~~ ~~so~~ ~~amended~~ ~~shall~~ ~~be~~ ~~repealed.~~ ~~Every~~ ~~bill~~ ~~passed~~ ~~by~~ ~~the~~ ~~general~~ ~~assembly~~ ~~shall,~~ ~~before~~ ~~it~~ ~~becomes~~ ~~a~~ ~~law,~~ ~~be~~ ~~presented~~ ~~to~~ ~~the~~ ~~governor~~ ~~for~~ ~~his~~ ~~approval.~~ If ~~he~~ THE GOVERNOR approves AN ACT, he shall sign it, ~~and~~ ~~thereupon~~ ~~it~~ ~~shall~~ ~~become~~ ~~a~~ IT BECOMES law, AND HE SHALL FILE IT ~~and~~ ~~be~~ ~~filed~~ with the secretary of state.

If he does not approve it he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to ~~that~~ THE house OF ORIGIN vote to repass the bill, it shall be sent, with the objections of the

governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to ~~that~~ THE SECOND house vote to repass it, it ~~shall become a~~ BECOMES law notwithstanding the objections of the governor, ~~except that in~~ AND THE PRESIDING OFFICER OF THE SECOND HOUSE SHALL FILE IT WITH THE SECRETARY OF STATE. IN no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all ~~such~~ cases OF RECONSIDERATION the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

If a bill ~~shall~~ IS not ~~be~~ returned by the governor within ten days, Sundays excepted, after being presented to him, it ~~shall become a~~ BECOMES law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it ~~shall become a~~ BECOMES law unless, within ten days after such adjournment, it ~~shall be~~ IS filed by him, with his objections in writing, in the office of the secretary of state. THE GOVERNOR SHALL FILE WITH THE SECRETARY OF STATE EVERY BILL NOT RETURNED BY HIM TO THE HOUSE OF ORIGIN THAT BECOMES LAW WITHOUT HIS SIGNATURE.

The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner ~~herein~~ prescribed BY THIS SECTION for the repassage of a bill.

History and Background of Section

The portion of Section 16 of Article II prescribing the procedure to be followed by the Governor when bills are passed and presented to him and authorizing gubernatorial veto was adopted November 3, 1903.

The Commission has divided present Section 16 by deleting the first three sentences of the present section. These three sentences contain the requirements that bills be fully read on three different days, that bills be limited to one subject matter, and that after passage bills be presented to the Governor for his approval, along with the prohibition against reenactment and repeal of laws by reference. These provisions have been re-written in part and transferred to Section 15 of Article II, the Commission's proposed new procedural section.

Effect of Change

Minor changes are made in the remainder of Section 16 as proposed. They are essentially nonsubstantive in effect. The "shall" construction when not used in a mandatory sense has been replaced with the present tense. This change reflects the Commission's policy decision to follow the rules of code revision for style and language. Thus in the first sentence of the section, the third sentence of the second paragraph, and the first sentence of the third paragraph the expression that a bill "shall become law" (upon gubernatorial signature, repassage, or expiration of ten days) has been revised to provide that the bill "*becomes*" law at each such juncture. Similarly, the expression that if a bill "shall not be returned by the Governor" has been changed to "is not returned," and the clause that provides "unless within ten days . . . it shall be filed" would read as revised "unless within ten days . . . it is filed. . . ."

The Commission has attempted to remove slight ambiguities that arise from other references in the section by substituting language as follows:

Location	Expression	Changed to:
Second paragraph	reference to "that house," meaning house where bill originated	"house *of origin*"

Location	Expression	Changed to:
Second paragraph	"that house," meaning house other than house of origin	"the *second* house"
Second paragraph	"such cases," meaning when a bill is reconsidered	"cases *of reconsideration*"
Fourth paragraph	"herein," meaning this section, as opposed to article or constitution	*"this section"*

In its deliberations the committee took note of the fact that Section 1(c) of Article II does not appear to have been coordinated with procedures set forth in Section 16. Section 16 declares that a bill becomes law when signed by the Governor. Section 1(c) of Article II, the subject of which is the initiative and referendum, provides: "No law passed by the General Assembly shall go into effect until ninety days after it shall have been filed by the Governor in the office of the Secretary of State, except as herein provided." Section 1(c) by its terms does not appear to apply to a measure enacted over veto because, in that case, the bill is not filed by the Governor in the office of the Secretary of State. Section 16 is silent as to the procedural steps to be followed after repassage, and therefore Section 16 as proposed would fill the gap by requiring that the presiding officer of the second house file the bill with the Secretary of State. Section 1(c) should probably be amended to eliminate any question about the effective date of a law passed over veto, and the committee decided to consider an amendment at the appropriate time. It is not regarded as essential to the change made in this section.

Another apparent gap in Section 16 is the failure to provide for the filing of bills with the Secretary of State when they become law without the Governor's signature after the expiration of ten days. Section 16 as proposed provides that the Governor shall do such filing.

The committee also considered revising the Section 16 provisions which declare that a bill becomes "law" at specified points because of concern that one who is unfamiliar with the Constitution might assume by reading Section 16 that a bill goes into *effect* at that point. The suggestion was made that a reference within Section 16 to Sections 1(c) and 1(d) of Article II would warn the reader that a 90 day effective date provision might apply to a particular law. However, the committee concluded that such an amendment would be unwise because the initiative and referendum sections will be the subject of independent study. The effective date provisions will be examined with a view toward possible recommendation that they be revised. A future recommendation that Sections 1(a) through 1(g) be rewritten and renumbered is likely.

The committee also explored the question of conflict when two bills are passed at the same session of the legislature, both affecting the same Revised Code section. If two acts, A and B, enact a new section on the same subject or amend an existing section in differing ways, and act A, passed first, contains no emergency clause, the section in A becomes effective 90 days after filing. The same section in B, passed later as an emergency act, becomes effective before the section contained in A, and a difficult problem arises as to which version of the section prevails—the section in the bill with the later effective date (A), or the last expression of the legislature (B). In practice, the Legislative Service Commission and the Clerks' offices attempt to call such situations to the attention of the General Assembly and

suggest conforming amendments to eliminate the conflict. The committee considered the questions involved in resolving problems of legislative intent in situations of this kind and concluded that it could not definitively settle all conflicts of this nature by adding provisions to the section on legislative procedure. The General Assembly by amendment may declare its intent in individual instances, or if it fails to do so, the intent in particular instances of possible conflict must be determined by court decision. Because the committee will at a later date consider the whole question of the effective or operative date of legislation, as contained in the sections on the initiative and referendum, further consideration of the conflict question was deferred until that time.

On the matter of gubernatorial veto of appropriations, the committee weighed the pros and cons of allowing the Governor to have the power to reduce items, in addition to the power to make item vetos. The power to reduce appropriation items exists in Pennsylvania by judicial decision, and a number of other states have authorized item reduction by constitutional provision. Conditional veto or executive amendment is recognized in some other states as an alternative or supplement to item vetoes.

The committee discussed and rejected expanding the Governor's powers to include reduction of appropriation items, preferring to consider and broaden, if necessary, the Governor's budgetary controls.

The committee also pondered the question of legislative consideration of vetoes made after adjournment and the necessity of revising this provision to guarantee that the General Assembly have the final word. The committee concluded that the General Assembly can reserve opportunity to reconsider vetoed bills through its adjournment resolution. Moreover, if Section 8 is adopted, the General Assembly could convene a special session to pass new legislation to supplant the vetoed enactment. Such legislation would require only a simple majority in most instances whereas repassage over veto calls for a three-fifths majority.

Whether to recommend retention of this three-fifths majority requirement was also considered. The committee was reluctant to raise special majorities. An increase—to two-thirds, for example, for consistency with other provisions calling for extraordinary votes—was judged unwise. To require a two-thirds vote to override a veto, in the committee's view, could create problems because the state of Ohio is so evenly divided.

Rationale of Change

The Commission's purpose in proposing the revision of present Section 16 of Article II is to facilitate understanding of the procedural steps involved in the enactment of laws by fitting them all in one or two sections. In Section 16 the Commission recommends style changes in order to maintain a clear and readable Constitution. The Commission responded to gaps in procedure by supplying additional steps to be followed when bills are transmitted to the Governor and he does not sign and file them. Because the Constitution is silent as to the effective date of a measure enacted over a veto or one that becomes law without the Governor's signature, the Commission proposes to add provisions for the filing of such bills with the Secretary of State.

Intent of Commission

The changes in Section 16 are intended to be nonsubstantive. The Governor's role in the passage of legislation would not be affected by the adoption of this Section.

ARTICLE II

Section 17

Present Constitution

The presiding officer of each House shall sign, publicly in the presence of the House over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the General Assembly.

Commission Recommendation

Repeal (provisions transferred)

Commission Recommendation

The Commission recommends the repeal of Section 17 of Article II because its provisions are transferred to and incorporated in Division (E) of Section 15. See the commentary to Section 15.

ARTICLE II

Section 18

Present Constitution

The style of the laws of this State shall be, "Be it enacted by the General Assembly of the State of Ohio."

Commission Recommendation

Repeal (provisions transferred)

Commission Recommendation

The Commission recommends the repeal of Section 18 of Article III because its provisions are transferred to and incorporated in Division (B) of Section 15. See the commentary to Section 15.

ARTICLE II

Section 19

Present Constitution

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.

Commission Recommendation

Repeal (provisions transferred)

Commission Recommendation

The Commission recommends the repeal of Section 19 of Article II because its provisions are transferred to and incorporated in Section 4. See the commentary to Section 4.

ARTICLE II

Section 25

Present Constitution

All regular sessions of the General Assembly shall commence on the first Monday of January, biennially. The first session, under this constitution, shall commence on the first Monday of January, one thousand eight hundred and fifty-two.

Commission Recommendation

Repeal (provision transferred)

Commission Recommendation

The Commission proposes the repeal of Section 25 and the transfer of its substance by enacting a new Section 8. See the commentary to Section 8.

ARTICLE II

Section 31

Present Constitution

The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office.

Commission Recommendation

The members and officers of the General Assembly shall receive an annual salary and such allowances for reasonable and necessary expenses related to the performance of their duties as are provided by law; and no change in a member's salary shall take effect during the term for which he was elected.

Commission Recommendation

The Commission recommends amendment of Section 31 of Article II as follows:

Section 31. The members and officers of the General Assembly shall receive ~~a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise~~ AN ANNUAL SALARY AND SUCH ALLOWANCES FOR REASONABLE AND NECESSARY EXPENSES RELATED TO THE PERFORMANCE OF THEIR DUTIES AS ARE PROVIDED BY LAW; and no change in ~~their compensation~~ A MEMBER'S SALARY shall take effect during ~~their~~ THE term ~~of office~~ FOR WHICH HE WAS ELECTED.

History of Section and Background of Section

Under Section 19 of Article I of the Ohio Constitution of 1802 no member of the legislature could receive "more than two dollars per day, during his attendance on the legislature, nor more for every twenty-five miles he shall travel in going to, and returning from, the general assembly." The original proposal before the 1851 Convention did not increase this limit very much. It provided: "Members of the General Assembly shall receive three dollars per day during the time they remain in session and three dollars for every twenty-five miles traveled in going to and returning from the place of their meeting."[1]

Many amendments were immediately offered when the proposal was put before the Convention. An amendment to add a prohibition against any other compensation or perquisite except postage was the subject of lengthy debate. An opponent argued that members had a difficult time refusing the franking privilege to friends. He further opposed the postage allowance as unequal. Other amendments would have put compensation on a graduated scale, with three dollars per day for the first 30 days of the session and less for succeeding days. Some delegates favored setting minimum amounts only, and others argued strongly against setting limits in the Constitution because of the "mutations of things and the fluctuations of time." 1 *Debates* 211 (May 28, 1850). Later that year the debates on the matter of legislative compensation continued, and both opponents of fixing compensation in the Constitution and others concerned with the "evil growing out of the present system of charging postage and stationery accounts to the state" were equally vocal. 2 *Debates* 211-214 (December 31, 1850). The section in its present form, but for nonsubstantive changes made by the Committee on Revision, Arrangement and Enrollment, was agreed to on February 19, 1851. 2 *Debates* 663.

Modern constitutional authorities deplore the freezing of salary and compensation details in constitutional provisions. Such an obstacle is fortunately absent from the Ohio Constitution. The salary of Ohio legislators, as set by Section 101.27 of the Revised Code, is presently $12,750 per year, payable in equal monthly installments. President pro tempore of the Senate and Speaker of the House receive $16,750 per year. Senate minority leader, Senate Majority whip, House Speaker pro tempore, House majority floor

[1] 1 *Debates* 293 (June 4, 1850)

leader, and House minority leader receive $14,750. House assistant minority leader receives $13,750 annually.

The basic compensation figure of $12,750 annually compares favorably with the 1970 national average of $13,256 biennially, and the lower median compensation figure of $10,637 biennially. Ohio rates seventh in the scale of legislative compensation as of May 1, 1970. States with greater compensation were, in descending order of compensation, California, New York, Michigan, Florida, Hawaii and Massachusetts. All of these states provide for expense allowance, including per diem, which were included in the compensation comparison.

Under Section 101.27 of the Revised Code each member of the Ohio General Assembly receives a travel allowance of 10 cents per mile each way for mileage once a week during the session from and to his place of residence.

The prohibition against "allowance or perquisites, either in the payment of postage or otherwise," under present Section 31 has resulted in some ambiguous and conflicting interpretations. An Ohio Court of Appeals has upheld statutory travel expenses for members of the General Assembly in spite of the prohibition, under the apparent holding that they constitute part of a legislator's "compensation." *State ex rel. Harbage v. Ferguson,* 68 Ohio App. 189 (1941) dism'd 138 Ohio St. 617 (1941) held that a fixed rate per mile "travel allowance for mileage each way once a week" is not "an allowance or perquisite" forbidden by Section 31 but is constitutional under at least one of two theories—that the travel expense payment is (1) reimbursement of an expense, impliedly not an allowance or perquisite or (2) as part of constitutional compensation. The opinion contains dictum to the effect that reimbursement for "hotel and living expenses" would be unconstitutional.

Several years earlier the Ohio Supreme Court invalidated a statute providing members of the General Assembly "room and board" for attendance at a special session but based its ruling upon the prohibition against *changing* compensation during term, thus implying that the room and board were provided constituted compensation and not an invalid "allowance."

As a result of these two cases the judicial fate of any per diem for members of the General Assembly is unpredictable. The prohibition against "postage" has been avoided by central mailing.

Effect of Change

The proposed revision of Section 31 removes a prohibition against the payment of allowance or perquisites to members and officers of the General Assembly.[1] It replaces the vague provision for a "fixed compensation" with provision for "an annual salary and such allowances for reasonable and necessary expenses related to the performance of their duties as are provided by law" and makes a language change in the second clause, prohibiting change in salary during term, that is intended to make the clause more readable. This bar on a change in salary, rather than compensation, during term does not extend to "allowances" under the section as proposed.

The committee explored a recent trend in various states to establish salary commissions, with authority to fix or propose salaries for legislators or elected state officers generally. Some states have adopted a constitutional provision for such a commission, either to be appointed by the Governor or by the Governor and legislative leaders, to make salary recommendations to the legislature. These recommendations in most cases become law unless rejected or reduced. Arizona, Maryland, West Virginia, Michigan and Hawaii have recently provided for such commissions by constitutional

[1] The Citizens' Conference on State Legislatures said of Ohio: "Very few of the weaknesses are the product of constitutional restrictions, with the exception of the limitation on expense reimbursement of members." *The Sometime Governments,* op. cit. p. 280.

amendment and Idaho has done so by statute. Similar amendments were recently defeated in Nebraska, New Hampshire and North Dakota.

The committee discussed the desirability of establishing such a commission in Ohio. An advisory commission or a plan that requires an affirmative act by the General Assembly, it agreed, could be adopted by statute without constitutional amendment. The committee deliberately did not pursue the commission route, however, not having explored the question of what results would be sought by such a change and the broader policy questions involved in establishing compensation to attract people of particular professions and employments to legislative service. The concept of the citizen legislature is one to which the committee gave its continued support.

Rationale of Change

The purpose of amending Section 31 of Article II is to remove an obsolete and ambiguous prohibition against "allowance and perquisites." Ambiguity results from interpretations of two Ohio courts referred to above that taken together leave uncertain the meaning of the terms employed in the present Constitution. Furthermore, the revision proposed recognizes that legislators ought to be reimbursed for reasonable and necessary expenses incurred where such expenses are related to legislative duties. It is intended to supplant current circumvention of the bar against postage and perquisites (that conceivably could include secretarial services, which are made available) with a fair and realistic provision for compensating legislators.

Intent of Commission

The Commission intends by this proposal to recommend the elimination of obsolete terminology and removal of ambiguities that have resulted from 19th century language. It recognizes that the provision for legislative compensation should allow salary and reimbursement of necessary expenses in amounts sufficient to permit and encourage competent persons to undertake growingly important and time consuming legislative duties.[1] It acknowledges that the hours a legislature is in session represent a small fraction of the hours a conscientious legislator spends at his job and that research, investigation, study, hearings, both formal and informal, and constant demands of constituents consume much additional time.[2]

ARTICLE III

Section 1a

Present Constitution

Commission Recommendation

In the general election for governor and lieutenant governor, one vote shall be cast jointly for the candidates nominated by the same political party or petition. The general assembly shall provide by law for the joint nomination of candidates for governor and lieutenant governor.

Commission Recommendation

The Commission recommends the enactment of Section 1a of Article III, to read as follows:

Section 1a. IN THE GENERAL ELECTION FOR GOVERNOR AND LIEUTENANT GOVERNOR, ONE VOTE SHALL BE CAST JOINTLY FOR THE CANDIDATES NOMINATED BY THE SAME POLITICAL PARTY OR PETITION. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW FOR THE JOINT NOMINATION OF CANDIDATES FOR GOVERNOR AND LIEUTENANT GOVERNOR.

1. Committee on Legislative Processes and Procedures of the National Legislative Conference, Final Report of 1961
2. The Citizens' Commission on the General Assembly Reports to the Legislature and the People of Maryland, 1967.

History and Background of Section

The office of Lieutenant Governor was created by the Constitution of 1851. Section 12 of Article II of the prior Constitution had provided that in case of death, impeachment, resignation or removal of the Governor, the Speaker of the Senate would exercise the office of Governor until acquittal or another Governor was duly qualified. In case of impeachment of the Speaker of the Senate or his death, removal from office, resignation, or absence from state, the Speaker of the House was to succeed to the office and exercise the duties thereof until a Governor was elected and qualified.

Debates of the Convention of 1851 reveal that one reason advanced in favor of creation of the office was that the Lieutenant Governor could be designated "ex-officio presiding officer of the Senate," thus securing a prompt and effective organization of that body.[1] Past organizational difficulties were referred to in the debates over creation of the office and in debates concerning adoption of Section 7 of Article II, requiring the General Assembly to prescribe the mode of organizing the House of Representatives. Opponents to creation of the office favored "simplicity" in government, urged that Ohio had gotten along for some 40 years without the office, and claimed that the existing vacancy procedures were adequate.[2]

"Uncertainty and confusion"[3] about the provision for succession to the office of Governor seemed to trouble delegates. One argued that the office of speaker of the senate was not an office that exists all year round but rather is one held by a person elected to serve during a legislative session only. The people ought to elect a full time officer for succession to the office of Governor in the event of a vacancy, he reasoned. The proponents prevailed, and the provision for a Lieutenant Governor was incorporated into the executive article of the new constitution, apparently for the chief purpose of providing a full-time stand-by for the Governor.

Effect of Change

This section would provide for the joint nomination and election of the Lieutenant Governor and the Governor. The General Assembly would be required to provide by law for the joint nomination of candidates for the two offices.

Under present Section 1 of Article II the Lieutenant Governor is designated as a member of the executive department. He is nominated and elected independently of the Governor and therefore need not have the same party affiliation as the Governor.

The Commission's proposal does not attempt to set out the details by which preprimary selection takes place. Section 7 of Article V provides in part: "All nominations for elective state, district, county, and municipal offices shall be made at direct primary elections or by petition as provided by law . . ." To require, as does proposed Section 1a, that the General Assembly provide by law for joint nomination of candidates is consistent with Article V and keeps the Constitution flexible and free of statutory matters.

Rationale of Change

In the Commission's view, joint nomination and election of the Lieutenant Governor with the Governor recognizes his position as an executive official of state government. Moreover, joint election preceded by preprimary selection of candidates serves the principal purpose for which the office of Lieutenant Governor was created — to provide an automatic

[1] *Debates* 300 (June 5, 1850)
[2] 1 *Debates* 301 (June 5, 1850)
[3] 1 *Debates* 302 (June 5, 1850)

successor, elected state wide, to fill any vacancy which may occur in the office of the Governor.

In recommending joint nomination and election the Commission points out a trend in this direction. New York was the first state to provide for tandem election of the Governor and Lieutenant Governor in 1938. Today, the constitutions of at least the 15 states of Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New Mexico, New York, Pennsylvania, and Wisconsin provide for team election, and the Indiana legislature has passed such a proposal for submission to the people as a constitutional amendment. Alaska chose to drop the term "Lieutenant Governor" and provides that the Secretary of State be elected on a joint ballot with the Governor, to succeed him in case of vacancy. Joint nomination is specifically provided for in the new Illinois constitution which, like the section 1a proposed, gives the General Assembly responsibility for providing by law for the joint nomination of candidates.

Lieutenant Governor John W. Brown, in oral testimony before the Commission, stated that he is a strong advocate of team election and pre-primary selection of candidates for Governor and Lieutenant Governor by having them file joint candidacy petitions.

Governor John J. Gilligan communicated to the Commission his vigorous endorsement of this proposal. Specifically, he wrote:

> "I am certain that any Governor would welcome the opportunity of having a Lieutenant Governor of his choice serve as his 'strong right arm.'
> Moreover, it is the constitutional responsibility of the Lt. Governor to assume the duties of the Governor if the latter dies or becomes disabled. A close working relationship between the Governor and Lt. Governor will substantially ease the problems of the gubernatorial transition. I am certain that a Lt. Governor of the Governor's own party will play a major role in much of the discussion and decision making process in the Governor's office and will, therefore, be better equipped in an emergency to take over the duties of the State's Chief Executive."

The League of Women Voters, too, agreed with the proposal as one that will provide for more cohesion and continuity within the executive department.

Representative Keith McNamara, sponsor of House Joint Resolution 18 of the 109th General Assembly, which also proposes such a change in the Ohio Constitution, pointed out in a letter to the Commission:

> "On nine occasions since the turn of the century Ohio has had a Governor of one political party and a Lieutenant Governor of a different party. These situations have occurred in 1902, 1906, 1909, 1919, 1925, 1927, 1952, 1954 as well as at the present time. On at least one occasion (1906) a Lieutenant Governor succeeded to the office of a Governor of a different party upon the death of the Governor during the middle of his term . . . The specific role which the Lieutenant Governor would play would, no doubt, depend upon the personalities of the two men. It is certain, however, that the Lieutenant Governor's role will always be minimized when he belongs to a different political party than the Governor."

The Commission finds merit in these statements of support in recommending the enactment of Section 1a of Article III.

Intent of Commission

In recommending joint election of the Governor and Lieutenant Governor the Commission intends to strengthen the executive role of the Lieutenant Governor and, by requiring political harmony between the two offices, insure continuity of public policy in the event of an abrupt transition of government.

ARTICLE III

Section 3

Present Constitution

The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The joint candidates having the highest number of votes cast for governor and lieutenant governor and the person having the highest number of votes for any other office shall be declared duly elected; but if any two or more have an equal and the highest number of votes for the same office or offices, one of them or any two for whom joint votes were cast for governor and lieutenant governor, shall be chosen by the joint vote of both houses.

Commission Recommendation

The Commission recommends the amendment of Section 3 of Article III as follows:

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The JOINT CANDIDATES HAVING THE HIGHEST NUMBER OF VOTES CAST FOR GOVERNOR AND LIEUTENANT GOVERNOR AND THE person having the highest number of votes FOR ANY OTHER OFFICE shall be declared duly elected; but if any two or more ~~shall be~~ HAVE AN EQUAL AND THE highest, ~~and equal in~~ NUMBER OF votes, for the same office OR OFFICES, one of them OR ANY TWO FOR WHOM JOINT VOTES WERE CAST FOR GOVERNOR AND LIEUTENANT GOVERNOR, shall be chosen by the joint vote of both houses.

History and Background of Section

The predecessor of Section 3 of Article II was Section 2 of Article II of the Constitution of 1802. It related only to the disposition of the returns of election for Governor, as follows:

> The governor shall be chosen by the electors of the members of the General Assembly, on the second Tuesday of October, at the same places, and in the same manner, that they shall respectively vote for members thereof. The returns of every election for governor, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the speaker of the senate, who shall open and publish them, in the presence of a majority of the members of each house of the general assembly; the person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by joint ballot of both houses of the general assembly. Contested elections for governor shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

The same procedure for transmitting returns and declaring the results was retained in the Constitution of 1851, which broadened the section to apply to the election of all officers.

Effect of Change

The proposed revision of Section 3 complements the enactment of Section 1a of Article III. Section 3 provides for the transmitting of election returns

to the President of the Senate, who is directed to open and publish them and declare results. The section provides that the person having the highest number of votes for an office is declared "duly elected" and establishes a procedure for determining the victor in case of a tie. The proposed revision of Section 3 is for the sole purpose of adding to the section a special provision for counting the votes cast for joint candidates for Governor and Lieutenant Governor, in addition to the procedure that applies to the declaration of the individual person who has received the highest number of votes for other offices.

Rationale of Change

The changes in Section 3 of Article III are necessary to provide for the disposition of returns of votes cast for Governor and Lieutenant Governor. Otherwise, the substance of Section 3 is not affected, and the Commission has not further reviewed the history of the section.

Intent of Commission

The sole intent of the Commission in recommending amendment of Section 3 of Article III is to avoid conflict that will result if Section 1a of Article III is enacted without changing Section 3 of Article III.

ARTICLE III

Section 16

Present Constitution

The Lieutenant Governor shall be President of the Senate, but shall vote only when the Senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of Governor, the Senate shall choose a President pro tempore.

Commission Recommendation

The Lieutenant Governor shall perform such duties in the executive department as are assigned to him by the Governor and exercise such powers as are prescribed by law.

Commission Recommendation

The Commission recommends the amendment of Section 16 of Article III as follows:

Section 16. The Lieutenant Governor shall ~~be President of the Senate, but shall vote only when the Senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of Governor, the Senate shall choose a President pro tempore~~ PERFORM SUCH DUTIES IN THE EXECUTIVE DEPARTMENT AS ARE ASSIGNED TO HIM BY THE GOVERNOR AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY LAW.

History and Background of Section

Comments following the proposals for Section 7 of Article II and 1a of Article III discuss the background and rationale of the 1851 Convention in establishing the office of Lieutenant Governor. One reason given in the debates of the convention for establishing the office was to designate the Lieutenant Governor President of the Senate in order to insure the expeditious organization of that body at the commencement of each session.

This proposal is intended to complement the Commission's recommended amendment of Section 7 of Article II to have the presiding officer of the Senate chosen by the members from among its membership. The proposal is also related to the Commission's proposal to amend Section 8 of Article II by allowing presiding officers of the General Assembly to convene a special session. The intent of the amendment to Section 8 is that the presiding officers be representatives of the legislative, not executive department of government. The power to call a special session under Section 8 would be coequal between executive department, represented by the governor, and the legislative department, represented by legislative leadership. The

Commission's intent would be thwarted if a member of the executive department of government were one of the presiding officers entitled to participate in the legislative convening of a special session.

Article III presently confers only two responsibilities upon the holder of the office of Lieutenant Governor. Section 15 directs that he exercise powers and duties of the office of Governor in the event of death, impeachment, resignation, removal or other disability of the governor, and Section 16 that he act as President of the Senate. Section 1 of Article III classifies the Lieutenant Governor as a member of the executive department of state government.

Effect of Change

The effect of the revision of Section 16 of Article III is to remove the Lieutenant Governor as President of the Senate, with authority to vote when the Senate is equally divided; delete the constitutional provision that calls for choice of a President pro tempore of the Senate in case of the absence or impeachment of the Lieutenant Governor; and require the Lieutenant Governor to perform such duties in the executive department as are assigned to him by the Governor and to exercise such powers as are prescribed by law.

Rationale of Change

Beyond complementing its recommendations affecting the presiding officers of both houses of the General Assembly, the Commission favors the revision of Section 16 of Article III as an elevation of the office of Lieutenant Governor. Not only does the amendment serve to promote independence of the legislative from the executive branch of government, but it also confers upon the Lieutenant Governor administrative and executive responsibilities, designed to better prepare him for the chief purpose he serves — that or understudy to the Governor.

In its review of the office throughout the states the Commission learned that 40 states have a Lieutenant Governor and that the office is established by the Constitution in 39 of these states. Without exception the creation of the office appears in the executive article of the state constitution, as it does in the Ohio Constitution.

The Commission found support for its position in the writings of two outstanding authorities on state government. Byron Abernathy, in a 1960 report on the state executive branch,[1] pointed out that the classification of the position as legislative or executive has not been clear cut, and termed it "hybrid." Specifically, he asked, "Can the office be justified in a capacity more useful than that of presiding over the senate?"

Abernathy's analysis deplores the dearth of political literature concerning the Lieutenant Governor and notes that "here is an office, the true nature and functioning of which has been obscured by its apparent 'spare tire' nature and which students of government have too long ignored."

Although most writers appear to speak of him primarily as an executive official, Abernathy asserts:

> "The Lieutenant Governor does not normally carry a significant share of state executive and administrative responsibilities, while at the same time state governors are finding the burden of their offices increasingly overwhelming. They need assistance in their work, and students of state government have hit upon the idea that making the Lieutenant Governor a sort of assistant governor could relieve the governor of some of his duties and make better use than is now made of this office, and to relieve the governor from many onerous tasks so that he could be free to devote his efforts to the larger responsibilities of his office."

The Commission finds Abernathy's analysis relevant in Ohio.

1 Abernathy, Bryon, *Some Persisting Questions Concerning the Constitutional State Executive*, University of Kansas publications, Governmental Research Series No. 23 (1960).

In a keynote address delivered at the fifth annual meeting of the National Conference of Lieutenant Governors in Cleveland in June 1966,[1] Harvey Walker traced the development of the office of Lieutenant Governor in America and urged its transformation. Specifically, he argued that the lieutenant governorship should be an executive office and a very busy one — not one of presiding over a legislative body. He emphasized the importance of training the Lieutenant Governor as a possible successor to the Governor. Full time employment in the executive branch of government is imperative, he urged, if the primary purpose for creating the office is to be served. Executive duties should permit him to enjoy a wide administrative experience to prepare hime to assume the reins of state government in an emergency. Walker states:

> "Another cogent reason for dedicating the office of Lieutenant Governor to executive duties is that, as the legislative process becomes more visible ... he might well become a political rival of the Governor rather than his understudy ... The Lieutenant Governor, if he is to be a worthy successor to the Governor, needs to be identified with the executive side of this debate, not the legislative side. His apprenticeship should follow his principal duty."[2]

Dr. Walker reported a trend toward recognizing the Lieutenant Governor as understudy for the Governor. In a number of states, the constitution provides that the duties of office may be prescribed by law. In Colorado, where this provision appears in the constitution, the Lieutenant Governor is, by statute, a member of the governor's cabinet, as he is, reportedly by custom, in New York and Pennsylvania. By constitutional directive, he is a member of the equivalent (governor's council) in Massachusetts. In Louisiana he is chairman of the state advisory board and of the state voting registration board. In Pennsylvania he is chairman of the pardon board and state defense council. In Nebraska, by Constitution, the legislature may establish departments of government and place the Lieutenant Governor as department head, and he is a member of the board of pardon. In North Carolina, he serves on the state board of education. In Hawaii the constitution leaves the duties of office to be prescribed by law, and statutes make him Secretary of State. By statute in Indiana he is the Director of Commerce and Industry, and he serves ex officio on one or more administrative committees, boards or commissions in a large number of states.

Some commentators on the subject have taken the position that the administrative duties lieutenant governors perform are of so little importance that they could as well be exercised in other existing offices. The Model State Constitution eliminates the office. However, little support exists for proposals to abolish the office in states where it exists. Most of the literature of state government calls for the development of duties to make the holder of the office a kind of assistant to the Governor.

Such a solution is not without skeptics. What if the Lieutenant Governor becomes a hindrance, not a help? The Governor cannot remove a popularly elected official if the latter is an unsatisfactory assistant.

Team election is one solution to the problems involved in disagreement between the two officials. Another is to make it constitutionally possible for the Governor to use the Lieutenant Governor as an assistant but to leave to the discretion of the governor the extent to which he does so. The Commission endorses both in its specific proposals for Sections 1a and 16 of Article III. The added provision in Section 16 that the lieutenant governor shall "exercise such powers as are prescribed by law" insures flexibility.

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[1] Reprinted as "Office of the Lieutenant Governor: Authority and Responsibility," 42 Social Science 142 (June, 1967)
[2] *Ibid*, p. 245

Intent of Commission

The Commission regards its proposal to give the Lieutenant Governor administrative and executive, instead of legislative, responsibilities, as enhancing the stature of that office. This change it regards as particularly appropriate if Governor and Lieutenant Governor are to be jointly nominated and elected. In the Commission's view, not only would an executive role better prepare the Lieutenant Governor for emergency assumption of gubernatorial duties, but an active role for the Lieutenant Governor in the executive department, as is envisioned by the Commission, will result in a more effective and efficient executive.

Furthermore, the amendment of Section 16 of Article II in the manner proposed is consistent with the Commission's commitment to a strong, independent General Assembly, with control over its own destiny.

ARTICLE IV
Section 15

Present Constitution

Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 15 of Article IV, which reads as follows:

Section 15. Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

History and Background of Section

The Constitution of 1851 vested the judicial powers of the state in the Supreme Court, District Courts, Common Pleas Courts, Probate Courts, and in Justices of the Peace and such other courts inferior to the Supreme Court as might be established from time to time by the legislature. The state was divided into nine judicial districts, which were in turn divided into smaller subdivisions for the purpose of election of judges of the common pleas courts or such other trial courts of general original jurisdiction as might be created by the legislature.[1] Under Section 5 of Article IV the District Court of each of the nine districts was comprised of one of the judges of the Supreme Court and two common pleas judges of a district in which sessions were held.

Section 15 as adopted in 1851 reads as follows:

The General Assembly may increase or decrease the number of the judges of the Supreme Court, the number of the districts of the Court of Common Pleas, the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each House shall concur therein; but no such change, addition or diminution shall vacate the office of any judge.

[1] Hon. Lee E. Skeel, "History of Ohio Appellate Courts," 6 Cleve. Mar. L. Rev. 323 (1957)

The judicial article was amended in 1883 to replace the District Courts with a Circuit Court.

Constitutional amendments adopted in 1912 included changes in the judicial article. The Court of Appeals was created to succeed the Circuit Court, and a Common Pleas Court was provided for each county. Section 15 of Article IV was changed to accord with these amendments, and it is the 1912 version of the section, still in effect, that is proposed to be repealed.

In an early interpretation of Section 15 of Article IV the Supreme Court held that the Constitution does not limit the power of the General Assembly to abolish courts created by the legislature nor its power to vacate the office of judge of such courts. *State ex rel. Flinn v. Wright,* 7 Ohio St. 333 (1857). Section 15 of Article IV requires a two-thirds vote for the passage of laws to change the number of judges in the Supreme Court or Common Pleas Court or to establish courts other than the Supreme Court or Common Pleas Court. Legislation proposing to increase the number of judges of Courts of Appeals, Probate Courts, Municipal Courts, or County Courts requires only the concurrence of a majority of all members elected in each house. 1961 Ohio Atty. Gen. 2160.

The 1912 amendments to Section 15 of Article IV were proposed to maintain consistency in the judicial article as revised, but the basic question of requiring a two-thirds vote for the narrow purposes conceived was not the subject of recorded debate. Neither was the rationale for specifying a special majority for changes in some but not all constitutionally recognized courts in 1851.

Effect of Change

Repeal of Section 15 of Article IV eliminates the necessity of a two-thirds legislative majority to increase or decrease the number of judges of the Supreme Court and Court of Common Pleas and to establish other courts.

Rationale of Change

Section 15 is regarded by the Commission as an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting courts specifically named in the Constitution or as may be established by law. The expansion of the monetary and subject matter jurisdiction of the municipal courts in recent years, in part to ease the case load of the courts of common pleas, has effectively raised the status of the municipal court, and the difference in treatment of the two courts is even less justifiable than it may have been in an earlier period of the history of the judiciary in Ohio, when municipal courts were not courts of record.

The Modern Courts Amendment of 1968 gave the Supreme Court "general superintendence over all courts in the state," required the high court "to prescribe rules governing practice and procedure in all courts of the state," and authorized creation of additional courts "inferior to the supreme court" rather than "to the courts of appeal," as under the 1912 amendments. These changes have been heralded as the first step in the creation of a unified court system.

Retention of the two-thirds majority for the narrow purposes set forth in Section 15 is without logical basis under the principles recognized by the Modern Courts amendment. Section 15 is regarded as a legislative limitation without reason today.

The Administrative Director of the Ohio Supreme Court transmitted to the Commission his endorsement of the repeal of Section 15 of Article IV as an outmoded provision.

Intent of Commission

The Commission intends by this amendment to remove a provision which has no current place in the Constitution. Whatever justification existed for requiring a special vote for changing the number of judges on two of the three constitutional courts is no longer consistent with contemporary thinking. On the contrary, years of study and work by groups studying the Ohio court system, or lack thereof prior to the Modern Courts Amendment of 1968 demonstrate the importance of legislative flexibility to meet demands for better court organization and administration.

ARTICLE IV
Section 22

Present Constitution

A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General Assembly may, on application of the supreme court, duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 22 of Article IV, which reads as follows:

Section 22. A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision

shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General Assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

History and Background of Section

Section 22 of Article IV, added by constitutional amendment adopted October 12, 1875, provided for the appointment of a five member Supreme Court Commission to help dispose of the accumulated business of the Supreme Court. By specific provisions in Section 22, the terms of commissioners were set to expire three years "from and after the first day of February, 1876" and the Commission was given "like jurisdiction and power in respect to such business as are or may be vested" in the Supreme Court. Members were to receive "a like compensation for the time being, with judges of said court." Section 22 established commission quorum requirements, provided for certification and enforcement of commission decisions, authorized commission attendants, and required the filling of commission vacancies.

That portion of Section 22 which calls for the appointment of a commission to expire in 1879 is clearly obsolete. The remainder of the section authorizes the creation of further commissions with "like powers, jurisdiction and duties" on application of the Supreme Court, by a two-thirds vote of the General Assembly. Section 22 limits the term of any such commission to two years and prohibits its creation oftener than once in ten years. Only one additional commission has been appointed pursuant to Section 22. The second was appointed in 1883, for a two-year period.

Section 22 was adopted at a period in the history of the judicial article of the Ohio Constitution when a District Court was functioning in nine districts of the state, comprised of one of the judges of the Supreme Court and two Common Pleas judges of the district in which sessions were held. The late Judge Lee Skeel of the Court of Appeals, has described the operation of the District Court as follows:

> "As thus constituted, such district court was required to hold stated sessions in at least three places within each of the districts each year. It was an appellate court, its jurisdiction being defined as the same as that of the Supreme Court. But of course its place in the judicial system was inferior to that of the Supreme Court. This was the first attempt in Ohio to create an intermediate reviewing court, albeit its members were taken in part from the court where the trial was had and in part from the court to which the final appeal could be taken."[1]

[1]Hon Lee E. Skeel, "History of Ohio Appellate Courts, 6 Cleve. Mar. L. Rev. 323 (1957)

The need for the commission created by Section 22, according to Judge Skeel, arose because the judicial system "where the session in banc in Columbus was followed by a long tour on the circuit, required judges to have not only profound knowledge of the law but also great physical stamina to withstand the hardships of travel of that day. An overcrowded condition of the docket was also being caused by increase in litigation as the State's industry grew, and by the fact that the then-judicial process was geared to a sparsely settled rural civilization, out of keeping with the rapid development of the State and its increasing population." [1]

The failure of the District Court was ascribed to the breadth of its jurisdiction. The constitutional amendment of 1883 abolished the district courts and established a new intermediate appellate or reviewing court, the Circuit Court, presided over by judges elected to serve on that court. The number of Supreme Court judges was increased from four to five. According to Judge Skeel, although the Circuit Court did not relieve the Supreme Court of part of its heavy docket, it did relieve the judges of the Supreme Court from circuit duty. The 1912 amendments created the Court of Appeals, to succeed the Circuit court. The result of the 1912 revision of the judicial article was to make the Court of Appeals the court of last resort in most cases.

Effect of Change

Repeal of Section 22 of Article IV removes from the Constitution a provision already obsolete by its terms, specifically that portion of the section that established a three-year commission in 1876. It also removes an apparent delegation of the power to the General Assembly to create such a commission by a two-thirds vote, along with the limits on this power that restrict the term of any such commission to two years and its creation to once every ten years.

Rationale of Change

Delegation of the power to legislate in the manner prescribed has roots in history, when the District Court failed to meet the needs of intermediate retrial and review or to relieve the Supreme Court of the heavy burden imposed upon it by requirements that it meet in banc in Columbus and that its members attend district court around the state.

Problems to which Section 22 were addressed no longer persist. Such restrictions upon the General Assembly as requiring a special majority and a specific means of meeting the problems created by congested court dockets are completely inconsistent with contemporary views about the inherent authority of the legislature. The Commission views Section 22 as an unnecessary restraint upon legislative power. The recommendation to repeal it is one of others to modernize the fundamental law by deleting provisions that were relevant only to problems of an earlier day and attitudes about how they must be met. The Administrative Director of the Ohio Supreme Court concurs in the Commission's reasons for recommending repeal.

Intent of Commission

This recommendation is nonsubstantive in that deletion of the section is regarded neither as increasing nor decreasing the authority of the General Assembly to act upon proposals for improving the courts and the administration of justice. The provision is obsolete and is removed solely for purposes of updating the Constitution.

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[1] *Ibid*, p. 326

ARTICLE V

Section 2a

Present Constitution

The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

The Commission recommends the amendment of Section 2a of Article V as follows:

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, AND OTHER THAN CANDIDATES FOR GOVERNOR AND LIEUTENANT GOVERNOR) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

History and Background of Section

Section 2a became effective as a part of Article V of the Constitution on December 8, 1949. By requiring the alternation of candidates' names in groups under the titles of offices they seek, Section 2a requires that votes for all candidates be registered by individual selection and prohibits a single straight party line vote. The Commission has not reviewed the history or background of the present section and proposes its amendment for the sole purpose of making the section compatible with changes proposed in Article III by the enactment of Section 1a, providing for the joint election of Governor and Lieutenant Governor.

Effect of Change

The proposed revision of Section 2a of Article V complements the enactment of Section 1a of Article III. The section calls for the rotation of names of candidates and party designation. Section 2a provides that an elector may vote for candidates only by individual selection. An exception is included for President and Vice-President of the United States. The amendment here proposed expands the exception to include candidates for Governor and Lieutenant Governor.

Rationale of Change

The changes in Section 2a of Article V are necessary to provide for the casting of joint ballots for Governor and Lieutenant Governor. In recommending a change in one part of the Constitution, the Commission considered that it had the responsibility to propose changes in other parts of the Constitution that would be affected by its recommendations. The inclusion of Section 2a avoids conflict and uncertainty.

Intent of Commission

The intent of the Commission in proposing amendment of Section 2a of Article V is solely to avoid conflict if Section 1a of Article III should be enacted without recognition of the new joint election provision in the Section 2a ballot provision.

APPENDIX B

Part 2

STATE DEBT

December 31, 1972

STATE DEBT
INTRODUCTION

The questions of public debt are concerned with how much debt may be incurred, for what purposes, and how it should be repaid. These are not just questions of finance. Rather, the quantitative answers reflect important policy determinations that greatly affect all citizens of the State of Ohio.

In contrast to the federal government, the bonded debt of this state is not and cannot now be used for operating deficits, but is reserved primarily for capital improvements—roads, hospitals, schools and similar public facilities which benefit our citizens generally for many future decades. Clearly, there are occasions when it is not feasible to finance urgently needed facilities solely from current revenues. The structuring of debt thus becomes the decision-making process for determining how the burden of paying for these needed facilities should be allocated between present and future taxpayers who will benefit from them.

If the debt is too severely limited, our proper public purposes will have been jeopardized. If the debt becomes excessively great—or the repayment thereof is not completed within the useful life of the facilities financed thereby—future taxpayers will be unfairly burdened with paying for facilities benefiting earlier taxpayers who did not carry their fair share of the repayment burden.

Since these are complex matters and it is impossible to fully anticipate future needs, several knowledgeable observers have argued that the Constitution should not include any debt limit and that the responsibility for such matters should be left solely to the collective judgment of the Legislature—to our elected representatives in the General Assembly. Ten states have adopted this approach. The Commission has, however, concluded that, in view of its history and culture, Ohioans will not accept the principle of delegating this responsibility entirely to the General Assembly. The Commission has also concluded that constitutionally determined debt limits—however defined—may well be regarded as future authorizations to incur debt. The above observations thus have led to the recognition by the Commission that any constitutionally defined debt limit should receive the most careful consideration. It has further concluded that such a limit should have both flexibility and a direct relationship to ability to repay. Flexibility is an important concept since any fixed limit, however reasonable today, cannot anticipate the future; and "ability to repay" is a well-recognized principle of finance as a basic criterion for determining appropriate levels of borrowing.

These are the principles that have guided the Commission in the development of the debt limit proposed in this report—a limitation that is not so restrictive that it will thwart our proper purposes, and yet not so permissive as to lead to future excesses.

A notable by-product of the Commission's recommendations—resulting principally from the removal of provisions authorizing the issuance of general obligation debt in specific amounts or to specific limits—is a reduction of approximately 85% in the length of Article VIII, from an estimated 11,200 words to 1,672 words.

The provisions of Article VIII of the Ohio Constitution of 1851, many of which have survived with little or no change since their adoption, are largely the result of an attempt by the Constitutional Convention of 1850-1851 to remedy by constitutional means the fiscal problems caused by the

involvement of the state and its political subdivisions in the building of canals, railroads, and turnpikes during the period 1820 to 1850. The principal reasons for calling the Convention were to forestall repudiation of the state debt and to work out a constitutional framework for its repayment.[1] The latter object was "the main principle" behind Article VIII.[2] The provisions of this article, and its companion Article XII, were legislative in character and were deliberately designed to severely restrict the power of the General Assembly in fiscal matters. These characteristics are a hallmark of state constitutions written during this era of American history, and the shortcomings of this approach to constitution-making became evident within a few years. As one observer remarked in 1875: "The spirit of these enactments, however harsh, may be justifiable in view of the recklessness and extravagance of the past; but let us understand that we are doing penance, and not pretend to say that such is a normal one for a healthy commonwealth," [3] and in what Benjamin U. Ratchford, the leading student of American state debts,[4] was to call a pioneering work,[5] Horace Secrist wrote in 1914:

> "If the purpose of the restrictions on the financial powers of the states was to prohibit the use of credit, they have served it well. If the restrictions were intended to take the states out of the industrial field they have been as equally successful. That the purpose in mind was often of this double character, there can be no doubt, but that such was in every case a policy of wisdom may be questioned. State borrowing is in essence a question of political and financial expediency, and its use or non-use should be judged by political standards and by the rules of finance. At any time, given the needs for public revenues, there are two sources open for their acquisition, *viz.*, direct taxation and public borrowing. The method used will be governed largely by the purposes for which the money is to be expended. If the amount is large, and the expenditure of a non-recurrent nature, and such that taxation cannot or ought not to be adjusted to raise the money, then public credit should be utilized. The duration of loans should be determined by the benefits accruing from the expenditures, and the rule of equality between the present and the future become the guide. Even with the most restricted state policy public borrowing remains a valid instrument of public financiering. Borrowing, far from always being an evil, is frequently a public good, providing it is not used as a cloak for perpetual debt."
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> "The state is an organism, and its essential nature like that of life in general is dynamic, and no cut-and-dried field of endeavor can be mapped out as good for this and all future times. If this is true, then the above limitations for the most part are inappropriate, when made a part of constitutions, since financial expedients cannot readily be adjusted to a changing political philosophy. The state should and does conserve the interests of the people in perpetuity, and a philosophy of a rigid character should never control its policy or hamper its use of borrowed funds if they are necessary for its operation." [6]

The Commission believes that, within reasonable constitutional limits, the determination of matters concerning the state debt and the extension of the credit of the state is, and should clearly be recognized as, a legislative responsibility. The people of Ohio, in a series of amendments to Article VIII proposed by the General Assembly and adopted by substantial margins during the last 25 years, have shown a willingness to accept

legislative recommendations in fiscal matters, including recommendations which have established the principle of borrowing as an instrument of public finance in the Constitution. At the end of fiscal 1972, the state's bonded indebtedness, incurred under this series of amendments, totaled $1,237,090,000, broken down as follows:

Section of Art. VIII	Year Passed	Favorable Vote	Purpose	Amount Authorized [a]	Amount Issued [a]	Amount Outstanding 6/30/72 [b]
2(c)	1953	60%	Major Thoroughfare Construction	$500	$500	$ 16.3
2(d)	1956	71%	Korean Conflict Bonus	90	60(tot.)	2.4
2(e)	1955	56%	Capital Improvements Construction	150	150	13.9
2(f)	1963	60%	Public Works	250	250	248.1
2(g)	1964	65%	Highways	500	500	302.9
2(h)	1965	57%	Development	290	290	253.2
2(i)	1968	53%	Highway Obligations	500[c]	225[c]	220.6
2(i)			Public Improvements	259[c]	185[c]	179.6

During the 15-year period 1953-1968, the voters of Ohio approved capital improvement debt averaging $163,000,000 per year in authorization. There is, to the knowledge of the Commission, no "ideal" or "proper" level of state debt. However, the Commission concludes that Ohio's post-war debt has not been excessive in comparison to the debt of other states. For example, according to statistics computed from information published by the Bureau of the Census, at the end of fiscal 1970, on a *per capita* basis, Ohio ranked 23rd among the states in the amount of general obligation debt, 26th in the amount of non-guaranteed debt, and 25th in total debt.[7]

However, the Commission concludes, considering Ohio's post-war borrowing pattern, that the state's present $750,000 debt limit is illusory, and that the present method of incurring additional debt, through referenda resulting in constitutional amendments, is certainly unnecessarily cumbersome and potentially ineffective as a device to control state debt. For these reasons, the Commission recommends that both the $750,000 unvoted general obligation debt limit and the method for incurring additional guaranteed debt be changed.

At the present time, Ohio is one of 16 states requiring constitutional amendment to incur guaranteed debt for capital improvement purposes.[8] Twenty-one states require referenda for this purpose,[9] and eleven states have no constitutional debt limit whatever.[10] In addition, the Constitutions of Hawaii[11] and Pennsylvania[12] contain formulas fixing these states' general obligation debt limits at a multiple of general fund revenues or

(a) Dollar amounts in millions.
(b) Dollar amounts in millions, rounded to nearest tenth. Columns may not total due to rounding.
(c) As of June 30, 1972—and with the exception of the Korean Conflict Compensation Fund authorized by Section 2(d) of Article VIII, under which no more bonds will be issued—all remaining constitutional authority to issue general obligation bonds was under Section 2(i). This authority consisted of $274 million for highways—if highway authority is looked upon as a "once only" authority, which it is not—and $74 million for nonhighway public improvements. To the extent that such authority was not used prior to repeal, it would cease upon the repeal of Section 2(i) as proposed by the Commission.

Sources: Office of the Commissioners of the Sinking Fund.
Office of the Secretary of State.

annual tax revenues, respectively, while the Constitution of the Commonwealth of Puerto Rico limits debt service payments to a maximum percentage of the average of a two-year revenue base.[13]

In its study, the Commission considered the following constitutional alternatives on the question of a state debt limitation:

1. Maintaining the present debt limit, and the present method for incurring additional debt.
2. Maintaining the present debt limit, and requiring only a referendum instead of a constitutional amendment to incur additional debt.
3. Increasing the present debt limit to some higher amount, and either permitting the legislature to incur debt within this limit or requiring referendum approval within this limit.
4. Omitting any constitutional debt limit.
5. Creating a flexible debt limit, within which the General Assembly may incur debt for capital improvement purposes without voter approval, and providing that debt outside the constitutional formula should be subject to referendum.

The Commission rejected the possibility of recommending an increase in the present fixed dollar limit to a higher amount, because it concluded that any dollar amount fixed in the Constitution is as likely to be as inappropriate in the future as the present one is now, since it is impossible to make any reasonably accurate long-range economic forecast or to predict the demands by citizens for governmental services—demands which have been rapidly changing during the 20th century.

The Commission also rejected the possibility of recommending that the present debt limit be maintained, and that there be a change in the method of incurring debt from requiring a constitutional amendment to requiring a simple referendum, as was done in the Michigan Constitution of 1963.[14] The Commission chose not to recommend such a proposal, first because there is doubt of the effectiveness of a referendum requirement as an instrument for limiting state debt and, more importantly, because it shares the view expressed by many informed observers that a referendum requirement has a tendency to encourage revenue bond financing in situations in which such financing may be inappropriate, and to shift responsibility for extremely complex fiscal decisions away from elected representatives. A. James Heins, a leading contemporary writer on state constitutional debt restrictions, writes:

> "Others have proposed that states generally adopt the referendum requirement now present in twenty state constitutions. Such action would permit the assumption of present nonguaranteed debt in those states where a pledge of the state's credit is now impossible without constitutional amendment. It would also permit future borrowing with general obligations, but keep the reins in the hands of the electorate, hopefully forestalling the possibility of a runaway state debt. While the proposal would improve the options available in some states, it would not change the position of states currently having referendum provisions in their constitutions. This latter group of states has relatively as large a debt as states currently unrestricted. A referendum provision does not forestall rapid increases in state debt, because nonguaranteed borrowing is available without resort to a referendum. In Kentucky, a referendum state, the Legislative Research Commission had this to say: 'The constitutional arrangement for general obligation bonds ***, designed as a directive and safe-

guard, has served as an effective deterrent. Administrative officials do not relish a statewide drive to gain acceptance of a debt proposal. However, through its corporate agencies the state has employed revenue bonds, which are exempt from the constitutional provisions.' In other words, a referendum provision deters rapid increases in full-faith and credit debt because of the difficulty and cost of holding a referendum, but it does not prevent expensive increases in total debt of which nonguaranteed debt is a part. If a state legislature wishes to borrow without troubling with a referendum, it is generally free to do so through one of the nonguaranteed methods. The cost of referendum and legislative desire to avoid them should not be the deciding factors in the type of obligation selected for issuance by a state. The public should elect responsible officials. If it does not do so, a referendum requirement in a state constitution is not going to protect the public from improper management of state debt."[15]

The National Municipal League, in the sixth edition of its *Model State Constitution*, which is the result of the League's State Constitutional Studies Project, in progress since 1957, also questions the effectiveness of the referendum as an instrument for governing basic debt authority:

"Prior *Models*, and nearly half of existing state constitutions, require that debt authorized by law cannot take effect until approved by referendum of the state's voters. The popular referendum requirement has not proved to be much of a restriction upon the creation of debt, however, since voters are asked to pass judgment with limited or no knowledge of the complex fiscal and general policy issues that prompted the legislature and the governor to seek the new debt."

"Certainly the referendum is not consonant with the fixing of responsibility for policy development in the people's elected representatives. Many believe referenda on debt merely produce legislative irresponsibility, with law-making bodies 'passing the buck' to a bewildered electorate."[16]

Although there is no evidence that the voters of Ohio have ever been deliberately misled in regard to the content and intent of any constitutional amendment under which they have authorized the issuance of additional guaranteed state debt, the Commission believes that the mere scope and complexity of many such amendments make it nearly impossible, in the best of faith, to adequately inform the voters on the issues on which they are being asked to vote, or for the voters to comprehend the issues.

The most complex amendment of this nature now in the Ohio Constitution is Section 2i of Article VIII, adopted in 1968. It provides authority for general obligation debt of up to $759,000,000, subject to certain limitations. These include:

1. That the purpose of the debt be for capital improvements for highways, water pollution control, water management, higher education, technical education, vocational education, juvenile correction, parks and receration, research and development facilities for highway improvements, mental hygiene and retardation, police and fire training, airports, and other state buildings and structures.
2. That not more than $100,000,000 principal amount be issued in any one year for highway improvements and related purposes, and that not more than $500,000,000 be outstanding at any one time for these purposes.

3. That not more than $259,000,000 be issued for the other purposes stated; of this amount $120,000,000 must be used for water pollution control, $100,000,000 for higher education, vocational education, and juvenile correction, $20,000,000 for parks and recreation, and $19,000,000 for airports, state buildings, and police and fire training facilities. (It is important to note that, unlike the provision for highway bonds, these amounts are limits on the authority to issue bonds. Thus, when any one of these purposes has reached its constitutional limit, the General Assembly has no more bonding authority. With highways, on the other hand, the General Assembly can authorize more than $500,000,000, provided it does not have more than $500,000,000 outstanding at any time.)
4. That any bond issue be repaid within 30 years.

Section 2i also contains general instructions concerning funding of payment of bonds. It also authorizes the issuance of "hybrid" revenue bonds for a number of purposes, without regard to the dollar limitation referred to above. The purposes for which Section 2i authorizes issuance of such bonds are mental hygiene and retardation, parks and recreation, state-supported and state-assisted institutions of higher education, including technical education, water pollution control and abatement and water management, and housing of branches and agencies of state government. One recent study of the Ohio Constitution concludes as follows in regard to this section:

> "Thus, the voters have given the legislature virtually unlimited authority to issue bonds for highway improvements, and a substantial authority *** for other improvements. There is no termination date in this section for the cessation of the authority. The effect is to nullify the $750,000 borrowing limitation of Article VIII, Section 1."[17]

This section is a prime example of the debt-authorizing constitutional amendment which, by its very scope, must be over-simplified in the manner in which it is presented to the voter in public information campaigns and on the ballot. Such complexity and over-simplification, combined with the fact that the individual voter must decide whether to accept or reject such an amendment as a "package," in the Commission's view, effectively deprives the electorate of much truly meaningful control over the size of the state's guaranteed and nonguaranteed debt, as well as the purposes for which such debt is incurred, the referendum notwithstanding. The Commission also views a requirement for more frequent and more limited referenda on "ordinary" capital expenditures of the state as impractical and likely to have an unfavorable effect on capital planning and budgeting.

Another alternative rejected by the Commission was that of recommending that the Constitution prescribe no state debt limit at all. As previously indicated, eleven states now have constitutions which fall in this category. Illinois recently adopted such a constitution, in 1970.[18] However, it is the position of the Commission that the Ohio Constitution should contain a debt limit. Also, whatever the merits of the abolition of a state debt limit may be, in the view of the Commission such a proposal would represent too much of a departure from the present method of incurring debt to be acceptable to the people of this state.

The remaining alternative, a basic state general obligation debt limit expressed in a formula based on a moving average of state revenues, which is recommended in this report, seems to this Commission to offer the best solution to the need for modernizing the mechanism by which

the state incurs general obligation or guaranteed debt, while at the same time recognizing the historical preference of the people of Ohio for some amount of constitutional control in fiscal matters.

The concept of a constitutional state debt formula is not novel. Benjamin U. Ratchford advocated such an approach to debt limitation in *American State Debts*, a classic study on the subject published in 1941.[19] Under his proposal, the basic state debt limit would be as follows: the legislature could authorize borrowing so long as the net debt incurred under such authorization did not exceed 100% of the average revenue receipts of the state for the preceding five years. The electorate could, by a referendum vote, authorize borrowing of a similar amount. The normal or basic limit for the debt would thus be an amount equal to twice the average revenue receipts, as defined above, for the preceding five years; it would be a moving limit to be computed each year. Ratchford advocated keeping the voted and nonvoted parts of the limit separate to show (1) the part of the debt authorized by the legislature and by the people and (2) the amount of additional indebtedness which each might authorize. Also, in his proposal, revenue receipts would be defined as (1) net collections from taxes and license and registration fees levied by law; (2) donations and grants from the federal government; and (3) net receipts from state investments and enterprises. While admonishing that "there is no magic in debt limitations, and we should not expect to solve all problems by writing a formula in the constitution," [20] Ratchford nevertheless strongly advocated the adoption of the formula approach to the limitation of state debt, and evaluated his proposal as follows:

> "The *** plan would allow a reasonable and prudent use of the state's credit but would prevent excessive borrowing. Borrowing could be authorized without undue delay, and the debt limit would rise with the increase of state revenues. If the state desired to make heavy outlays, it could, by increasing revenues, pay for a part of the outlays and at the same time raise the debt limit. Large revenues collected to retire a debt would increase the future margin of borrowing both by reducing the existing debt and by raising the debt limit. In emergencies the legislature could invoke additional borrowing power to a limited extent. These provisions would allow all the borrowing that is desirable under normal conditions. If an emergency should arise to make further borrowing necessary, the people always have the privilege of amending the constitution."[21]

In 1958, Ratchford commented that "there does not seem to have been any basic changes in the methods of limiting debts in recent years. Several proposals, originally advanced more than 20 years ago, have made little or no progress. One of these was to limit debts in terms of average revenue receipts. Apparently no state has tried any version of this idea."[21] Two states and the Commonwealth of Puerto Rico have, since that time, adopted constitutional debt limit formulas. While these formulas are alike to the extent of being based on a moving average of revenues, they vary in their particular details, each reflecting the constitutional history and the fiscal situation of the jurisdiction in which each was adopted. The constitutional state debt formula proposed by the Commission in this report fits the same pattern. This formula, which is the cornerstone of the Commission's recommendations for a revised Article VIII, and the other recommendations of the Commission relating to this article, are examined in detail in the remainder of this report.

RECOMMENDATIONS

ARTICLE VIII

Section 1

Present Constitution

Section 1. The State may contract debts, to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Commission Recommendation

The Commission recommends the repeal of Section 1 and the enactment of a new Section 1 to read as follows:

Section 1. (A) THE STATE MAY, BY LAW PASSED WITH THE CONCURRENCE OF THREE-FIFTHS OF THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, CONTRACT DEBT FOR CAPITAL IMPROVEMENTS, CAPITAL ACQUISITIONS, LAND, AND INTERESTS IN THE FOREGOING, AND FOR REFUNDING DEBT CONTRACTED FOR SUCH PURPOSES. DEBT FOR SUCH PURPOSES SHALL NOT BE CONTRACTED IF, IN ANY FISCAL YEAR, THE AMOUNT REQUIRED FOR PRINCIPAL AND INTEREST PAYMENTS ON SUCH DEBT AND ON ALL OUTSTANDING DEBT PREVIOUSLY CONTRACTED WOULD EXCEED SIX PER CENT OF THE AVERAGE OF THE ANNUAL REVENUES OF THE STATE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY, EXCLUDING BORROWED MONEYS, MONEYS RECEIVED FROM THE FEDERAL GOVERNMENT, AND MONEYS REQUIRED TO BE RETURNED BY SECTION 9 OF ARTICLE XII OF THIS CONSTITUTION, RECEIVED BY THE STATE DURING THE THEN TWO PRECEDING FISCAL YEARS. NEW DEBT FOR SUCH PURPOSES SHALL NOT BE CONTRACTED IN ANY FISCAL YEAR IN A TOTAL PRINCIPAL AMOUNT EXCEEDING EIGHT PER CENT OF SUCH REVENUE AVERAGE.

(B) THE STATE MAY, BY LAW, CONTRACT DEBT TO REPEL INVASION, SUPPRESS INSURRECTION, OR DEFEND THE STATE IN WAR.

(C) THE STATE MAY, BY LAW, CONTRACT DEBT TO MEET APPROPRIATIONS DURING ANY FISCAL YEAR, BUT SUCH DEBT SHALL BE PAID NOT LATER THAN THE END OF SUCH FISCAL YEAR.

(D) THE STATE MAY, BY LAW, CONTRACT DEBT IN ADDITION TO THAT, OR FOR PURPOSES OTHER THAN THOSE, PROVIDED FOR IN DIVISION (A), (B), OR (C) OF THIS SECTION, BUT ONLY IF THE QUESTION OF CONTRACTING SUCH DEBT HAS BEEN SUBMITTED TO THE ELECTORS AND APPROVED BY A MAJORITY OF THOSE VOTING ON THE QUESTION. THE MANNER OF SUBMITTING SUCH QUESTIONS SHALL BE PROVIDED BY LAW.

(E) DEBT CONTRACTED PURSUANT TO DIVISION (B), (C), OR (D) OF THIS SECTION SHALL NOT BE INCLUDED IN THE LIMITS OF, NOR BE SUBJECT TO THE REQUIREMENTS OF, DIVISION (A) OR (G) OF THIS SECTION.

(F) THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW FOR THE PAYMENT OF THE STATE DEBT AND FOR THE METHOD AND PROCEDURE FOR INCURRING, EVIDENCING, REFUNDING, AND RETIRING DEBT. THE GENERAL ASSEMBLY SHALL APPROPRIATE SUFFICIENT MONEYS AS WILL PROVIDE FOR THE FULL AND TIMELY PAYMENT OF THE PRINCIPAL OF AND INTEREST ON THE STATE DEBT. IF THE GENERAL ASSEMBLY DOES NOT, AT ANY TIME, MAKE SUCH APPROPRIATIONS, THE TREASURER OF STATE SHALL SET ASIDE FROM THE FIRST REVENUES OF THE STATE APPLICABLE TO THE GENERAL REVENUE FUND AND ANY OTHER APPROPRIATE FUNDS OF THE STATE SUFFICIENT SUMS TO PROVIDE FOR SUCH FULL AND TIMELY PAYMENT AND SHALL SO APPLY THE MONEY SET ASIDE.

(G) AT LEAST FOUR PER CENT OF THE TOTAL PRINCIPAL AMOUNT OF DEBT OUTSTANDING AT THE BEGINNING OF A FISCAL YEAR SHALL BE PAID, OR MONEYS FOR SUCH PAYMENT SET ASIDE, DURING SUCH FISCAL YEAR. FOR THE PURPOSES OF DIVISION (A) OF THIS SECTION, THE GENERAL ASSEMBLY SHALL PROVIDE FOR COMPUTING REQUIRED PRINCIPAL AND INTEREST PAYMENTS, AND MAY PROVIDE FOR ESTIMATING PRINCIPAL AND INTEREST PAYMENTS ON BONDS WHILE NOTES IN ANTICIPATION THEREOF ARE OUTSTANDING, FOR INCLUDING PRINCIPAL AND INTEREST PAYMENTS ON DEBT CONTRACTED TO REFUND OR RETIRE PRIOR DEBT IN LIEU OF SUCH PAYMENTS ON SUCH PRIOR DEBT, AND FOR THE METHOD OF COMPUTING PRINCIPAL AND INTEREST PAYMENTS ON ANY DEBT REQUIRED TO BE RETIRED, OR FOR WHICH SINKING FUND DEPOSITS ARE REQUIRED, PRIOR TO MATURITY. THE TREASURER OF STATE SHALL DETERMINE AND CERTIFY THE ANNUAL PRINCIPAL AND INTEREST PAYMENTS ON OUTSTANDING DEBT, THE REVENUES OF THE STATE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY, AND OTHER FINANCIAL DATA NECESSARY FOR THE PURPOSES OF DIVISION (A) OF THIS SECTION, AND SUCH CERTIFICATION SHALL BE CONCLUSIVE FOR PURPOSES OF THE VALIDITY OF ANY DEBT CONTRACTED PURSUANT TO SUCH DIVISION.

(H) FOR THE PURPOSES OF THIS SECTION, "DEBT" MEANS GENERAL OBLIGATIONS OF THE STATE FOR WHICH THE FAITH, CREDIT, AND TAXING POWER OF THE STATE ARE PLEDGED.

Comment

The wording of present Section 1 has not been changed from that which was enrolled by the Constitutional Convention in 1851.[23] The principal feature of this section is the $750,000 state debt limitation, which was originally inserted into the report by the committee which prepared Article VIII, for discussion purposes, "as a matter of convenience." [24] In 1849, the total revenues of the state were $2,511,119,[25] so that $750,000 represented approximately one-third of the revenues of the state when this provision was adopted. Significantly, in fiscal 1972, based on data provided by the Commissioners of the Sinking Fund and the Department of Finance, Ohio's general obligation or guaranteed debt was 33.3% of the total revenues of the state in that year. It is also interesting to note that in 1912, a proposal by the Constitutional Convention of 1912 to authorize the issuance of $50,000,000 in bonds to finance a state-wide system of inter-county wagon roads was defeated by only two thousand votes, 272,564 to 274,582,[26]

indicating that many voters considered the $750,000 limitation inadequate even at that time.

Section 1 of the Commission's proposal for a revised Article VIII is more comprehensive in scope than present Section 1. Section 1 of the Commission's proposal would not only prescribe a new method for computing the state's guaranteed or general obligation debt limit, but it would also set forth all other constitutional matters relating to guaranteed or general obligation debt. The remainder of the comments under this section deal with each one of these matters, beginning with the basic general obligation state debt limit contained in proposed Section 1, Division (A). Division (A) reads as follows:

(A) THE STATE MAY, BY LAW PASSED WITH THE CONCURRENCE OF THREE-FIFTHS OF THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, CONTRACT DEBT FOR CAPITAL IMPROVEMENTS, CAPITAL ACQUISITIONS, LAND, AND INTERESTS IN THE FOREGOING, AND FOR REFUNDING DEBT CONTRACTED FOR SUCH PURPOSES. DEBT FOR SUCH PURPOSES SHALL NOT BE CONTRACTED IF, IN ANY FISCAL YEAR, THE AMOUNT REQUIRED FOR PRINCIPAL AND INTEREST PAYMENTS ON SUCH DEBT AND ON ALL OUTSTANDING DEBT PREVIOUSLY CONTRACTED WOULD EXCEED SIX PER CENT OF THE AVERAGE OF THE ANNUAL REVENUES OF THE STATE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY, EXCLUDING BORROWED MONEYS, MONEYS RECEIVED FROM THE FEDERAL GOVERNMENT, AND MONEYS REQUIRED TO BE RETURNED BY SECTION 9 OF ARTICLE XII OF THIS CONSTITUTION, RECEIVED BY THE STATE DURING THE THEN TWO PRECEDING FISCAL YEARS. NEW DEBT FOR SUCH PURPOSES SHALL NOT BE CONTRACTED IN ANY FISCAL YEAR IN A TOTAL PRINCIPAL AMOUNT EXCEEDING EIGHT PER CENT OF SUCH REVENUE AVERAGE.

Division (A) of Section 1 of the proposed Article VIII would permit the General Assembly, by a three-fifths (3/5) vote of the members elected to each house, to contract general obligation or guaranteed debt, subject to limitations contained in the section, for "capital improvements, capital acquisitions, land, and interests in the foregoing." Although the Commission feels that broad interpretation of "capital improvements" would probably cover all the items enumerated, it concluded that it is preferable to list these items in order to avoid any uncertainty regarding the intent of this provision. Guaranteed debt could also be contracted for refunding debt for the foregoing purposes, with the intent of giving the state the flexibility to take advantage of favorable changes in the money market or in financing methods, as such changes and methods may develop in the future.

The three-fifths (3/5) vote requirement is recommended to assure that any debt-authorizing legislation has broad support in the General Assembly. It corresponds with the present requirement of 3/5 of each house to place a proposed constitutional amendment on the ballot for voter approval.

The base from which the state's basic general obligation debt limit would be calculated is the average of the annual state revenues subject to appropriation by the General Assembly in the then preceding two fiscal years, excluding borrowed moneys, moneys received from the federal government, and 50% of the income and inheritance taxes which are required by the Constitution to be returned to specified local governmental units. The reason for recommending the exclusion of borrowed moneys is that the

Commission believes that the state ought not to include in the base used to calculate the amount it can borrow, moneys which it has already borrowed. The Commission also believes that federal funds ought not to be included for the reason that this source of revenue is too unpredictable, being entirely dependent on federal laws and programs over which the state presently has little or no control. Further, the Commission believes that the one-half (½) of all income and inheritance taxes which the state must share with local government units under Section 9 of Article XII should logically also be excluded from the base, since the state has no control over these funds.

The Commission believes that the revenue base it has chosen to recommend is one which reasonably reflects the state's ability to repay borrowed funds, and that the elements constituting the base can be determined with certainty.

The choice of a two fiscal year period for determining the base is deliberate, since the Commission believes that the debt limit should be quickly affected by a change in revenues, particularly in periods of economic recession.

The amount of debt which could be contracted pursuant to Division (A) would be limited in two ways: (1) an overall debt service limit of 6% of the base and (2) an annual principal amount limit of 8% of the base. The overall debt service limit of 6% would serve to limit the amount of the state's revenues (as defined, constituting the base) which could be spent in any fiscal year to pay principal and interest on general obligation or guaranteed debt.

This division would expressly prohibit the contracting of debt if, in any fiscal year, payments for principal and interest on the proposed debt, and all guaranteed or general obligation debt previously contracted—including general obligation debt contracted under present constitutional provisions [27] would exceed 6% of the base. In point of fact, Ohio has, during several recent fiscal years, spent more on general obligation debt service than would be permitted under the proposed 6% general obligation debt service limit. With the revenue base defined as proposed by the Commission in this report, such debt service was 4.8% of revenues in fiscal 1967; 6.5% of revenues in fiscal 1968; 6.0% of revenues in fiscal 1969; 7.3% of revenues in fiscal 1970; 7.0% of revenues in fiscal 1971; and 7.1% of revenues in fiscal 1972.[28]

The second limitation on debt issuance, the annual 8% principal amount limit, will assure that an inordinate amount of new debt would not be issued in any one fiscal year. Five of the six capital improvement bond amendments adopted in recent years have included provisions limiting the amount of new debt issuable in any one year and the imposition of this second restriction on the General Assembly's authority to issue new debt seems desirable to the Commission. With the revenue base defined as proposed, the 8% principal amount limit would have amounted to approximately $120,000,000 for fiscal years 1967 and 1968; $129,000,000 in fiscal 1969; $146,000,000 in fiscal 1970; $162,000,000 in fiscal 1971; and $172,000,000 in fiscal 1972. New debt actually issued in each of the last four years of this period considerably exceeded 8% of the base revenues, and the annual average of the principal amount of bonds issued during these six fiscal years amounted to $207,000,000.[29] The calculation of the principal amount limit for fiscal 1973, $193,000,000, when compared to this historical average of bonds issued indicates that the proposed 8% limit, if it were now in force, would permit approximately the same level of new indebted-

ness in fiscal 1973 as that incurred, on an average basis, in recent fiscal years.

The Commission believes that the adoption of the foregoing general obligation debt formula would have several beneficial effects on the capital spending program of the state. First, it would transfer to the General Assembly the responsibility for making decisions on "ordinary" expenditures for capital improvements, at spending levels approximating those which the people of Ohio, through the approval of a series of constitutional amendments authorizing the contracting of debt, have shown themselves willing to accept. This transfer of responsibility, in the Commission's view, is likely to lead to an improvement in capital planning and budgeting processes by constantly calling attention to the link between capital expenditures and revenues and the need for careful coordination between the two. Such coordination is not neglected in Ohio at the present time under the Capital Plan,[30] but would almost certainly be improved by a procedure under which the debt margin could be calculated and a program of capital improvements carried out on a regular and systematic basis without having to accumulate capital projects for presentation in a referendum not necessarily when they are needed but when it is politically feasible to do so. Second, the Commission believes that the formula will provide sufficient leeway to allow the state to finance or refinance through general obligation bonds some projects which it is now financing through revenue bonds at higher interest rates. General obligation debt is, as a rule, significantly less costly than revenue bond debt.[31]

Division (B) reads as follows:

(B) THE STATE MAY, BY LAW, CONTRACT DEBT TO REPEL INVASION, SUPPRESS INSURRECTION, OR DEFEND THE STATE IN WAR.

Division (B) of the proposed Section 1 would give the General Assembly power to contract debt outside the debt limit "to repel invasion, suppress insurrection, and defend the state in war." Similar authorization is granted in present Section 2 of Article VIII of the Constitution, which would be replaced by Division (B). The Commission recommends the preservation of such authority while realizing that, in a strict sense, such a provision may not be necessary today because military defense is recognized as an essentially federal function.

Division (C) reads as follows:

(C) THE STATE MAY, BY LAW, CONTRACT DEBT TO MEET APPROPRIATIONS DURING ANY FISCAL YEAR, BUT SUCH DEBT SHALL BE PAID NOT LATER THAN THE END OF SUCH FISCAL YEAR.

Division (C) of the proposed Section 1 would give the state short-term borrowing authority to meet appropriations, an authority which is not presently contained in the Constitution. This authority would have no dollar limit, but it could not be used as the basis for long-term borrowing, since all money borrowed under this division would have to be repaid within the fiscal year in which it is borrowed. The provision is recommended solely for the purpose of giving the state an option available to the money managers of private businesses, namely to borrow for short periods of time in order to alleviate cash-flow problems within a fiscal year. At the present time, since the state has no short-term borrowing authority, it must keep large cash balances on hand during the "high-cash" periods in order to be able to meet payrolls and other payables falling due during the "low-cash" periods.

For example, because of the inherently cyclical nature of the tax-collection process, the state has more cash or "near-cash" funds at certain times of the year than at other times. Constitutional short-term borrowing authority would at least give the state the option to choose the most appropriate fiscal course of action in any given circumstances—and permit the state to rely on short-term borrowing to bridge a temporary shortage in cash-flow, as is normal business practice. Second, short-term borrowing authority would enable the state to take advantage of the discount, normally ranging from 2% to 3%, which many vendors offer the state for prompt payment of bills, also in accordance with usual business practice. In the appropriate circumstance, the cost of borrowing for a short period—for example, a month or less—could be more than offset by the saving represented by a discount, resulting in a net saving to the taxpayer. Third, short-term borrowing authority would minimize the possibility that the state would have to "borrow" from its creditors or local governments by late payment. This situation was observed in Michigan, prompting the Convention which produced the Michigan Constitution of 1963 to recommend a provision authorizing short-term borrowing, and to state as follows:

> "The financial flexibility introduced here should make it unnecessary for the state to continue the present practice of 'borrowing' from its creditors and local governments by late payment—a policy which has been sometimes required because the state's income flow is irregular and often not correlated as to time with its disbursements." [82]

For these reasons, the Commission recommends Division (C) of the proposed Section 1.

Division (D) reads as follows:

(D) THE STATE MAY, BY LAW, CONTRACT DEBT IN ADDITION TO THAT, OR FOR PURPOSES OTHER THAN THOSE, PROVIDED FOR IN DIVISION (A), (B), OR (C) OF THIS SECTION, BUT ONLY IF THE QUESTION OF CONTRACTING SUCH DEBT HAS BEEN SUBMITTED TO THE ELECTORS AND APPROVED BY A MAJORITY OF THOSE VOTING ON THE QUESTION. THE MANNER OF SUBMITTING SUCH QUESTIONS SHALL BE PROVIDED BY LAW.

Division (D) would authorize the state to contract debt in addition to, or for purposes other than, those set forth in Divisions (A), (B), and (C) of this section, provided the question of whether such debt could be incurred has been submitted to the electorate and has received a majority vote for passage. The last sentence would authorize the General Assembly to prescribe the technical procedures for submitting such questions to the electorate. The purpose of this division would be to require voter approval for incurring debt in addition to or outside of the constitutional limits prescribed in Divisions (A), (B), and (C), without a constitutional amendment, thus preventing the accumulation of needless and often obsolete clutter of financial detail in the Constitution. The situations in which such authority might be sought could include noncapital items, such as veterans' bonuses. Other situations might arise in which the debt limit, in the opinion of the General Assembly, should be increased for a particular capital improvement need, and the legislature could present that need to the voters for their approval in a referendum.

The Commission believes that its recommendation of Division (D) is consistent with its recommendation of Division (A). The basic purpose of Division (A) is to provide the General Assembly freedom within an historically justifiable limit with respect to "ordinary" capital improvements, which are a normal part of state government. In regard to such expendi-

tures, the Commission believes that the General Assembly should be free to incur debt without either a constitutional amendment or a referendum, within the flexible debt limit proposed in this report. However, the Commission also believes that the General Assembly should have to seek voter approval before incurring general obligation debt outside the proposed debt limit. It is for this reason that the adoption of Division (D) is recommended.

Division (E) reads as follows:

(E) DEBT CONTRACTED PURSUANT TO DIVISION (B), (C), OR (D) OF THIS SECTION SHALL NOT BE INCLUDED IN THE LIMITS OF, NOR BE SUBJECT TO THE REQUIREMENTS OF, DIVISION (A) OR (G) OF THIS SECTION.

Division (E) of the proposed Section 1 would exclude debt contracted pursuant to Division (B), (C), or (D) of this section from the limits or requirements of Division (A) or (G) of this section. Excluding voter-approved and emergency debt from the limit continues the present situation, and the Commission believes that short-term borrowing should also be excluded, as being different in duration and purpose from borrowing for capital improvements.

Division (F) reads as follows:

(F) THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW FOR THE PAYMENT OF THE STATE DEBT AND FOR THE METHOD AND PROCEDURE FOR INCURRING, EVIDENCING, REFUNDING, AND RETIRING DEBT. THE GENERAL ASSEMBLY SHALL APPROPRIATE SUFFICIENT MONEYS AS WILL PROVIDE FOR THE FULL AND TIMELY PAYMENT OF THE PRINCIPAL OF AND INTEREST ON THE STATE DEBT. IF THE GENERAL ASSEMBLY DOES NOT, AT ANY TIME, MAKE SUCH APPROPRIATIONS, THE TREASURER OF STATE SHALL SET ASIDE FROM THE FIRST REVENUES OF THE STATE APPLICABLE TO THE GENERAL REVENUE FUND AND ANY OTHER APPROPRIATE FUNDS OF THE STATE SUFFICIENT SUMS TO PROVIDE FOR SUCH FULL AND TIMELY PAYMENT AND SHALL SO APPLY THE MONEY SET ASIDE.

Division (F) prescribes certain conditions attached to all state general obligation borrowing, whether for capital improvements or for other purposes. It would require that state debt be repaid, and authorize the General Assembly to enact the necessary laws respecting methods and procedures for incurring, evidencing, refunding, and retiring state debt, and require the Treasurer to set aside sufficient moneys from the state revenues to pay the state debt if the General Assembly fails to appropriate or make adequate appropriations. The latter provision offers a guarantee to bond purchasers that a debt will be repaid. The Commission has been advised that such a guarantee is most desirable, from a practical point of view, to facilitate the marketing of state bonds. Presently effective Sections 2b through 2i of Article VIII, which authorize the issuance of general obligation debt above the $750,000 limitation and which would be repealed under the Commission proposal, purport to be self-executing by providing that the moneys pledged to the repayment of the debt authorized in each section are subjected to repayment of the debt without necessity for further appropriation. While the last sentence of Division (F) is not an exact equivalent of such a provision it is, likewise, intended to give the bond buyer a protection which he would not otherwise have.

Division (G) reads as follows:

(G) AT LEAST FOUR PER CENT OF THE TOTAL PRINCIPAL AMOUNT OF DEBT OUTSTANDING AT THE BEGINNING OF A FISCAL YEAR SHALL BE PAID, OR MONEYS FOR SUCH PAYMENT SET ASIDE, DURING SUCH FISCAL YEAR. FOR THE PURPOSES OF DIVISION (A) OF THIS SECTION, THE GENERAL ASSEMBLY SHALL PROVIDE FOR COMPUTING REQUIRED PRINCIPAL AND INTEREST PAYMENTS, AND MAY PROVIDE FOR ESTIMATING PRINCIPAL AND INTEREST PAYMENTS ON BONDS WHILE NOTES IN ANTICIPATION THEREOF ARE OUTSTANDING, FOR INCLUDING PRINCIPAL AND INTEREST PAYMENTS ON DEBT CONTRACTED TO REFUND OR RETIRE PRIOR DEBT IN LIEU OF SUCH PAYMENTS ON SUCH PRIOR DEBT, AND FOR THE METHOD OF COMPUTING PRINCIPAL AND INTEREST PAYMENTS ON ANY DEBT REQUIRED TO BE RETIRED, OR FOR WHICH SINKING FUND DEPOSITS ARE REQUIRED, PRIOR TO MATURITY. THE TREASURER OF STATE SHALL DETERMINE AND CERTIFY THE ANNUAL PRINCIPAL AND INTEREST PAYMENTS ON OUTSTANDING DEBT, THE REVENUES OF THE STATE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY, AND OTHER FINANCIAL DATA NECESSARY FOR THE PURPOSES OF DIVISION (A) OF THIS SECTION, AND SUCH CERTIFICATION SHALL BE CONCLUSIVE FOR PURPOSES OF THE VALIDITY OF ANY DEBT CONTRACTED PURSUANT TO SUCH DIVISION.

Division (G) of proposed Section 1 is concerned with the technical aspects of the administration of state debt. The first sentence would require that at least 4% of the principal of the general obligation debt outstanding at the beginning of the fiscal year be repaid within that fiscal year, or money for its payment set aside. The 4% is not intended to apply to any particular issue of bonds, but rather to the aggregate of the principal of the general obligation debt, including debt which would be outstanding at the time of the adoption of this proposal. The Commission believes that this approach would preserve a measure of desirable flexibility in regard to structuring the repayment of particular debts, while at the same time assuring that at least 4% of the principal of the total debt outstanding at the beginning of a fiscal year is repaid within that fiscal year, or money for its payment is set aside. The practical effect of the foregoing provision would be to require the establishment and maintenance of orderly repayment schedules. The option to set money aside is proposed because there are bonds by the terms of which payment of principal to the bondholder is not required in every fiscal year during which the bond is outstanding.

Division (G) would further require the General Assembly to provide the required principal and interest payments for the nonvoted capital improvement debt, and authorize other provisions deemed necessary for the purpose of estimating principal and interest payments on bonds issued for such purposes while bond anticipation notes are outstanding on such bonds, to include payments on debt contracted to refund or retire prior debt for other payments on such prior debt, and for computing principal and interest payments on debt which is required to be retired before maturity, or in connection with which sinking fund deposits are required. This division also imposes on the Treasurer of State the duty to certify the financial data necessary for the computations of Division (A), and provides that such certification shall be conclusive for purposes of the debt contracted pursuant to Division (A). The provision regarding the conclusiveness of the Treasurer's certification is inserted because the Com-

mission has been informed that its omission could result in an adverse effect on the credit rating of the state and the marketability of its bonds, since certainty in the authority to issue bonds is required in bond market transactions.

Division (H) reads as follows:

(H) FOR THE PURPOSES OF THIS SECTION, "DEBT" MEANS GENERAL OBLIGATIONS OF THE STATE FOR WHICH THE FAITH, CREDIT, AND TAXING POWER OF THE STATE ARE PLEDGED.

Division (H) of the proposed Section 1 would define "debt" for purposes of this section.

At the present time, the Constitution contains no definition of the word "debt"—which is intended to refer to general obligation or guaranteed debt only for purposes of Section 1 of the proposed Article VIII. The Commission believes that this section should contain such a definition, for purposes of clearly distinguishing general obligation debt from debt incurred through revenue bonds. The traditional definition of general obligation debt is that it is debt to the repayment of which the "faith and credit" or "full faith and credit" of the state are pledged. However, these terms, standing alone, still appear to have no precise definition themselves, in relation to state financing, despite broad use. It does appear, however, that the essential characteristic of general obligation debt is that the pledge to repay it is expressly or impliedly backed by the taxing power of the state, and that the concept of what constitutes "taxing power" is universally understood.[33] In practical terms, "the power of taxation is a power to enforce contribution from persons and property for the maintenance of the government." [34]

Recommendation for Repeal

The Commission recommends the repeal of the following sections of present Article VIII contemporaneously with the enactment of the proposed Section 1 of Article VIII: Sections 1, 2, 3, and 2b, 2c, 2d, 2e, 2f, 2g, and 2h.[35] The Commission also recommends the repeal of present Section 2i except that the "hybrid" revenue bond portion of this section would be preserved as a new Section 3 in the proposed article.

The Commission further recommends the repeal of present Section 6 of Article XII which reads as follows: "Except as otherwise provided in this Constitution the state shall never contract any debt for purposes of internal improvement." The Commission feels that this section is no longer necessary, since the proposed Article VIII would adequately and completely cover the question of how the state may incur debt for internal improvement or other public purposes.

ARTICLE VIII
Section 2

Present Constitution

Section 2. In addition to the above limited power, the State may contract debts to repel invasion, suppress insurrection, defend the State in war, or to redeem the present outstanding indebtedness of the State: but the money, arising from the contracting of such debts, shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever; and all debts, incurred to redeem the present outstanding indebtedness of the State, shall be so contracted as to be payable by the sinking fund, hereinafter provided for, as the same shall accumulate.

Commission Recommendation

The Commission recommends the repeal of Section 2 and the enactment of a new Section 2 to read as follows:

Section 2. NO STATE DEBT SHALL BE CONTRACTED NOR SHALL THE CREDIT OF THE STATE BE USED EXCEPT FOR A PUBLIC PURPOSE DECLARED BY THE GENERAL ASSEMBLY IN THE LAW AUTHORIZING SUCH DEBT OR USE OF CREDIT.

Comment

Present Section 2 of Article VIII has two parts: the first, which ends with the word "whatever," contains the so-called "emergency borrowing power" to repel invasion, suppress insurrection, or defend the state in war, or to redeem "the present outstanding indebtedness of the state," and mandates that all moneys borrowed for these purposes shall be applied to no other purpose. The second part requires that all debt incurred to redeem the present outstanding indebtedness of the state shall be repaid through a sinking fund to be provided for in the Constitution.

Section 2 has survived unchanged since the time of its adoption, and exemplifies the preoccupation of its drafters with "the present outstanding indebtedness of the state," that is, the specific debt arising from internal improvements, mainly canals, which is referred to in the introduction to this report.

In Division (B) of proposed Section 1, the Commission recommends the retention of the provision which authorizes borrowing outside the general obligation debt limit to repel invasion, suppress insurrection, and defend the state in war. However, the Commission believes that a constitutional provision that all moneys arising from a loan for these purposes shall be applied to them, as required by present Section 2, is redundant, and should be omitted from the Constitution. The references to Ohio's canal debt, which has long been paid, should also be omitted. In addition, the Commission recommends the repeal of all constitutional provisions relating to the Sinking Fund, as explained in the Comments to Sections 7-11 of Article VIII.

The proposed Section 2 reads as follows:

"No state debt shall be contracted nor shall the credit of the state be used except for a public purpose declared by the General Assembly in the law authorizing such debt or use of credit."

This new section would replace present Section 4 of Article VIII. It would prohibit the contracting of state debt and the extension of state credit except when a public purpose has been declared by the General Assembly, whereas present Section 4 of Article VIII prohibits the extension of state credit for any individual, association or corporation, whether or not a public purpose would be served by it, and also prohibits the state from being a joint owner or stockholder in any company or association, regardless of the purpose for which such company or association is formed. In the Commission's view, neither of these prohibitions is necessary in the Constitution today and may, in fact, prevent such beneficial cooperation as may be deemed advisable by the General Assembly between the governmental and private sectors in providing essential benefits and services for the public good. It seems to the Commission that such cooperation is receiving increasing attention in modern society and that the judgment should properly be a legislative matter.

There has already been a relaxation of the ban against the extension of the credit of the state in two significant constitutional amendments adopted in the last decade. Article VI, Section 5, adopted in 1965, permits the state to guarantee loans to Ohio residents for higher education, and Article VIII, Section 13, adopted in 1968, permits the state, as well as its

political subdivisions, taxing districts or public authorities, to guarantee or make loans and to borrow money and issue revenue bonds for purposes of industrial development.

As to the determination of what constitutes a "public purpose," the Commission believes that when the General Assembly has made such a determination, its decision should not be lightly disturbed by the courts, and that the definition of what constitutes a "public purpose" should not be "frozen" into the Constitution.

As stated in *Chase v. Board of Tax Appeals:* "When dealing with constitutional phrases such as "public property" and "public use" we must remember that if these phrases are to be anything more than frozen abstractions embedded in the rock of past generations, they must be amenable to the expansion necessary to meet the exigencies of the present. As Mr. Justice Holmes has stated: 'A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' "[36] And the California Constitution Revision Commission has said:

> "It appears that the term "public purpose" is not necessarily a static concept, but rather adjusts to the changing concepts of government. If the activity falls within the realm of governmental duty, the requisite public purpose will probably be found even though certain persons or organizations may be directly benefited. Under this test, it is the essential character of the activity promoted which determines the validity of expenditure.
>
> Other cases have measured the validity of the interest to be promoted by determining the magnitude of the interest to be effected. Whether a given expenditure will be held valid depends on the degree to which the general community is ultimately benefited. If a large number of people are benefited, there is greater likelihood that the legislation will be upheld.
>
> In a pragmatic sense the Legislature largely determines what is a public purpose. In this determination, the Legislature is vested with discretion which is not controlled by the courts unless the action is clearly evasive or violative of other constitutional provisions. In other words, the Legislature determines the method of promoting a public purpose and it is the sole judge of the wisdom and necessity of expending public funds. *When the Legislature has declared the use to be public its judgment will be respected by the courts unless the use is palpably without reasonable foundation. Alameda County v. Janssen,* 16 Calif. 2d 276, 281, 106 P. 2nd 11 (1940)."[37] (Emphasis added.)

It is with the hope and intent of removing an impediment to beneficial cooperation between the public and private sectors for public purposes—cooperation which the Commission believes the citizens of Ohio accept and expect as a matter of course—and fixing responsibility for determining "public purpose" in the General Assembly while minimizing the need for litigation in this area, that the Commission recommends the adoption of proposed Section 2 and the repeal of Section 4 of the present Article VIII.

ARTICLE VIII

Section 3

Present Constitution

Section 3. Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by, or on behalf of the State.

Commission Recommendation

The Commission recommends the repeal of Section 3 and the enactment of a new Section 3 to read as follows:

Section 3. THE GENERAL ASSEMBLY MAY AUTHORIZE THE ISSUANCE OF REVENUE OBLIGATIONS AND OTHER OBLIGATIONS, THE OWNERS OR HOLDERS OF WHICH ARE NOT GIVEN THE RIGHT TO HAVE EXCISES OR TAXES LEVIED BY THE GENERAL ASSEMBLY FOR THE PAYMENT OF PRINCIPAL THEREOF OR INTEREST THEREON, FOR THE ACQUISITION, CONSTRUCTION, RECONSTRUCTION, OR OTHER IMPROVEMENT OF, AND PROVISION OF EQUIPMENT FOR, BUILDINGS, STRUCTURES, OR OTHER IMPROVEMENTS, AND NECESSARY PLANNING AND ENGINEERING, AND THE ACQUISITION AND IMPROVEMENT OF REAL ESTATE AND INTERESTS THEREIN REQUIRED WITH RESPECT TO THE FOREGOING, INCLUDING PARTICIPATION IN SUCH CAPITAL IMPROVEMENTS WITH THE FEDERAL GOVERNMENT, MUNICIPAL CORPORATIONS, COUNTIES, OR OTHER GOVERNMENTAL ENTITIES OR ANY ONE OR MORE OF THEM WHICH PARTICIPATION MAY BE BY GRANTS, LOANS, OR CONTRIBUTIONS TO THEM FOR ANY OF SUCH CAPITAL IMPROVEMENTS, FOR MENTAL HYGIENE AND RETARDATION, PARKS AND RECREATION, STATE SUPPORTED AND STATE ASSISTED INSTITUTIONS OF HIGHER EDUCATION, INCLUDING THOSE FOR TECHNICAL EDUCATION, WATER POLLUTION CONTROL AND ABATEMENT, WATER MANAGEMENT, AND HOUSING OF BRANCHES AND AGENCIES OF STATE GOVERNMENT, WHICH OBLIGATIONS SHALL NOT BE DEEMED TO BE DEBTS OR BONDED INDEBTEDNESS OF THE STATE UNDER OTHER PROVISIONS OF THIS CONSTITUTION. SUCH OBLIGATIONS MAY BE SECURED BY A PLEDGE UNDER LAW, WITHOUT NECESSITY FOR FURTHER APPROPRIATION, OF ALL OR SUCH PORTION AS THE GENERAL ASSEMBLY AUTHORIZES OF CHARGES FOR THE TREATMENT OR CARE OF MENTAL HYGIENE AND RETARDATION PATIENTS, RECEIPTS WITH RESPECT TO PARKS AND RECREATIONAL FACILITIES, RECEIPTS OF OR ON BEHALF OF STATE SUPPORTED AND STATE ASSISTED INSTITUTIONS OF HIGHER EDUCATION, OR OTHER REVENUES OR RECEIPTS, SPECIFIED BY LAW FOR SUCH PURPOSE, OF THE STATE OR ITS OFFICERS, DEPARTMENTS, DIVISIONS, INSTITUTIONS, BOARDS, COMMISSIONS, AUTHORITIES, OR OTHER STATE AGENCIES OR INSTRUMENTALITIES, AND THIS PROVISION MAY BE IMPLEMENTED BY LAW TO BETTER PROVIDE THEREFOR; PROVIDED, HOWEVER, THAT ANY CHARGES FOR THE TREATMENT OR CARE OF MENTAL HYGIENE OR RETARDATION PATIENTS MAY BE SO PLEDGED ONLY TO OBLIGATIONS ISSUED FOR CAPITAL IMPROVEMENTS FOR MENTAL HYGIENE AND RETARDATION, ANY RECEIPTS WITH RESPECT TO PARKS AND RECREATION MAY BE SO PLEDGED ONLY TO OBLIGATIONS ISSUED FOR CAPITAL IMPROVEMENTS FOR PARKS AND RECREATION, ANY RECEIPTS OF OR ON BEHALF OF STATE SUPPORTED OR STATE ASSISTED INSTITUTIONS OF HIGHER EDUCATION MAY BE SO PLEDGED ONLY TO OBLIGATIONS ISSUED FOR CAPITAL IMPROVEMENTS FOR STATE SUPPORTED OR STATE ASSISTED INSTITUTIONS OF HIGHER EDUCATION, AND ANY OTHER REVENUES OR RECEIPTS MAY BE SO PLEDGED ONLY TO OBLIGATIONS ISSUED FOR CAPITAL IM-

PROVEMENTS WHICH ARE IN WHOLE OR IN PART USEFUL TO, CONSTRUCTED BY, OR FINANCED BY THE DEPARTMENT, BOARD, COMMISSION, AUTHORITY, OR OTHER AGENCY OR INSTRUMENTALITY THAT RECEIVES THE REVENUES OR RECEIPTS SO PLEDGED. THE AUTHORITY PROVIDED BY THIS SECTION IS IN ADDITION TO, CUMULATIVE WITH, AND NOT A LIMITATION UPON, THE AUTHORITY OF THE GENERAL ASSEMBLY UNDER OTHER PROVISIONS OF THIS CONSTITUTION; SUCH SECTION DOES NOT IMPAIR ANY LAW HERETOFORE ENACTED BY THE GENERAL ASSEMBLY, AND ANY OBLIGATIONS ISSUED UNDER ANY SUCH LAW CONSISTENT WITH THIS SECTION SHALL BE DEEMED TO BE ISSUED UNDER AUTHORITY OF THIS SECTION. THE PRINCIPAL OF AND INTEREST ON OBLIGATIONS AUTHORIZED BY THIS SECTION SHALL BE EXEMPT FROM TAXATION WITHIN THIS STATE.

Comment

Under the Commission's proposal, present Section 3 would be repealed as obsolete, and a new Section 3 substituted in its place. The proposed Section 3 is a transfer of the "hybrid" revenue bond provisions of present Section 2i of Article VIII. The Commission intends no substantive change to be effected by the transfer, the purpose of minor language changes being solely for purposes of grammar.

The proposed Section 3, like the corresponding provisions of present Section 2i, would authorize the issuance of "hybrid" revenue bonds for capital improvements for purposes of mental hygiene and retardation, parks and recreation, state supported and state assisted institutions of higher education, including technical education, water pollution control and abatement, water management, and housing of branches and agencies of state government.

A "pure" revenue bond is a revenue bond to the repayment of which only the revenues generated by the facility being financed with the proceeds of the bond are pledged, while a "hybrid" revenue bond is a bond to the repayment of which certain other revenues or receipts may be pledged as well. Present Section 2i and the proposed Section 3 permit the General Assembly to make such a pledge by law. The issuance of a "pure" revenue bond does not create a debt of the state. Therefore, such a bond does not fall within the $750,000 debt limitation of present Section 1 of Article VIII, and no constitutional authorization is needed for its issuance. The effect of the "hybrid" revenue bond provisions of present Section 2i is to exempt "hybrid" bonds from the $750,000 limitation, also. The Commission is mindful of the fact that the voters approved "hybrid" revenue bond financing quite recently, in 1968. Primarily for this reason, the Commission recommends that the "hybrid" revenue bond provisions of present Section 2i be retained as a new Section 3 of Article VIII and that bonds issued pursuant to this section be exempt from the general obligation debt limit, as is presently the case.

However, consistent with its view that all sections of Article VIII which authorize the issuance of general obligation bonds in specific amounts for specific purposes should be removed from the Constitution, the Commission recommends the repeal of the general obligation bond provisions of present Section 2i. At the same time, the Commission wishes to emphasize that the enumeration of purposes for which revenue bonds may be issued under the proposed Section 3 is not intended as a limit on the power of the General Assembly to define "public purpose" pursuant to the proposed

Section 2. Neither is the enumeration of purposes for which revenue bonds may be issued under the proposed Section 3 intended to prevent the General Assembly from financing or refinancing facilities for which revenue bonds have been or may be issued pursuant to present Section 2i of Article VIII or the proposed Section 3 with general obligation bonds under the provisions of Section 1 of the proposed Article VIII.

ARTICLE VIII

Section 4

Present Constitution

Section 4. The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the State ever hereafter become a joint owner, or stockholder, in any company or association in this State, or elsewhere, formed for any purpose whatever.

Commission Recommendation

The Commission recommends the repeal of Section 4 and the enactment of a new Section 4 to read as follows:

Section 4. EXCEPT AS PROVIDED BY LAW, NO LOCAL GOVERNMENTAL ENTITY IN THIS STATE SHALL BECOME A STOCKHOLDER IN, RAISE MONEY FOR, OR LOAN ITS CREDIT TO OR IN AID OF, ANY JOINT STOCK COMPANY, CORPORATION, OR ASSOCIATION.

Comment

Section 4 of Article VIII of the present Constitution is recommended for repeal, and the subject matter covered by it is included in the Commission recommendation for a new Section 2. For a discussion of the present Section 4 and the reasons for the proposed Section 2, see the Comment following Section 2.

The proposed new Section 4 is intended to replace present Section 6, which would be repealed. Section 6 presently reads as follows:

Section 6. No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit.

The first portion of present Section 6 prohibits any county, city, town or township from extending its credit, and joint ownership or ownership of stock. This portion of present Section 6 dates from the Constitutional Convention of 1850-1851, while the second portion relating to the insurance of public buildings or property and the regulation of insurance companies dates from the Constitutional Convention of 1912.

Undoubtedly, the 1851 portion of this section was motivated by a desire on the part of that Convention to separate the public and private sectors of the economy as completely as possible to stop abuses prevalent at the time. The framers of this provision wanted to prevent the public-private mix even though a public purpose would be accomplished. Indeed, one delegate stated that he thought the purpose of present Section 6 was to "pre-

vent municipal corporations from combining their means with those of individuals, for the purpose of effecting a *public object.*" [38] The Commission believes that the absolute separation of the public and private sectors mandated by present Section 6 is no longer consonant with the views of the majority of citizens regarding the proper relationship of the two sectors, and yet feels that some continuing constitutional control over the financial activities of local governments is desirable. Therefore, the proposed Section 4 would permit the General Assembly to prescribe by law the conditions under which local governmental entities could engage in activities prohibited by present Section 6. As indicated in the Comment on proposed Section 2, present Section 13 has already modified these prohibitions in the area of industrial development financing. The Commission chose to substitute the expression "local governmental entity" for "county, city, town or township," presently used in Section 6, because it seems desirable that the scope of proposed Section 4 should cover all types of governmental entities now in existence as well as forms of local governmental organization which may be formed in the future.

The Commission also intends that the use of the term "local governmental entity" will serve to distinguish units of local government with general governmental powers, such as cities and villages, from special purpose districts which may be defined as "political subdivisions" by law. Parenthetically, it may be noted that the phrase "governmental entities" is presently used, without definition, in the first paragraph of Section 2h of Article VIII.

The insurance provisions of present Section 6 appear to have no relationship to the first part of the section discussed above. However, these were added in 1912 as the result of two 1911 opinions of the Attorney General which held that the insurance of public buildings or property in mutual insurance associations or companies violated Section 6 of Article VIII as it stood at that time by constituting either an extension of public credit or unconstitutional joint ownership. These two opinions figured prominently in the discussion of Proposal 51 which, upon adoption, became the "proviso" and the final sentence of this section.[39] The "proviso" permits any city, county, town or township to insure public property or buildings in mutual insurance associations or companies. The final sentence authorizes the state to regulate rates charged by any insurance company, corporation or association in Ohio.

The "proviso" is, obviously, a direct response to the Attorney General's opinions. Research indicates that there are no statutes at the present to implement it, and in the few instances in which the right of local governmental entities to insure public buildings or property in mutual companies has been before the courts, they have recognized the right as being derived directly from Section 6 of Article VIII.[40] The Commission views the "provio" as legislative detail which should not be in the Constitution. However, if this provision were simply repealed, it is possible that the reasoning of the Attorney General's opinions would still be applied to cast doubt on the ability of governmental entities to insure public buildings and property in mutual associations or companies. Assuming that the General Assembly wishes to continue the authority of political subdivisions to insure public buildings and property in mutual associations or companies, it could enact legislation for this purpose, to become effective at the time the "proviso" is repealed. The General Assembly would have the power, under the proposed Section 4, to prescribe by law how local governmental entities could extend their credit or become stockholders in a joint stock company, corporation

or association. The beginning phrase of the proposed Section 4—"Except as provided by law"—is intended to give this power to the General Assembly.

The last sentence of present Section 6, relating to the regulation of insurance rates, was added to assure that the state had the power to do this. Although the delegate who first offered an amendment relating to this subject apparently regarded insurance companies as public utilities and had no doubt that the state could regulate insurance rates without a constitutional provision, he thought the Convention should take the opportunity to declare this in the Constitution. "If we are going to amend this section why not say in plain English that we have that right," [41] he asked. In the view of the Commission, the last sentence of present Section 6 is also legislative detail which should be removed from the Constitution. The state could, without question, undertake such regulation, absent any constitutional provision. The United States Supreme Court has declared that a state possesses the power to regulate the business of insurance companies which do business in the state, and to regulate their rates, provided such regulation is not confiscatory.[42]

ARTICLE VIII

Section 5

Present Constitution

Section 5. The State shall never assume the debts of any county, city, town, or township, or of any corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the State in war.

Commission Recommendation

The Commission recommends no change in present Section 5 of Article VIII.

Comment

Present Section 5 is also part of the original Constitution of 1851. Its intent was to keep the state from assuming the debts of local political subdivisions for internal improvements.[43] The Commission believes that there are ample means other than the assumption of debts through which the state can and does assist local governments financially, and since repeal of this section might conceivably be viewed by some local governments as an invitation to overextend themselves financially, the Commission recommends no change in this section.

ARTICLE VIII

Section 6

Present Constitution

Section 6. No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit.

Commission Recommendation

The Commission recommends the repeal of present Section 6, and the transfer of its provisions, with some changes, to new Section 4. For a

discussion of the section and the proposed changes, see the Comment following Section 4.

Present Section 13 of Article VIII would be amended in the Commission recommendations, including an amendment to change the number of the Section from 13 to 6. A discussion of that section and the proposed changes is found following Section 13.

ARTICLE VIII

Sections 7-11

Present Constitution

Section 7. The faith of the State being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and, annually, to reduce the principal thereof, by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding, at the rate of six per cent per annum. The said sinking fund shall consist, of the net annual income of the public works and stocks owned by the State, of any other funds or resources that are, or may be, provided by law, and of such further sum, to be raised by taxation, as may be required for the purposes aforesaid.

Section 8. The governor, treasurer of state, auditor, secretary of state, and attorney general, are hereby created a board of commissioners, to be styled, "The Commissioners of the Sinking Fund".

Section 9. The commissioners of the sinking fund shall, immediately preceding each regular session of the General Assembly, make an estimate of the probable amount of the fund, provided for in the seventh section of this article, from all sources except from taxation, and report the same, together with all their proceedings relative to said fund and the public debt, to the Governor, who shall transmit the same with his regular message, to the General Assembly; and the General Assembly shall make all necessary provision for raising and disbursing said sinking fund, in pursuance of the provisions of this article.

Section 10. It shall be the duty of the said Commissioners faithfully to apply said fund, together with all moneys that may be, by the General Assembly, appropriated to that object, to the payment of the interest, as it becomes due, and the redemption of the principal of the public debt of the State, excepting only, the school and trust funds held by the State.

Section 11. The said Commissioners shall, semi-annually, make a full and detailed report of their proceedings to the Governor, who shall, immediately, cause the same to be published, and shall also communicate the same to the General Assembly, forthwith, if it be in session, and if not, then at its first session after such report shall be made.

Commission Recommendation

The Commission recommends repeal of Sections 7-11.

Comment

The Commission proposes the repeal of Sections 7 through 11 of Article VIII, which deal with the Commissioners of the Sinking Fund and their duties, and the Sinking Fund itself. Whatever justification these sections might have had at one time, in the Commission's view they no longer serve a useful constitutional purpose. The very concept of the sinking fund, in which large sums of money are accumulated until they are needed to pay bonds at maturity, has fallen into disfavor. Today, the bond which is the norm for public financing is the serial bond:

> "State and local debt nowadays is almost always in serial form, that is, when the debt is incurred, provision is made for annual retirement of the principal, so that the annual carrying charge for a twenty-year issue includes a sum sufficient to redeem, say, one-twentieth of the principal, as well as a sum of interest."[44]

However, in suggesting the deletion of sections relating to the Sinking Fund, the Commission is not suggesting that the General Assembly should not have the power to establish either a sinking fund or a sinking fund commission, should it desire to do so, and hence Section 1 of the proposed

Article VIII would provide ample authority to do so. The deletion of these sections is recommended only because the Commission believes that these sections are not needed in the Constitution.

ARTICLE VIII

Section 12

Present Constitution

Section 12. So long as this state shall have public works which require superintendence, a superintendent of public works shall be appointed by the governor for the term of one year, with the powers and duties now exercised by the board of public works until otherwise provided by law, and with such other powers as may be provided by law.

Commission Recommendation

The Commission recommends repeal of Section 12.

Comment

The Commission recommends repeal of Section 12 of Article VIII, relating to the Superintendent of Public Works, because it sees no need for this office to be a constitutional office.

ARTICLE VIII

Section 13 (new 6)

Present Constitution

Section 13. To create jobs and employment opportunities and to improve the economic welfare of the people of the state, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under or ratified, validated, confirmed, and approved by this section.

No guarantees or loans and no lending of aid or credit shall be made under laws enacted or validated, ratified, confirmed, and approved pursuant to or by this section of the Constitution for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

The powers herein granted shall be in addition to and not in derogation of existing powers of the state or its political subdivisions, taxing districts, or public authorities, or their agencies or instrumentalities or corporations not for profit designated by any of them as such agencies or instrumentalities.

Any corporation organized under the laws of Ohio is hereby authorized to lend or contribute moneys to the state or its political subdivisions or agencies or instrumentalities thereof on such terms as may be agreed upon in furtherance of laws enacted pursuant to this section or validated, ratified, confirmed, and approved by it.

Amended Substitute House Bill 270 enacted by the General Assembly on June 4, 1963, and Amended Senate Bill 360 enacted by the General Assembly on June 27, 1963, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section as laws of this state until amended or repealed by law.

Commission Recommendation

The Commission recommends the amendment Section 13 as follows:

Section ~~13~~ 6. To create OR PRESERVE jobs and employment opportunities and to improve the economic welfare of the people of the state, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment, and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under ~~or ratified, validated, confirmed, and approved by~~ this section.

EXCEPT FOR FACILITIES USED PRIMARILY FOR POLLUTION CONTROL, ~~No~~ NO guarantees or loans and no lending of aid or credit shall be made under laws enacted ~~or validated, ratified, confirmed, and approved~~ pursuant to ~~or by~~ this section of the Constitution for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

The powers herein granted shall be in addition to and not in derogation of existing powers of the state or its political subdivisions, taxing districts, or public authorities, or their agencies or instrumentalities or corporations not for profit designated by any of them as such agencies or instrumentalities.

Any corporation organized under the laws of Ohio is hereby authorized to lend or contribute moneys to the state or its political subdivisions or agencies or instrumentalities thereof on such terms as may be agreed upon in furtherance of laws enacted pursuant to this section ~~or validated, ratified, confirmed, and approved by it.~~.

~~Amended Substitute House Bill 270 enacted by the General Assembly on June 4, 1963, and Amended Senate Bill 360 enacted by the General Assembly on June 27, 1963, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section as laws of this state until amended or repealed by law.~~

Comment

Section 13 of Article VIII would be amended under the Commission recommendation, including an amendment to change the section number

to 6 since the intervening sections would be repealed. Section 13 permits what is commonly known as "industrial development" revenue bond financing. The Commission recommendation, in addition to renumbering the section, removes obsolete language dealing with acts of the General Assembly which have since been replaced with other statutes.

The proposal would also make the following changes:

1) Expand the scope of the section to permit revenue bond financing of industrial projects which will serve to preserve existing jobs and employment in this state. The purpose of present Section 13 is limited to creating new jobs. The Commission believes that circumstances will arise where it would be desirable to use industrial revenue bonds to finance the construction of replacement facilities, modernization of existing plants, or the addition of pollution abatement facilities in order to maintain existing jobs in Ohio. The Commission feels that this change is consonant with the objectives of Section 13.

2) Make an exception to the prohibition presently existing in Section 13 which is applicable to gas and electric utilities in order to permit such financing for pollution control facilities for such utilities. The Commission sees no reason why industrial development revenue bonds should not be used, in a proper case, to finance pollution control facilities required by existing Ohio utilities.

Since the adoption of present Section 13, industrial development revenue bond financing has been used extensively and successfully, to the benefit of the people of Ohio, and the Commission believes that this method of financing ought to remain available for use in the future.

ARTICLE VIII

Schedule

All obligations of the state issued under authority of any section of Article VIII of the Constitution of Ohio repealed by this amendment, or under authority of any law enacted pursuant to or validated by any such section, which obligations are outstanding on the date of the adoption of this amendment, shall remain valid and enforceable obligations of the state according to their terms and conditions. Any law enacted pursuant to or validated by any section of Article VIII of this Constitution repealed by this amendment shall remain valid and enforceable as if such section had not been repealed. The repeal of such sections and the adoption of this amendment shall not be deemed to impair, diminish, or restrict the rights or benefits of any holder or owner of any such obligations, nor any liability, covenant, or pledge of the state with respect thereto, including those for the levy and collection of taxes, the maintenance of funds, and the appropriation and application of money.

Any moneys set aside or appropriated by or pursuant to any section of Article VIII repealed by this amendment for the payment of the principal of or interest on debts contracted thereunder shall be included in revenues of the state subject to appropriation by the general assembly for purposes of the computations to be made under divisions (A) and (G) of Section 1, Article VIII, enacted by this amendment.

Section 3 of Article VIII, enacted by this amendment, is a substitution for the equivalent provisions of Section 2i of Article VIII, repealed by this

amendment, and any references to such provisions of Section 2i shall be deemed to be references to Section 3.

Section 6 of Article VIII, enacted by this amendment, is a substitution for the equivalent provisions of Section 13 of Article VIII, repealed by this amendment, and any references to such provisions of Section 13 shall be deemed to be references to Section 6.

Comment

The first paragraph of the proposed schedule would assure the continuing validity of all state obligations existing at the time the revised Article VIII is adopted. The second paragraph, in the view of the Commission, is necessary to assure that all outstanding general obligation bonds issued under any section of the present Article VIII would be included in the computations to be made under Divisions (A) and (G) of Section 1 of the proposed Article VIII, in determining the state's general obligation or guaranteed debt limit. In the absence of a provision such as contained in the second paragraph of the proposed schedule, some question might arise as to whether the funds pledged to the payment of debt contracted under any section of present Article VIII—namely Sections 2b through 2i—were "subject to appropriation by the General Assembly" within the meaning of Division (A) of proposed Section 1, because each of these sections purports to be self-executing to the extent of providing that the funds pledged to the repayment of debt contracted pursuant to each section may be applied to such payment without necessity of further appropriation. The second paragraph of the proposed schedule would assure that these funds would be considered to be subject to appropriation by the General Assembly for purposes of calculating the state's basic debt limit, the provisions of individual bond amendments notwithstanding.

The third paragraph of the proposed schedule would assure that all existing references to the revenue bond portions of Section 2i of the present Article VIII would be construed as references to the proposed Section 3, to which the revenue bond provisions of present Section 2i would be transferred. The fourth paragraph of the proposed schedule would assure that all existing references to Section 13 of the present Article VIII would be construed as references to the proposed Section 6, since the section number of Section 13 would be changed to 6.

Although the schedule is presented in this report as one section, separate elements of it would, of course, be made applicable to separate amendments if all sections of Article VIII are not included in one amendment.

FOOTNOTES

1. 1 *State of Ohio, Debates and Proceedings, Constitutional Convention, 1850,* pp. 509-51 (June, 1850). (hereafter cited as *Debates).*
2. 1 *Debates* 527 (June 21, 1850).
3. H. Reed, "Some Late Effects of Constitutional Reform", *North American Review,* Vol. 121, p. 26 (1875).
4. James A. Maxwell, *Financing State and Local Governments,* rev. ed. (Washington, The Brookings Institution, 1969), p. 194.
5. Benjamin U. Ratchford, "A Formula for Limiting State and Local Debts," *Quarterly Journal of Economics* LI (November, 1936), p. 72.
6. Horace Secrist, *An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness* (Ph. D. diss., Bulletin of the University of Wisconsin No. 637, Madison, 1914).
7. "State Government Finances in 1970", U. S. Department of Commerce, Bureau of the Census, 1971.
8. The states requiring constitutional amendment are Alabama, Arizona, Colorado, Georgia, Indiana, Louisiana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, West Virginia and Wisconsin.
9. The states requiring referenda are Alaska, Arkansas, California, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Virginia, Washington and Wyoming.
10. The states having no constitutional debt limits are Delaware, Illinois, Massachusetts, Minnesota, Connecticut, Maryland, Mississippi, Montana, New Hampshire, Tennessee and Vermont. Maryland has a fifteen year maturity limit, which acts as a debt limit in practice.
11. Hawaii: ".... provided that such bonds at the time of authorization would not cause the total of state indebtedness to exceed a sum equal to three and one-half times the average of the general fund revenues of the state in the three fiscal years immediately preceding the session of the legislature authorizing such issuance..." Article VI, Section 3, approved November 5, 1968.
12. Pennsylvania: "... one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years..." Article 8, Section 7 (4), 1968 Amendment, adopted April 23, 1968.
13. Puerto Rico: "... 15 per cent of the average of the total amount of the annual revenues raised under the provisions of commonwealth legislation and covered into the Treasury of Puerto Rico in the two fiscal years next preceding the then current fiscal year . . ." Article VI, Section 2, 1961 Amendment, adopted December 10, 1961.
14. *Michigan Constitution of 1963,* Article IX, Section 15.
15. James A. Heins, *Constitutional Restrictions Against State Debt* (Madison: The University of Wisconsin Press, 1963) pp. 86-87.
16. National Municipal League, *Model State Constitution* (6th ed., 1968 rev.). See also Gordon Tullock, "Some Problems in Majority Voting",

reprinted in *State and Local Finance,* William E. Mitchell and Ingo Walter, eds. (New York: The Ronald Press Company, 1970), pp. 54-62.

17. *State Government for Our Times—A New Look at Ohio's Constitution* (Stephen H. Wilder Foundation, Cincinnati, 1970) p. 31.
18. See *Illinois Constitution of 1970,* Article 9, Section 9.
19. Benjamin U. Ratchford, *American State Debts* (Durham: Duke University Press, 1941), pp. 592-599. See also Benjamin U. Ratchford, "A Formula for Limiting State and Local Debts", *Quarterly Journal of Economics* LI (November, 1936), pp. 71-89.
20. Ratchford, *American State Debts,* p. 592.
21. *Ibid.,* p. 598.
22. *Proceedings of the National Tax Asssociation,* 1958, p. 218.
23. 2 *Debates* 861 (March 10, 1851).
24. 1 *Debates* 467 (June 17, 1850).
25. *Report of the Auditor of State for 1849,* p. 6.
26. *State of Ohio, Proceedings and Debates, Constitutional Convention, 1912,* p. 2113. (hereafter cited as *Proceedings and Debates, 1912).*
27. See table "General Obligation Debt Service Requirements on Bonds Issued for Capital Items under Article VIII, Ohio Constitution", Appendix A, p. 53.
28. Percentages calculated from data furnished by Department of Finance and Office of the Commissioners of the Sinking Fund.
29. Annual average calculated from data appearing in the *Semi-Annual Report of the Commissioners of the Sinking Fund* for the period January 1, 1972 to June 30, 1972.
30. Section 125.82 of the Revised Code.
31. It is said that, as a general rule, the cost of financing by means of revenue bonds is from ¼% to 1% higher than the cost of financing by means of general obligation bonds. See Manuel Gottlieb, "The Revenue Bond and Public Debt", reprinted in Mitchell and Walter, *State and Local Finance,* pp. 183-193.
32. Convention Comment, *Michigan Constitution of 1963,* Article 9, Section 14.
33. See ~~McClough~~ McCulloch *v. The State of Maryland et al.,* 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819).
34. *Shurtleff v. City of Chicago,* 190 Ill. 473, 60 N. E. 870 (1901).
35. For texts of Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, and 2i, see Appendix B, pp. 55-73.
36. *Chase v. Board of Tax Appeals,* 10 Ohio App. 2d 75 (1967).
37. *Article XVI, State Debt, Background Study 4,* California Constitution Revision Commission (February, 1970) pp. 7-8.
38. 2 *Debates* 311 (January 13, 1851).
39. *Proceedings and Debates, 1912,* pp. 1015-1025, 1721-1731, 1824-1825.
40. See *Bunt v. City of Cleveland,* 76 Ohio App. 457 (1945).
41. *Proceedings and Debates, 1912,* p. 1024.

42. See *Osborn v. Ozlin,* 60 S. Ct. 758, 310 U. S. 53, 84 L. Ed. 1074 (1940); *German Alliance Insurance Company v. Lewis,* 34 S. Ct. 612, 233 U. S. 389, 58 L. Ed. 1011 (1914); *Aetna Insurance Company v. Hyde,* 275 U. S. 440, 72 L. Ed. 357 (1928).

43. See 2 *Debates* 308 f. (January 11, 1851).

44. Maxwell, *Financing State and Local Governments,* p. 185.

MINORITY REPORT

With considerable reluctance, I have voted "No" on the motion to accept the Finance and Taxation Committee report with respect to Article VIII (State Debt) as amended July 20 and recommend it to the General Assembly.

My reluctance to vote "No" exists because I am in accord with most of the provisions contained in proposed Article VIII; because of the great amount of time that the members of the Finance and Taxation Committee have spent in the development of the form and substance of Article VIII as contained in that Committee's report as amended on July 20; and because of my respect for the abilities and competencies of the chairman and my other colleagues on that Committee.

It is in the degree to which the debt limit would be liberalized that I find myself in disagreement, both as to the amount of authorized debt and the permitted purposes of such debt. A brief explanation is, I believe, in order.

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1. Under the proposal, state debt (including the total amount of debt presently outstanding) may be created by the General Assembly for capital improvements, capital acquisitions, and land, so long as the amount required in any fiscal year for payments on principal and payments for interest on such debt and all debt previously contracted does not exceed 6% of the average annual revenues (with certain specified exclusions) of the state subject to appropriation by the General Assembly and received by the state during the then next preceding two fiscal years. There is a second limitation that no debt in excess of 8% of such revenue average may be created in any fiscal year. This provision, generally speaking, is to replace the existing limitation on the Legislature of seven hundred and fifty thousand dollars.

Presently outstanding general obligation debt amounts to approximately $1.3 billion and all of it except for $750,000 was created by permissive constitutional amendments adopted by the electorate. It is my understanding that present requirements for payments on principal and payments for interest are somewhat in excess of 6% of the revenue average, but fairly close. But to the extent that the amount of these payments is reduced because of a reduction in the principal amount outstanding, the General Assembly would have the power to create new debt. Therefore, aside from certain increases in the revenue average, the effect of the provision is to permit continuous replacement by action of the General Assembly of approximately $1.3 billion of general obligation debt.

Furthermore, under the proposal any new general obligation debt created by the electorate through the referendum procedure is not to be charged against the amount that the General Assembly may create. In other words, presently outstanding debt created by the electorate is, in effect, used as a measure for determining future permissible debt creation by the Legislature, but any future debt created by the electorate has no bearing on the Legislature's authority to create future debt.

The existing limitation, for all intents and purposes, precludes the creation of general obligation debt by the Legislature without approval of the electorate. It is obsolete and unrealistic and should be changed. Further, I agree with the concept of a varying limitation depending upon available revenue for debt service and amortization of principal. Plain

logic, however, suggests either (a) including all future debt, irrespective of the manner in which it is created, within any general limitation, or (b) excluding all present debt created by the electorate in determining a limitation on the General Assembly's power to create general obligation debt.

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2. I fully support proposed Section 13, which continues and/or creates certain exceptions to the prohibitions in Sections 4 and 6, but I do not approve of the repeal or modification of provisions in existing Sections 4 and 6, which prohibit the lending of funds or the credit of the State or of a political subdivision to or in aid of a private business entity. The present or equivalent safeguards are needed to prevent the wholesale entry of governmental financing into the realm of private enterprise. Should these recommendations be incorporated into the constitution, there is literally very little that state or local governments could not undertake by way of financing ventures as long as approved by the Legislature. Misuse and abuse of public funds, all too incipient even under the present constitutional strictures, is to be feared if there are to be no constitutional rules. I am aware that proposed Section 2 provides, in part, that no credit of the state may be used except for "a public purpose declared by the General Assembly", and that proposed Section 4 prohibits the lending of credit of a political subdivision to a private business association "except as provided by law". I am also aware that there is no definition of the phrase "a public purpose", which presumably means any purpose declared to be such by the General Assembly and by the Supreme Court of Ohio.

The prohibitions in existing Sections 4 and 6 have been, and are, in the public interest and have, in the past, served the people well. I consider their repeal or modification as provided in proposed Sections 2 and 4 as not being a good substitute.

D. BRUCE MANSFIELD
9/22/72

COMMENTS ON MINORITY REPORT

A distinguished member of the Commission, Mr. D. Bruce Mansfield, has submitted a separate statement indicating his disagreement with certain features of the Commission's recommendation with respect to Article VIII. In order that those who will be weighing the merits of the recommendation are fully apprised of the Committee's position, a response to the minority statement seems advisable.

Mr. Mansfield's statement indicates he agrees that the present $750,000 debt limit is "obsolete and unrealistic and should be changed". He also agrees with the flexible debt limit approach which is the keystone of the Commission's recommendation. His disagreement, it appears, lies only in the *scope* of the new debt authority which the proposal would give to the General Assembly. He suggests that any future voter-approved debt should be "charged against" the amount of debt which the General Assembly could authorize under the proposal. This suggestion, although expressed by Mr. Mansfield to the full Commission, was not adopted—presumably because it is directly contradictory to the basic philosophy embodied in the Commission's revision. That philosophy, briefly expressed, is that the General Assembly should have some *meaningful* amount of authority to create debt for needed capital improvements without seeking voter approval. In seeking to define "meaningful", the Commission has, in effect, suggested that it is not unreasonable to empower the General Assembly to devote up to six per cent of the state's available revenues for meeting the debt service requirements on capital improvement bonds. Some observers will undoubtedly consider this formula too restrictive while others will consider it too permissive. However, since the Commission's recommendation was adopted with only three negative votes, it appears that the Commission proposal may well represent just what was intended —a formula occupying the middle ground between the two extremes. In evaluating the Commission's recommendation in the light of Mr. Mansfield's suggestions, the following points should be considered:

1. The six per cent debt service limit is significantly *less* than the percentage of revenues devoted to debt service in recent years. In fact, in four of the five most recent fiscal years, debt service has exceeded six per cent of base revenues, and in three of those years, it exceeded seven per cent. In fiscal 1972, debt service was 7.1% of base revenues—a level 18% over the debt service limit recommended by the Commission for governing future debt.
2. Although the magnitude of the state's current general obligation debt ($1.237 billion at June 30, 1972) may seem unduly large to some, in all fairness it should be viewed alongside the debt of Ohio's sister states and in perspective with Ohio's present-day resources and needs. A number of the members of the Commission felt the following points were significant:
   a. Ohio stands about in the middle of the 50 states, 23rd, in the per capita ratio of general obligation debt to revenues—indicating that her debt level is in the mainstream of current debt trends among the various states.
   b. All of Ohio's present debt has been incurred with the approval of the people expressed through substantial majorities at the polls—indicating that this level of debt is not offensive to the attitudes of a majority of our citizens.

c. Ohio's current ratio of general obligation debt to revenues, 1 to 3, is almost identical to the ratio which the $750,000 debt limit bore to the state's revenues at the time that limit was adopted in 1851—indicating that the Commission's debt level concept has historical support.

Looking into the core of Mr. Mansfield's suggestion, it is difficult to see the logic in combining General Assembly-approved debt and any new voter-approved debt into one six per cent debt service limit. If that plan were accepted and a sizeable amount of voter-approved debt should be authorized, the probable result would be a total prohibition against the creation of any new debt by the General Assembly for needed capital improvements, possibly for years on end. This would be inimical to the objectives inherent in the Commission's proposal. If the Commission is correct that the six per cent limit should be adequate to accommodate Ohio's normal debt structure in the future, the submission of bond issues to the voters should be seldom required—and when and if such issues are sent to the people, they will have a clear choice of keeping the debt service expense at six per cent by voting "No" or permitting it to be increased by voting "Yes". And since this choice is clearly reserved to the people, it would appear that ample constitutional guarantees against runaway debt have been provided.

In effect, what the Commission proposal would do is update the constitutional $750,000 debt limit, presently restricting the General Assembly, to modern terms, and permit the people the same choice they presently have of going beyond the limit.

Mr. Mansfield's alternate suggestion that all presently outstanding debt be excluded from the debt service formula likewise contradicts the basic concept of the Commission's recommendations. To the extent the General Assembly is given authority under the formula to issue new debt, Ohio's debt service level could *increase* above its present 7.1% level if outstanding debt service were excluded. This the Commission was not prepared to recommend.

Mr. Mansfield's statement also takes exception to those portions of the report which recommend repeal of Section 4 and changes in Section 6 of Article VIII. Considerable discussion was held during the Commission's deliberations about the desirability of making it possible for the state and local units of government to participate with private enterprise in solving future problems in our state. In the view of a majority of the Commission, the state should have this capability among its available tools. It was also concluded that local governments—subject to prior authorization by the General Assembly—should have a similar capability. In the view of the Commission, the ability to effectively utilize the private sector in solving the increasingly broad range of complex problems facing the public should no longer be prohibited. The new "public purpose" restriction contained in Section 2 of the recommendation is deemed by a majority of the Commission to be an adequate and effective limitation.

NOLAN W. CARSON, *Chairman*
Committee on Finance and Taxation

APPENDIX A

General Obligation Debt Service Requirements
on Bonds Issued for Capital Items under Article VIII
Ohio Constitution

Fiscal Year	Principal	Interest	Total Debt Service
1972	$91,320,000	$56,940,588	$148,260,588
1973	82,540,000	59,930,710	142,470,710
1974	68,070,000	56,973,180	125,043,180
1975	69,075,000	53,883,282	122,958,282
1976	68,690,000	50,616,723	119,306,723
1977	60,085,000	47,272,637	107,357,637
1978	58,250,000	44,329,839	102,579,839
1979	64,870,000	41,151,875	106,021,875
1980	55,335,000	37,927,625	93,262,625
1981	55,790,000	34,950,755	90,740,755
1982	56,195,000	32,108,812	88,303,812
1983	56,705,000	29,336,865	86,041,865
1984	57,235,000	26,517,847	83,752,847
1985	57,790,000	23,624,403	81,414,403
1986	58,385,000	20,660,400	79,045,400
1987	59,000,000	17,633,370	76,633,370
1988	58,255,000	14,524,795	72,779,795
1989	58,650,000	11,510,288	70,160,288
1990	54,175,000	8,470,546	62,645,546
1991	51,045,000	5,856,843	56,901,843
1992	34,800,000	3,505,956	38,305,956
1993	16,855,000	2,058,450	18,913,450
1994	14,065,000	1,246,857	15,311,857
1995	14,615,000	524,605	15,139,605
1996	4,170,000	83,400	4,253,400

Source: Ohio Constitutional Revision Commission (April 21, 1972).

Computed from data furnished by the Office of the Commissioners of the Sinking Fund.

APPENDIX C

Part 3

CONSTITUTIONAL AMENDMENTS

December 31, 1973

Recommendation

Article XVI - Section 1

PRESENT CONSTITUTION

Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately.

COMMISSION RECOMMENDATION

Either branch of the general assembly may propose amendments to this constitution; and if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be filed with the secretary of state at least ninety days before the date of the election at which they are to be submitted to the electors, for their approval or rejection. They shall be submitted on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe.

The ballot language for such proposed amendments shall be prescribed by a majority of the Ohio ballot board, consisting of the secretary of state and four other members, who shall be designated in a manner prescribed by law and not more than two of whom shall be members of the same political party. The ballot language shall properly identify the substance of the proposal to be voted upon. The ballot need not contain the full text nor a condensed text of the proposal. The board shall also prepare an explanation of the proposal, which may include its purpose and effects, and shall certify the ballot language and the explanation to the secretary of state not later than seventy-five days before the election. The ballot language and the explanation shall be available for public inspection in the office of the secretary of state.

The Ohio supreme court shall have exclusive, original jurisdiction in all cases challenging the adoption or submission of a proposed constitutional amendment to the electors. No such case shall be filed later than sixty-four days before the election. The ballot language shall not be held invalid unless it is such as to mislead, deceive, or defraud the voters.

Unless the general assembly otherwise provides by law for the preparation of arguments for and, if any, against a proposed amendment, the board may prepare such arguments.

Such proposed amendments, the ballot language, the explanations, and the arguments, if any, shall be published once a week for three consecutive weeks preceding such election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The general assembly shall provide by law for other dissemination of information in order to inform the electors concerning proposed amendments. An election on a proposed constitutional amendment submitted by the general assembly shall not be enjoined nor invalidated because the explanation, arguments, or other information is faulty in any way. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article XVI as follows:

Section 1. Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be FILED WITH THE SECRETARY OF STATE AT LEAST NINETY DAYS BEFORE THE DATE OF THE ELECTION AT WHICH THEY ARE TO BE submitted to the electors, for their approval or rejection~~;~~. THEY SHALL BE SUBMITTED on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe.

THE BALLOT LANGUAGE FOR SUCH PROPOSED AMENDMENTS SHALL BE PRESCRIBED BY A MAJORITY OF THE OHIO BALLOT BOARD, CONSISTING OF THE SECRETARY OF STATE AND FOUR OTHER MEMBERS, WHO SHALL BE DESIGNATED IN A MANNER PRESCRIBED BY LAW AND NOT MORE THAN TWO OF WHOM SHALL BE MEMBERS OF THE SAME POLITICAL PARTY. THE BALLOT LANGUAGE SHALL PROPERLY IDENTIFY THE SUBSTANCE OF THE PROPOSAL TO BE VOTED UPON. THE BALLOT NEED NOT CONTAIN THE FULL TEXT NOR A CONDENSED TEXT OF THE PROPOSAL. THE BOARD SHALL ALSO PREPARE AN EXPLANATION OF THE PROPOSAL, WHICH MAY INCLUDE ITS PURPOSE AND EFFECTS, AND SHALL CERTIFY THE BALLOT LANGUAGE AND THE EXPLANATION TO THE SECRETARY OF STATE NOT LATER THAN SEVENTY-FIVE DAYS BEFORE THE ELECTION. THE BALLOT LANGUAGE AND THE EXPLANATION SHALL BE AVAILABLE FOR PUBLIC INSPECTION IN THE OFFICE OF THE SECRETARY OF STATE.

THE OHIO SUPREME COURT SHALL HAVE EXCLUSIVE, ORIGINAL JURISDICTION IN ALL CASES CHALLENGING THE ADOPTION OR SUBMISSION OF A PROPOSED CONSTITUTIONAL AMENDMENT TO THE ELECTORS. NO SUCH CASE SHALL BE FILED LATER THAN SIXTY-FOUR DAYS BEFORE THE ELECTION. THE BALLOT LANGUAGE SHALL NOT BE HELD INVALID UNLESS IT IS SUCH AS TO MISLEAD, DECEIVE, OR DEFRAUD THE VOTERS.

UNLESS THE GENERAL ASSEMBLY OTHERWISE PROVIDES BY LAW FOR THE PREPARATION OF ARGUMENTS FOR AND, IF ANY, AGAINST A PROPOSED AMENDMENT, THE BOARD MAY PREPARE SUCH ARGUMENTS.

Such proposed amendments, THE BALLOT LANGUAGE, THE EXPLANATIONS, AND THE ARGUMENTS, IF ANY, shall be published once a week for THREE consecutive weeks preceding such election, in at least one newspaper OF GENERAL CIRCULATION in each county of the state, where a newspaper is published. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW FOR OTHER DISSEMINATION OF INFORMATION IN ORDER TO INFORM THE ELECTORS CONCERNING PROPOSED AMENDMENTS. AN ELECTION ON A PROPOSED CONSTITUTIONAL AMENDMENT SUBMITTED BY THE GENERAL ASSEMBLY SHALL NOT BE ENJOINED NOR INVALIDATED BECAUSE THE EXPLANATION, ARGUMENTS, OR OTHER INFORMATION IS FAULTY IN ANY WAY. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately.

HISTORY AND BACKGROUND OF SECTION

Section 1 of Article XVI provides the method by which the General Assembly can propose and submit constitutional amendments to the voters. The 1802 Ohio Constitution had no such provision–the only method of amending provided for in that Constitution was through a convention, recommended by the General Assembly and voted for by a majority of the electors voting for representatives. The only election at which such a recommendation could be submitted to the voters was at the election for members of the General Assembly. The 1851 convention, called pursuant to this procedure, made it at least possible for the General Assembly to submit proposed amendments to the people for their approval or rejection, but retained several conditions which had the effect of reducing the probabilities that the Constitution would be amended this way. One such restriction was the necessity that a proposed amendment be approved by a majority of all those voting at the election. Another was the requirement that amendments could be submitted only at the election for members of the General Assembly.

In 1912, as a result of the work of the Convention held in that year, the section was amended to permit submission of proposed constitutional amendments by the General Assembly at a special or a general election, as the General Assembly prescribed, and to declare amendments adopted if approved by a majority of the voters

voting on the amendment, rather than a majority voting at the election. Other significant changes were also made in 1912--amendments must now be submitted on a separate ballot without any party designation, and the duration of required newspaper publication was reduced from six months preceding the election, to five weeks.

CHANGES PROPOSED BY COMMISSION

The major issues which have occupied the attention of the Constitutional Revision Commission with respect to submission of legislatively proposed constitutional amendments were not debated at the 1912 Convention. These issues include: (1) assuring that the language on the ballot is clear and nontechnical so that voters will be informed, not confused, by what they read when they enter the voting booth; (2) providing information to the voters about the substance and effect of the proposal; and (3) establishing a time frame prior to the election for submitting proposals and court actions.

A. BALLOT LANGUAGE

The present statutory requirement (Section 3505.06 of the Revised Code) is that the "condensed text" of a proposed constitutional amendment must appear on the ballot, if the entire text does not. The Commission has been advised by the Secretary of State, who is presently responsible, again by virtue of statute, for preparing the ballot language, that in order to avoid undesirable court tests on the acceptability of a "condensed text", this requirement leads to the presentation of amendments to the voters in lengthy, highly technical, legalistic language which can confuse voters as to the true purpose and effect of the proposal.

The Commission's proposal would provide for an Ohio Ballot Board, with the Secretary of State as one of its members, which would be responsible for drafting the language to appear on the ballot for amendments proposed by the General Assembly. In addition to the Secretary of State, four members shall be named in a manner designated by the legislature, not more than two of whom are members of the same party. The ballot language need not be a condensed text of the issue, but **shall properly identify the substance of the proposal.** Language could not be ruled off the ballot unless it is such as to mislead, deceive, or defraud the voters. These standards for ballot language–identification of the issue, and language to be invalidated only if it is misleading, deceiving, or fraudulent--are taken from an Ohio Supreme Court decision which predated the present statutory requirement that the "condensed text" appear. (*Thrailkill v. Smith*, 106 Ohio State 1, 1922).

In the Commission's view, providing a constitutional mechanism for preparing the ballot language, and standards which emphasize the substance of the proposal and de-emphasize technical details, will assist in reaching the goal of furthering voter understanding of constitutional amendments.

B. VOTER INFORMATION

The Constitution presently requires only one type of information to be supplied to voters prior to voting on proposed constitutional amendments–legal advertising in newspapers five weeks prior to the election. The Commission believes that few people read such advertisements, and if they do, they are given only the text of the proposal and no explanation.

The proposal to amend section 1 of Article XVI requires the Ballot Board to prepare an explanation of the proposed amendment, when it prepares the ballot language. The explanation may include the purpose and effects of the proposal. In addition, unless the General Assembly otherwise provides for the preparation of arguments for and against the proposal, the Ballot Board may prepare such arguments.

The Commission's proposal would continue to require legal advertising of proposed amendments, but added to the advertising would be the explanation prepared by the Ballot Board and the arguments, if any. The advertising would be required for three, instead of five, weeks. The requirement of newspaper publication of the proposed amendment was retained in 1912 from the 1851 version of the section, and the only change, which reduced from 6 months to 5 weeks the durational requirement of publication, was made because, according to the debates, communications had substantially improved since 1851, and the costs of publication had also increased. For both of these reasons, the Commission recommends a further reduction from five weeks to three weeks for publication.

The section, as proposed by the Commission, would specifically require the General Assembly to provide by law for dissemination of information other than newspaper publication in order to inform the electors concerning proposed amendments. The use of other media, and presentation of material other than the text of the amendment, it is hoped, would serve not only to spark voter interest in the constitutional question involved, but to enable voters to cast an informed and intelligent vote.

C. THE TIMETABLE

Last minute submission of amendments to the voters results in lessened public understanding of

the issues and may deprive both proponents and opponents of an issue of adequate opportunity to place their views before the public; last minute halting of elections by court order causes substantial problems for elections officials, confuses the voters, and undoubtedly lessens public confidence in some aspects of governmental processes.

The Commission proposes to set forth a time table in the Constitution and to provide for court challenges to the most important aspects of submitting amendments in order to overcome these difficulties. The General Assembly would be required to file proposed amendments with the Secretary of State at least 90 days before the election at which they are to be submitted. (The statutes presently require submission 75 days before the election.) The Ballot Board would then have 15 days in which to prepare the ballot language and the explanation of the proposal, which are to be available for public inspection in the office of the Secretary of State.

The Ohio Supreme Court is given exclusive, original jurisdiction in all cases challenging any aspect of the adoption and submission of proposed constitutional amendments to the voters, but any such suit must be brought not later than 64 days before the election. Thus, 10 days are allowed for examination of the ballot language and the explanation prepared by the Board and the filing of a suit if a challenge is to be brought. Although the election on the proposed amendment might be enjoined by the Court if the ballot language is such that it misleads, deceives, or defrauds the voters, or for other reasons which might be found in faulty legislative procedures or in the inclusion of more than one amendment without permitting a separate vote on each, it could not be enjoined because the explanation, arguments, or other information supplied to the voters is faulty. The Commission believes that other remedies--such as halting the publication of an explanation which is not proper--would be adequate for such defects.

APPENDIX D

Part 4

TAXATION

May 1, 1974

TAXATION

Introduction

This is the second report of the Commission to to the General Assembly on constitutional provisions governing fiscal matters. The first of these, dated December 31, 1972, concerned primarily Article VIII and questions of state debt. The present report on Article XII deals primarily with provisions which prescribe the types of taxes which may be levied or are prohibited, the uniform rule of real property taxation, permissible exemptions from taxation, and the limitation on unvoted property taxation. These recommendations, like the recommendations on state debt, are the work of the Finance and Taxation Committee of the Commission, chaired by Mr. Nolan W. Carson of Cincinnati.

Matters of state taxation and matters of state debt are necessarily related to the extent that taxes are used for the payment of debt, and many state constitutions, including all of those which have been adopted recently, contain only one article covering these related subject areas. Ohio's first constitution, the Constitution of 1802, except for the fact that it expressly prohibited the imposition of a poll tax, was silent on the specifics either of state taxation or of state debt. Such specificity was introduced into the Constitution in 1851 because of the near-chaotic fiscal conditions prevailing in Ohio during the second quarter of the nineteenth century, as a restraint on the power of the General Assembly. The subjects of debt and taxation were dealt with separately by the Constitutional Convention of 1850-1851 because the question of debt was, at the time, such an overriding issue that it was thought to merit special consideration by a committee of the Convention separate from the one which considered finance and taxation. While the products of the two committees—Article VIII and Article XII, respectively—show unmistakable signs of overlap, the separate existence of these articles has not been a source of major constitutional problems. Probably for this reason, the Constitutional Convention of 1912, which made major changes especially in Article XII, did not combine the two articles. The Finance and Taxation Committee of this Commission considered the possibility of such consolidation but found no compelling reason to recommend it.

The 1912 Convention made no change in the basic concept relative to state debt expressed in Article VIII—namely, that no significant amount of debt shall be incurred except by constitutional amendment. It did, however, contribute considerably to the then-prevalent practice of specifying fiscal matters in rather minute detail in the Constitution. This is particularly evident in Article XII which, for example, was revised so as to specifically authorize the imposition of inheritance, income and severance taxes, and to authorize inheritance and income taxes to be either uniform or graduated as to rate.

Knowledgeable observers agree that since taxation is an inherent power of a state, a state constitution need not contain authorization for the imposition of specific types of taxes. While the Commission shares this view, it is not aware of a compelling reason to recommend a departure from the basic approach evidenced in present Article XII in this regard. Neither does the Commission conclude that there are compelling reasons to recommend changes at this time in the provisions governing the one per cent limitation on unvoted property taxation, the uniform rule of taxation of real property and exemptions.

Except for one provision to permit the incorporation and prospective operation of federal statutes in Ohio's tax laws, the Commission's recommendations on Article XII all have their roots in existing sections of the article. Although a few substantive changes are recommended, most of the recommendations involve the rearrangement of sections, modernization of language and changes to promote clarity and conciseness. Where the Commission has concluded that existing provisions state sound basic fiscal principles still applicable today, it recommends no substantive changes.

Taxation is a very delicate subject. The structure of Ohio's system of taxation has developed over the years, constantly refined by the interaction of the General Assembly and the Courts. The Commission took the view that, in the main, this structure has served the state well over the years and, under it, Ohio has prospered; consequently the Commission concluded that the structure should not be disturbed unless there are compelling inequities which require rectifying, or problems which call for the proposal of alternatives. Moreover, the Commission recognized that the General Assembly has wide power to adjust and revise our system of taxation within constitutional limits, so that considerable flexibility is available to change and refine the tax structure in future years. It is the hope and belief of the Commission that its approach to the revision of Article XII has produced an article which is both firmly grounded in the principles of taxation traditional in Ohio, and precise and flexible enough to meet the needs of the present and the foreseeable future.

It will be noted that this report includes recom-

mendations with respect to each existing section of Article XII except Sections 5a, 6 and 11. Considerable discussion occurred within the Commission, and several proposals were considered, relative to the repeal or broadening of Section 5a, which restricts the expenditure of highway "user" taxes to highway purposes. Since the necessary ⅔ vote of the Commisson could not be secured with respect to any disposition of this section, consideration of it was tabled. Consequently, this report does not recommend any changes in Section 5a, although it is possible that the Commission may be able, prior to completing its work, to reach the necessary consensus on a definitive recommendation.

In regard to Section 6, which concerns the manner of incurring debt for internal improvements, the Commission has already recommended its repeal in Part 2 of its report to the General Assembly dated December 31, 1972, for the reason that it views this section as superfluous.

Section 11, interpreted in conjunction with the one per cent limitation on unvoted property taxation contained in Section 2 of Article XII, imposes the so-called "indirect debt limit." The indirect debt limit question (and Section 11) has been referred, at the suggestion of the Finance and Taxation Committee, to the Commission's Local Government Committee for further study since it primarily involves a local government problem. It is anticipated that a recommendation with respect to Section 11 will be included in a later report of the Commission.

The report of the Finance and Taxation Committee also contained a recommendation to the Commission for a constitutional provision formalizing and refining the Ohio doctrine of taxation preemption which has developed through a long line of court decisions. Following Commission discussion, and at the suggestion of the Finance and Taxation Committee, this question was likewise referred to the Commission's Local Government Committee for further study. Consequently, no recommendation is included in this report on this subject.

ARTICLE XII

Section 1

PRESENT CONSTITUTION

Section 1. No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value.

COMMISSION RECOMMENDATION

No change.

COMMISSION RECOMMENDATION

The Commission recommends that no change be made in the present Section 1 of Article XII.

HISTORY AND BACKGROUND OF SECTION

A poll tax is a tax of a fixed rather than a graduated amount per head or person which is levied on adults and the payment of which is often made a requirement for voting.

Ohio was among the first states to express a constitutional proscription against the levying of poll taxes. Indeed, the Constitution of Ohio has always included a ban on poll taxes. The framers of Ohio's first Constitution, the delegates to the 1802 Convention, harbored such strong feelings about the undesirability of taxes by the poll that they included a prohibition on the levying of such taxes in the part of the Constitution of 1802 which they titled the Bill of Rights. The statement on poll taxes is among the very few substantive references to taxation in the Constitution of 1802, and reads as follows:

> That the levying taxes by the poll is grievous and oppressive; therefore the legislature shall never levy a poll tax for county or state purposes.[1]

The strength of such a constitutional statement is obvious, and caused one commentator to remark more than a century after its adoption:

> The members of the convention of 1802 had no theories on taxation except on one point . . . They were determined that no tax gatherer should be permitted to call on citizens of the new state and demand a *per capita* based on their manhood.[2]

When the Constitution of 1802 was revised and the present Constitution adopted in 1851, the substance of the ban on the levying of poll taxes was transferred, with only stylistic modifications, to Article XII, which deals with finance and taxation. As originally incorporated into the Constitution of 1851, the provision read:

> The levying of taxes, by the poll, is grievous and oppressive; therefore the General Assembly shall never levy a poll tax, for county or state purposes.[3]

In accordance with these provisions of the Constitutions of 1802 and 1851, no poll tax was ever required to be paid before an Ohio citizen could vote. However, beginning in 1804 state law did require that every male citizen either perform annually a given amount of work on the public roads or contribute a certain sum of money to the road fund.[4] These requirements constituted a poll tax in fact, and concern over this situation was expressed in the debates of the Constitutional Convention of 1850, as is evident from these comments:

> Under our present system of laws, there is but one manner in which a tax by the poll is levied—for road purposes. This law enforces upon every citizen the obligation to perform a given amount of labor on the public highway, and this, without regard to the amount of property he may possess or, in fact whether he may have property or not.[5] . . .[T]he obligation to labor on the highway is really and truly a poll tax.[6] . . . [and] what [we] desire to provide against is, the practice of making a man perform labor on the road, who has no property.[7]

Despite the awareness at the 1850 Convention that the highway labor requirement was in actuality a poll tax, and the continuation in the 1851 Constitution of the provision prohibiting the levying of a poll tax, state law, in 1912, required male citizens over twenty-one years of age to donate annually either two days of their labor or $3.00 for the maintenance of the public highway system. This was seen by some as merely a nominal tax which was applied narrowly, had never been abused, and was not a burden on the people.[8]

However, the drafters of the 1912 revisions of the Ohio Constitution did see fit to retain the provision barring the levying of a poll tax and amended the section to the form in which it exists today. The revision of the section appears to have been adopted by the 1912 Convention without formal debate, and there is little in the records of that Convention to reflect the effect intended by the language modifications made in

it at that time. As amended in 1912, and as it now exists in the Constitution, Article XII, Section 1 reads:

> No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value.

It can only be deduced from the 1912 revision of Section 1 that its framers wanted to clearly prohibit not only those poll taxes which might be levied as requirements on exercising the right to vote or other privileges of citizenship, but also poll taxes requiring the performance of physical services for which payments of money could be substituted. By this change, the spirit of the original poll tax provision written in 1802 was at last fully implemented.

RATIONALE FOR RETAINING SECTION

The rationale for retaining Section 1 is based on a desire to provide continued protection for the people of Ohio from a form of taxation which the Commission believes would be viewed by Ohioans today as "grievous and oppressive" just as it was by the Ohioans of earlier years. It should be noted that the United States Supreme Court has construed the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution to prohibit the levy by any state of a poll tax if payment of the tax is made a condition to exercising the elective franchise.[9] It would, therefore, be violative of the federal Constitution for Ohio to levy a poll tax as a condition of voting whether or not the Ohio Constitution would so allow. However, since the Ohio prohibition goes further than the Supreme Court's interpretations of the federal Constitution, the Commission feels Section 1 should be retained intact.

INTENT OF THE COMMISSION

A poll tax, regardless of historical or technical definition, is today popularly associated with the abridgement of voting rights. It is the intent of the Commission in retaining Section 1 not only to safeguard the exercise of voting rights from the future imposition of any such burden but also to continue to prohibit a "head tax" (and service in lieu of payment of such a tax) as a condition of the exercise by Ohioans of any perquisites of citizenship in the state. This prohibition has served Ohio well—it should not be disturbed.

Footnotes

Section 1

1. *Constitution of Ohio, 1802*, Article VIII, Section 23.
2. Nelson W. Evans, *A History of Taxation in Ohio* (Cincinnati: The Robert Clarke Company, 1906), p. 7.
3. *Constitution of Ohio, 1851*, Article XII, Section 1.
4. 2 O. Laws 207, at 217.
5. *State of Ohio, Debates and Proceedings, Constitutional Convention, 1850*, pp. 34-35 (December 9, 1850). (Hereafter cited as *Debates*).
6. 2 *Debates* 745 (February 27, 1851).
7. 2 *Debates* 746 (February 27, 1851).
8. See "Our Present Problems in Taxation," an address by U. G. Denman, Attorney General of Ohio, at the Thirteenth Annual Meeting of the Ohio State Bar Association, July 8, 1909, (Toledo: Legal News Printers, 1909), pp. 19-20. The work requirement was removed from the law, General Code Section 5649, in 1913. 103 O. Laws 489.
9. *Harper v. Virginia Board of Elections*, 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1969).

ARTICLE XII

Section 2

PRESENT CONSTITUTION

Section 2. No property taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of residents sixty-five years of age and older, and providing for income and other qualifications to obtain such reduction. All bonds outstanding on the 1st day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the 1st day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

COMMISSION RECOMMENDATION

No change.

COMMISSION RECOMMENDATION

The Commission recommends that no change be made in the present Section 2 of Article XII.

HISTORY AND BACKGROUND OF SECTION

Section 2, without precedent in the Constitution of 1802, was proposed by the Constitutional Convention of 1850 and adopted, in its original form, as a part of the Constitution of Ohio in 1851.

As proposed by the Convention and ratified in 1851, Section 2 expressed a mandate for taxation by uniform rule and prescribed a system of *ad valorem* taxation for real and personal property. It also permitted the exemption of certain property from taxation. It read as follows:

> Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property, so exempted, shall, from time to time, be ascertained and published, as may be directed by law.[1]

In the years since its adoption, Section 2 has been amended six times. Currently, the provision deals with four major subject areas: the one per cent limitation on unvoted *ad valorem* property taxes, the taxation of real property by uniform rule according to value, the exemption of property from taxation, and the recently added provision permitting partial "homestead exemptions."

Section 2 was first amended in 1905, when a mandatory exemption was written into the section. Unlike the original exemption provision which merely made permissible the passage of general laws exempting certain types and amounts of property, the 1905 amendment directly exempted from taxation the bonds of the state and its subdivisions as well as the bonds issued in behalf of public schools.

The Constitutional Convention of 1912, after vigorous and divisive debate, proposed a second amendment to the section. At the center of this debate, which raged for a number of days, stood the issue of the uniform rule versus the classification of property for taxation. Business interests generally supported classification, anticipating that it would give favorable treatment to intangible personalty. Proponents of retaining the uniform rule argued that it was fairer to the people of the state and that to allow classification would be to allow an inroad to manipulation of the tax laws.

Many of those endorsing the uniform rule also maintained that all bonds, including those types exempted by the 1905 amendment, should be subject to taxation. The delegates favoring the uniform rule and the taxation of bonds prevailed, and the 1912 amendment, as adopted by the electorate, retained the uniform rule, limited the exemption of bonds to those previously exempt and still outstanding, reworded the provision referring to the exemption of property devoted to charitable purposes and increased, from $200 to $500, the amount of an individual's personal property which could be exempted from taxation.

Regardless of the attention given Section 2 by the 1912 Convention, the amendment adopted in that year was destined to be short-lived, because the section was again revised in 1918. The nature of this change was a clarification of just which government bonds were exempt from taxation. The 1912 amendment had referred to those bonds "at present outstanding" as being exempt, and the 1918 change substituted the words "outstanding on the first day of January, 1913."

Section 2 was next amended in 1929. The most important substantive changes included in this amendment were: (1) confinement of the application of the uniform rule to real property only; (2) imposition of a one and one-half per cent limitation on the amount of *ad valorem* property taxes which could be levied without voter approval; and (3) modification of the exemption provisions.

By confining the application of the uniform rule to real property, and thus permitting classification and a different tax treatment of both tangible and intangible personal property, this amendment allowed significant changes in Ohio's tax system.

In 1910 (101 Ohio Laws 430), the General Assembly had prohibited the levy of more than ten mills on each dollar of tax valuation of the taxable property without voter approval. The delegates to the 1912 Constitutional Convention debated placing a similar limitation in the Constitution, but ultimately rejected the proposal. The statutory limitation was increased to 15 mills in 1927 (112 Ohio Laws 391). The 1929 amendment to Section 2 of Article XII imposed a limit on unvoted *ad valorem* property taxes of one and one-half per cent of "true value in money."

Finally, the 1929 amendment included a provision exempting from taxation the bonds sold pursuant to Section 2a of Article VIII, adopted in 1921, the proceeds of which constituted the World War Compensation Fund. The amendment also removed the $500 limit on the amount of personal property which could be exempt from taxation, and made other modifications of the exemption provisions, which are discussed in more detail under the heading "Rationale for Retaining Section" in this comment.

When the proposed revision of Section 2 was submitted to the voters in 1929, the question of whether or not to repeal Section 3 of Article XII was included on the same ballot. Section 3, an original part of the Constitution of 1851, provided for the taxation of property employed in banking, but it had little practical effect, being largely redundant of other sections on corporations and taxation. Section 3 was repealed as the amendment to Section 2 was adopted.

A fifth revision of Section 2 was approved by the electorate in 1933. This amendment of the section was, at least in part, a response to the economic depression of the 1930's and did nothing more than lower from one and one-half to one per cent of true value the constitutional limitation on unvoted property taxes.

The statute was also changed, reducing the 15 mill limit to 10 mills. It may be noted that the statutory limit on unvoted *ad valorem* property taxes has always been 10 or 15 mills, as the case may be, on the tax valuation (or assessed value) of the taxable property, whereas the constitutional limit of one or one and one-half per cent, as the case may be, is based on the "true value in money" of the property. Thus, the constitutional and statutory limitations are, in fact, different limitations. As long as the tax valuation is less than true value in money, which has been traditional under Ohio's assessment pattern, the statutory limit is lower than the constitutional limit.

The most recent amendment to Section 2 was adopted in 1970, when the so-called "homestead exemption" was added to the provisions of the section. The new provision is not technically an exemption but is an exception to the uniform rule. It permits the passage of statutes reducing taxes on the homesteads of residents 65 years of age and older through a reduction in taxable valuation determined by income and other qualifications.

RATIONALE FOR RETAINING SECTION

The One Per Cent Limitation

The one per cent limitation imposed by Section 2 places a maximum on the extent to which property, both real and personal, which is taxed according to value, may be taxed without specific voter approval or authorization set forth in a municipal charter. The limitation is cumulative and applies to the state and all of its political subdivisions which have the authority to levy taxes.

As noted earlier, the statutes currently impose a ten-mill limit on the tax valuation of taxable property (Section 5705.02 of the Revised Code). Although the ten-mill statute and the one per cent constitutional provisions impose the same limitation only if the base on which they are measured is the same (which is not

presently the case), Section 5705.02 declares that the ten-mill limit refers to and includes both the limit of the statute and the limit imposed by Section 2 of Article XII of the Constitution. It reads as follows:

> The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the "ten-mill limitation," and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

In considering a recommendation as to the one per cent limitation, the Commission considered three basic alternatives: (1) deleting the provision; (2) increasing the limitation to some greater percentage; and (3) retaining the limitation as it now exists. It was recognized that the one per cent limitation, as implemented by statute, guarantees the protection of a basic right held by the people of Ohio for over 60 years, namely the right of the people to determine at the polls what property tax burden beyond a restricted amount they are willing to assume. The Commission found no compelling reason to eliminate or restrict this right and concluded that the limitation on unvoted *ad valorem* property taxation should be retained unchanged in the Constitution. Parenthetically, the Commission views this position as fully consistent with its recommendation of an unvoted flexible debt limit for state purposes in Article VIII because the issues involved in state or local tax levies required to be submitted to the voters as a result of the one per cent rule, are by their very nature more limited in scope, and far easier for the electorate to comprehend adequately than the lengthy and often extremely complex constitutional amendments which are now part of the procedure by which the state incurs debt.

No discussion of the one per cent (and statutory 10-mill) limitation would be complete without at least a recognition of the "indirect debt limit", which results from a conjunctive interpretation of Section 2 and Section 11 of Article XII. See Section 11 for the present Commission disposition of this problem.

The Uniform Rule

No provision of Article XII has, since its adoption in 1851, occupied a more prominent place in the history of taxation in Ohio than the uniform rule, yet uniformity received relatively little debate during the 1850 Convention, and it can only be deduced that its framers intended the rule mainly to assure that all kinds of property subject to taxation were taxed equally, regardless of ownership. This intent may be ascribed, in large part, to the unfavorable reaction of the general public to taxing statutes then in effect which had, as a result of a pragmatic interest in encouraging the internal economic development of the new state, exempted from taxation, or granted favorable tax treatment to, certain factories and mills as well as the capital of banks and the property of railroads.

The uniform rule has been interpreted by the Ohio Supreme Court to require that all real property in the state "be assessed on the basis of the same percentage of actual value," and that the best method for determining such value "is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so."[2] The Court has also said that the "current use" method of valuation cannot be used in conformity with the uniform rule, because this method "excludes, among other factors, location and speculative value which comprise market value."[3]

The opposite of taxation by uniform rule is the classification of property for tax purposes. Only a minority of states permit real property classification—Minnesota being the state that has classified most profusely—but even in those jurisdictions which have no constitutional prohibition against it, classification has been used sparingly. Real property classification may be of two types: (1) classification based on current use or (2) classification based on land-value or site-value. Classification based on current use is the more prevalent in the United States, and such a system usually includes at least the classification of agricultural, residential, commercial and industrial property. Land-value or site-value taxation—which in its pure form shifts the entire tax burden to land and imposes none on improvements in order to encourage the most intensive use of land—exists in modified form in Hawaii and Pennsylvania, and is also practiced abroad, particularly in Australia and New Zealand. However, because this theory of taxation has never been widely used since it was first proposed nearly 100 years ago, there is little hard evidence on which to conclude that any of the existing land-value or site-value systems of taxation would have a significant influence in stimulating either real property improvement or urban redevelopment, and at least one prominent student of tax systems concludes that under the tax rate levels now prevailing in America, replacing the real property tax with a tax on land alone would result in a prohibitive loss of revenue by causing a drastic decrease in the value of land.[4]

Minnesota is among those states which classify real property as to use, and the Commission examined the

Minnesota experience as a part of its study to determine whether a constitutional revision permitting or providing for real property classification should be recommended for Ohio. More than a dozen classes, and many subclasses, of real property had been established in Minnesota as of 1970, but the Commission found no good reason to conclude from the Minnesota experience that the classification system promotes equitable taxation. In fact, some observers of the Minnesota taxing structure, including a former tax commissioner, have reported that the classification system in that state has not worked satisfactorily and that it might be well to abolish it.[5]

The Commission concludes that the uniform rule has served Ohio well, and that there is little demand for its change or repeal. More importantly, the Commission has found no basis on which to conclude that a detailed system of classification of real property for tax purposes would result in a more equitable tax structure. The Commission recognizes the considerable present interest in decreasing the property tax burden on agricultural land and, possibly, certain other limited types of real estate. However, the Commission believes that inequities in relation to the taxation of specific categories of real property should best be considered and redressed individually without the outright abolition of the uniform rule, as the people did in 1973 when they adopted an amendment to Section 36 of Article II permitting special tax treatment of "agricultural land".

Exemptions

Concerning the exemption provisions of Section 2, it may be said that the five categories of property enumerated in the exemption clause are merely suggestions for exemption, and that the General Assembly has the power to determine exemptions from taxation, which power is limited only by the Equal Protection Clause contained in Article I of the Ohio Constitution. This is clearly the view of the Supreme Court expressed in *Denison University v. Board of Tax Appeals,* 2 Ohio St. 2d 17, 205 N.E. 2d 896 (1965), and is based on the removal from this section of the requirement that "all" property be taxed by uniform rule according to value, and the addition of the phrase "without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom," in the 1929 amendment of this section.

Ohio laws providing for exemptions have been criticized as being too generous and resulting in substantial reductions in the amount of taxable property in some areas.[6]

The Commission considered several possible alternatives with respect to the provisions in Section 2 dealing with the exemption of property from taxation. Revision of the exemption clause could provide for the enumeration of mandatory or permissible exemptions and prohibit any others, the prohibition of all exemptions, or the establishment of a system of partial exemptions. Or, the exemption provisions might be completely repealed. Since the *Denison* case, it is settled law under the present language of Section 2 that the General Assembly has the power to determine all exemptions, limited only by Article I of the Ohio Constitution.

The Commission concluded that exemptions from taxation are appropriately a legislative function, and should be neither prohibited nor mandated in the Constitution. Although it might be argued, for the same reason, that the enumeration of certain exemptions in the Constitution, even though not mandatory, should be eliminated, the Commission felt that removal of the specific permissive exemptions might be construed as an indication of a conclusion that these exemptions should not be permitted. Since the Commission reached no such conclusion, it does not recommend any change in the exemption language. The Commission does, however, urge the General Assembly to conduct a periodic review of exemptions in order to make certain that the public interest and welfare, and equitable and equally applied principles, are served by its policies in this field.

INTENT OF THE COMMISSION

The Commission has devoted considerable attention to Section 2 and believes that its recommendation to leave this section unchanged is appropriate and responsive to the collective interests of the people of Ohio in the foreseeable future. Section 2 has often been amended in conformity with exigencies of the time, and it is the analysis of the Commission that in its present form, and as construed by the courts, the section today presents a reasonable and workable structure for the imposition and control of *ad valorem* property taxation in this state.

FOOTNOTES

Section 2

1. 2 *Debates* 863 (March 10, 1851).
2. *Park Investment Company v. Board of Tax Appeals,* 175 Ohio St. 410, 195 N.E. 2d 908 (1964).
3. *State ex rel. Park Investment Company v. Board of Tax Appeals,* 32 Ohio St. 2d 28 at 33, 289 N.E. 2d 579 at 582 (1972).
4. L. L. Ecker-Racz, *The Politics and Economics of State-Local Finance* (Englewood Cliffs, New Jersey: Prentice Hall, 1970), pp. 100-103.
5. Rolland F. Hatfield, *Report to Governor's Minnesota Property Tax Study Advisory Committee,* (Minnesota State Planning Agency, November 1970).
6. E. g., Arnold W. Reitze, Jr., "Real Property Tax Exemptions in Ohio—Fiscal Absurdity," 18 W. Reserve L. Rev. 64 (1967).

ARTICLE XII

Section 3

PRESENT CONSTITUTION

Vacant. Former Section 3 repealed November 5, 1929.

COMMISSION RECOMMENDATION

Enact new section, below

COMMISSION RECOMMENDATION

The Commission recommends the enactment of a new section 3 to read as follows:

Section 3—(A) LAWS MAY BE PASSED PROVIDING FOR:

(1) THE TAXATION OF DECEDENTS' ESTATES OR OF THE RIGHT TO RECEIVE OR SUCCEED TO, SUCH ESTATES, AND THE RATES OF SUCH TAXATION MAY BE UNIFORM OR MAY BE GRADUATED BASED ON THE VALUE OF THE ESTATE, INHERITANCE, OR SUCCESSION. SUCH TAX MAY ALSO BE LEVIED AT DIFFERENT RATES UPON COLLATERAL AND DIRECT INHERITANCES, AND A PORTION OF EACH ESTATE MAY BE EXEMPT FROM SUCH TAXATION AS PROVIDED BY LAW.

Section 7—Repeal

Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation.

(2) THE TAXATION OF INCOMES, AND THE RATES OF SUCH TAXATION MAY BE EITHER UNIFORM OR GRADUATED, AND MAY BE APPLIED TO SUCH INCOMES AND WITH SUCH EXEMPTIONS AS MAY BE PROVIDED BY LAW.

Section 8—Repeal

Laws may be passed providing for the taxation of incomes, and such taxation may be either uniform or graduated, and may be applied to such incomes as may be designated by law; but a part of each annual income as provided by law may be exempt from such taxation.

(3) EXCISE AND FRANCHISE TAXES AND FOR THE IMPOSITION OF TAXES UPON THE PRODUCTION OF COAL, OIL, GAS, AND OTHER MINERALS; EXCEPT THAT NO EXCISE TAX SHALL BE LEVIED OR COLLECTED UPON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD.

Section 10—Repeal

Laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals.

Section 12—Repeal

On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

(B) LAWS IMPOSING TAXES MAY ADOPT BY REFERENCE PROVISIONS OF THE STATUTES OF THE UNITED STATES AS THEY THEN EXIST OR THEREAFTER MAY BE CHANGED.

This recommendation includes the repeal of present Sections 7, 8, 10, and 12 of Article XII. The proposed section is a composite, in amended form, of these four sections. The format brings together in Division (A) of this section every provision of Article XII—except Sections 1 and 2—which deal with the imposition of specific types of taxes. In addition, the proposed section contains a new provision relating to the incorporation into Ohio tax law, by reference, of laws of the United States prospectively. Section 1, which prohibits the poll tax, is kept separate to emphasize its historic significance.

HISTORY AND BACKGROUND OF PROPOSED SECTION 3, DIVISION (A) (1)

Division (A) (1) is derived from present Section 7 of Article XII, which has remained in the Constitution unchanged since its adoption in 1912, and was placed there to settle a question concerning the constitutionality of a *graduated* inheritance tax which had arisen as the result of a series of Ohio cases decided before 1912.

In 1894 the General Assembly had imposed a graduated tax on inheritances, or the right to receive an estate. Estates valued at not more than $20,000 were entirely exempt; but estates valued at more than $20,000 were taxed on the entire amount at graduated rates. The Ohio Supreme Court held this tax unconstitutional in *State ex rel. Schwartz v. Ferris,* 53 Ohio St. 314 (1895). The basis for the decision was not the inability of the General Assembly to levy such a tax, since it had long been recognized in Ohio that the power of the state to levy taxes is an inherent incident of sovereignty.[1] Rather, the exemption feature and the graduation of the amount of the tax, by imposing a greater rate on larger estates, were held to violate the equal protection clause of Section 2 of Article I of the Ohio Constitution. In the *Ferris* case, the Court held that an exemption must operate equally for all, and the rate of taxation must be the same on all estates.

In 1904 the General Assembly levied a new inheritance tax, which contained a $3,000 exemption applied to all estates, and a flat tax rate of two per cent applicable to all estates. This act was upheld by the Supreme Court in *State ex rel. Taylor v. Guilbert,* 70 Ohio St. 229 (1904). In the *Ferris* case, the Court had indicated that the maximum exemption which could be permitted was $200 (reasoning from a constitutional provision permitting a $200 personal property exemption), but this statement was rejected in the subsequent *Guilbert* case. There, in upholding the new act, the Court said:

> We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms cannot be said to deprive any one of the equal protection of the law, or in any manner to violate the bill of rights, or any section of the constitution . . . When it is determined . . . that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency.[2]

If the decisions seem inconsistent in the treatment of the exemption question, the matter was resolved by the 1912 Convention, which added Section 7 to Article XII, authorizing a graduated inheritance tax, and permitting "a portion of each estate not exceeding twenty thousand dollars" to be exempt from taxation.

On July 1, 1968, the Ohio legislature repealed the inheritance tax and adopted an estate tax[3], but no change in the language of Section 7 has occurred. An inheritance tax is a tax on the right of devisees or legatees to inherit, generally measured by the value of the property, whereas an estate tax is a tax on the property composing a decedent's estate.

EFFECT OF CHANGE

In the transfer from Section 7 to the proposed Section 3 (A) (1), two substantive changes have been made: (1) the taxation of estates is specifically authorized and (2) the constitutional ceiling of twenty thousand dollars on exemptions is removed in favor of permitting exemptions to be set by law.

RATIONALE FOR CHANGE

The reason for the transfer of Section 7, as amended, to the new Section 3 is to consolidate in one section all provisions of Article XII, except Sections 1 and 2, which authorize, or prohibit, the imposition of specific types of taxes. The Commission recommends the retention of the substance of Section 7, as amended, because the section specifically authorizes the graduation of taxes, an option which the Commission believes should continue to remain available, and based on the history of the inheritance tax in Ohio prior to the adoption of Section 7, a question may arise concerning the constitutionality of a graduated tax in the absence of specific authorization to impose it, because of the requirements of equal protection.[4]

The Commission further recommends that the section be amended to add a reference to an estate tax, as well as an inheritance tax, for purposes of clarity and specificity.

The use of the term "decedents' estates" will assure that the estate tax could not, by any interpretation, be imposed on the estates of living persons, because this term has gained a well-settled meaning in probate law. The change from the phrase "and such taxation may be uniform" to the phrase "and *the rates* of such taxation may be uniform" is for clarification purposes and reflects the fact that most people tend to think of taxation with this term in mind.

Finally, the Commission recommends that the $20,000 limitation on exemptions be removed from the Constitution because the value of money changes and this is a legislative detail, better left to the discretion of the General Assembly, particularly in view of the fact that Ohio's estate tax, like the income tax, is modeled, to a large extent, on the federal estate tax law.[5]

HISTORY AND BACKGROUND OF PROPOSED SECTION 3, DIVISION (A) (2)

Division (A) (2) is derived from Section 8 of Article XII, which also originated in 1912. It was amended in 1973 to remove the $3,000 exemption limit.

As previously noted, the state's power to levy taxes had been recognized as an inherent power prior to 1912. Why, then, did the delegates in 1912 deem it necessary to add Section 8 to Article XII? There was little or no discussion about the point that the General Assembly could levy an income tax if it so desired, without constitutional authorization. The first effort by Congress to levy an income tax, and a very limited one at that, had been held unconstitutional by the Supreme Court of the United States in the case of *Pollock v. Farmers' Loan and Trust Co.,* 157 U.S. 429 (1895), on strictly federal constitutional questions involving the interpretation of Section 2 of Article I of the federal Constitution which reads in part: "Representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers", and which has no counterpart in any state constitution. Although some states may have felt it necessary to authorize, specifically, an income tax in their constitutions because of the federal decision, this factor did not enter into the discussions in 1912 in Ohio. Rather, it seems clear that both the inheritance and income tax sections of Article XII were proposed by the 1912 Convention because of the prior decision in Ohio holding an inheritance tax unconstitutional, not because the General Assembly had no power to levy such a tax, but because of its graduation and exemption aspects.

The Supreme Court of Ohio, in reviewing the sections of Article XII drafted by the 1912 Convention and authorizing the imposition of specific types of taxes, certainly reached this conclusion when it said in *State ex rel. Zielonka v. Carrel,* 99 Ohio St. 220 (1919), at page 223:

> Section 7 of this article is a new product, and is in no sense a limitation of power, being rather a special grant, and has to do with taxation on inheritances. . . .
>
> Section 8 of the same article, providing for the taxation of incomes, for the same reason cannot be said to be a limitation of power, nor can it be said to be equivalent to a conclusion that without such express grant incomes might not be the subject of taxation. It is much more likely that the incorporation of this new section by the constitutional convention of 1912 was occasioned by a desire on the part of its members that the method of levying taxes on incomes should be precisely similar to taxation of inheritances, in so far as it might relate to graduation of rates and exemption.

The exemption provision of Section 8 was undoubtedly modeled on the corresponding inheritance tax provision of Section 7. The specific amount on the limitation on exemptions, three thousand dollars, was probably suggested by the pioneer income tax law of Wisconsin which had considerable influence on the deliberations of the Convention on the question of an income tax. The limit on exemptions was removed by the voters in Ohio in November, 1973, and the legislature now has authority to provide for exemption in any amount.

EFFECT OF CHANGE

There are a number of grammatical changes in proposed Division (A) (2) from the language of present Section 8. The only substantive change recommended by the Commission was the removal of the $3,000 limitation on exemptions, and this change has already been made by the voters.

RATIONALE FOR CHANGE

The transfer of Section 8, as amended, to Division (A) (2) is intended to effect a consolidation of all tax-authorizing or tax-prohibiting sections of Article XII, except Sections 1 and 2, as previously noted. In addition, the change to the phrase "and *the rates* of such taxation may be either uniform or graduated" from the phrase "and such taxation may be either uniform or graduated" is recommended for the same reason as the corresponding change is recommended in Division (A) (1), that is, to update the constitutional language to reflect current usage. Likewise, substitution of the phrase "as may be *provided* by law" for the phrase "as may be *designated* by law" is intended to reflect current bill-drafting practice in Ohio.

One noteworthy by-product of the proposed revision is the removal of the word "annual", thus obviating the necessity for defining "annual income" in the last phrase of Section 8, which reads "but a part of each such annual income as provided by law may be exempt from such taxation." This is especially significant in view of the fact that the state income tax law, as previously noted, is modeled on the federal one and, in fact, adopts the definitions of many terms used in the Internal Revenue Code.[6] The proposed removal would forestall a possible conflict in definition between state and federal law.

HISTORY AND BACKGROUND OF PROPOSED SECTION 3, DIVISION (A) (3)

Division (A) (3) is derived from two present sections of Article XII. That portion of the proposed division which precedes the semi-colon is transferred in substance from Section 10, which dates from 1912 and has not been changed since, and that portion of the

proposed section which follows the semi-colon is transferred, without the phrase "On and after November 11, 1936", from Section 12, which was adopted on November 3, 1936.

EFFECT OF CHANGE

No change in meaning results from the transposition.

RATIONALE FOR CHANGE

The transfer of Sections 10 and 12, as amended, to Division (A) (3) of Section 3 completes the consolidation envisioned by this proposed section. The further consolidation of Sections 10 and 12 in Division (A) (3) is deemed appropriate because both of these sections deal, at least in part, with excise taxes.

In regard to the state's power to levy a severance tax the Supreme Court of Ohio said in *State ex rel. Zielonka v. Carrel, supra,* at page 224:

> Section 10 of Article XII of the new Ohio Constitution declares that laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals.
>
> It is to be concluded that the incorporation of this new section in the constitution was to make certain the authority of the general assembly to levy tax on the specified minerals named, for certainly in view of the legislation and construction thereof by the supreme courts of both Ohio and the United States no express grant of power was required in order to sustain either excise or franchise taxation.
>
> A majority of this court are of the opinion that there is no constitutional limitation resting upon the authority of the general assembly to levy tax on property of every kind and character, except that it must be uniform and according to its true value in money. Nor is there even this limitation on its power to provide for the levy of taxation on incomes, inheritances and franchises, including the imposition of excise taxes.

The above comment by the Court on the severance tax has caused some theorists to question whether a severance tax may not in fact be a property tax subject to the uniform rule, thus needing constitutional authorization in order to permit the levy of such a tax in other than a uniform manner. This does not appear to have been litigated, but it is apparent that the 109th General Assembly, in enacting Section 5749.02 of the Revised Code, which imposes a severance tax on minerals, did not treat this tax as a property tax, since it imposed the tax on a *unit* basis—so much per ton—and not on the *value* of the minerals severed. At the present time, however, the Commission does not feel justified in recommending the removal of specific authority to levy a severance tax from the Constitution.

Since present Section 10, which authorizes the severance tax, also authorizes excise and franchise taxes, the possibility exists that removing the reference to excise and franchise taxes while leaving the reference to the severance tax might be construed to negate the state's power to levy excise and franchise taxes, even though, as *Zielonka* points out, these taxes could have been levied without specific constitutional authorization. The Commission also feels that the deletion of the reference to excise and franchise taxes, which are clearly transaction taxes, might be construed in the future to give a different meaning to the severance tax authority than was originally intended when the section was adopted. For these reasons, the Commission recommends the retention of the substance of Section 10, *in toto.*

The Commission has also concluded that the prohibition of an excise tax on food contained in present Section 12 represents a policy judgment of sufficient importance to merit continued constitutional attention. Since present Section 10 generally authorizes the imposition of an excise tax while Section 12 prohibits the imposition of an excise tax on a specific subject, it was thought appropriate to combine them in the division proposed here.

The deletion of the reference to a specific date, now in Section 12, merely removes a legislative detail from the Constitution.

HISTORY AND BACKGROUND OF PROPOSED SECTION 3, DIVISION (B)

Proposed Division (B) has no present counterpart in the Constitution.

EFFECT OF CHANGE

The proposed Division (B) would give constitutional authorization for the prospective adoption of provisions of federal tax law by the state through laws enacted by the General Assembly.

RATIONALE FOR CHANGE

In recent years, several states have adopted constitutional provisions of a similar nature, as the practice of "dovetailing" portions of the tax laws of the states on the federal tax law has become more common. These states include Colorado[7], Illinois[8], Kansas[9], Nebraska[10], New Mexico[11], New York[12], and North Dakota[13].

Certain portions of the tax laws of Ohio, too, are written so as to adopt portions of the federal law by reference prospectively. For example, Section 5731.01 (E) of the Revised Code states, in part: "The value

of the gross estate [for state estate tax purposes] may be determined, if the person required to file the estate tax return so elects, by valuing all the property in the gross estate on the alternate date, if any, provided in Section 2032. (a) of the Internal Revenue Code of 1954, *or any amendments or reenactments thereof,* as such section generally applies, for federal estate tax purposes, to the estates of persons dying on the decedent's date of death"; and the first paragraph of Section 5747.01 of the Revised Code—the definition section of the personal income tax law—states: "Except as otherwise expressly provided or clearly appearing from the context, any term used in Chapter 5747. of the Revised Code has the same meaning as when used in a comparable context in the Internal Revenue Code, and all other statutes of the United States relating to income taxes." Division (I) of Section 5747.01 then defines "internal revenue code" as the "internal revenue code of 1954, 68A stat. 3, 26 U.S.C. 1, *as now or hereafter amended.*" (Emphasis added).

There is no constitutional question with respect to the power of a state legislature to adopt by reference provisions of federal law which are in existence at the time the state law is enacted, However, and even though the trend of more recent cases tends to indicate that such action is permissible within prescribed limits, there is still a question in the minds of some constitutional theorists as to whether a state law which authorizes the adoption of federal law by reference, prospectively, constitutes an unlawful delegation of the state's legislative power to Congress, within the meaning of the Constitution of the United States and certain state constitutional provisions.[14] The relevant provisions of the Constitution of Ohio are that portion of Section 1 of Article II which provides that the legislative power of the state shall be vested in a General Assembly and Section 26 of Article II, which reads:

> All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act except such as related 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.

The question of whether the foregoing provisions prevent the adoption by the state of portions of the federal tax law, prospectively, has not been litigated and the Commission expresses no view on the validity of such action. However, the Commission recommends the adoption of the proposed Division (B) of Section 3 to clarify the matter, and to assure that the General Assembly is empowered to insure the consistency of Ohio's tax laws with federal laws if such consistency is deemed desirable.

The Commission considered but rejected the idea of including federal tax regulations, in addition to federal statutes, in the proposed new language.

INTENT OF COMMISSION IN PROPOSING SECTION 3

The intent of the Commission in proposing Divisions (A) (1), (A) (2) and (A) (3) of Section 3 is three-fold: (1) consolidating all sections of Article XII—except Sections 1 and 2—which either authorize or prohibit the imposition of specific types of taxes in one section; (2) updating the language of the provisions to reflect contemporary drafting practice and usage and, in the case of the reference to the estate tax, to give explicit constitutional recognition to the imposition of this type of tax; and (3) removing from the document certain legislative details, such as specific dates and exemption limits, which, in the view of the Commission, are not appropriately a part of a constitution.

The intent of the Commission in proposing Division (B) of Section 3 is to remove any constitutional doubt concerning the power of the General Assembly to adopt provisions of federal tax law prospectively.

Footnotes

Section 3

1. *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521 (1876).
2. *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229 (1904).
3. Sections 5731.01 *et seq.* of the Revised Code.
4. *Kroger Co. et al. v. Schneider*, 9 Ohio St. 2d 80 (1967).
5. See Sections 5731.01 (E) and 5731.18 (B) of the Revised Code.
6. Section 5747.01 of the Revised Code.
7. *Colorado Constitution*, Article X, Section 19.
8. *Illinois Constitution*, Article IX, Section 3(b).
9. *Kansas Constitution*, Article 11, Section 11.
10. *Nebraska Constitution*, Article VIII, Section 18.
11. *New Mexico Constitution*, Article III, Section 16.
12. *New York Constitution*, Article III, Section 22.
13. *North Dakota Constitution*, Article XI, Section 175.
14. James O. Huber, "Constitutionality of a Federalized Income Tax", 1963 Wisconsin L. Rev. 445, 449.

ARTICLE XII

Section 4

PRESENT CONSTITUTION

Section 4. The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the State, for each year, and also a sufficient sum to pay the interest on the State debt.

COMMISSION RECOMMENDATION

Section 4. The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt.

COMMISSION RECOMMENDATION

The Commission recommends the amendment of Section 4 of Article XII as follows:

Section 4. The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the ~~State~~ STATE, for each year, and also a sufficient sum to pay ~~the~~ PRINCIPAL AND interest AS THEY BECOME DUE on the ~~State~~ STATE debt.

HISTORY AND BACKGROUND OF SECTION

Section 4 is an original part of the Constitution of 1851 and has remained unchanged since its adoption. There was no direct predecessor of this provision in the Constitution of 1802. Rather, Section 4 is among the constitutional revisions made in 1851 as a remedial response to the financial laxity of the state government during a period of approximately 25 years before the call of the Constitutional Convention. During that period Ohio had embarked on a series of internal improvement projects, including the construction of a canal system. The building of the canals in Ohio was begun in 1825, and it was anticipated that the system when complete would, by improving transportation, encourage the growth of the state's economy. The state financed the project in part through the sale of interest-bearing "transferable certificates of stock" which had many of the indicia of modern bonds. The legislation which provided for the issuance of the stock pledged state funds for the payment of interest and principal, and made the auditor responsible for determining the tax necessary to satisfy the state's obligations on the stocks.[1] However, during the ensuing years the Auditor, often with the support of the Governor and the General Assembly, fell into the practice of diverting funds from other state purposes to servicing the canal debt. Thus, Ohio established a pattern of borrowing money to pay the interest due on previous borrowing. This practice extended beyond the financial obligations of the canal projects begun in 1825, for it also tainted the state's payment of debts incurred in a second phase of internal improvements entered into in 1836, and was compounded by the financial abuse resulting from the "Loan Law" of 1837.[2]

The action of the General Assembly in calling the Constitutional Convention for 1850 was very much a response to these and other financial and tax difficulties in which the state found itself. Among the main objectives of the delegates to the Convention was restricting the financial power of the General Assembly and, as a part of that objective, prescribing a method for paying the public debt.

During the Convention the position was expressed that the people had been deceived in the General Assembly's failure to levy taxes sufficient to meet the expenses of interest, and in the use of borrowed money to pay interest.[3] This sentiment carried the Convention and Section 4 was proposed as a measure to assure that the pattern of borrowing to pay interest would be brought to an end, never to be revived, and that taxes sufficient to meet the expenses of the state would thereafter be levied.

EFFECT OF CHANGE

The Commission does not foresee that the suggested amendment to Section 4 will cause any change in the manner in which the state debt is presently managed or paid. The General Assembly already provides through the revenues it raises for the principal as well as interest on state debt to be paid when due. Therefore, rather than giving the General Assembly direction to modify its current practice, the proposed revision of this section merely makes the original constitutional provision more complete. The effect of the amendment is to retain a concept of fiscal policy which has proven to be sound, and to add to the section slight changes which will modernize it and, hopefully, perfect the constitutional direction.

RATIONALE FOR CHANGE

The history of Section 4 shows that abuses in the area of interest payments on the state debt were an

overriding concern to the framers of the Constitution of 1851. It may be inferred from this concern that there was no specific intent to exclude the raising of sufficient sums to meet payments on the *principal* of debt from the constitutional mandate, and that the omission of reference to principal in the 1851 provision was just that—an omission and not an intentional exclusion. The Commission believes that the addition of the word "principal" completes the constitutional mandate in a logical manner and provides the people with a more effective protection against any future financial mismanagement which might otherwise arise in this area.

The Commission suggests the inclusion of the words "as they become due" in this section to emphasize that the requirement of this section in regard to the payment of principal and interest on the state debt is intended to apply only to that portion of the debt for which provision must be made in any fiscal year, and not to the entire debt. Most modern state debt is serial in form, so that not all obligations incurred in any one year must be met or satisfied at once at some later point in time. In addition, this language requires *timely* payment of debt service payments— a necessary adjunct to fiscal responsibility of government.

INTENT OF THE COMMISSION

The Commission believes that Section 4, although more than 120 years old, makes a viable statement on fiscal policy for Ohio, and it desires to clarify and perpetuate that policy by way of the proposed amendment. The original adoption of the section was intended to mandate a change in state fiscal policy and correct a great abuse which no longer exists. However, a constitution is adopted to give the fundamental directions for the operation of government, and making provision for paying the expenses incurred directly or through debt is such a basic responsibility of government that the Commission feels that a provision setting out and assigning that responsibility should be retained in the Ohio Constitution.

Footnotes

Section 4

1. 23 *O. Laws* 50.
2. 35 *O. Laws* 76.
3. 1 *Debates* 481 (June 18, 1850).

ARTICLE XII

Section 5

PRESENT CONSTITUTION

Section 5. No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

COMMISSION RECOMMENDATION

No change

COMMISSION RECOMMENDATION

The Commission recommends that no change be made in the present Section 5 of Article XII.

HISTORY AND BACKGROUND OF SECTION

Section 5 is an original part of the Constitution of 1851. No change has been made in the section since 1851, and there was no parallel provision in the Constitution of 1802. Like Section 4 of Article XII, Section 5 was among the constitutional provisions adopted in 1851 with the intent of putting an end to the gross mismanagement of government finances which had gone on during the second quarter of the 19th century and with the hope that an orderly system of taxation and expenditure could be established. Some of the provisions on fiscal affairs which were placed in the Constitution of 1851 may readily be criticized as being too remedial in nature and not directed effectively enough toward the establishment of a permanent framework for government. Certainly, remedy was a strong motivation in the adoption of Section 5, but the provision sets forth a limitation on the powers of the General Assembly, which limitation is of continuing value.

The concepts of Section 5 are relatively simple: no tax may be levied unless the General Assembly first enacts a statute which authorizes the levy; any such enabling legislation must set forth the purpose of the levy or be invalid; and the revenue derived from the levy must be applied solely to the purpose indicated in the enabling statute or statutes. By imposing these guidelines on the levying of taxes and the expenditure of resulting revenue, Section 5 protects the people from having to pay taxes not fully considered and formally authorized by the General Assembly and from having to contribute revenue which is used in unspecified ways or expended for purposes other than those which the people, through their representatives, have approved.

EFFECT OF RETAINING SECTION

No change in the meaning or effect of Section 5 is intended.

RATIONALE FOR RETAINING SECTION

An initial reading of the first clause of Section 5 would seem to indicate nothing more than the obvious, to wit: taxes may only be levied when authorized by statutory provision. However, the Commission believes that such basic safeguards as this statement are eminently appropriate for inclusion in the Constitution of Ohio. The limitation of the first clause, or indeed the entire section, would not be clearly implied in the General Assembly's general power of taxation. For the people to enjoy the continued protection of having taxes levied only when authorized by statute and having revenues thereby produced applied only to the statutory purposes, such a provision should be retained in the Constitution. The Commission understands that the intent of the second clause of Section 5, to require taxing statutes to set forth their objectives and to limit the application of resultant revenues to those purposes, may be compromised by the enactment of tax legislation which states only the broadest and most general objectives. Nonetheless, the Commission recommends that the second clause also be retained in any revision of the Constitution because it does express a protection to the people of the state which seems just and proper—and requires the General Assembly to justify in advance the uses and purposes for which new taxes are to be devoted.

INTENT OF THE COMMISSION

Within the Commission's overall task of recommending to Ohioans a Constitution which states the fundamental rights of the people and establishes a framework for modern government is the responsibility to analyze the provisions of the existing Constitution and to suggest the retention of those sections which, however old, have continuing vitality. It is the intent of the Commission in recommending that Section 5 of Article XII be retained that a safeguard still thought to be important not be excluded from the statement of the most basic law of Ohio.

ARTICLE XII

Section 5a

PRESENT CONSTITUTION

Section 5a. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

COMMENT

During its deliberations concerning a possible recommendation on this section—which is relatively new, having become effective on January 1, 1948 — the Commission considered five alternatives:

1. Making no change in the section. This would, of course, continue the present situation.

2. Repealing the section. This would permit the General Assembly freedom to expend Section 5a-related funds, without preconditions, for any purpose, except to the extent any of these funds are committed for debt service on bonds issued pursuant to constitutional amendments.

3. Permitting Section 5a-related funds to be expended for any purpose with the concurrence of two-thirds of the members elected to each house of the General Assembly. This alternative would, likewise, permit the General Assembly to expend these funds, not otherwise committed, for any purpose, without preconditions, except that it would impose the requirement of a two-thirds vote, which is the same majority as is presently required to pass emergency legislation. This recommendation was contained in the report of the Commission's Finance and Taxation Committee, with the comment that this approach would give the General Assembly the option to change priorities in the future, should it desire to do so, while at the same time assuring that such a change would never be made lightly.

4. Requiring that all state revenues derived from any transportation source be expended only for publicly owned or publicly operated transportation facilities. This alternative would pool all transportation-related revenues, including Section 5a funds, in a common fund to finance all types of publicly owned or publicly operated transportation facilities. It would, in effect, broaden both the types of earmarked revenues and the purposes for which they are earmarked. This approach was suggested to the Commission by the Ohio Department of Transportation.

5. Permitting Section 5a-related funds to be expended for any transportation purpose. (Variations of this approach might include limiting the expenditure of such funds to publicly owned or publicly operated facilities). Under this alternative, Section 5a-related funds would not be pooled with other transportation-derived revenues by constitutional mandate, but would nevertheless be available for transportation purposes other than highways, should the General Assembly deem it appropriate to use them for such purposes.

The Commission was unable to secure the necessary approval for any of the alternatives, and thus makes no recommendation with respect to Section 5a at this time. If approval of a recommendation is reached later, it will be transmitted to the General Assembly.

COMMISSION RECOMMENDATION

The Commission has no recommendation with respect to Section 5a at this time.

ARTICLE XII

Section 6

PRESENT CONSTITUTION

Section 6. Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement.

COMMENT

The Commission has already recommended the repeal of Section 6 of Article XII as being unnecessary, in Part 2 of its report, dated December 31, 1972.

ARTICLE XII

Section 7

PRESENT CONSTITUTION

Section 7. Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation.

COMMISSION RECOMMENDATION

Repeal and transfer.

COMMISSION RECOMMENDATION

The Commission recommends the repeal of present Section 7 and the transfer of its provisions, with some changes, to Division (A) (1) of the proposed Section 3.

COMMENT

The discussion of the history and background of present Section 7, the rationale for recommending changes in the section, and the intent of the Commission in making these recommendations, appears following the proposed Section 3, beginning at page 20.

ARTICLE XII

Section 8

PRESENT CONSTITUTION

Section 8. Laws may be passed providing for the taxation of incomes, and such taxation may be either uniform or graduated, and may be applied to such incomes as may be designated by law; but a part of each annual income as provided by law may be exempt from such taxation.

COMMISSION RECOMMENDATION

Repeal and transfer.

COMMISSION RECOMMENDATION

The Commission recommends the repeal of present Section 8, and the transfer of its provisions, with some changes, to Division (A) (2) of the proposed Section 3.

COMMENT

The discussion of the history and background of Section 8, the rationale for recommending changes in the section, and the intent of the Commission in making these recommendations, appears following the proposed Section 3, beginning at page 20.

ARTICLE XII

Section 9

PRESENT CONSTITUTION

Section 9. Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income or inheritance tax originates, or to any of the same, as may be provided by law.

COMMISSION RECOMMENDATION

Section 6. Not less than fifty per cent of the income, estate, and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income, estate, or inheritance tax originates, or to any of the same, as may be provided by law.

COMMISSION RECOMMENDATION

The Commission recommends the amendment of Section 9 to read as follows:

Section ~~9~~ **6**. No less than fifty per ~~centum~~ CENT of the income, ESTATE, and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income, ESTATE, or inheritance tax originates, or to any of the same, as may be provided by law.

The renumbering of this section results from the fact that present Sections 7 and 8, as amended, would be transferred to Divisions (A) (1) and (2) of the proposed Section 3 of Article XII, and present Section 6 would be repealed.

HISTORY AND BACKGROUND OF SECTION

Section 9 was adopted in its original form in 1912 when it read:

> Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the city, village or township in which said income and inheritance tax originate.

This provision was amended effective November 4, 1930 to include specific reference to counties and school districts, and by the addition of the words "or to any of the same, as may be provided by law" at the end of the section.

The Debates of the Constitutional Convention of 1912 are of no assistance in ascertaining the original intent of Section 9, although it appears that the "fifty-fifty" formula contained in it is, by its very nature, a compromise between state and local taxing interests. The 1930 amendment, on the other hand, followed by a year the adoption of the "classification amendment" to Section 2 of Article XII, which removed personal property from the uniform rule of taxation contained in that section, and there was apparently little doubt at the time that classification of personal property would reduce revenues from the property tax. The 1930 amendment can be seen, then, as an effort to ease the burden of loss of revenue created by classification and by reappraisal, particularly on counties and school districts, which relied heavily on the property tax and were not receiving any part of the inheritance tax, then the only tax levied under this section. However, the amendment by no means assured counties and school districts that they would *automatically* benefit from the inheritance tax, and a possible income tax, as a result of their specific mention in Section 9, since the last part of the amendment clearly gives the General Assembly the power to determine which subdivisions shall benefit.

EFFECT OF CHANGE

No change in meaning results from the proposed amendment.

RATIONALE FOR CHANGE

The Commission concluded that the concept of requiring one-half of all taxes levied under this section to be returned to the point of origination should be retained in the Constitution and that the people of Ohio would not today accept a repeal of these provisions.

As previously stated, this section would be renumbered to fill a vacancy left by the proposed reorganization of Article XII.

The change from "per centum" to "per cent" is simply a matter of style, while the addition of the reference to estate taxes, as in the proposed Section 3 (A) of Article XII, recognizes the fact that Ohio now imposes such a tax. Parenthetically, the Commission has been advised that a portion of the estate taxes which are being collected are, in fact, being returned to local units as if the estate tax were specifically mentioned in Section 9.

The possibility of requiring the return of part of the corporate franchise tax under this section was considered by the Finance and Taxation Committee of the Commission, but the committee was advised that such a requirement would cause serious problems in ad-

ministration, particularly in regard to the allocation of the income of corporations which derive income from several counties or from statewide operations. Additional problems could be caused by a change in the basis on which a corporation pays income taxes, which may change from year to year. In recognition of these problems, the Commission concluded not to include the franchise tax in this section as a tax "measured by income."

The Commission also concluded that any change in the "origination language" of this section to define more clearly the point of origin of the tax revenues would be as likely to create new problems of administration and interpretation as it would be to solve existing ones. Hence, no change in this language is recommended.

INTENT OF COMMISSION

The intent of the Commission is to change the language of this section to reflect contemporary usage and to add a specific reference to the estate tax.

ARTICLE XII

Section 10

PRESENT CONSTITUTION

Section 10. Laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals.

COMMISSION RECOMMENDATION

Repeal and transfer.

COMMISSION RECOMMENDATION

The Commission recommends the repeal of Section 10, and the transfer of its provisions, with some changes—including their combination with the provisions of Section 12, as changed—to Division (A) (3) of proposed Section 3.

COMMENT

A discussion of the history and background of Section 10, the rationale for recommending changes in the section, and the intent of the Commission in making these recommendations, appears following the proposed Section 3, beginning at page 20.

ARTICLE XII

Section 11

PRESENT CONSTITUTION

Section 11. No bonded indebtedness of the state, or any political sub-divisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

COMMENT

Section 11 of Article XII, when read in conjunction with the one per cent limit of Section 2 of Article XII and the ten-mill limit of Section 5705.02 of the Revised Code, creates an indirect debt limit. Since this limit has its greatest effect on political subdivisions, rather than on the state, the Commission determined, after considerable study by the Finance and Taxation Committee and upon that Committee's recommendation, to refer the matter to the Local Government Committee. Therefore, it has no recommendation with respect to Section 11 at this time.

COMMISSION RECOMMENDATION

The Commission has no recommendation with respect to Section 11 at this time. It has been referred to the Commission's Local Government Committee, and will be included in a future report of the Commission.

ARTICLE XII

Section 12

PRESENT CONSTITUTION

Section 12. On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

COMMISSION RECOMMENDATION

Repeal and transfer.

COMMISSION RECOMMENDATION

The Commission recommends the repeal of present Section 12 and the transfer of its provision with some changes—including their combination with the provisions of Section 10, as changed—to Division (A) (3) of the proposed Section 3.

COMMENT

A discussion of the history and background of Section 12, the rationale for recommending changes in the section, and the intent of the Commission in recommending these changes, appears following the proposed Section 3, beginning at page 20.

APPENDIX E

Part 5

INDIRECT DEBT LIMIT

December 31, 1974

THE INDIRECT DEBT LIMIT
Article XII, Section 11

Present Constitution

Section 11. No bonded indebtness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

Commission Recommendation

The Commission recommends the repeal of Section 11 of Article XII and the enactment of a new Section 7 of Article XII as follows:

Section 7. SO LONG AS ANY BONDS OR NOTES WHICH ARE GENERAL OBLIGATIONS OF A POLITICAL SUBDIVISION ARE OUTSTANDING, SUCH POLITICAL SUBDIVISION SHALL AT THE TIMES REQUIRED MAKE PROVISIONS FOR THE TIMELY PAYMENT OF THE PRINCIPAL OF AND INTEREST ON SUCH BONDS AND NOTES BY PROVIDING FOR AND COLLECTING BY TAXATION OR BY ANY OTHER MEANS BY WHICH SUCH SUBDIVISION IS AUTHORIZED BY THIS CONSTITUTION OR BY LAW TO OBTAIN MONEYS FOR SUCH PURPOSES AND BY APPROPRIATING SUFFICIENT AMOUNTS FOR SUCH PURPOSE. IF AT ANY TIME THE OFFICERS OR OTHER AUTHORITY OF THE SUBDIVISION HAVING RESPONSIBILITY FOR MAKING SUCH PROVISIONS FOR THE TIMELY PAYMENT OF PRINCIPAL AND INTEREST FAIL TO DO SO, THE TREASURER OR OTHER OFFICER HAVING CHARGE OF THE RECEIPT OF MONEYS OF THE SUBDIVISION SHALL SET ASIDE FROM LAWFULLY AVAILABLE MONEYS OF THE SUBDIVISION, INCLUDING THOSE FIRST RECEIVED THEREAFTER, SUFFICIENT AMOUNTS FOR SUCH PAYMENT AND SHALL APPLY SUCH MONEYS THERETO. THIS SECTION AND SECTION 2 OF ARTICLE XII OF THIS CONSTITUTION DO NOT DIRECTLY OR INDIRECTLY LIMIT THE AMOUNT OF GENERAL OBLIGATION DEBT WHICH MAY BE INCURRED BY A POLITICAL SUBDIVISION BUT THE GENERAL ASSEMBLY MAY, BY LAW, PROVIDE FOR LIMITATIONS ON SUCH AMOUNTS. THIS SECTION DOES NOT AUTHORIZE THE LEVY OF ANY AD VALOREM PROPERTY TAX OTHER THAN AS AUTHORIZED OR PERMITTED BY SECTION 2 OF ARTICLE XII OF THIS CONSTITUTION.

History and Background of Section

Section 11 was added to Article XII, the Taxation Article, as a result of the proposals of the 1912 Convention. It prohibits bonded indebtedness from being incurred or renewed by the state or any political subdivision unless the legislation provides for levying and collecting, annually, by taxation an amount sufficient to pay the interest and to provide a sinking fund for the redemption of the bonds at maturity.

As interpreted by the Ohio Supreme Court, when read in conjunction with Section 2 of Article XII which prohibits levying ad valorem property taxes in excess of one per cent of the value of the property without a vote of the people in the taxing district, Section 11 constitutes a limit on the amount of general obligation debt which may be incurred. The Court held, in Portsmouth v. Kountz, 129 Ohio St. 272 (1935), that the amount required to meet the payments on general obligation debt must be computed within the one per cent (statutory 10-mill) limit even though the debtor anticipated that revenues other than those received from property taxation would be sufficient to meet the bond payments. Moreover, the outstanding unvoted indebtedness of all overlapping political subdivisions must be included in computing whether the proposed bond issue will fall within the "10-mill" limit. The 1912 convention debates do not indicate that this was the anticipated effect of the section -- for one thing, the Constitution did not contain a property millage tax limitation and the Convention rejected a proposal to insert one in the Constitution; for another, the Smith "one per cent" law, in effect at the time, excluded millage necessary to meet payments to sinking funds and interest on bonds. Thus, it seems to have been anticipated by the delegates that the taxes referred to in Section 11 would not fall within the 10 mill limit. However, the Supreme Court held that the people must have intended, when the one per cent limitation was subsequently placed in the Constitution, to have the limit cover taxes levied, or which might be necessary to be levied, for debt, as well as those levied for current expenses of government.

The 1912 debates on Section 11 discuss almost entirely the problems of political subdivisions, and very little the problems of state debt. Indeed, the $750,000 limitation on state debt, which carried over from 1851, was, and is, a severe limitation on the state's ability to incur debt and, as a practical matter, all major amounts of state debt must be voted by the people. In another report, the Commission has made recommendations to the General Assembly regarding state debt. Except where specifically provided in a constitutional amendment the state has not levied ad valorem property taxes to meet payments on state debt.

Another effect of Section 11 is to place debt charges in a priority position over other expenses of government. (State ex rel. Bruml v. Brooklyn, 126 Ohio St. 459 (1933)). Thus, the section is a guarantee of payment -- at least, to the extent that payment can be obtained from within the one per cent (10 mill) limit.

The Ohio General Assembly has complete authority, by virtue of Section 13 of Article XVIII and Section 6 of Article XIII, to limit the power of municipal corporations to incur debt, and has plenary power, by virtue of its general legislative power, to limit the authority of other political subdivisions to incur debt. Moreover, this authority is exercised by the General Assembly through appropriate statutes. Although the Commission, in its report on Local Government, is making recommendations to combine the two sections relating to municipal corporations, no diminution of the legislature's power to regulate and limit local government debt will result.

The Commission believes that the problem of the indirect debt limit is that it is an articificial limit, since levies within the 10 mills are rarely, if ever, necessary to meet debt payments. Other sources of taxation, and revenues other than tax revenues, are used for debt purposes; the particular local government may, nevertheless, and within the statutory limits, prefer to issue unvoted general obligation bonds to finance a particular project for a variety of reasons -- lower interest rate; immediate need for a project and lack of time to go to the voters; a decision that the project is not one to engender great public support and might lose at the polls, no matter how necessary it might be, or for some other reason. There is no evidence that local governments in Ohio are failing to meet debt payments when due.

Effect of Commission Recommendation

The Commission proposal would:

1. Continue the guarantee aspects of Section 11 of Article XII by requiring timely payment of principal and interest on general obligations, and requiring the treasurer or other officer in charge of the receipt of money to set aside from lawfully available moneys of the subdivision sufficient amounts for payment if sufficient provision is not made.
2. Permit provision for payment to be made from taxation or by any other means by which the subdivision can legally obtain money.
3. Eliminate the reference to the state from the section. The present constitutional debt limit is a sufficient barrier to the state incurring debt; the Commission's recommendations on state debt, if adopted, would render this section completely superfluous as to the state.
4. Eliminate the sinking fund requirement, since most bonds today are serial bonds.
5. Specifically state that the tax limitation of Section 2 is not a debt limit, but reinforce the provision that the General Assembly may provide for political subdivision debt limitations.
6. Specifically state that the new section does not authorize the levy of any ad valorem property tax other than as authorized by Section 2 of Article XII. Thus, the one per cent tax limit could not be violated by construction of the new section.
7. The section would be renumbered in accord with the scheme indicated in the Commission's fourth report, dealing with Article XII.

Intent of the Commission

Adoption of the proposal will not, by itself, solve any problems for the political subdivisions presently restricted by its application as an indirect debt limit, since statutes presently impose the same limit and will require alteration before the indirect debt limit is removed. However, this is a necessary first step.

APPENDIX F

Part 6

THE EXECUTIVE BRANCH

March 15, 1975

CHAPTER I

A. Gubernatorial Succession And Disability Introduction

The purpose of adequate provisions on gubernatorial succession and disability is to avoid the confusion resulting from disputes over succession and to assure continuity of policies that the voters approved. The provisions on succession in the Ohio Constitution have gaps, leaving much open to interpretation. In certain situations, the Constitution is wholly inadequate. It is not clear, for example, whether the Lieutenant Governor, when succeeding to the gubernatorial office, becomes the Governor in fact, or if the Lieutenant Governor serves as acting Governor. The Constitution is silent on how to compensate the Lieutenant Governor who assumes gubernatorial office or who temporarily exercises gubernatorial duties. What happens if a Governor-elect cannot assume office is a question of potential complexity. A strict interpretation applied to the limitation of two consecutive terms in the office of Governor conceivably could mean that Ohio would be without a legal chief executive should the Governor-elect die prior to assuming office while a Governor in office was constitutionally prevented from further service. A 1947 opinion of the Ohio Attorney General said that the term "Governor" as it appears in the Ohio Constitution does not include the "Governor-elect," so that when that person dies, the office cannot be assumed by the Lieutenant Governor.

Gubernatorial disability also would pose a problem if it occurred in Ohio. Past experience of several states indicates that some method of determining whether a Governor is incapable of performing the duties and functions of office is needed to avoid disconcerting experiences.

The federal experience also offers evidence of the need for disability provisions. Until the 25th Amendment was adopted, the Federal Constitution lacked a procedure for determining the question of disability, with the result that in two instances of disability, those of Presidents Garfield and Wilson, the former continued in office until his death, and other, after his partial recovery, until the end of his term.

Passage of the 25th Amendment in 1967 provided a constitutional mechanism for determining disability. Under this provision, the Vice-President becomes Acting President whenever (a) the President transmits to the Senate and to the House of Representatives a declaration of disability to discharge the duties of office; or (b) the Vice-President and a majority of the principal officers of the executive departments or of another body named by Congress transmit to the two houses a similar declaration. A resumption of powers by the President follows the same procedure with the addition that a two-thirds vote of Congress resolves a dispute over the President's recovery.

Ohio law lacks procedures for raising and for determining disability questions. The Commission proposes to amend Section 15, to repeal Sections 16 and 17, and to enact two new sections in Article III in order to supply procedures for contingencies not covered under the present succession provisions and to remove ambiguities as to the status of one who serves in the capacity of Governor under varying situations.

The recommendations assume repeal of the present designation of the Lieutenant Governor as President of the Senate, in accordance with Part 1 of the Commission's recommendations to the General Assembly. In that

part of its Report, the Commission called for tandem election of the Governor and Lieutenant Governor and the amendment of Section 16, not its repeal. The substance of the Section 16 amendment in Part I—to require the Lieutenant Governor to perform such duties in the executive department as are assigned by the Governor and to exercise such powers as are prescribed by law—could be incorporated as a new section in Article III to eliminate apparent conflicts in these two parts of its recommendations with respect to the Lieutenant Governor. The intent of the revision of Sections 15, 16, and 17 of Article III, as proposed in this Report, is not to alter the substance of the proposal contained in Part I.

RECOMMENDATIONS

ARTICLE III

Section 15

Present Constitution

Section 15. In case of the death, impeachment, resignation, removal, or other disability of the Governor, the powers and duties of the office, for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the Lieutenant Governor.

Commission Recommendation

Section 15. (A) In case of the death, conviction on impeachment, resignation, or removal of the Governor, the Lieutenant Governor shall succeed to the office of Governor.

(B) When the Governor is unable to discharge the duties of office by reason of disability, the Lieutenant Governor shall serve as governor until the Governor's disability terminates.

(C) In the event of a vacancy in the office of governor or when the Governor is unable to discharge the duties of office, the line of succession to the office of governor or to the position of serving as governor for the duration of the Governor's disability shall proceed from the Lieutenant Governor to the President of the Senate and then to the Speaker of the House of Representatives.

(D) Any person serving as governor for the duration of the Governor's disability shall have the powers, duties, and compensation of the office of governor. Any person who succeeds to the office of governor shall have the powers, duties, title, and compensation of the office of governor.

(E) No person shall simultaneously serve as Governor and Lieutenant Governor, President of the Senate, or Speaker of the House of Representatives, nor shall any person simultaneously receive the compensation of the office of governor and that of the lieutenant governor, president of the senate, or speaker of the house of representatives.

Commission Recommendation

The Commission recommends the amendment of Section 15 of Article III as follows:

Section 15. (A) In the case of the death, CONVICTION ON impeachment, resignation, OR removal, of the Governor, the Lieutenant Governor SHALL SUCCEED TO THE OFFICE OF GOVERNOR.

Divisions (B), (C), (D), and (E) in the Commission's recommendation, set forth in full above, are new language.

Effect of change

In its revision of Section 15, the Commission distinguishes between succeeding to the office of Governor, in case of the Governor's death, conviction on impeachment, resignation, or removal, and serving as Governor in the event of the Governor's disability. Under present Section 15 much is left to interpretation of the provision whereby powers and duties of office "devolve upon" the Lieutenant Governor in the event of either gubernatorial removal or disability. The recommendation separates gubernatorial disability and makes it the subject of division (B). Under division (A), the Lieutenant Governor would become Governor where the Governor dies, resigns, or is removed from office; under division (B) the Lieutenant Governor would serve as Governor on a temporary basis in the event of gubernatorial disability.

Division (D) of the revised section further develops this differentiation in the status of a successor. It eliminates uncertainty concerning authority, compensation, and title by providing that a person who acts as Governor for the duration of a disability succeeds to the powers, duties and

compensation of that office. In case of a gubernatorial vacancy, division (D) provides for the additional succession to the title of Governor.

Another effect of the revision of Section 15 is to specify that **conviction** on impeachment results in removal from office. Impeachment, under both the Federal and Ohio Constitutions, is a proceeding against a public officer instituted by one house of the legislative branch (in each case the House of Representatives) through articles of impeachment, which serve a purpose similar to an indictment for criminal activity. The House of Representatives in each case must pass upon the articles of impeachment, which allege the complained-of misconduct of the particular officer.

Once the articles of impeachment are passed by the House, the impeachment is presented to and prosecuted before the other house (in each case the Senate). If two thirds or more of all Senators vote for conviction, the party impeached is found guilty of the charges contained in the articles of impeachment and is thereby removed from office. The amendment to Section 15 would recognize more clearly than does the present language that a vacancy occurs at the point of conviction on the articles of impeachment.

Under division (A), if a vacancy occurs in the office of Governor, the Lieutenant Governor becomes Governor, and a vacancy in the office of Lieutenant Governor is created. This vacancy would not be filled unless, as provided in proposed Section 17, within the first 20 months of a term a second vacancy occurs in the office of Governor, through the death, conviction on impeachment, resignation, or removal of the successor Governor (former Lieutenant Governor) or unless initially a simultaneous vacancy occurred in the offices of Governor and Lieutenant Governor within such 20 month period. Under either situation proposed Section 17 calls for the election of a new Governor and Lieutenant Governor for the unexpired portion of the term.

The present line of succession would be retained but restated. Present Section 17 would be replaced by division (C) of Section 15, which provides that the line of succession from Lieutenant Governor goes first to the President of the Senate and then to the Speaker of the House. The President of the Senate would be the President elected by that body, consistent with the Commission's other recommendations concerning the Lieutenant Governor.

Under division (E) of new Section 15, no person could simultaneously serve in or receive compensation from the office of Governor and other offices in the line of succession.

Comment

The Commission believes that it is proposing to fill a major gap in the present succession provisions by recommending a distinction between succeeding to the governorship on the one hand and becoming an acting governor on the other. By coupling this distinction with a specific procedure for determining the existence of a disability and for reinstating the Governor upon its termination, the Commission seeks to avoid difficulties that result when the chief executive resists displacement or when a successor is reluctant to exercise certain powers because of uncertainty over status. Other jurisdications have encountered such problems and have, through similar kinds of constitutional revision, sought to strengthen constitutional provisions on succession.

The Commission examined a variety of possibilities for a line of succession to the office of Governor and concluded that the present order should be retained. History reinforces its view that the Lieutenant Governor should succeed to the office of Governor. One important reason for creation of that position by the Constitutional Convention of 1850 was that a successor should be elected on the same statewide basis as the Governor. If the Lieutenant Governor is to be elected on the same party ticket as the

Governor — as the Commission recommends and as is done in some 19 other states — the successor would presumably have political philosophy harmonious to that of the Governor.

The present line of succession in Ohio further calls for assumption of gubernatorial duties by the President of the Senate or, if the President of the Senate is incapable of performing such duties, by the Speaker of the House. The Commission favors retention of this lineal succession because it has not been demonstrated to be unsuccessful and because, short of a catastrophe, these two legislative positions could always be filled.

Such a line of succession thus assures the availability of a designated office holder who can be expected to be very knowledgeable about the affairs of state and hence well equipped for succession. A contrary view questions the advisability of having legislative leaders in the line of succession because a legislator represents a smaller segment of the state's population than another official elected on a statewide basis. The Commission holds, however, that because of their selection by elected bodies at large as legislative leaders, presiding officers of the Senate and House are recognized on a statewide basis. Finally, the Commission maintains the line of succession should be definite and certain.

The Commission has chosen not to attempt a definition of the limits of disability. The intention is to treat as a disability any condition of circumstance that renders the Governor "unable to discharge the duties of his office." Some states, having had a problem with an absent governor, have provided for temporary succession every time that the Governor is absent from the state. Because modern transportation and communications can keep a Governor in close touch with state affairs, the Commission found no basis for making absence a ground for temporary succession in Ohio.

ARTICLE III
Section 16

Present Constitution

Section 16. The Lieutenant Governor shall be President of the Senate, but shall vote only when the Senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of Governor, the Senate shall choose a President pro tempore.

Commission Recommendation

Section 16. The supreme court has original, exclusive, and final jurisdiction to determine disability of the governor or governor-elect upon presentment to it of a joint resolution by the general assembly, declaring that the governor or governor-elect is unable to discharge the powers and duties of the office of governor by reason of disability. Such joint resolution shall be adopted by a two-thirds vote of the members elected to each house. The supreme court shall give notice of the resolution to the governor and after a public hearing, at which all interested parties may appear and be represented, shall determine the question of disability. The court shall make its determination within twenty-one days after presentment of such resolution.

If the governor transmits to the supreme court a written declaration that the disability no longer exists, the supreme court shall, after public hearing at which all interested parties may appear and be represented, determine the question of the continuation of the disability. The court shall make its determination within twenty-one sion to the office of the governor or to its powers and duties.

The supreme court has original, exclusive, and final jurisdiction to determine all questions concerning succesdays after transmittal of such declaration.

Commission Recommendation

The Commission recommends the repeal of Section 16 of Article III and enactment of a new section, as shown above.

Effect of Change

Proposed Section 16 sets forth a procedure by which a disabled Governor may be officially declared disabled by the successive actions of the General Assembly and the Supreme Court. It designates a legislative joint resolution, adopted by a two-thirds majority of elected members, as the mechanism for initiating the question of whether a gubernatorial disability exists and gives the Supreme Court original, exclusive, and final jurisdiction to determine questions of gubernatorial disability and succession.

Section 16 does not attempt a definition of disability, and it is so worded that disability is a factual question. The Court would determine the existence of disability by finding that any condition exists which renders the Governor unable to discharge the powers and duties of the office.

The Court would be required to give notice of the joint resolution to the Governor, hold a public hearing, allow interested parties to appear and be represented, and determine the question of disability within 21 days of the resolution's presentment.

The second paragraph of the proposed new Section 16 allows the Governor to initiate a proceeding to determine whether the disability has ceased to exist. It would further guarantee notice, public hearing, and the right to be represented in proceedings to determine continuation of a disability.

The Present Section 16 is unrelated in subject matter. Its history and background are explored in Part I of the Commission's Report to the General Assembly. The recommendation in Part I that the Lieutenant Governor be removed as President of the Senate and be given executive duties and powers is not abrogated by this recommendation. The Lieutenant Governor's executive status and duties should be the subject of a new section 1a in Article III to eliminate sectional numbering conflict.

Comment

The Commission recognizes that determinations of when a state of gubernatorial disability exists and when that state no longer exists are highly sensitive actions. For that reason it believes that an adequate constitutional procedure must cover both initiation of a disability question and its final resolution. The Ohio Constitution is silent on both points. The constitutional provisions of some states designate a final forum for decision but fail to specify how a disability question is to be raised. Where a given court has jurisdiction to make the determination about a disability but the Constitution is silent on the question of who can raise the issue, either the legislature may provide by law for the commencement of disability proceedings or standing to raise the issue must be developed by the courts in a traditional case by case method. The Commission rejects either alternative because of the uncertainties that they introduce into the procedure.

The Commission decided to recommend joint resolution of the General Assembly as the triggering mechanism for inquiry into the disability question because it feels that the question should not be frivolously raised. The requirement is designed to protect the Governor from spurious action. The Commission believes that a reasonable prerequisite to judicial hearing is to require that a body composed of elected representatives of all the people go on record in this matter. The necessity of a special majority for legislative action is deemed to be an appropriate way in which to reduce political motivations. The two-thirds majority selected is chosen for consistency with other constitutional requirements. It is the same majority as that required by Article II Section 1d to pass emergency legislation or by Article II Section 15 to dispense with three separate considerations of pending legislation.

The Commission opted to give the state Supreme Court original, exclusive, and final jurisdiction to determine questions of gubernatorial dis-

ability and succession because it is impressed with the reasoning that all issues relating to succession under the state Constitution will evenually reach that court anyway. Giving the Court original and exclusive jurisdiction represents an effort to allow disability cases to be disposed of with promptness and finality so as to minimize the disruption which results from the Governor's disability.

In designating the Court rather than the General Assembly as final arbiter, the Commission sought to avoid the introduction of irrelevant political concerns. Participation of the Supreme Court in the procedure is considered by the Commission to be vital to protect the Governor from irresponsible action by a legislative majority of the opposing political party.

The inclusion of a procedure whereby the Governor may raise the question of the disability's continuance is considered important because it evolved out of Commission dissatisfaction with proposals to put a limit upon temporary succession. In some jurisdictions, for example, a vacancy in office occurs if gubernatorial disability does not terminate within a given period, such as six months. The Commission, recognizing that impairment of faculties may be a temporary condition, feels that the Governor should not be foreclosed from seeking reinstatement. In its view constitutional specificity on this point is considered imperative to assure that the disability procedure is fair to the interests of all parties concerned. The provision for transmittal by the Governor of a declaration that the disability no longer exists has a federal parallel in the constitutional procedure for determining presidential disability.

Finally, the Commission's intentions in setting forth requirements that disability hearings be public, that all interested parties be permitted to appear and be represented, and that determinations be made within 21 days of the initiation of court action, are to guarantee procedural due process in disability proceedings and to define a reasonable time limit for their determination.

ARTICLE III
Section 17

Present Constitution

Section 17. If the Lieutenant Governor, while executing the office of Governor, shall be impeached, displaced, resign or die, or otherwise become imcapable of performing the duties of the office, the President of the Senate shall act as Governor, until the vacancy is filled, or the disability removed; and if the President of the Senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of Governor, the same shall devolve upon the Speaker of the House of Representatives.

Commission Recommendation

Section 17. When for any reason a vacancy occurs in both the office of governor and lieutenant governor prior to the expiration of the first twenty months of a term, a governor and Lieutenant governor shall be elected at the next general election occurring in an even-numbered year after the vacancy occurs, for the unexpired portion of the term. The officer next in line of succession to the office of the governor shall serve as governor from the occurrence of the vacancy until the newly elected governor has qualified.

If by reason of death, resignation, or disqualification, the governor-elect is unable to assume the office of governor at the commencement of the gubernatorial term, the lieutenant governor-elect shall assume the office of governor for the full term. If at the commencement of such term, the governor-elect fails to assume the office by reason of disability, the lieutenant governor-elect shall serve as governor until the disability of the governor-elect terminates.

Commission Recommendation

The Commission recommends the repeal of Section 17 of Article III and enactment of a new section, as shown above.

Effect of Change

New Section 17 would establish a special procedure should the offices of both Governor and Lieutenant Governor become vacant with a substantial

part of the term still to run. The vacancies would be filled by election to office for the unexpired portion of the term at the next general election occurring in an even-numbered year after the vacancy occurs. As is the case with filling vacancies in the state Senate, the procedure would apply where the vacancies occur prior to the expiration of the first 20 months of a term. Prior to election the gubernatorial vacancy would be filled temporarily by the officer next in line of succession, namely either the President of the Senate or the Speaker of the House. The temporary vacancy in the office of Lieutenant Governor would not be filled.

The second paragraph of new Section 17 provides that if for any reason the Governor-elect is unable to assume the office of Governor at the commencement of the gubernatorial term, on the second Monday of January after the election, the Lieutenant Governor shall do so, either as Governor or acting Governor, depending upon the circumstances. In the event of death, resignation, or disqualification at commencement of the term, the Lieutenant Governor-elect would assume the full status and title of Governor; in the event of disability, the Lieutenant Governor would serve as Governor until the disability of the Governor-elect terminates.

Present Section 17 provides for a line of succession if the Lieutenant Governor, while executing the office of Governor, is removed, resigns, dies, or becomes disabled. The President of the Senate would act as Governor until the vacancy is filled or the disability removed, and if the President of the Senate for any of such reasons becomes incapable of performing gubernatorial duties, they devolve upon the Speaker of the House.

Present Section 17 would be repealed. The line of succession which it establishes is retained in new Section 15, and therefore Section 17 becomes unnecessary. As rewritten in Section 15, the equivocal provision for duties to "devolve" upon a successor would be replaced by the clear and concise provisions as to status, title, and compensation.

Comment

The decision to provide a special procedure should the office of Governor and Lieutenant Governor both become vacant early in the term was motivated by a feeling that an officer elected to represent the constituency of a legislative district instead of the state at large should not hold the office of Governor for longer than a stated period. Without such a provision either the President of the Senate or the Speaker of the House would succeed to the governorship. An appropriate and consistent precedent appears to be the provision for filling a senatorial vacancy by election of the people if it occurs within the first 20 months of a senator's four-year term.

The second paragraph of Section 17 assures a ready successor in the event of the death, resignation, disqualification, or disability of the person elected to become Governor between the November election and the second Monday in January, when the gubernatorial term begins. Because of authority to the effect that the term "Governor" as it appears in the Ohio Constitution does not include Governor-elect, a special succession provision is considered necessary to avoid a problem that could arise when the Governor-elect is unable to assume office and the incumbent Governor is unable to hold over because of the constitutional limitation on serving more than two consecutive terms.

Under Article II legislative sessions commence on the first Monday or Tuesday in January and under Article III the Governor's term commences on the second Monday in January. Actually, there is no one with "Governor-elect" status until the results are declared in January, although the term of office of the past Governor continues until a successor is elected and qualified. The Commission's intent is to assure smooth transition when for any reason the Governor-elect is unable to assume the office on the second Monday in January. The provision is designed to ensure that

the state will never be without a chief executive because of the dual effect of non-application of succession provisions to a Governor-elect and the limitation in Section 2 of Article III that might prohibit the out-going Governor from continuing in office if has already served two successive terms.

B. REPEAL OF OBSOLETE MATTER

Introduction

Article XV, the miscellaneous article of the Ohio Constitution, contains three sections that pertain to the executive branch and that have for such a long time outlived their usefulness as to be obsolete. All originated in 1851, and in every instance published proceedings of the Constitutional Convention disclose that the provisions were adopted to meet specific problems of that period. Two of the three provisions authorize legislative action and may, therefore, be said to violate the principle that state legislative power is plenary in the absence of specific constitutional limitation.

The Commission's purpose in recommending repeal is threefold: (1) to remove from the Constitution provisions that are clearly dated and hence archaic; (2) to remove provisions authorizing the General Assembly, by law, to prescribe solutions to problems that are not related to governmental operations of the 20th century; and (3) to remove provisions which could be misconstrued as limitations on legislative power.

The sections recommended for repeal are Sections 2, 5, and 8 of Article XV. The text of each section is set forth below, along with the specific reason for recommending its repeal.

RECOMMENDATIONS

ARTICLE XV

Section 2

Present Constitution

Section 2. The printing of the laws, journals, bills, legislative documents and papers for each branch of the general assembly, with the printing required for the executive and other departments of state, shall be let, on contract, to the lowest responsible bidder, or done directly by the state in such manner as shall be prescribed by law. All stationery and supplies shall be purchased as may be provided by law.

Commission Recommendation

Repeal

Comment

Section 2, having been proposed in 1851 to require that public printing be let on contract and amended in 1912 to allow alternatively that it be done directly by the state, is no longer a limitation upon the legislature and as an authorization is unnecessary. It was reportedly adopted originally for purposes of economy and to end fierce legislative contests over selection of a printer and the fixing of printing costs. By 1912 a department of public printing had been established, but because Section 2 still required that printing contracts be let by executive officers, it was amended to eliminate the out-of-date requirement.

Public printing is governed by adequate provisions in long established statutory law. The constitutional provision serves no purpose. Its original incorporation in the Ohio Constitution of 1851 is an example of the excess of detail in constitutions of the nineteenth century, reflecting popular distrust of state lawmaking bodies because of legislative excesses and abuses.

ARTICLE XV

Section 5

Present Constitution

Section 5. No person who shall hereafter fight a duel, assist in the same as second, or send, accept, or knowingly carry, a challenge therefor, shall hold any office in this State.

Commission Recommendation

Repeal

Comment

The section on dueling is wholly obsolete. The section is unnecessary in view of other qualifications that have been established by a statute for the holding of public office. Furthermore, Section 5 of Article XV can be viewed as a redundancy in view of Section 4 of Article V, which recognizes the power of the General Assembly to prohibit felons from holding office. Section 4 of Article V provides: "The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime." The Commission recommends, in another report that "a felony" replace "bribery, perjury or other infamous crime" in this section.

The legislature has inherent power to regulate eligibility to office by statute. Statutory material should be deleted from the Constitution unless compelling reason exists for making an exception to that rule. The Com-

mission submits that in the case of eligibility of duelists and their accomplices to public office none exists.

Little can be anticipated in the way of opposition to the removal of a dueling provision in a modern constitution.

ARTICLE XV

Section 8

Present Constitution	Commission Recommendation
Section 8. There may be established in the Secretary of States* office, a bureau of statistics, under such regulations as may be prescribed by law.	Repeal

Comment

Section 8 is plainly one that violates the principle that state legislative power is plenary in the absence of specific constitutional limitation. Unnecessary detail in the Constitution often restricts legislative innovation. The General Assembly has ample power to create a statistical bureau, and the affirmation of powers already possessed is unwise because it may be interpreted as limiting such action to the office of the Secretary of State. The creation of any kind of state agency to collect statistics of any sort is not a matter of fundamental nature. The provision is obsolete, and the 1850 Convention debate concerning its inclusion because of the failure of the state board of agriculture to collect and disseminate agricultural information is illustrative of its datedness.

*So in the original on file in the office of the Secretary of State.

CHAPTER 2

Structure And Administration of The Executive Department Introduction

The Commission through its Legislative-Executive Committee has taken a close look at the structure and administration of the Ohio executive department and has determined that no constitutional revision is necessary. Aware of concerns in some quarters that the 20th century chief executive is constitutionally shackled by executive fragmentation on the one hand or a dominating legislature on the other, the Commission has focussed attention upon the relationship of the Governor's office to other executive offices and to other branches of state government. Its conclusion that structure of the executive department should not be altered followed extensive deliberation upon the following basic questions: Which executive officials should be provided for in the Constitution? Which officials should be elected? What powers and duties, if any, should be specified in the Constitution for these officials?

Section 1 of Article III states that the executive department in Ohio consists of the Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, and Attorney General. Under Section 2 all of them are elected for terms of four years. For none of these offices does the present Constitution contain any general statement of powers and duties. Some specific executive responsibilities are contained in Article III and are discussed in this Report. The Constitution contains various references to individual officers, naming them to various boards and agencies of government and involving them in specific governmental procedures.

The Legislative-Executive Committee considered a variety of options for each office before making its recommendation to the Commission. In addition to the question of retaining constitutionally elective status, it considered revising the scope of responsibilities by constitutional directive, limiting the authority of the General Assembly to prescribe powers and duties, and finally, identifying the basic function of the office with a descriptive term that suggests the scope of its responsibility, subject to constitutional recognition of legislative authority to delineate specific powers and duties.

The committee found that the powers and duties of each office are statutory in this state. The Commission recommends no change in this format. Although the committee proposed for each office the addition of a statement of basic function, intended to allow the General Assembly free reign to assign authority and responsibility, the Commission did not adopt the proposal because it does not feel that the need for such an addition has been demonstrated and does not wish to limit legislative flexibility to assign powers and duties as needs arise.

The Commission has, of course, already recommended that the nature of the duties of the Lieutenant Governor be spelled out very generally in Article III and that the Lieutenant Governor be elected jointly with the Governor. To replace the constitutional designation of Lieutenant Governor as President of the Senate the Commission has recommended the following statement of authority: "The Lieutenant Governor shall perform such duties in the executive department as are assigned to him by the Governor and exercise such powers as are prescribed by law."

RECOMMENDATIONS

ARTICLE III

Section 1

Present Constitution

Section 1. The executive department shall consist of a governor, lieutentant*governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly.

Commission Recommendation

No change

*So in the original file in the office of the Secretary of State.

Comment

The Commission recommends no change in the composition of the executive department nor in its constitutionally elective status.

In its examination of the executive department structure the Commission confronted some conflicting assertions about independent election of officials other than the Governor and Lieutenant Governor and concerning ways of maximizing administrative efficiency. Its conclusion to recommend no change was reached after study of research materials from a variety of sources, as well as testimony, discussion and debate on the issues involved.

The Commission approached the question of whether any existing office ought to be retained as an independent elective one with the premise that need for change is demonstrated only if the election of a given official obstructs the effective functioning of state government. Thus in discussion of each office one test applied was: Is the Governor's authority in any manner handicapped by the constitutional provision for election? Commission concern over whether the *status quo* hinders the exercise of the Governor's duty to govern was prompted by a recognition that some constitutional revisionists have called for a shorter ballot, out of concern that fragmentation of executive power through the elective process weakens the chief executive, and that the voters are not able to make intelligent selections for offices if they are faced with too many.

The Commission concluded that no need for change was demonstrated as compelling, in spite of claims made that the resulting "long ballot" reduces gubernatorial accountability, causes administrative inefficiency, and confuses the voter. Not finding the state ballot confusingly long, the Commission found the following reasons for retaining it in its present form more convincing: increased prestige and importance attached to elective offices; responsibility is best achieved by direct election; elective offices provide a training ground for higher public responsibilities.

The controversy over whether each executive office should be appointive or elective was thoroughly debated, and resolution of the conflicting views was deliberative. In opposition to the Commission's conclusion, it was urged that officeholders other than Governor *should* be responsible to the voters but that in reality the voters hold the Governor responsible, even where the Governor has little power to control administrative structure. That position is recognized in Dr. Warren Cunningham's alternative draft and commentary, included as Appendix A to this Report. Dr. Cunningham departs from the Commission recommendation with respect to elective status because he views the function of the office in question to be essentially administrative in character. His thesis is that voters have neither the time nor competence to make decisions in areas which require

a high degree of expertise. Therefore, in his view, administrative officers should be appointed by and be responsible to the Governor, and the chief executive should be responsible for the conduct of officers with administrative responsibilities.

Set forth below are highlights of the debate resulting in a decision to recommend retention of each of the executive offices (in addition to the Governor and Lieutenant Governor) as a constitutionally elective post.

A. Secretary of State

Perhaps originally viewed as a purely ministerial or clerical post under duties prescribed by the Ohio Constitution of 1802, the office of Secretary of State has long since evolved into one whose duties go far beyond that of mere keeper of official records and documents.

In examining the function of the office of the Secretary of State and its relationship to state government the Commission concluded that the Secretary should continue to be elected, particularly if the duties of office include being chief election officer, as is prescribed by statute. The Commission adopts the position that the election function constitutes an important function of state government and is an appropriate place to separate executive authority.

In view of the Secretary's additional and varied functions — as filing officer under both the Ohio corporations law and the Ohio Uniform Commercial Code, as compiler of the session laws of the General Assembly, and as constitutional member of the apportionment board — the Commission recognizes important growth in secretarial responsibilities beyond the custodial and housekeeping duties which originally constituted the office's *raison d'etre.* The Commission believes that consequently the Secretary of State exercises an important policy making function and that therefore selection by popular election is very appropriate. It adopts a view of the office as a logical place to assign diverse duties, often on a temporary basis, and rejects the opposing view of the office as that of secretary in the strict dictionary sense.

Furthermore, believing in the general proposition that a definition of the duties attached to executive officers has no place in the Constitution and is better left to legislation, the Commission endorses no addition to Article III to define by way of general statement the duties that inhere in the office or to limit the General Assembly in this respect. It recognizes that historically the office of state Secretary of State has been assigned supervisory obligations for miscellaneous endeavors that have subsequently assumed an importance sufficient to justify their independent status. The Secretary's involvement has consequently been temporary, and the Commission finds such flexibility desirable.

Although it makes no proposal for constitutional revision, the Commission bases a recommendation for review of existing statutory duties on information brought to its attention in regard to the difficulty experienced in finding the correct office for certain state records. The Commission submits that the Secretary of State should be the keeper of all official records. It believes that the Secretary's office should be the ready source of certified copies of all official documents or of information regarding the status of any entity or activity which requires state approval. It finds, however, that an interested party often has difficulty finding the correct office for even related records.

Inasmuch as the Secretary of State is popularly regarded as the chief depository of records for the state, the Commission hopes that the General Assembly will review all such record keeping duties as are presently disbursed and consider assigning them to the Secretary of State, in keeping with its view of the office as the proper one for record centralization.

B. Auditor of State

The Commission recommends that the office of Auditor of State be retained as a constitutionally elective one and that the powers and duties of office continue to be prescribed by statute. It does so after extensive study of the office and exchange of ideas about it.

Under the test applied to each office — i.e., whether independent election hampers the operation of the chief executive — the Commission found no basis for concluding that the Auditor of State should be selected in any other manner. In fact, of all six executive officers only the Auditor was given a four year term in Constitution of 1851; not until 1954 were the terms of the Governor and other executive officers extended from two to four years. The political rationale for independent election is particularly appropriate in this case because the office of Auditor has long been a valuable stepping stone of experience for prospective candidates to higher office.

The belief expressed in the Convention of 1850 that the credit of the state itself depends upon the efficiency and good conduct of the Auditor, is one that has long had public support. It was the basis of the unique four-year term at that time. The Commission acknowledges the popularity of the view that an independently elected auditor provides a valuable means of validating the legality of public expenditures. Legality is assured through dual statutory responsibility to: (1) approve and verify vouchers and issue all warrants upon the state treasury; and (2) examine the fiscal accounts of all public offices. Although the terms "pre-audit" and "post-audit" are not used in the Code, experts refer to functions falling under the first category as "pre-audit" and under the second category as "post-audit" responsibilities.

Although some proponents of change in the Auditor's status have termed the pre-audit function as purely administrative in character and have argued that it could be handled by an appointive office, the Commission endorses retention of an independent Auditor to check on fiscal operations of state government. The Commission finds merit in the position that the presence of an independently elected Auditor provides a valuable means of checking on the honesty of public officials. The contrary argument that an appointive rather than elective Auditor guarantees professionalism in office, fails to take into account, in the Commission's view, the important check and balance that is achieved through an elective Auditor. Furthermore, because of the history of the office and the statutory responsibility that attaches to it, any recommendation to substitute an appointive for an elective Auditor would be difficult to explain to voters. Having been designated by law as the chief accounting officer of the state, the Auditor is regarded as the watchdog of the treasury.

The Commission has considered and rejected proposals to substitute a legislatively appointed auditor for an elected executive official. Although it recognizes the value of performance auditing, whereby an official determines whether moneys were expended in line with legislative policy and for the purposes for which they were appropriated, it regards such a function as appropriate for the legislature to establish through the creation of an additional post.

The Commission considered a variety of proposals for describing the responsibilities of the Auditor of State and concluded that the powers and duties of office are better developed by law than by Constitution. It concluded that the term "Auditor General," suggested to emphasize greater development of post-audit authority, is not appropriate. The Commission's intent in making its recommendation regarding the Auditor of State is to retain the present procedure whereby the General Assembly makes the determination of audit powers, both as to the funds subject to

audit and the duties to be exercised in the audit function. The recommendation recognizes the General Assembly's authority to provide for performance auditing, including the examination of the manner in which executive officials have discharged their responsibilties to faithfully, efficiently, and effectively administer programs under their direction.

C. Treasurer of State

The Commission recommends that the constitutionally elective office of Treasurer of State be retained. Although some critics of this position argue that because the office of Treasurer is an administrative post it should be responsible to the Governor, the Commission has applied the test of whether any compelling reason exists for changing the present method of selection. Its analysis of the traditional functions of the office reveal no characteristics requiring the exercise of gubernatorial control over their execution. In the absence of a concrete basis for designating the office as one that is subordinate to that of the chief executive, the Commission rejects abandonment of a long tradition of direct responsibility to the electorate. To label the office ministerial only does not, in the Commission's view, justify major change in structure. The Commission concludes that election is valid even where the office in question lacks an extensive policy making role.

Specifically, too, the Commission finds no need to alter the way in which state funds are presently handled and in which the Treasurer's office operates. The legislature has always prescribed the powers and duties that attach to the office, and the Commission sees no reason to depart from this practice by attempting the virtually impossible task of making a general statement of duties in the fundamental law that might serve little but to restrict the General Assembly in its future consideration of the office. It has rejected overly detailed statements of the Treasurer's responsibilities as statutory in nature and as thereby intruding upon the province of the General Assembly.

D. Attorney General

The Commission is committed to the position that the Attorney General should continue to be an independent elective officer because if the Attorney General were appointed by the Governor, as some have proposed, the office would become subordinate to the Governor. The Commission notes that such a position would be contrary to the long standing role that the Attorney General has played in Ohio as state's attorney, responsible through many statutory provisions to protect interests and rights of the people and the state. Some have characterized an Attorney General's role as unique because of the executive status of the office, its special advisory relationship on questions of law to the legislature, and the quasi judicial character of opinions of law which the office is called upon to issue. Certainly, the diversity of important responsibilities that the General Assembly has seen fit to confer upon the office since its creation by law in 1846 is persuasive evidence, in the Commission's opinion, that to make the post dependent upon gubernatorial approval would be contrary to the traditional development of its function in this state.

The Commission is further committed to the position that fear of loss of office should not deter the Attorney General from issuing opinions that should be rendered solely on the basis of law and not as counsel for a particular administration.

As is the case with other members of the executive department, the Commission finds no necessity to define the nature of the Attorney General's authority in even the most general of constitutional terms. From the inception of the office in Ohio the powers and duties of office have been the subject of statutes specially conferring them. The Commission

is aware that in some states courts have held that the office of a state attorney general is clothed with powers not expressly defined by law but belonging to the office as result of its common law development. Although the Ohio Attorney General, in advocating recognition of retained common law powers, referred to the historical development of the office in colonial America and the degree to which its character was influenced by an English counterpart, the Commission believes that the only powers possessed by the Ohio Attorney General are powers derived through the Constitution of this state.

In recent years, a number of programs and recommendations for improving the administration of criminal justice have incorporated proposals for enhancing the role of the state attorney general and have called for greater coordination between that office and local prosecutors. The Committee examined the conclusions of a variety of other studies calling for greater state leadership in the development and implementation of reforms. Whatever changes in the office are made as a result of increasing emphasis upon cordinating the Attorney General's role with that of local prosecutors and broadening of prosecutorial and investigative powers, particularly in the area of organized crime, should, the Commission believes, come about as a result of legislative not constitutional mandate. The Commission would defer to legislative discretion to further specify the prosecutorial and other functions of the office.

CHAPTER 3-OTHER RECOMMENDATIONS

ARTICLE III

Section 2

Present Constitution

Section 2. The Governor, Lieutenant Governor, Secretary of State, Treasurer of State, and Attorney General shall hold their offices for four years commencing on the second Monday of January, 1959. Their terms of office shall continue until their successors are elected and qualified. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. No person shall hold the office of Governor for a period longer than two successive terms of four years.

Commission Recommendation

No Change

Comment

The Commission recommends no change in four year executive terms nor in the limitation upon holding the office of Governor for a period longer than two successive terms of four years.

The limitation, having been adopted on November 2, 1954, is relatively new. Judicial interpretation of the provision is even more recent. Prior to a holding of the Ohio Supreme Court in May, 1973, the Ohio limitation was regarded by many as ambiguous on the basis that it was subject to two possible interpretations — one, that a person who has served two successive terms may be elected Governor again after the intervention of one or more terms; and two, that two successive terms is an absolute limit on the number of terms a person may serve as Governor. In *State ex rel. Rhodes v. Brown,* 34 Ohio St. 2d, 101, the Court held that the section permits persons to serve as many four-year terms as they are able to achieve, so long as not more than two of them are sought to be served successively. The Commission deferred consideration of the pro's and con's of having a term limitation because litigation was pending to settle the interpretation question.

The question of whether the number of terms to which a person may be elected Governor should be prescribed in a Constitution is a difficult one. On the one hand, any prescribed limitation restricts the people's choice of persons that they could elect Governor by eliminating from a gubernatorial contest any candidate who had just served two terms as Governor. It has been alleged that this removes from the election the candidate who is most familiar to the voters and denies them an opportunity to pass judgment at the polls on the immediate governor's past administration.

Conversely, it has been argued, political experience indicates that it is often difficult to defeat an incumbent governor who is seeking re-election even though he may not be the most qualified candidate. Thus a two-term restriction upon a governor's tenure is believed by some to offer the best protection against "bossism."

ARTICLE III

Sections 5 Through 9

Present Constitution	Commission Recommendation
Section 5. The supreme executive power of this State shall be vested in the Governor.	No Change
Section 6. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed.	No Change
Section 7. He shall communicate at every session, by message, to the General Assembly, the condition of the State, and recommend such measures as he shall deem expedient.	No Change
Section 8. The governor on extraordinary occasions may convene the general assembly by proclamation and shall state in the proclamation the purpose for which such special session is called, and no other business shall be transacted at such special session except that named in the proclamation, or in a subsequent public proclamation or message to the general assembly issued by the governor during said special session, but the general assembly may provide for the expenses of the session and other matters incidental thereto.	No Change
Section 9. In case of disagreement between the two Houses, in respect to the time of adjournment, he shall have power to adjourn the General Assembly to such time as he may think proper, but not beyond the regular meetings thereof.	No Change

Comment

The Commission recommends retention of these sections because, from study of the executive department, it has determined that they serve useful purposes. Although the Commission recognizes that were it dealing with a clean slate, it might not conclude that all of these sections are essential or be entirely satisfied with the arrangement of provisions they contain, it finds no good reason for changing them substantively. Unless a constitutional provision is in some way hindering the operation of government or creating other problems, and in the absence of specific reasons for repeal, such as obsolescence, it is better left in the Constitution.

Section 8 provides for the Governor's power to call special sessions. This corresponds to the similar power of legislative leaders to call special sessions, as provided in Article II Section 8. The latter power emanated from a Commission recommendation to the legislature. The two powers do not conflict, and their coexistence is intended. The Legislative-Executive Study Committee noted that the power of the Governor to call special sessions could also be used when the General Assembly was in recess if the Governor felt that something needed immediate consideration.

The Commission calls particular attention to the importance of retaining Section 6, which authorizes the Governor to require that executive officers furnish written information relating to their offices. Along with Section 20 of Article III, requiring that they report to the Governor prior to each legislative session, Section 6 is judged by the Commission to be of especial value to insure appropriate communication between independently elected officials. In its view Sections 6 and 20 are essential to minimize the possible adverse effects of independence.

ARTICLE III

Section 11

Present Constitution

Section 11. He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offences,* except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.

*So in the original on file in the office of the Secretary of State.

Commission Recommendation

No change

Comment

The Commission recommends no change in the Governor's power after conviction to grant reprieves, commutations, and pardons for all crimes and offenses except treason and cases of impeachment, upon such conditions and subject to such statutory regulations as are provided for in Section 11. It finds that among states with recently adopted, amended, or revised constitutions, or in which constitutional revision was studied in the past decade, there has been no discernible trend toward standardization of pardoning practices. It notes that Ohio, like most states, makes use of a pardoning authority, to assist the Governor in the discharge of clemency powers.

In Ohio the matter of clemency has been the subject of legislative development, and no problems were called to the attention of the Commission that could not be solved by statute, in its view. Among the suggestions presented to the Study Committee was that treason be removed as a stated exception to the pardoning power, on the basis that treason convictions might be inconsistent with the Federal Constitution. The reference to treason may be obsolete inasmuch as only two cases have been uncovered of completed treason prosecutions by a state. However, Ohio statutes recognize the crime of treason against the state.

No justification has been established for revising the present provision governing executive clemency in Ohio. The Commission believes that no case has been made for affixing constitutional permanency to pardon authorities.

ARTICLE III

Sections 12 and 13

Present Constitution

Section 12. There shall be a seal of the State, which shall be kept by the Governor, and used by him officially; and shall be called "The Great Seal of the State of Ohio."

Section 13. All grants and commissions shall be issued in the name, and by the authority, of the State of Ohio; sealed with the great Seal; signed by the Governor, and countersigned by the Secretary of State.

Commission Recommendation

No change

No change

Comment

In recommending no changes in Sections 12 and 13, relative to the great seal of Ohio and the issuance of grants and commissions, the Commission recognizes the historical significance of these provisions. Although it believes that these two sections are not essential to modern state government, it also observes that they create no problems. The Commission views the seal as basically a tradition, a symbol of state authority, and surmises that in 1802 its use was probably considered essential to give grants and commissions of the state official authority.

The Commission reasons that if there is to be a seal of the state, it is a matter of constitutional importance. It believes that constitutional recognition of the seal prohibits its abolition by executive or legislative authority and discourages frequent changes in design.

ARTICLE III
Section 14

Present Section	Commission Recommendation
Section 14. No member of congress, or other person holding office under the authority of this state, or of the United States, shall execute the office of the Governor, except as herein provided.	No Change

Comment

Like Sections 5, 7, 8, and 9 of Article III, Section 14 does not impede the operation of the executive department of government. The Commission finds merit in the constitutional inhibition upon simultaneously serving as Governor and holding other public office.

This recommendation is consistent with the Commission's earlier recommendation that members of the General Assembly should not hold other public office. The section appears to have given rise to no serious question, and, therefore, in accord with the approach taken throughout this report, the Commission finds no reason to suggest its revision or repeal.

The final exception to the ban on executing the office of Governor by a public office holder — "except as herein provided" — is included to cover a case where there has been succession to the governorship by another public official — i.e. the Lieutenant Governor, President of the Senate, or Speaker of the House — on a temporary or permanent basis.

ARTICLE III
Section 20

Present Constitution	Commission Recommendation
Section 20. The officers of the executive department, and of the public State Institutions shall, at least five days preceding each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly.	No Change

Comment

The Commission recommends the retention of Section 20 because, together with Section 6, it provides for necessary communication between independently elected officials in the executive department and the Governor.

ARTICLE III

Section 21

Present Constitution

Section 21. When required by law, appointments to state office shall be subject to the advice and consent of the Senate. All statutory provisions requiring advice and consent of the Senate to appointments to state office heretofore enacted by the General Assembly are hereby validated, ratified and confirmed as to all appointments made hereafter, but any such provision may be altered or repealed by law.

No appointment shall be consented to without concurrence of a majority of the total number of Senators provided for by this Constitution, except as hereinafter provided for in the case of failure of the Senate to act. If the Senate has acted upon any appointment to which its consent is required and has refused to consent, an appointment of another person shall be made to fill the vacancy.

If an appointment is submitted during a session of the General Assembly, it shall be acted upon by the Senate during such session of the General Assembly, except that if such session of the General Assembly adjourns sine die within ten days after such submission without acting upon such appointment, it may be acted upon at the next session of the General Assembly.

If an appointment is made after the Senate has adjourned sine die, it shall be submitted to the Senate during the next session of the General Assembly.

In acting upon an appointment a vote shall be taken by a yea and nay vote of the members of the Senate and shall be entered upon its journal. Failure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment.

Commission Recommendation

No change

Comment

Section 21 of Article III was adopted by the electorate in November, 1961, and establishes some procedural requirements governing advice and consent of the Senate on appointments to state office when required by law. Because of its recent origin and the absence of evidence that the requirements have been unsatisfactory, the Commission recommends no change.

Remaining Sections in Article III

Sections 3, 4, and 18 of Article III were referred to the Committee studying Elections and Suffrage which also considered, in conjunction with its study of Article XVII, the constitutional provisions for filling vacancies in public offices. Recommendations with regard to those sections are found in the report on Elections and Suffrage, Part 7 of the Commission's report to the General Assembly.

Section 19, compensation of executive officers, has been referred to a committee studying other sections dealing with compensation of public officers and Section 10, which designates the Governor as commander-in-chief of the military and naval forces of the state, has been referred to a committee studying Article IX, concerning the militia generally.

CHAPTER 4

Other Proposals Considered

Among the proposals presented to the Commission's Legislative-Executive Committee were ones to expand the executive article by incorporating provisions dealing with the following subjects: (1) Executive reorganization; (2) The budget as an executive responsibility; and (3) Executive enforcement of compliance with law.

Commission Recommendation

The Commission makes no recommendations as to the adoption of proposals for executive reorganization, an executive budget, or executive enforcement of compliance with law. It recognizes that they involve some changes in the structure and operation of the executive department that may serve useful purposes but sees no reason to recommend constitutional change at this time for their implementation. Although these proposals have not resulted in recommendations, widespread interest in the subject matter prompts the Commission to call them to the attention of the General Assembly. In some instances the commentary suggests that the goals sought could be accomplished by legislation instead of constitutional amendment.

1. Executive Reorganization

A twentieth century administrative revision movement has resulted in the popularity of recommendations for:

(A) Constitutional authority for the Governor to initiate reorganization of executive department and agencies, subject to legislative veto;

(B) A Constitutional ceiling (commonly 20) on the number of executive departments that may be established.

A. Reorganization powers

While legislatures have long established the statutory shape of state administration, only after World War II did the sharing of this role with the executive really begin in the states, although federal sharing or reorganization powers between President and Congress began as early as 1932. An illustration of how authority might be conferred upon the governor to initiate administrative reorganization can be found in the National Municipal League's Model State Constitution. Section 5.06 of that model recognizes a legislative function to prescribe, modify and reallocate the powers and duties of various state departments and agencies but specifically provides as well that "the governor may make such changes in the allocation of offices, agencies, and instrumentalities, and in the allocation of such functions, powers, and duties, as he considers necessary for efficient administration." Under that proposal, if the changes affect existing law, they must be set forth in executive orders and have the force of law within 60 days after submission to the legislature unless modified or disapproved. The governor would have broad powers, but legislative participation would be required to effectuate recommended changes in the law.

States with constitutional provisions comparable to the MSC approach include Alaska, Illinois, Michigan, Massachusetts, Maryland, Kansas, North Carolina, and Virginia. Rejected constitutions in Arkansas (1970), Idaho (1968), and New York (1967) offered reorganization plans that called for executive initiative and legislative veto.

From various discussions of administrative reorganizaton emerge three basic arguments favoring executive initiative powers subject to legislative rejection or amendment:

1. The governor is primarily accountable for and is better equipped than the legislature to oversee administration; therefore, the governor should have the authority, subject to legislative veto, to reorganize the administrative units under his direction.

2. The legislature would retain effective power over reorganization because no reorganization could be made without its consent.

3. The power would assist the executive branch in carrying out efficiently the administrative functions assigned to it.

On the other hand, the alternative to executive consolidation of administrative operations is to retain statutory allocation of government departments, without constitutional incorporation of an executive role. The position favoring such legislative reorganization relies upon the following arguments:

1. The structure of government is properly a legislative responsibility, so the legislature should have the principal role in framing departmental structure to assure that the policies of government are being executed and accomplishing the desired results.

2. Experience shows that executive and legislative branches can work cooperatively to reorganize when the constitutional power is vested in the legislature.

3. Existing provisions have achieved the objective of preventing proliferation of governmental units in many states.

The Commission notes that Ohio governors presently propose changes in administrative structure through individual bills introduced by legislators for that purpose. Departmental reorganizations have taken place from time to time for the purpose of coordinating activities in major current problem areas. Ohio governors have realigned functions by the transfer of personnel and in such a way have effected administrative changes by executive action. Furthermore, legislation has been introduced in Ohio to provide the Governor with statutory authority to reorganize executive agencies, subject to legislative veto. Such legislation has not been adopted in Ohio, but similar reorganization activity has taken place in other states by virtue of legislation, without constitutional change. States which have at one time enacted either permanent or temporary reorganization statutes of executive initiative include: Georgia, Kentucky, Missouri, Rhode Island, New Jersey, New York, and Vermont. Reportedly of the 12 states where significant restructuring has occurred in the last decade, four of those states effected such reorganization by act of the legislature without constitutional mandate.

B. A ceiling on executive departments

Cogent reasoning has been advanced both for and against a constitutional limitation on the number of executive departments. Proposals for this purpose have been offered as a result of concern over wasteful duplication and bureaucratic conflict. A summary of arguments that have been advanced for amending state constitutions to limit the number of departments that may be created would emphasize the following points:

1. The provision helps insure that the legislature cannot create executive branch departments at will and thus helps protect the power of the Governor to administer state government.

2. The provision protects the legislature from undue pressure to create new departments.

3. The provision helps to insure that the Governor has a manageable span of control over departments and helps to limit the number of departments and units reporting directly to him, thereby increasing governmental efficiency and accountability of officials.

4. A maximum of 20 departments appears to be the trend in other states in their attempts to prevent proliferation of departments and being sound management principles to the operation of government.

In opposition it has been said:

1. The limit on the number of departments may result in an inefficient grouping of unrelated activities and interfere with efforts to achieve flexibility in administraton.

2. The existence of a limit has contributed to a proliferation of divisions, special agencies, boards, commission, and offices.

3. A limitation of twenty departments is wholly arbitrary.

4. A specific limit should not be in the Constitution; the objectives could be achieved by statute which would have the advantage of greater flexibility. The Commission notes that authorities are in considerable disagreement as to the appropriate number of departments, with some committed to 12 as the only means of precluding executive fragmentation and others calling 20 unduly restrictive. Moreover, an implementation problem has been noted as to what agencies are to be included within the limitation. In at least one state the limitation has been considered to be ineffective.

The Commission reports developments in this area because it realizes that principles and models of state reorganization are receiving increasing attention.

2. The Budget as an Executive Responsibility

Although Section 7 of Article III requires the Governor to "communicate at every session, by message, to the General Assembly, the condition of the state and recommend such measures as he shall deem expedient," the Ohio Constitution lacks explicit provision for an executive budget. Section 107.03 of the Revised Code requires that the Governor make appropriate recommendations for all the state's activities and revenue estimates under existing and proposed legislation.

Research has disclosed a trend toward providing for the budget function in the state constitution. Authorities on state government have called for a strong executive budget, granting the Governor full authority for preparing a budget that covers all administrative operations, and for a clear constitutional delineation of the fiscal relationship between the Governor and the General Assembly. *State Government for our Times,* the 1970 Report of the Wilder Foundation on the Ohio Constitution, for example, recommends that the duty to submit a *balanced* budget be constitutionally imposed on the Governor. Such a system, it reasons, would help prevent buckpassing and fighting between the two branches of government in times of revenue shortages.

Others have called for the substitution of an annual for a biennial budgetary system. The number of states with annual budgets rose from five in 1949 to a reported 33 in 1972. In Ohio the budget is adopted biennially, but appropriations are made for each year of the biennium separately.

The Commission recognizes that notwithstanding administrative merits the question is a political one. Reducing the frequency of legislative-executive confrontations frees the executive from financial dependence on the legislature for longer period, and the effect is to advance executive power. On the other hand, annual budget systems correspond with annual legislative sessions.

3. Executive Enforcement of Compliance with Law

A third question is whether the Governor should be empowered to investigate any part of the executive department and enforce compliance with law by proceeding against officers.

Although under Section 6 of Article III the Governor "shall see that the laws are faithfully executed," some state constitutions have specifically recognized a constitutional duty to investigate possible misconduct. Alaska and New Jersey have done so by incorporating provisions for the enforcement of compliance with law, and comparable authority is included in the National Municipal League's Model State Constitution. Section 5.04 of the 1963 edition of that model not only makes the governor responsible for the faithful execution of the laws but provides further that the governor may bring actions in the name of the state to enforce compliance with law or to restrain violations by officers, departments, agencies, or divisions of the state. According to the Commentary accompanying this section, the effect of such a provision is to enable the governor to initiate proceedings or to intervene in proceedings on behalf of the people of the state or on behalf of any individual, even in situations where the interest of the state is not directly involved and to give the governor standing to sue where the state itself has nothing to gain or lose by the litigation.

There are conflicting views as to whether executive authority ought to be expanded to encompass a duty to enforce compliance with the law. Advocates for constitutional incorporation of such authority maintain that it would enhance the executive power of the governor and even extend it into general law enforcement areas. In *State Government for Our Times* the point is made that constitutional affirmation of a duty on the part of the governor to investigate possible misconduct can prevent unnecessary conflict between the governor and the legislature. Other commentators have questioned the necessity of such a device to help the governor enforce executive policy and hold that existing powers furnish ample basis for leadership.

Although the Commission has taken no position regarding executive reorganization, the budget as an executive responsibility, or executive enforcement of compliance with law, its rationale for describing developments in these areas is a recognition that changes in state needs may justify their further consideration at some future time.

APPENDIX A

SUGGESTED ARTICLE UPON THE EXECUTIVE FOR THE CONSTITUTION OF THE STATE OF OHIO

Prepared and submitted for the consideration
of the Legislative-Executive Committee of
the Ohio Constitutional Revision Commission
by: W. Cunningham, Miami University.

ARTICLE III
The Executive and Administrative Department

Sec. 1—**Executive Department**

Par. 1—The supreme executive power shall be vested in a governor.

Par. 2—The executive department shall consist of all state elective and appointive officials and employees except the officials and employees of the legislative and judicial department.

Par. 3—In addition to the governor and lieutenant governor, there shall be a secretary of state, attorney general, auditor, and such additional officers and departments of government over which they shall preside, not to exceed , as may hereafter be established by law.

Par. 4—All present or future boards, bureaus, commissions, and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are, to him germane.

Par. 5—There shall be a lieutenant governor who shall have the same qualifications as the governor. The lieutenant governor shall be the *administrative assistant of the governor* and shall perform such duties in the integration and coordination of administrative departments and functions of government as the governor shall delegate to him, or which shall be fixed for him by the legislature in the Administrative Code of the state. (Suggested by writer.) The lieutenant governor shall be appointed by the governor and shall be responsible to him in the performance of his duties of office, and his term of office shall be indefinite at the pleasure of the governor. The governor may delegate any or all of his administrative powers to the lieutenant governor as administrative assistant to the governor. The lieutenant governor shall be assisted by such aides as may be provided by law, but all such aides shall be appointed and shall hold office in accordance with the civil service regulations fixed by the legislature.
It is suggested that if the General Assembly and/or electorate prefer the "tandem" election of a lieutenant governor with the Governor for his term to act as administrative assistant to perform "such duties as provided by law" other than preside in the Senate, this writer would compromise with this suggestion, as alternate to the provisions above for an appointed Lieutenant Governor.

Par. 6—The secretary of state, attorney general, auditor, and directors of such additional departments as may hereafter be established by law shall be appointed by, and may be removed by, the governor, and they shall hold office at the pleasure of the governor and shall continue in office until removed or a successor has been appointed to succeed to the office.

Sec. 2—**Term of Office and Qualifications for Governor**

Par. 1—The governor shall hold office for four years. His office shall commence on the second Monday of January next after his election which shall take place in odd numbered years, and shall continue until his successor is elected or otherwise qualified.

Par. 2—The term of governor under this constitution shall commence on the second Monday in January, in the year nineteen hundred and ....., (an even numbered year), and on the same day every four years thereafter. (This section may be placed in the SCHEDULE if any are appended to the Constitution.)

Par. 3—The governor shall be at least ..... years old and shall have been a citizen of the United States for at least ..... years and a resident and elector of the state at least ..... years next before his election. (It is questioned whether such specific qualifications are desirable other than that he be an elector of the state. It is to be noted that any qualifications will automatically apply to lieutenant governor. If they are adopted, then a similar provision should be made to apply to the lieutenant governor.)

Par. 4—No member of Congress, or other person holding office under the authority of this state, or of the United States, shall execute the office of governor or lieutenant governor, except as herein provided. (O-III, 14)

Sec. 3—**Succession to the Governorship**

Par. 1—In the event of the death, impeachment, resignation, removal, continued absence from the state, or other disability of the governor, the powers and duties of the office, for the residue of the term, or lesser time as herein provided, or until his disability shall be removed shall devolve upon the lieutenant governor.

Par. 2—Within ..... months of the death, impeachment, resignation, removal, continued absence from the state, or other disability of the governor, the legislature shall convene in special session upon the notice given to the members thereof by the presiding officer of the senate if the legislature is in session, or by the presiding officer of the senate immediately last past if the legislature is in adjournment, at which time and place the legislature shall fix a time for holding a general election at which the question of whether the lieutenant governor shall succeed to the governorship shall be submitted to the electorate. If the electorate shall vote against the continuation of the lieutenant governor in office to succeed to the governor for the unexpired term, a successor to the office of governor for the unexpired term shall be provided as in the election for governor, as provided by law. (Suggested by the writer to take care of the transition from administrative appointive officer to that of executive elective officer.) It is suggested that if the General Assembly and/or electorate prefer the "tandem" election of a Lieutenant Governor with the Governor for his term to act as administrative assistant to

perform "such duties as provided by law" other than preside in the Senate, this writer would compromise with this suggestion, as alternate to the provisions above for an appointed Lieutenant Governor.

Par. 3—Should the lieutenant governor be authorized to succeed to the office of governor for the unexpired term as herein provided, it shall be his duty to appoint a successor to the office of lieutenant governor as herein provided. (Suggested by the writer to provide a new administrative assistant.)

Par. 4—In the event of the death, impeachment, resignation, removal, continued absence from the state, or other disability of the governor, in the absence of a lieutenant governor duly appointed to the office, the president of the senate shall act as governor; and if the president of the senate shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the lower house of the legislature, until the next general election, at which time a successor to the office shall be elected as provided by law for the unexpired term.

Sec. 4—**Legislative Powers of the Governor**

Par. 1—The governor shall communicate at the beginning of every general session of the legislature, and during each general or special session as he may deem necessary, by message the condition of the state and may then and there recommend such measures as he shall deem expedient.

Par. 2—The power of veto shall be reserved to the governor over legislation as herein provided. (Suggested as a reference section to the Article on the legislature.)

Par. 3—The governor shall have power to convene the legislature in special sessions when he deems it advisable, by proclamation, stating therein the purpose for such session. The legislature shall not be restricted thereby to consider, when so convened, those matters contained in the proclamation. This power shall not restrict the legislature, in the absence of such proclamation to be convened upon its order as herein provided. (Procedure for the convention of the legislature in special sessions upon its own motion would be set forth in the Article on the legislature.)

Par. 4—The governor shall have power to adjourn the legislature in case of disagreement between the two houses in respect to the time for adjournment, but in no instance shall he adjorn it beyond . . . . . .

Par. 5—The governor, the lieutenant governor, and the directors of the administrative departments shall be entitled to seats in the legislature, may introduce bills therein, and may take part in the discussion of measures in which they are interested, but shall have no vote. (This is highly controversial and should be thoroughly discussed as to policy.)

Sec. 5—**Judicial Powers of the Governor**

Par. 1—The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be prescribed by law.

Sec. 6—**Grants, Appointments, and Commissions**

Par. 1—All grants, appointments, and commissions shall be issued in the name and by the authority of the State of Ohio, signed by the governor and countersigned and sealed by the secretary of state.

Par. 2—There shall be a Great Seal of the State of Ohio which shall be provided by law, which shall remain in the custody of the secretary of state and affixed by him to all grants, appointments, and commissions executed by the governor.

Par. 3—The grants, appointments, commissions and other instruments of the state which shall be so executed shall be fixed by law. (Suggested.)

Par. 4—The governor shall make such other appointments, other than those specifically herein referred to, as provided by law.

Sec. 7—**Compensation**

Par. 1—The officers mentioned in this article shall, at stated times, receive a compensation for their services to be established by law.

NOTE: It is to be noted that the following sections of the current constitution have been omitted.

Art. III, sec. 6—*He May Require Written Information,* has been omitted as unnecessary.

sec. 10—*Commander-in-chief of Militia,* has been omitted since he is this anyway since the Adjutant General or similar department is one of his administrative departments over which he has administrative control. (It is the belief of the writer that no state department should be maintained for this purpose. He believes that a Department of Penology should perform the state police function and that national defense should be Federal in character. The state geographically might be a FEDERAL MILITARY RESERVE DISTRICT or two or more states be joined for that purpose. Others may disagree with the suggestion.)

sec. 3 and 4—*Election Returns,* has been omited since it should be in the section on elections. (It is suggested that all election returns should be deposited with the secretary of state and that a canvass board in lieu of the legislature be substituted.)

sec. 11—*Reprieves, Commutations and Pardons,* has been materially modified and restated so that the procedure for reprieves, commutations and pardons may be provided by the legislature so that the matter will not be left to the discretion of the executive.

sec. 18—*What Vacancies Governor to Fill,* is not necessary as stated. Vacancies and appointments have been taken care of in the sections above.

APPENDIX G

Part 7

ELECTIONS AND SUFFRAGE

March 15, 1975

INTRODUCTION

ELECTIONS AND SUFFRAGE

This is the second report of the Constitutional Revision Commission to the General Assembly arising from the study of its Elections and Suffrage Committee. The first report, dated December 31, 1973, discussed aspects of the constitutional amending process, and proposed the amendment of Section 1 of Article XVI to facilitate voter understanding of legislatively proposed constitutional amendments and establishing a time frame prior to an election for submitting proposals and court actions. The subjects of this report, Part 7 of the Commission's Report to the legislature, are the elective franchise; procedures for the conduct of elections; and matters of terms of elective officers and filling of vacancies. The Elections and Suffrage Committee was chaired by Katie Sowle, of Columbus, Ohio.

History confirms the fact that, in America, the elective franchise and process have consistently been prized as being of fundamental value to a democratic form of government. And, as with all things of great value, the people have sought to safeguard the process by erecting a system of regulations to protect it from those who might misuse it. The right to vote, which was originally granted to a very small segment of the people — white adult male freeholders, today is granted to virtually all people over 18 years of age.

The expansion of the franchise has resulted from several factors: legislative action, constitutional amendment, and changing public attitude, which has been reflected in decisions of the United States Supreme Court. The evolution of thinking regarding the right to vote is dramatically illustrated in the following: "We now think that participating in elections is part of our birthright, but this has not always been the case. Even now, there is nothing in the United States Constitution that explicitly requires any state to conduct a popular election for the selection of a President. Presumably, should a state so decide it could provide that its presidential electors (to the Electoral College) be appointed by the state legislature. Of course, no state is likely to abandon the popular election of presidential electors, but it is sobering to stop and think how far we have come in allowing broad participation in the electoral process." [1] Changes in the electoral franchise and electoral process have led to the inclusion in the franchise of groups once excluded, such as females, negroes, eighteen to twenty year olds, and nonproperty owners. Four constitutional amendments adopted between 1913 and 1965 expanded the franchise.[2] In 1965 Congress enacted the Voting Rights Act to protect the right of negroes to vote in areas where racial discrimination had been prevalent. More recently, laws denying access to the ballot to certain military personnel[3] and prisoners awaiting trial[4] have been revised or declared unconstitutional. The Twenty-Sixth amendment to the United States Constitution, adopted in 1971, extends the right to vote to citizens eighteen years of age or older.

The importance of attitude and public opinion toward the elective franchise should not be understated. At one time, voting was considered the right of a privileged few but the courts today have begun to view the elective franchise as a fundamental right[5] and laws excluding groups from the voting process are viewed with greater stringency than ever before. Studies[6] reveal that the desire to safeguard the elective process by, for example, requiring registration of voters, have sometimes resulted in overly restrictive laws disfranchising and discouraging many potential voters. Recent federal and state legislation indicated a trend toward achieving universal suffrage; the trend includes proposals to make registration easier.

The Commission, in reviewing the constitutional provisions concerning the electoral process, recognizes the role of public attitude in the process and realizes that a fundamental document which contains much statutory material will not be able to tolerate expected change without constantly being in need of revision. The Constitution, ideally, should be flexible enough to accommodate changes, while continuing to state basic principles.

The recommendations contained in this report have in common a guideline: to construct the most flexible constitutional framework possible consistent with safeguarding the elective process.

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[1] James F. Blumstein, The Supreme Court and Voter Eligibility, reprinted in *Issues of Electoral Reform*, National Municipal League, 1974, p. 33.

[2] The seventeenth amendment (1913) mandated the popular election of United States senators; the nineteenth amendment. (1920) prohibited discrimination in voting on the basis of sex; the twenty-third amendment (1961) extended the franchise to residents of the District of Columbia for presidential elections; and the twenty-fourth amendment (1964) banned the use of the poll tax in federal elections.

[3] *Carrington v. Rash*, 380 U.S. 85, 89 S. Ct. 775 (1965) *Evans v. Cornman* 39 U.S. 49, 90 S. Ct. 1752 (1970); *Stencel v. Brown* U.S.D.C. Southern District of Ohio (#72 331)1973)).

[4] H.B. 73, effective Oct. 31, 1973, amended sections 3509.02, 3509.03, 3509.032, 3509.04 and 3509.08 to permit a person confined in a jail or workhouse under sentence for a misdemeanor or awaiting trial on a felony or misdemeanor to vote by absentee ballot.

[5] *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969).

[6] See, for example: League of Women Voters, *Administrative Obstacles to Voting, a report of the Elections System Project*, 1972, the League of Women Voters Education Fund; Ohmdahl, Lloyd B., *Fraud Free Elections are Possible Without Voter Registration—A Report on North Dakota's Experience*, Bureau of Governmental Affairs, 1971.

The Elections and Suffrage Committee found some statutory material in the sections of the Ohio Constitution it has studied. The Commission considers that such matters should be removed from the Constitution, wherever possible, to provide needed flexibility.

The following detailed description of each section includes:

1. The section as it presently reads and, next to it, the section as it would read if adopted by the General Assembly and the voters as proposed by the Commission.

2. The Commission recommendation, which shows a draft of the section with the old material to be omitted stricken through with a horizontal line and new material shown in capital letters, conforming with Ohio bill drafting rules.

3. History and Background of Section.

4. Effect of Change.

5. Rationale of Change.

6. Intent of Commission.

ARTICLE V

Section 1

Present Constitution

Section 1. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.

Commission Recommendation

Section 1. Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, in which he resides, such time as may be provided by law, has the qualifications of an elector, and is entitled to vote at all elections.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article V as follows:

Section 1. Every citizen of the United States, of the age of ~~twenty-one~~ EIGHTEEN years, who ~~shall have~~ HAS been a resident of the state, ~~six months next preceding the election, and of the~~ county, township, or ward, in which he resides, such time as may be provided by law, ~~shall have~~ HAS the qualifications of an elector, and ~~be~~ IS entitled to vote at all elections.

~~Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.~~

History and Background of Section

The elective franchise was granted in the Ohio Constitution of 1802[1] to white male inhabitants above 21 years of age who resided in the state for one year prior to an election and were eligible to pay a state or county tax. An elector was permitted to vote only in the county or district in which he actually resided at the time of the election. The 1802 Convention Reports indicate that a motion to strike the word "white" from the Constitution was defeated.[2] By the time of the 1850 Constitutional Convention, sentiment for extending the franchise to non-whites and women had strengthened. The report of the Standing Committee on the Elective Franchise retaining the restriction of suffrage to white males was debated extensively; the movement for female suffrage had support from some delegates, especially from the northern and eastern counties of the state, although the movement for non-white suffrage had fewer supporters. Section 1, as adopted by the convention, restricted the franchise to white males, aged 21, who resided in the state for one year preceding an election and resided in their county, township or ward such time as was provided by law. The initial report of the Standing Committee on the Elective Franchise did not include as a condition to vote the eligibility to pay a state or county tax, as was required in the 1802 Constitution. There was no discussion of why the taxation requirement was omitted.

The 1873-74 Constitutional Convention also considered extending suffrage to women, non-whites, and to aliens who had declared their intentions to

[1]Constitution of Ohio, 1802, Article IV, Section 1.
[2]1802 Constitutional Convention page no. 21 as reprinted in *The Historical Magazine*, July 1869.

become citizens of the United States. The female suffrage movement had support and opposition from all parts of the state, and some delegates proposed letting women who would be eligible voters were they males decide the issue, but the proposal was defeated by the convention.[3] In the post-Civil War era, pro-Negro sentiment influenced the delegates to remove the restriction of the vote to "white" males. Several years earlier, the Fifteenth Amendment to the United States Constitution, prohibiting disfranchisement on the basis of race, creed, color, or previous condition of servitude, had been adopted. The rejection of the proposed Ohio Constitution by the voters in 1874 left the language restricting suffrage to white males intact.

The extension of the vote to non-whites and females was again considered by the 1912 Constitutional Convention. A proposal to submit female suffrage to a referendum by women alone was again defeated.[4] Two amendments proposed by the convention — one restricting the vote to males of requisite age and residence and omitting "white", and one enfranchising all state citizens meeting the age and residency requirements — were both defeated in 1913 by the electors. In 1920, the Nineteenth Amendment to the United States Constitution was adopted, prohibiting the denial or abridgement of the right to vote to United States citizens on account of sex. Article V, Section 1 was finally amended in 1923 to remove "white" and "male".

The second paragraph of present Section 1 of Article V, providing for the election of President and Vice-President of the United States by electors who are not entitled to vote at all elections, was added in 1957. In 1971, the section was further amended to provide for a residency requirement of six months rather than one year.

Effect of Change

The Commission proposal reduces the age requirement for voting from twenty-one years to eighteen years, deletes the six month residency requirement, and omits the provision enabling persons not entitled to vote at all elections to vote for President and Vice-President of the United States. Grammatical changes are made to conform with the rules of bill drafting in Ohio.

Rationale for Change

The provision of Section 1 that sets twenty-one as the minimum age to vote has been rendered unconstitutional by the Twenty-Sixth Amendment to the United States Constitution, ratified in 1971. It provides, "The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Durational residency requirements for voting were held unconstitutional as violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995 (1972). Ohio's six month state residency requirement was specifically ruled unconstitutional in *Schwartz v. Brown,* by the United States District Court for the Southern District of Ohio in Civil Action 72-118 on August 7, 1972.

The Elections and Suffrage Committee considered recommending the repeal of Section 1 entirely, since it probably grants no power to the General Assembly that it does not already have, but concluded that it should be retained because of the importance of stating the basic right to vote in the Constitution. In addition, the Constitution makes reference elsewhere to the qualifications of an elector as a prerequisite to holding public office, and the committee felt that it was necessary to retain a statement of the qualifications in Section 1. Therefore, the recommendation is to retain the section but lower the voting age to eighteen and

[3]Debates, Ohio Constitutional Convention 1873-74, Vol. II, Pt. 3, p. 2808.
[4]Proceedings and Debates of the 1912 Ohio Constitutional Convention, Vol. II, p. 1856.

remove reference to a durational residency requirement. A state may impose a reasonable length of time for registration — perhaps thirty days. The recommendation gives the legislature the flexibility to impose residency requirements that are in accord with the requirements of the Federal Constitution as interpreted.

The second paragraph of Section 1 provides that if an elector does not qualify to vote for state and local officials, he may nevertheless be qualified to vote for President and Vice-President, in Ohio, if he has fulfilled the residency requirements provided by law. Since durational residency requirements have been declared unconstitutional, different residency requirements for voting in state, local and federal elections are no longer needed.

Intent of the Commission

The Commission, recognizing the importance of stating the basic right to vote in the Constitution, believes that Section 1 of Article V should conform with the Twenty-Sixth Amendment to the United States Constitution, and with judicial decisions on residency requirements. Commission members agree that reasonable residency requirements may be desirable to enable potential voters to register.

ARTICLE V

Section 2

Present Constitution	Commission Recommendation
Section 2. All elections shall be by ballot.	No change.

Commission Recommendation

The Commission recommends that no change be made in present Section 2 of Article V.

History and Background of Section

The Ohio Constitution of 1802 provided for elections to be by ballot in Article IV, Section 2. The 1851 Ohio Constitution retained the same language in Article V, Section 2. Court interpretation of the provision has occurred on two issues. In *State ex rel. Bateman v. Bode,* 55 Ohio St. 224, 45 N.E. 195 (1896), the Court affirmed that the discretion to prescribe the form of the ballot resided in the General Assembly. The question whether the constitutional requirement for elections by ballot prohibited the use of voting machines was resolved in *State ex rel. Automatic Registering Mach. Co. v. Green,* 121 Ohio St. 301, 168 N.E. 131 (1929). In that case, the Court interpreted "ballot" to designate a manner of conducting elections to insure secrecy as opposed to viva voce vote, concluding that the use of voting machines was not in violation of Article V, Section 2.

Rationale for Retaining Section

The Ohio Constitution states the fundamental principle of the secret ballot in Article V, Section 2, permitting electors to express their views on election matters without fear of retaliation. The Ohio Supreme Court has held that the use of voting machines conforms with the constitutional requirement for a secret ballot. The Commission believes that this fundamental principle is a proper matter for the Ohio Constitution and should be retained.

ARTICLE V
Section 2a

Present Constitution

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section 3. The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting method used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be less prominent than the candidate's name. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section ~~2a~~ 3. The names of all candidates for an office at any ~~general~~ election shall be arranged in a group under the title of that office ~~, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs~~. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE MEANS BY WHICH BALLOTS SHALL GIVE EACH CANDIDATE'S NAME REASONABLY EQUAL POSITION BY ROTATION OR OTHER COMPARABLE METHODS TO THE EXTENT PRACTICAL AND APPROPRIATE TO THE VOTING PROCEDURE USED. ~~Except at a Party Primary or in a non-partisan election.~~ AT ANY ELECTION IN WHICH A CANDIDATE'S PARTY DESIGNATION APPEARS ON THE BALLOT, the name or designation of each candidate's party, if any, shall be ~~printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed~~ LESS PROMINENT THAN THE CANDIDATE'S NAME. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

History and Background of Section

Section 2a of Article V was added to the Ohio Constitution in 1949, making Ohio the only state to provide for rotation of candidates' names on the ballot in its Constitution. In addition to the rotation feature, the section also requires that candidates be listed by office on the ballot and that the voter vote for each candidate separately, except for electors for President and Vice-President of the United States, who run in tandem. The requirement that voters must vote for each candidate separately prohibits straight party voting, thus precluding casting a vote for all of the candidates of one political party by pulling one lever. Of the several provisions contained in Section 2a, only the language on ballot rotation appears to have raised any significant problems, and it has been the subject of judicial interpretation as recently as 1974.

The Ohio Supreme Court, in *State ex rel. Russell v. Bliss*, 156 Ohio St.

147 (1951) held that the constitutional provision is self-executing and a statute varying the prescribed procedure is unconstitutional and void. Since 1951, two statutes prescribing rotational procedures have been held to violate this section.[1]

Section 2a has been construed to require perfect rotation of names on the ballot, in so far as may be reasonably possible. The issue has been raised in Ohio Courts whether the use of voting machines complies with the constitutional mandate, since this method of voting raises peculiar problems for rotation of names on the ballot. The use of paper ballots permits the voters to be presented with numerous configurations of candidates' names. Statutes require that paper ballots be printed and compiled in planned sequences. Voting machines, however, do not permit rotation in this manner; the order is fixed once the machine is locked, and all voters using the same machine will be presented with the same sequence of candidates' names. Moreover, the expense of a voting machine may result in there being only one or two at a polling place, and many, if not all, voters are exposed to the same order of candidates on the ballot.

In the opinion of the Court of Common Pleas of Mahoning County in *Bees v. Gilronen,* 66 OLA 130 (1953), and of the Attorney General (1957 OAG 984), the constitutional provision permits the use of voting machines, since it requires perfect rotation in so far as may be reasonably possible and perfect rotation may not be reasonably possible, when voting machines are used. In 1974, the Ohio Supreme Court affirmed that Section 2a of Article V of the Ohio Constitution does not absolutely prohibit the use of voting machines (*State ex rel. Roof v. Bd. of Commrs.,* 39 Ohio St. 2d 139 (1974)). In that case, the Court found that statutory language concerning rotation of machine ballots on a precinct by precinct basis (Section 3507.07 of the Ohio Revised Code) was not in compliance with Article V, Section 2a. In its opinion, the Court offered an acceptable way of using voting machines to comply with the Constitution, stating that each precinct using voting machines must have at least two or an even number of machines which, prior to the general election, have been arranged by the board of elections in a serial sequence throughout the county. Voters would be directed to alternate machines so that the various voting machines at a polling place would be used in serial sequence. In the formula proposed by the Court, although the number of alternative sequences in a given precinct is limited by the number of voting machines, when the use of machines by voters is regulated by a planned serial sequence, compliance with the constitutional requirement for rotation in Section 2a is achieved.

Effect of Change

The Commission recommendation removes the self-executing language which has been held to require perfect rotation of names on the ballot, as far as reasonably possible. The amendment, using relative rather than absolute terms, places the responsibility of providing for rotation with the General Assembly. In addition, the amendment removes the words "except at a Party Primary or in a non-partisan election . . .". This misleading language could imply that, in these elections, the political party may be given more prominence than the candidate's name. The word "general" has been removed from "general elections" in the first sentence, so that the provision will apply to all elections. The section number of the provision is changed from 2a to 3, and present Section 3 is being recommended for repeal. A discussion of the reasons for repeal will be found under present Section 3. Throughout, language referring to the method

[1]A provision for voting machine rotation in Section 3507.07 of the Revised Code was declared void in *State ex. rel. Wesselman v. Bd. of Elections of Hamilton County,* 170 Ohio St. 30 (1959). *Bliss* invalidated General Code 4785-80.

of voting has used very general terms to permit the section to apply to new methods of voting and technological changes.

Rationale for Change

The Elections and Suffrage Committee considered several alternative ways of dealing with the rotation provision of Section 2a. Most agreed that ballot rotation is a statutory matter, nothing that Ohio is the only state to provide for rotation in its Constitution. The idea of repeal was rejected because it would open the possibility of the enactment of a law like one in California which places the incumbent's name first on the ballot. The author of a Southern California Law Review article[2] suggests that the California statute violates the Fourteenth Amendment to the United States Constitution. His research indicates that the first-listed candidate has an advange: ". . . as a minimum, one can attribute at least a 5 percent increase in the first listed candidate's vote total to positional bias, and . . . this will be exceeded in most elections." He views this positional advantage as in violation of the one-man, one-vote rule, giving citizens voting for the first person listed an advantage over a group of equal strength with less favorable ballot position.

All shared a desire to retain the principle that no candidate should have an undue advantage or disadvantage by virtue of ballot position. However, the Commission viewed the present language as too restrictive on several accounts. When the constitutional provision is read as an absolute standard of rotation, there are unfortunate consequences. One paper ballot with a printing error or out of order may result in an entire election being invalidated. While fair treatment on the ballot is desirable, the invalidation of an election because in a small number of instances proper rotation did not occur exaggerates the importance of rotation. The constitutional language as presently interpreted restricts the use of new methods of voting, as evidenced by the difficulties encountered in trying to conform the use of voting machines to the rotation language in Section 2a. The tremendous difficulties and expenses boards of elections were encountering in the effort to conform with the Supreme Court ruling in the *Roof* decision were described in detail to the Commission.

One alternative is rotation by precincts rather than rotation by individual ballots. The Court of Appeals in the *Roof* decision suggested that equalization of population by precincts would be acceptable. Precinct population equalization, however, presents considerable problems for election officials, especially in areas with a highly mobile population. In any event, it seemed unwise to write such a specific provision into the constitution.

The Commission's proposal is more flexible than either the present language or the precinct equalization proposal; at the same time, it retains the principle of equal treatment in order to preclude a situation like that of California. The substitution of a relative standard of fairness to candidates for the rigid standard of perfect rotation wherever possible, the Commission thought, would enable the General Assembly and the courts to judge whether the value of a new voting technique might outweigh the advantages of exact rotation. A recent Florida election employed telephonic voice prints, and cable television holds out the possibility of voting by digital return systems. These and other electronic voting methods are being discussed and tested. The Commission felt that Ohio should be free to explore new technology, and believes that the proposed language permits the positional treatment to correspond to the voting method used.

There is a change in the first sentence of the section, "The names of

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[2]W. James Scott, Jr. "California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents", 45 So. California Law Review 365 (1972).

all candidates for an office at any general election . . ." The word "general" has been deleted in order to make the provision applicable to all elections. The Commission believes that fair treatment on the ballot by rotation or other comparable methods should be available at all elections, including special elections, which are not included under the present language.

The second part of Section 2a concerns the appearance of the office-type ballot, and permits electors to vote only for candidates individually, except for electors for President and Vice-President of the United States who run as a team. The Commission recommends a language change to remove a misleading statement. The section presently reads "Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed". The sentence could be read to mean that at a party primary or non-partisan election the candidate's party can be more prominent than the candidate's name. The Commission did not believe that this was the intention of the authors of the section, but that the exception had been included because at a party primary or non-partisan election, the political party does not appear on the ballot. The Commission recommends removing the clause excepting party primaries and non-partisan elections to remove the apparent ambiguity. The Commission recommendation also removes reference to the size and darkness of type, because election methods of the future may not use the printed media for balloting.

The Commission notes that, should a prior recommendation for the joint election of Governor and Lieutenant Governor be adopted, Section 2a will have to be amended to enable voters to vote for these two executive officers jointly.

Intent of the Commission

The proposed revision of Article V, Section 2a is intended to afford every candidate, by law, equitable treatment appropriate to the kind of ballot used in his election. The Commission views the removal of an absolute standard of rotation and the substitution of a relative standard as a more flexible and workable approach to achieving fairness in the balloting process — a result deemed desirable by all Commission members.

ARTICLE V

Section 3

Present Constitution

Section 3. Electors, during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 3 of Article V.

History and Background of Section

First included in the 1802 Constitution,[1] the electors' privilege from arrest was retained in the 1851 Constitution. The 1912 Constitutional Convention Debates contain no discussion or interpretation of the provision. There is no case law in Ohio interpreting the provision, and information on the limitations of the privilege implied by the exceptions of treason, felony, and breach of the peace is inferred from cases having to do

[1]Constitution of Ohio, 1802, Article IV, Section 3.

with a similar privilege from arrest extended to legislators in Article II, Section 12 of the Ohio Constitution, and to other groups who are granted the privilege from arrest by statute. Article II, Section 12 grants senators and representatives the privilege from arrest, except for treason, felony, and breach of the peace, during their attendance at or going to and from a legislative session. Section 2331.11 of the Ohio Revised Code grants a similar privilege to many groups of individuals, including electors, going to, attending or returning from an election; and others not granted the privilege in the constitution: e.g., judges, attorneys, clerks of courts, sheriffs, coroners, constables, criers, suitors, jurors, and witnesses, while going to, attending or returning from court; a person doing militia duty or going to or returning from the performance of such duty. The privileged groups seem to have in common the fact that the performance of the duties during which time they are so privileged is essential to the progress of government or protection of religious freedom.

An investigation of the historical basis for the provision revealed a desire to permit elected officials to do the job to which they were elected, without constant interruption of having to answer to creditors, much like the earlier privilege given to members of Parliament under English law. By implication, electors should not be obstructed from exercising their franchise by having to answer to minor offenses. The privilege from arrest granted a Senator by the United States Constitution was examined in *Long v. Ansell*, 69 F. 2d 386, 94 A.L.R. 1467 (1934). The plaintiff charged Senator Long with publishing a false and malicious libel by distributing a publication containing a report of a speech made by the defendant on the floor of the Senate. Senator Long claimed immunity from service of summons on account of Article I, Section 6 of the United States Constitution: "Senators and Representatives . . . shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses . . ." The Court of Appeals held that the Senator was not exempt from service of civil process by virtue of the constitutional provision. The opinion states, in part, "At the time of the adoption of the Constitution, there were laws in the states authorizing imprisonment for debt in aid of civil process. Undoubtedly, it was to meet this condition that the exemptions in federal and state Constitution; were aimed."[2]

The actual privilege granted to electors (and other persons immune from arrest for crimes other than treason, felony, and breach of the peace) has been limited by court decisions and other constitutional provisions. The phrase "breach of the peace" has been interpreted to include all criminal offenses by the United States Supreme Court in connection with Article I, Section 6 of the United States Constitution in *Williamson v. U.S.* 207 U.S. 425 (1908). The Ohio Supreme Court in *Akron v. Mingo*, 169 Ohio St. 511 (1969), stated that the interpretation in *Williamson* of "treason, felony, and breach of the peace" is applied to the same words appearing in the Ohio Constitution, Article II, Section 12, and in Revised Code Section 2331.13. In Ohio, therefore, there can be no immunity from arrest for a criminal offense, because the exception to the immunity provision includes all crimes and misdemeanors of every character.

If "treason, felony, and breach of the peace" are interpreted to include all criminal offenses, then it would seem that the privilege extends only to civil arrest. The instances where one is liable for civil arrest are limited. Section 15 of Article I of the Ohio Constitution says "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." The Ohio Revised Code, in Chapters 2713. and 2331., provides for arrest in civil actions before judgment and in the case of a judgment debtor when attempts at fraud are involved. Thus, the reason

[2] *Long v. Ansell*, C.A.D.C. 69 F. 2d 386, 94 A.L.R. 1467 (1934).

for the privilege from arrest offered in *Long v. Ansell* has been substantially nullified by Article I, Section 15 of the Ohio Constitution and by judicial interpretation of "breach of the peace" to include all criminal offenses. *Long v. Ansell* observes "The reason for incorporating this provision in the Constitution has largely disappeared . . . That which at the time of the adoption of the Constitution was of substantial benefit to a member of Congress has been reduced almost to a nullity."[3]

Effect of Change

The Commission's recommendation to repeal Article V, Section 3 would have no substantive effect on the privilege of electors from arrest while going to, attending, or returning from, elections. The Ohio statutes grant this privilege to electors as well as other groups of people who are not granted this privilege in the Constitution.

Rationale for Change

The Commission considers Article V, Section 3 obsolete and of little, if any, effect. The privilege from arrest has been restricted by other constitutional provisions and by court interpretations so that the section has very limited application. Some Commission members suggested that the constitutional language was potentially misleading to the voters, making them think they were privileged when, in all likelihood, they were not. Recognizing that the legislature has provided a similar privilege for persons not mentioned in the constitution, e.g., jurors, witnesses, attorneys, and noting that electors have been included in the statute granting the privilege, the Commission views the constitutional privilege as unnecessary. Research did not uncover any evidence that the erroneous arrest of an elector on his way to or from the election booth would affect the outcome of an election. The apparent absence of any consequence to the election from denying an elector his constitutional privilege strengthened the Commission's opinion that the section should be removed from the Constitution.

Intent of the Commission

The Commission recommends the repeal of Article V, Section 3, which it considers ineffective. The constitutional privilege has been rendered insignificant by Article I, Section 15 of the Ohio Constitution and judicial interpretation of its language. The Commission recognizes that if the privilege were removed from the Constitution, the legislature may provide for the privilege, and, in fact, has done so, for electors, and for other groups not mentioned in the Constitution.

[3] *Ibid.*, p. 1468.

ARTICLE V

Section 4

Present Constitution

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

Commission Recommendation

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

Commission Recommendation

The Commission recommends the amendment of Article V, Section 4 as follows:

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of ~~bribery, perjury, or other infamous crime~~ A FELONY.

History and Background of Section

The Ohio Constitution of 1802[1] included a provision giving the General Assembly full power to disfranchise persons convicted of bribery, perjury, or other infamous crime, and to bar them from any elected office. There is no parallel provision in the Federal Constitution. A comparable provision was included in the 1851 Ohio Constitution with no mention of the provision in the Debates of 1850. "Infamous crime" has generally been interpreted to mean a felony. Section 2961.01 of the Ohio Revised Code formerly denied the right to vote, to hold an office of honor, trust, or profit, and to serve on a jury, to any person convicted of a felony in this state, unless the conviction was reversed or annulled, or the rights restored by pardon. An effect of the statute was to provide mandatory restoration of rights to a person serving the maximum term of his sentence or granted release by the adult parole authority, but, with respect to a convicted person on probation, the Common Pleas Court could restore to the defendant his rights of citizenship. The new criminal code, effective January 1, 1974, amends Section 2961.01, retaining the provision disfranchising any person convicted of a felony, and expanding it to include felonies of other states or the United States. The section now provides that when a convicted felon is granted probation, parole, or conditional pardon, he is competent to be an elector during such time and until his full obligation has been performed and thereafter following his final discharge. Full pardon of a convict restores all rights and privileges forfeited under this section.

Effect of Change

The language recommended by the Commission defines the offenses for which a person may be denied the rights of suffrage or eligibility to office by the word "felony" instead of the present language, "bribery, perjury, or other infamous crime".

Intent of the Commission

The Commission desires to preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends. The retention of permissive language enables the legislature to respond to changes in criminal rehabilitation; at the same time, the electors are assured that the purity of the elective process will be regulated by the General Assembly in this regard.

[1]Constitution of Ohio, 1802, Article IV, Section 4.

ARTICLE V

Section 5

Present Constitution

Section 5. No person in the Military, Naval, or Marine service of the United States, shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State.

Commission Recommendation

Repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. For discussion of the proposed new section, see Section 6.

Commission Recommendation

The Commission recommends repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. The proposed new section is discussed under Section 6.

History and Background of Section

Ohio and other states have denied voting residence to persons living in a federal enclave. Ohio's provision was first included in the 1851 Constitution. The reason for such a provision may have been suggested in *Carrington v. Rash*, 380 U.S. 89 (1965), where Texas argued that its interest in prohibiting servicemen stationed in the state from voting was to prevent the small local civilian community vote from being over-

whelmed by the collective vote of military personnel, and to protect the franchise from infiltration by transients. The Court rejected this reasoning saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The United States Supreme Court, in *Evans v. Cornman*, 389 U.S. 49, 90 S. Ct. 1752 (1970), held that such restrictions violated the Fourteenth Amendment equal protection clause. In 1973, a United States District Court declared Section 5 of Article V of the Ohio Constitution unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave (*Stencel v. Brown*, U.S.D.C., Southern District of Ohio, #72-331).

Rationale for Change

The Commission believes this language should be removed from the Constitution because it is unconstitutional and because the Commission agrees with the principle of an expanded franchise.

ARTICLE V

Section 6

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Commission Recommendation

Repeal and enact new section 5:

Section 5. The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Commission Recommendation

The Commission recommends the repeal of Section 6, and enactment of a new section 5 as follows:

Section 5. THE GENERAL ASSEMBLY SHALL HAVE POWER TO DENY THE PRIVILEGES OF AN ELECTOR TO ANY PERSON ADJUDICATED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING ONLY DURING THE PERIOD OF SUCH INCOMPETENCY.

History and Background of Section

The Ohio Constitution of 1851 contained a provision disfranchising idiots and insane persons, who were not denied the vote in the 1802 Constitution. The language of section 6, "No idiot, or insane person, shall be entitled to the privileges of an elector", is self-executing, requiring no action by the General Assembly to implement the prohibition. The terms "idiot" and "insane" are not defined in the Constitution, and their application arises from legislation and judicial determination. Although most state constitutions at one time used the words "idiot" and "insane", these have become archaic and devoid of standard meaning. Newer state constitutional provisions regarding competence to vote use terms such as "mentally incompetent."[1] Scientific progress has revealed that the myriad of mental impairments do not fall into just two groups, and even the currently acceptable terms "mentally retarded" and "mentally ill" are thought to blur the distinctions among many types and extremes of mental disabilities.

The body of legislation which has been created regarding mental illness and mental retardation has several consequences for the constitutional prohibition against idiots and insane persons voting. The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. An earlier movement to promote treatment for mental illness advocated voluntary as well as involuntary admittance procedures to encourage persons to seek help, and the 1952 Draft Act, proposed by the National Association of Mental Health, recommended the retention of all civil rights by patients, unless adjudicated incompetent and not re-

[1]E.g. Constitution of Virginia, Article II, Section 1.

stored to capacity. The Ohio statutes reflect these recommendations. Voluntary patients do not appear before the probate court for a determination of the need for hospitalization and therefore retain their civil rights. A person who is involuntarily committed appears before the court and, after a finding of the need for indeterminate hospitalization, the person is declared legally incompetent and loses such civil rights as the right to vote. As a consequence, a voluntary patient who may be severely disabled is, theoretically, able to vote. This result contravenes the intent of the constitutional prohibition of idiots and insane persons voting.

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. A voter could be challenged at the polls on the grounds that he is an idiot or insane person. In the absence of standards to be used in making the determination, a person could be denied his right to vote without benefit of any medical testimony on his mental fitness, with the determination heavily dependent on the judge's personal opinion of what an idiot is.

Effect of Change

The Commission recognizes that the present constitutional language is antiquated and probably too broad to pass the Fourteenth Amendment equal protection and due process requirements for depriving a person of a fundamental right.[2] Therefore, the Commission recommends language that will give the General Assembly authority to create some useful standards to determine incompetency for the purpose of voting. Testimony presented to the Commission included cogent reasons why a person incompetent to serve on a jury or to drive may be competely competent to vote.

Rationale for Change

The Commission believes that the present constitutional provision is unacceptable for several reasons. The Elections and Suffrage Committee suggested, in its report to the Commission, that large scale and possibly arbitrary exclusion from voting is a greater danger to the democratic process than including in the franchise some who may be mentally incompetent. Repeal of present Section 6 and omission from the Constitution of any provision excluding persons from voting on the basis of mental incompetence was considered but rejected on the grounds that the Constitution should contain a recognition of the problem, leaving a specific solution to the General Assembly. The Commission's approach is to rewrite the provision so it will exclude only those persons who should not participate in the electoral process, and specifically to give the legislature the right to regulate the procedures for determining that one is mentally incompetent for the purpose of voting. An important factor in the Commission's decision to repeal the prohibition against idiots and insane persons voting was the testimony received from Professor Michael Kindred, a professor of law at The Ohio State University and an expert on the legal rights of mentally ill and mentally retarded persons. Professor Kindred suggested that Section 6 of Article V was probably unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and possibly unconstitutional under the due process clause of the Fourteenth Amendment. "It seems to me very clear at the present time that the provision is unacceptable. It's unacceptable because it is ambiguous, it's unacceptable because if it has any substance to it it's too broad, and it's unacceptable because the terms that it uses are basically insulting, stigmatizing terms."[3] The United States Supreme Court has begun to recognize the right to vote as a fundamental right, and restrictions on the right to vote must bear a necessary and rational relation to a compell-

[2] *Kramer v. Union Free School District No. 15*, 359 U.S. 621 (1969).

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974. p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V
Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

system by "adroit politicians" to thwart the popular will. Suggestions regarding the application of the direct primary included one that officers such as school board members and judges be nominated by petition to remove these offices from politics, and that townships of less than two thousand population not be required to go to the expense of an election for township offices. The Convention proposed Section 7, which has remained unchanged since approved by the voters in 1912. The section requires, concerning presidential nominations, that all delegates to national conventions be chosen by direct vote of the electors. Each candidate for delegate must state his first and second choice for president, which preferences appear on the ballot below the name of the candidate. In addition, the name of no candidate may be used without his written authority.

The listing of the names of all candidates for delegate on the ballot has resulted in the problem of the "bedsheet" ballot, occasionally presenting voters with a sizeable list of candidates, and at times making the use of electronic voting machines impossible in those circumstances. In the primary election in May, 1972, the Democratic Party departed from the earlier tradition of both parties to bring one slate of delegates and alternates before the voters at the party primary, pledged to a "favorite son". Numerous slates of delegates were offered, and when voting machines could not accommodate all of the names, some precincts used paper ballots instead of or in addition to machines. The confusion that occurred led some groups to call for an end to the individual listing of delegates and alternates of each candidate.

The Elections and Suffrage Committee, together with the Assistant Secretary of State studied several proposed solutions for dealing with the "bedsheet ballot" problem. Committee members felt that the Delegates to the 1912 Constitutional Convention wished to offer voters maximum flexibility, but that they did not anticipate the resultant problem of the extremely long and complicated ballot. A consensus developed to eliminate the requirement that delegates be listed individually with their first and second preferences for president, and substitute language whereby the voters would be able to express their wishes by a variety of methods, as provided by law. The proposal stated that the names of candidates for delegate need not be separately identified on the ballot and may be identified in the manner provided by law. The recommendation, however, failed to secure the 2/3 majority necessary for adoption by the Commission.

ARTICLE XVII

Section 1

Present Constitution

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Commission Recommendation

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

The term of office of all elective county, township, municipal, and school officers shall be such even number of years not exceeding four as may be prescribed by law.

The general assembly may extend existing terms of office so as to effect the purpose of this section.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article XVII as follows:

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

THE TERM OF OFFICE OF ALL ELECTIVE COUNTY, TOWNSHIP, MUNICIPAL, AND SCHOOL OFFICERS SHALL BE SUCH EVEN NUMBER OF YEARS NOT EXCEEDING FOUR AS MAY BE PRESCRIBED BY LAW.

THE GENERAL ASSEMBLY MAY EXTEND EXISTING TERMS OF OFFICE SO AS TO EFFECT THE PURPOSE OF THIS SECTION.

History and Background of Section

Article XVII, which consists of only 2 sections, was adopted in 1905. Section 1 fixes the date of a general election for state and county officers in even years on the first Tuesday after the first Monday in November, and states that all other elective offices shall be filled in the odd-numbered years at elections to be held on the first Tuesday after the first Monday in November.

In 1954, the Elections Article and related sections of the Constitution were amended when the terms of executive officers were increased from 2 to 4 years with the auditor's term remaining at 4 years.

Effect of Change

The Commission proposal attaches to Section 1 two sentences which are presently in Section 2 of Article XVII, making no substantive change from existing constitutional provisions. As a result of the Commission's decision to repeal the language in Section 2 regarding terms of office for offices covered elsewhere in the Constitution (discussed following this section), the language regarding the term of office of elective county, township, municipal and school officers presently in Section 2 was considered more appropriate for inclusion in Section 1. The amended section also includes language from present Section 2 empowering the General Assembly to extend existing terms of office in order to effect the purpose of the section - viz., that state and county officers be elected in even years, and all other officers mentioned in the odd-numbered years.

Rationale for Change

The retention of language regarding the terms of office of elective county, township, municipal and school officers is deemed desirable because these officers are not covered elsewhere in the Constitution. There was discussion about the appropriate length of the term of office for these offices, or whether this matter should be left to the General Assembly. The proposed language specifies the length as "such even number of years not exceeding four . . ." The final resolution of the matter was to leave the language regarding terms of office as it is since there seemed to be no compelling reason for making any change.

The language giving the General Assembly the power to extend the terms of existing offices to effect the purpose of Section 1 has value since some are provided by statute, and, should they be changed, the General Assembly's power would prove useful.

Intent of the Commission

The Commission's recommendation for amending Section 1 contemplates no substantive change from the authority presently in the Constitution. The proposal is based in interests of better constitutional drafting and a desire to have all relevant information in the same section. The changes recommended are consistent with the proposed revision of Article XVII, Section 2, discussed below.

ARTICLE XVII

Section 2

Present Constitution

Section 2. The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of the Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

Section 2. Any vacancy which may occur in any elective state office created by Article II or III or created by or pursuant to Article IV of this Constitution shall be filled only if and as provided in such articles. Any vacancy which may occur in any elective state office not so created shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

The Commission recommends the amendment of Section 2 as follows:

Section 2. ~~The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.~~

~~And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.~~

ANY VACANCY WHICH MAY OCCUR IN ANY ELECTIVE STATE OFFICE CREATED BY ARTICLE II OR III OR CREATED BY OR PURSUANT TO ARTICLE IV OF THIS CONSTITUTION SHALL BE FILLED ONLY IF AND AS PROVIDED IN SUCH ARTICLES. Any vacancy which

may occur in any elective state office NOT SO CREATED ~~other than that of a member of the General Assembly or of Governor,~~ shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

History and Background of Section

Section 2 of Article XVII, adopted in 1905, specifies the terms of office for elected executive officials and for some judges, and limits the terms of justices of the peace and of all elective county, township, municipal and school officers to not more than four years, and of Common Pleas Judges to not more than six years. The section empowers the General Assembly to extend existing terms of office to comply with the times for holding elections in Article XVII, Section 1. Provisions for filling of vacancies are set forth, requiring that the Governor fill vacancies in any elective state office other than that of a member of the General Assembly or of Governor until the disability is removed or a successor elected and qualified. It specifies when successors will be elected.

Prior to the adoption of Article XVII, the terms of office of and filling of vacancies in the executive, legislative and judicial departments were provided in Articles II,[1] III, and IV, pertaining to these three branches of government. For example, Article III, Section 18, adopted in 1851, stated, "Should the office of auditor, treasurer, secretary or attorney general, become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified." Article IV, Section 13 empowers the governor to fill vacancies in judicial offices. Article XVII, adopted in 1905, changes some judicial terms. The terms of probate court judges were set at three years in Article IV, Section 8, adopted in 1851, and Article XVII, Section 2, set the terms at four years. Amendments to the judicial article in 1883 specified the terms of supreme court and circuit court (court of appeals) judges as not less than five years as provided by the General Assembly (Art. IV, Sec. 2) and as provided by law (Article IV, Sec. 6) respectively: Article XVII, Section 2 stated that the terms of supreme court and circuit court judges shall be terms of an even number of years, not less than six years, as prescribed by the General Assembly. In some cases, Article XVII contains difference in language that could result in different interpretations. In 1947, Article XVII, Section 2 was amended, changing reference to circuit courts to the new words "courts of appeals". The term of office of a probate judge was increased to six years and reference to members of the board of public works was omitted from the 1947 version. In 1954, an increase in the terms of members of the executive branch from 2 to 4 years, involved a revision of Article XVII, Section 2 and related sections of the constitution. In 1970, Section 2 was amended to prevent filling a short-term vacancy by an election, and in the same year, Article III, Section 18 was also amended to conform with the change.

Effect of Change

The Commission's recommendations with respect to Section 2 do not propose any substantive change in existing constitutional powers; rather, the proposal eliminates duplication and inconsistent language, and some language is transferred to Section 1 of Article XVII as a matter of style.

[1]Article II, Section 11 provides for filling of vacancies in the General Assembly.

Rationale for Change

Much of the subject matter in Article XVII, Section 2 is dealt with in other sections of the Constitution. The Commission is of the opinion that the terms of office and filling of vacancies in legislative, executive and judicial offices is a proper subject for those articles, individually, and notes that the Constitution already provides for these matters in Article II, III, and IV.

The Commission recommends the repeal of the first and second sentences of the first paragraph of Section 2, pertaining to executive officers. Article III, Section 2 contains the same provisions (four year terms for governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general), and has already been approved by the Commission.

The third sentence of the first paragraph pertains to judicial terms. Article IV, Section 6 defines the terms of Supreme Court justices and Courts of Appeals judges as does Section 2 of Article XVII — not less than six years. Common Pleas and Probate judges are assigned terms of six years in Article XVII, thus differing from Article IV, Section 6 which specifies their terms as "not less than six years". Terms for other judges are not covered elsewhere. The fourth sentence defines the terms of Justics of the Peace, which no longer exist in Ohio. The Commission believes that judicial terms is an appropriate topic for the Judiciary Article, and recommends removal of the provisions from this section.

The final sentence in the first paragraph, regarding terms of office of other elective officers, has been transferred to Article XVII, Section 1, as has the second paragraph empowering the General Assembly to extend terms of elective office to conform to the prescribed election dates.

The third paragraph is concerned with filling vacancies in the offices of state elected officials other than Governor and members of the General Assembly. The filling of a vacancy in the office of a member of the General Assembly is provided for in Section 11 of Article II. Vacancies in the office of the secretary of state, auditor of state, treasurer of state, and attorney general are to be filled by the Governor, as provided in Article III, Section 18. The latter section does not include the office of lieutenant governor as one to be filled by the Governor in case of a vacancy. The Commission, in recommendations dealing with the Executive Branch, provides for succession to the office of governor in the event of a vacancy, but does not recommend that a vacant office of lieutenant governor be filled unless both offices become vacant before the middle of the term. Article XVII, Section 2 could be construed to empower the Governor to fill the vacancy in the office of lieutenant governor, in the language "Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor . . ." and this is not entirely consistent with Article III, Section 18. The language proposed by the Commission retains the method of filling vacancies in legislative, executive and judicial offices provided in their respective articles, and, in addition, empowers the Governor to fill vacancies in statutorily created elective offices which may be created at some future time in the manner specified in Section 2.

Intent of the Commission

The amendments proposed with respect to Section 2 do not make any substantive changes in the existing constitutional provisions. The Commission desires to remove duplicative and inconsistent language, and to retain authority granted by Section 2 that is not provided for elsewhere in the Constitution.

ARTICLE III

Section 18

Present Constitution

Section 18. Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article III, Section 18.

Comment

Article III, Section 18 was referred to the Elections and Suffrage Committee for consideration because its provisions overlap those of Section 2 of Article XVII, and is included in this report for that reason. No change is recommended in the section. The Commission proposes changes in Section 2 of Article XVII to make it clear that Article III governs filling of vacancies in the offices of elected executive officials. A more detailed explanation can be found under the discussion of Article XVII, Section 2.

ARTICLE III

Section 3

Present Constitution

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the President of the Senate, who, during the first week of the next regular session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of ~~Government~~ GOVERNMENT, by the returning officers, directed to the President of the Senate, who, during the first week of the NEXT REGULAR session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

History and Background of Section

The language of this section, unchanged since adopted in 1851, resembles a provision of the 1802 Constitution concerning the returns of the election for governor.[1] Prior to 1851, the members of the executive branch were not constitutional officers, or, as in the case of the secretary

[1]Constitution of Ohio, 1802, Article II, Section 2.

of state, were appointed rather than elected. The 1851 Constitution required that the lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general, be elected at a general election. These are the officers "named in the foregoing section" in Article III. At the time the section was drafted, the state had no state elections officer. The legislature, being a body with continued existence, was a likely choice to receive, open, and publish statewide election results. Ohio statutes currently designate the secretary of state as chief elections officer and contain detailed procedures as to how the Secretary shall declare election results.

Section 3 also provides for the resolution of tie votes. The constitution provides that both Houses of the General Assembly shall choose the winner of a tie by joint vote. The section states, in addition, that "the person having the highest number of votes shall be declared duly elected" — a stipulation which prevents run-off elections for those offices.

Effect of Change

The Commission proposes a modification of the section concerning the time when the election results would be presented to the General Assembly. By specifying that the presentation be made at the next regular session, the Commission intends to preclude the possibility of a special session being called in the event of a tie vote, or the vote being decided by a General Assembly already in session.

Rationale for Change

The initial recommendation considered by the Commission was to repeal this section. The Secretary of State, as the chief elections officer, is empowered by statute to publish and declare the results of the election, which are known before January. The Secretary of State has statutory authority to decide who is elected in case of tie votes for all officers other than executive officers. However, many Commission members favored retention of the ceremonial function of the General Assembly regarding declaration of election results. Moreover, the Commission wishes to retain the language defining the winner as the person having the highest number of votes, in order to preclude the possibility of run-off elections. The Commission, therefore, recommends retaining the ceremonial and tie-breaking functions of the General Assembly and precluding run-off elections. The Commission recommends the addition of language specifying that the declaration of election results and tie-breaking votes should be made at the next regular session of the legislature. Section 8 of Article II provides that the General Assembly shall meet in "first regular" and "second regular" session. The six executive officers and members of the General Assembly, except approximately half of the state senators, will usually be elected at the same time. The Commission believes that should there be a tie vote for any of the six elected officers, the General Assembly elected at the same election should be the General Assembly to resolve that tie-vote. By requiring that such resolution be at the *next regular* session, it is intended to preclude the calling of a special session to resolve the tie and prohibit the vote from being decided by a General Assembly already in session.

Intent of the Commission

The recommendation of the Commission is intended to retain all of the powers of the present section, and to modify the procedures of declaring election results and resolving tie votes by requiring that these procedures be performed by the General Assembly elected at the same election as those elected officials who might have received an equal number of votes for the same office.

ARTICLE III

Section 4

Present Constitution

Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends the repeal of Article III, Section 4.

History and Background of Section

Section 4, proposed by the 1851 Constitutional Convention, had no parallel in the 1802 Constitution. The original language was introduced as an amendment to Section 16 of the Executive Article which provided that members of the executive branch be elected for 2 year terms and that the Governor would fill any vacancies for the remainder of the term or until the disability was removed. Revision of the article by the committee on drafting severed the two sections. Article II, Section 25 provided that the legislature would commence on the first Monday of January, *biennially*, commencing in 1852. A problem arose if an election was held in a November before a January when the legislature was not in session. In this event, the President of the Senate would be unable to declare the results to the legislature. Section 4 was adopted as a solution. Pertinent statutes detailing the method in which election returns are made to the Secretary of State are found in Sections 3505.33 to 3505.35, inclusive, of the Ohio Revised Code.

Rationale for Change

The Commission recommends the repeal of Section 4. The problem to which it was proposed as a solution no longer exists. The adoption of a constitutional amendment by the voters in 1972 to Section 8 of Article II requires the General Assembly to be in session every January. Thus, there would not arise an election for statewide officers occurring in a November immediately preceding a January when the legislature would not be in session.

ARTICLE II

Section 21

Present Constitution

Section 21. The General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted .

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article II, Section 21.

History and Background of Section

With the expansion of the executive department proposed by the 1851 Constitutional Convention, and all state officials being elected by the voters of the state at large, it was considered important to provide for an orderly way of resolving contested election results. The legislative committee of the Convention considered two methods of resolving election contests. The first proposal allowed contested elections for the executive department, judges of the Supreme Court and all officers elected by the voters of the state at large to be determined by both houses of the General

Assembly in the manner provided by law. The proposal was not well received because some members feared that the law might allow the board of county commissioners, for example, to decide contested election cases regarding its own membership, since such persons were not elected by the voters of the state at large. The second alternative empowered the General Assembly to provide by law for the conduct of all election contests, with the proviso that no election be contested before the legislature except with reference to its own body. The proviso was omitted when it was observed that it was merely a repetition of the legislature's power under Article II, Section 6 to judge its own elections, returns, and qualifications of members. The language finally agreed to remains unchanged in the present Constitution.

Rationale for Retention of Section

The power to determine the conduct of contested elections granted to the General Assembly in Article II, Section 21 is not believed to be a significant addition to powers the legislature already possesses. The Commission considers it a plenary power of the legislature by virtue of Section 1 of that article, "The legislative power of the state shall be vested in a General Assembly". Consistent with the Commission's philosophy of making no changes in areas that are not presenting problems, however, it recommends that no change be made in this section.

APPENDIX H

Part 8

LOCAL GOVERNMENT

March 15, 1975

Overview of Local Government

One of the major issues that confronted the Constitutional Revision Commission from its inception was the relationship of local governments in Ohio to each other and to the state. The problems now facing many Ohio counties, municipalities and townships have been growing in magnitude during the last several decades and have raised serious questions in some cases as to the appropriateness of the governmental structures and powers granted to these units by provisions of the Ohio Constitution, some of which were originally adopted more than 170 years ago. The fact that the Constitutional Revision Commission was created indicates that the General Assembly recognizes the need for review and revision of the present Constitution during the 1970s.

The Advisory Commission on Intergovernmental Relations, in a report covering the general question of state constitutional revision throughout the country, stated its position on the need for revision to meet the problems confronting local government:

> "Early in its study, the Commission was confronted with the fact that many State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of State and municipal pleas for federal assistance. It is significant that the Constitution prepared by the Founding Fathers, with its broad grants of authority and avoidance of legislative detail, has withstood the test of time far better than the constitutions later adopted by the States. . . . The Commission finds a very real and pressing need for the States to improve their constitutions. A number of States recently have taken energetic action to rewrite outmoded charters. In these states this action has been regarded as a first step in the program to achieve the flexibility required to meet the modern needs of their citizens."

The three basic units of local government in Ohio—counties, municipalities and townships—were established with differing structures, powers and functions. The county serves as the basic administrative unit of the state for local government. Municipal corporations—cities and villages—form the administrative and legislative structure of urban areas and provide the bulk of the complex services these areas require. Townships are the local governmental structures for the unincorporated areas, although services, particularly utilities, are infrequently supplied directly by them. The overlap in authority among these three units is considerable and the level of government delivering a particular service varies widely within the state.[2]

In Ohio the number of general purpose units of local government has grown from a total of 2,291 in 1930 to 2,345 in 1970. The slight overall increase in local units is attributable to an increase in the number of cities, from 113 in 1930 to 229 in 1970. The number of villages and townships decreased slightly, from 752 villages to 708, and from 1,338 townships to 1,320, while the number of counties remained constant.[3]

Although the number of general purpose local governments remained fairly stable, there was a proliferation of special purpose units on the local level (school districts excluded). In the 15-year period from 1957 to 1972, the number of units that the U.S. Census Bureau designates as special districts in Ohio increased from 160 to 275.[4] Special districts are usually single-function, autonomous units whose jurisdictions are usually drawn to encompass particular service areas and frequently overlap existing local government boundaries.[5]

Not included by the Census Bureau in its compilation of special districts are various governmental designations that have certain characteristics of governmental units—often including considerable fiscal and administrative independence—but are treated by the Census as subordinate agencies of counties or municipalities. Special purpose units of local government are often created to solve problems or provide services that the counties, municipalities or townships are unable to handle because they lack the necessary powers, jurisdiction or fiscal resources. The Census designation of subordinate agencies includes, on the county level, some transit system districts, garbage and waste disposal districts, general health districts, joint sewer districts, and sewer and water districts. On the municipal level are health districts, joint sewer districts and joint municipal improvement districts.[6] The subordinate agencies further add to the proliferation of special units of local government. Overall, Ohio ranks ninth

1 U.S. Advisory Commission on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress*, Washington, D.C.: U.S. Government Printing Office (1955) pgs. 37-38.

2. Ohio Department of Urban Affairs, *Delivery and Organization of Local Government Services in Ohio*, (Draft, 1971) pgs. 4-5.

3. These figures were taken from *Ohio Population Reports* by the Ohio Secretary of State, 19th Federal Census (1970) and 16th Federal Census (1940).

4. These figures were taken from the *U.S. Census of Governments 1957* and *1972* by the U.S. Bureau of the Census, Vol. 1 pg. 426 (1972) and Vol. 1 No. 3 pgs. 62-63 (1957).

5. U.S. Advisory Commission on Intergovernmental Relations, *Regional Decision Making: New Strategies for Substate Districts*, Washington D.C.: U.S. Government Printing Office (October 1973) pgs. 20-21.

6. *U.S. Census of Governments 1972, op. cit.*, pg. 427.

among the states in the number of all local government units, with 3,259.[7]

Although the proliferation of special governmental units was, in large measure, a response to demands of metropolitan area residents for particular services or governmental functions, the trend toward an increasing number of special local units has only exacerbated the problems relating to increased urbanization of the state of Ohio. The problem has been described in these terms:

> "As the responsibilities of a local government expand beyond its fixed political boundaries, more and more political entities seem called for, to solve here-a-problem, there-a-problem, whenever the need becomes too obvious or too urgent to ignore. Unfortunately, the bits-and-pieces philosophy of government is totally inadequate at a time in our history when more than 70%—soon to be 80%—of the population of the United States is urban, when more than half of the people in more than half of the states live in metropolitan areas." [8]

Between 1900 and 1970, the percentage of Ohioans living in areas considered by the United States Census Bureau to be urban increased from 48.1% of the residents of the state to 75.3%.[9] Each of the state's 10 largest counties is classified as more than 75% urban, and the six largest are each more than 90% urban.[10] Continued urban growth, not only in Ohio but throughout the nation, is forecast.[11]

With the increasing urbanization of Ohio, an increasing number of areas of concern to local government officials, as well as citizens of these units, have developed, among them: a) the relative rigidity of boundaries of local units which often impedes proper service delivery; b) service areas that do not coincide with political boundaries and are seldom administered by persons directly responsible to the voters; c) the proliferation of special units of government and with this the fragmentation of responsibilities; d) maintenance of adequate services in rural areas; e) decline in property values and loss of tax revenues, especially in older central cities; and f) the impetus from the federal and state governments for increased cooperation among units and for regionalism.

In order to better understand these and other pressing problems facing local government in Ohio, the Constitutional Revision Commission established its Local Government Committee and gave it the responsibility of examining the problems and recommending any constitutional changes that could offer promise for solution.

The Local Government Committee, in studying present Ohio constitutional provisions relating to local government, conducted a seminar in the Fall of 1971 on the constitutional aspects of local government. The seminar, held at The Ohio State University, helped focus on current problems and resulted in the publication of a series of articles on local government in the Ohio State Law Journal.[12]

The committee studied metropolitan problems of a regional nature, such as transportation, law enforcement, pollution and waste disposal, which are not confined to arbitrary geographic or political boundaries, even county boundaries. The committee studied forms of metropolitan or regional governments that have been created elsewhere—particularly the Minneapolis-St. Paul seven-county region in Minnesota, and the often-cited Toronto, Canada experience—and worked extensively on a draft for a constitutional provision that would enable the creation of regional government by the voters. It then held a series of public hearings in Columbus, Cleveland and Cincinnati, at which both public officials and private citizens expressed their views on the problems of local government and on regional government as a means of solving those problems. What emerged from those meetings was a belief that regional government is the government of the future, but that in Ohio it is, indeed, still in the future. It is a concept not yet acceptable to many officials and citizens in Ohio, who variously fear loss of identity or deplore an additional level of government and taxation.

The alternative concept that emerged from the study of regional government was the belief that some local government problems in Ohio could be solved if county government were strengthened—indeed, in all but a few of the metropolitan areas in the state, the county *is* the region within which effective action could be taken to solve problems. The committee then recommended some amendments relating to county government which were considered by the full Commission and constitute the first part of this report.

The general thrust of the Commission's recommendations on county government is to strengthen county government. The Commission agrees with Robert Merriam, Chairman of the Advisory Commission on Intergovernmental Relations, who summarized the current emphasis on strong county government as follows:

"The Critical Need for Strong Counties

"Even if county government had not

7. *U.S. Census of Governments 1972, op. cit.*, pg. 426. This figure includes 88 counties, 936 municipalities, 1320 townships, 640 school districts, and 275 special districts.
8. Hessler, Iola O., *Metropolitan Answers*, Cincinnati: Stephen H. Wilder Foundation (1968) pg. 7.
9. *Ohio Population Report*, 19th Federal Census, *op. cit.*, pg. 201.
10. *Ibid.*, pgs. 8-10.
11. Commission on Population Growth and the American Future, *Population and the American Future*, pgs. 36-37.
12. *Ohio State Law Journal*, Vol. 33 No. 3 (1972).

existed in the Anglo-American structure, it would have to be invented now." Such was the conclusion of the authoritative second report of New Jersey's County and Municipal Government Study Commission. And this must be the conclusion of more and more policy-makers—at all levels of government—who are grappling with the ever increasing need for an effective governmental mechanism below the State level and above the localities.

For those who ponder this areawide need as it relates to counties, let me underscore a few of the more obvious linkages:

—When we seek effective regional answers to urban service problems, we, in effect, are seeking an effective county government in a majority of cases, since more than half of the Nation's standard metropolitan areas still are single-county in scope.

—When we struggle with the imbalances that characterize recent urban growth and especially the agonizing plight of rural areas suffering from outmigration, economic decline, and costly services, we squarely confront the burdensome agenda now troubling hundreds of our rural counties.

—When we see the helter-skelter consumption of valuable land on the urban periphery and the ineffectiveness of most land use controls and zoning, we see, in many instances, a glaring weakness of many county governments.

—When we criticize the proliferation and the frequent lack of accountability of special districts in both urban and rural areas, we, in effect, are criticizing a shackle that limits all too many counties.

—When we come to grips with the areawide implications of the various environmental programs and proposals requiring our urgent attention, we will see a new role for many counties.

—When we weigh the pros and cons of new towns and rural growth centers, we end up assessing the capabilities of the counties affected, since these jurisdictions have a prime role in coping with many of the governmental needs of such communities and centers.

—Finally, when we strive to reconcile bitter differences between the States and many of their larger municipalities, we strive for an effective intermediary force that can help arbitrate these destructive conflicts—hopefully, the counties." [13]

The Constitutional Revision Commission concluded that the existing form of government and powers of counties in Ohio do not adequately equip them to be effective leaders in solving the problems facing local governments. Amendments to the Constitution are needed to assist in the process of strengthening county government's ability to deal with urban problems.

The Commission's proposals for counties would strengthen county government by a) permitting the General Assembly to classify counties, within certain limits, for the purposes of establishing their organization and government; b) grant counties powers of local self-government, subject to certain limitations; c) make county charters easier to adopt; d) clarify ambiguities in the provisions for the operation of county charter commissions and for placing proposed charters on the ballot; and e) clarify the General Assembly's authority to reduce the number of counties, with the consent of the people in the counties.

As for Article XVIII, which deals with municipal corporations, the Commission is recommending that no changes be made in the basic municipal home rule provisions. It is, however, recommending amendments that would a) clarify the General Assembly's authority to enact legislation to change municipal boundaries; b) revise and clarify the procedures for and powers of municipal charter commissions; c) revise the procedures and powers of municipalities concerning the issuance of notes and bonds for utility purposes; and d) exempt transportation and solid waste management services from the 50% limitation on sale of municipal utility products or services outside a municipality. Non-substantive changes the Commission is recommending for the municipal sections include rearrangement of sections, language changes, clarifications and elimination of duplicative provisions.

In its considerations of Article XVIII on municipalities, particularly the home rule sections, the Commission recognized that since its adoption in 1912 there have been many legal battles over interpretations of some provisions of this article. The Commission viewed its basic task not as writing the ideal constitution with ideal solutions to state and local problems, but rather as ascertaining whether solutions to current problems are hindered by the present constitutional language or lack of it. The Commission was also concerned with whether the present language relating to municipalities, as currently interpreted, creates problems because those who must use and understand it are confused or unable to determine a course of action because they do not know what it means. In the final analysis, the Commission determined that although the constitutional language has been interpreted in varying ways, those interpretations are now understood and a body of law has grown up around them. They are not,

13. U.S. Advisory Commission on Intergovernment Relations, "For a More Perfect Union—County Reform," Washington, D.C.: U.S. Government Printing Office (1971) pg. 3.

therefore, presently a barrier to solving pressing problems. The meaning is reasonably fixed today and appears to be satisfactory to officials of both charter and noncharter municipalities.

Other sections of Article XVIII, in addition to the home rule sections, either give municipalities specific powers, such as the utility sections, or contain limitations by reserving certain powers to the General Assembly. Although it might be questioned whether some provisions are necessary, such as the authority for a municipal corporation to acquire utilities, which would probably be considered part of the home rule power of local self-government, most of the sections contain specific limitations or conditions which both the state and the municipalities have come to rely upon over the years, and extensive rewriting or repeal did not seem advisable. Changes have been recommended in the municipal sections to correct particular problems that have arisen since the sections were adopted. The Commission also recommends changing the order of the sections in Article XVIII because the present arrangement does not place all sections dealing with the same subject together or in proper sequence. For some sections dealing with municipalities, the only recommended change is in the number of the section.

On the matter of townships the Commission determined that the only significant problems that exist involve "urban townships" and only about 8% of the total number of townships in the state have populations, in 1970, of 5,000 or over. The problems now facing urban townships are similar in many respects to the problems facing other local units that are trying to deal with the myriad responsibilities and difficulties related to providing public services in metropolitan areas.

Some township officials urged the Commission to recommend constitutional amendments that would allow changes in the present structure of townships, and to recommend provisions that would allow townships to increase their powers and functions to those of home rule municipalities.

The Commission, however, is not recommending any changes in the township provisions. It believes that the General Assembly has ample authority to solve the problems facing urban townships and that there is no evidence of a compelling need to provide constitutionally for solutions or for a new governmental structure.

CHAPTER I

County Government

The county structure of government in the United States is an outgrowth of colonial experiences with British administrative districts of the national government. Following the British pattern, state constitutions were written to provide for the establishment of county government as an administrative arm of the state.[1]

Establishment of counties in Ohio predated statehood. Washington County was formed in 1788 and at the time included almost all of present-day Ohio. Soon after, Hamilton (1790), Knox (1790), and Wayne (1796) counties were created. In 1851 the last of the present 88 counties, Noble County, was formed. The last boundary change occurred in 1888 between Auglaize and Logan counties.[2]

In relation to other states, Ohio's counties are small in land area, averaging 455 square miles, compared to the national average of 600 square miles.[3]

According to the 1970 census, the populations of Ohio's counties range from a high of 1,721,300 in Cuyahoga County to a low of 9,420 in Vinton County. The populations of 19 of the state's counties exceed 100,000, and 31 counties are included in the U.S. Census Bureau classification as standard metropolitan statistical areas. By contrast, in 1960 only 19 Ohio counties were classified as SMSAs.[4]

While the population density average for all Ohio counties is 260 persons per square mile, 10 counties have densities ranging from 518.8 to 3,774.8 persons per square mile.[5]

Taxable resources and economic activities of Ohio counties also vary greatly. The estimated yield per capita on a one mill levy on county real and public utility taxable property varies from a low of $1.72 to a high of $7.01, with the average yield $2.81.[6]

Counties in Ohio, as in nearly all the states, are considered administrative units of state government, authorized by the Constitution to exercise only those powers expressly conferred upon them by the General Assembly, or powers incident to those powers. More than 100 years ago the Ohio Supreme Court in *Hamilton County v. Mighels*,[7] clearly defined the role of counties in Ohio in the following portions of its opinion:

> "Neither a county, nor the board of commissioners of a county, is a corporation proper; it is at most but a legal organization which, for purposes of a civil administration, is invested with a few functions characteristic of a corporate existence. . . .
>
> Counties are legal subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . .
>
> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." [8]

The structure of county government, created in the earliest days of Ohio's history, has remained essentially the same up to the present time, although the needs of county residents and the demands made both upon the county and by the county government upon its residents no longer bear much resemblance to the forces that originally helped mold the structure of county government. It has long been recognized that the structure of county government as developed during the 19th century is inadequate to meet the needs of modern counties. Forty years ago the problems with county government structure were fully recognized and the Governor's Commission on County Government in its 1934 report, *The Reorganization of County Government in Ohio*, described the county dilemma in these terms:

> "In the judgment of most students of government the present system of county government is basically unsound and ill-adapted

1. Duncombe, Herbert Sidney, *County Government in America*, Washington, D. C.: Arrow Press (1966) pg. 18.
2. Downes, Randolph Chandler, "Evolution of Ohio County Boundaries," Ohio Archaeological and Historical Society Publications Vol. 36 (1927), pgs. 340-477.
3. Ohio Legislative Service Commission, "Staff Report on County Government," (1970) pg. 3.
4. *Ibid*, pgs. 3-5.
5. *Ohio Population Report*, 19th Federal Census, pg. 205.
6. Legislative Service Commission, *op cit.*, pg. 4.
7. *Hamilton County v. Mighels*, 7 Ohio St. 109 (1857).
8. *Ibid*, pgs. 115-119.

to the performance of the functions entrusted to it. . . . The county has undergone the least change of organization of any major part of the system of local government. It is cut to a pattern designed in pioneer days, the principal features of which have been but little modified in the last century. In fact, the county officers of today are the same as those in 1834, and with one exception they are filled in the same manner. While this pattern was never written into the constitution in detail, as in some states, its chief characteristics were prescribed by provisions of the constitution of 1851." [9]

The inadequacies of county governmental structure, however, are not constitutional in nature and, therefore, could be dealt with legislatively by the General Assembly. In addition, the Commission is recommending amendments that would make it easier for a county to adopt a charter and thus make changes in its own structure to meet particular needs.

The governmental structure of Ohio counties, established by general law, consists of a three-person elected board of county commissioners, eight other elected officers and a complex network of commissions and boards. County governments provide a large number of varied functions—such as welfare, highways and hospitals—and often perform functions in cooperation with other governments and governing boards.[10]

Counties may exercise some additional powers by adopting a charter pursuant to Sections 3 and 4 of Article X of the Ohio Constitution, or by adopting an alternative form of county government under Section 1 of Article X and Chapter 302. of the Ohio Revised Code. To date no county has adopted either a charter or an alternative form.

Pressure for county home rule began to be felt soon after adoption of the municipal home rule sections of Article XVIII in 1912, and several county home rule constitutional amendments permitting county charters were introduced into the General Assembly. The issue finally reached the ballot in the form of a new Article X in November, 1933.

County home rule was strongly opposed by many county, township and suburban municipal officials, although public debate over the issue in 1933 was somewhat muffled because of the fact that the repeal of Prohibition was on the same ballot.[11]

Charles P. Taft II of Cincinnati, chairman of the County Home Rule Association, and one of the prime sponsors of the amendment, was quoted at the time as saying that "only tax spenders are opposing" [12] the county home rule amendment, and the evidence seems to indicate that the economic situation that characterized the Depression aided, to a great degree, in convincing Ohioans that the amendment should be approved as a means of reducing taxes in counties that adopt charters.

The constitutional amendment repealing old Article X and replacing it with new Article X, which contained authorization for county charters, was approved by a majority of more than 100,000 of the almost 1,600,000 people voting.[13]

Since new Article X was adopted, there have been 17 elections in eight of the state's 12 largest counties on the question of election of a charter commission; ten resulted in the election of commissions. Nine of the proposed charters were defeated at the polls.[14] The 10th, recently elected in Summit County, has not yet submitted its charter. A more detailed discussion of the problems faced by counties in adopting charters can be found in the portion of this report dealing with Sections 3 and 4 of Article X.

Although the power to provide for alternative forms of county government was granted the General Assembly by new Article X in 1933, it was not until 1961 that the Legislature enacted Chapter 302. of the Revised Code authorizing counties to adopt either an elected or appointed executive alternative form of county government, on approval of a majority of electors voting. According to Chapter 302., upon adoption of an alternative form, general laws pertaining to counties are operative only insofar as they are not inconsistent with the alternative form of government laws. In addition to the specific powers granted to the board of county commissioners of a county which adopts an alternative form of government, division (M) of Section 302.13 of the Revised Code, which was added by an amendment enacted in 1963, provides that the board of county commissioners may:

"By ordinance or resolution make any rule, or act in any matter not specifically prohibited by general law; provided that, in the case of conflict between the exercise of powers pursuant to division (M) of this section and the exercise of powers by a municipality or township, the exercise of power by the municipality or township shall prevail, and

9. Governor's Commission on County Government, *The Reorganization of County Government in Ohio*, (1934) pgs. 37-38.
10. Legislative Service Commission, *op. cit.*, pgs. 6-12.
11. The Cleveland Plain Dealer, October 7, 1933 pg. 7.
12. *Ibid.*
13. The Ohio State Journal, November 9, 1933, pg. 2.
14. Institute of Governmental Research, *Obstacles to County Reorganization: Constitutional Aspects*, University of Cincinnati (1971).

further provided that the board may levy only taxes authorized by general law."

This provision was attacked in the case of *Blacker v. Wiethe*, 16 Ohio St. 2d 65 (1965) as an unconstitutional delegation of legislative power without standards for the exercise thereof. The court found Article X, Section 1 to be sufficient authority for the provision in question. While the case is important in upholding the power, it should be noted that the case arose not in response to an attempt to exercise that power but as a challenge to the validity of an election on the adoption of an alternative form of government. The court's holding was then limited to a determination that division (M) is not "unconstitutional on its face." This holding leaves much room for further consideration of the extent to which powers could actually be exercised under that provision.

The Commission, however, recommends no change in Section 1 of Article X as it relates to the alternative form of county government. This section confers upon the General Assembly ample authority to provide for alternative forms and to make determinations as to the extent of the powers to be granted, within constitutional limitations.

Since 1961, Cuyahoga County has tried twice and Hamilton and Montgomery counties once each to pass alternative forms, but all were defeated at the polls.[15]

15. *Ibid.* pg. 5.

Recommendations

ARTICLE X

Section 1

Present Constitution

Section 1. The General Assembly shall provide a general law for the organization and government of counties, and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law. Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Commission Recommendation

Section 1. The General Assembly shall provide by general law for the organization and government of counties, and for such purposes may classify the counties of the state. Each classification, which may be according to population or any other reasonable basis, shall be for a purpose as specified in the law establishing the same, and any such basis shall be related to the purpose of the classification. No classification shall contain more than four classes, and each class shall contain more than one county.

The General Assembly may also provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and aproved by a majority of those voting thereon under regulations provided by law.

Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities and townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article X as follows:

Section 1. The General Assembly shall provide by general law for the organization and government of counties, and FOR SUCH PURPOSES MAY CLASSIFY THE COUNTIES OF THE STATE. EACH CLASSIFICATION, WHICH MAY BE ACCORDING TO POPULATION OR ANY OTHER REASONABLE BASIS, SHALL BE FOR A PURPOSE AS SPECIFIED IN THE LAW ESTABLISHING THE SAME, AND ANY SUCH BASIS SHALL BE RELATED TO THE PURPOSE OF THE CLASSIFICATION. NO CLASSIFICATION SHALL CONTAIN MORE THAN FOUR CLASSES, AND EACH CLASS SHALL CONTAIN MORE THAN ONE COUNTY.

THE GENERAL ASSEMBLY may ALSO provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law.

Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities and townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Description of Changes

The amendment to Section 1 recommended by the Constitutional Revision Commission would specifically add to the General Assembly's constitutional power to provide by general law for the organization and government of counties, the power also to classify counties for such purposes.

The General Assembly could, within specified limits, recognize differences among counties in legislation relating to their organization and powers, by arranging counties into groups having common, defined characteristics.

The amendment permits an unlimited number of classifications, but requires that the purpose for each be specified in the law establishing the classification. The basis upon which counties would be assigned to the classes created by any classification would have to be reasonably related to the purpose of the classification.

The language permitting the General Assembly to classify on the basis of population "or any other reasonable basis," is similar to Section 8.01 of the Model State Constitution of the National Municipal League [16] and is intended to give the General Assembly a high degree of flexibility in reaching solutions to county problems.

The amendment limits the General Assembly's authority to classify counties by prohibiting classifications containing more than four classes, and by requiring that each class contain more than one county. The term "classification" used in the amendment means the entire group of 88 counties as divided into classes for a specific purpose. Within any one classification, all the counties of the state could be divided into not more than four classes. These two limitations are intended to prevent excessive classification and special legislation, which characterized municipal legislation prior to the adoption of the municipal home rule powers in Article XVIII in 1912. The Commission believes that an unlimited authority to classify, which could result in adoption of laws containing particular governmental or organizational provisions for each of the 88 counties, should not be permitted.

Although the Commission is not recommending that the General Assembly adopt any particular classification scheme, it suggests several examples of possible purposes for dividing the state's 88 counties into classes. Among the purposes suggested:

a) In order to deal rationally with water resources and facilities, counties could be divided into different classes according to the type of waterway located within or on the border of each county (i.e., counties along Lake Erie, counties along major rivers, counties with small streams, etc.)

b) In order to assist counties in providing necessary services or governance, counties could be divided according to size to permit different forms of government.

The only other change in Section 1—adding "also" in the sentence permitting the General Assembly to provide alternative forms of county government—is intended to emphasize that the power to classify is in addition to the other powers in the section which the General Assembly possesses regarding county government.

History and Background of Section

In 1933, the proponents of county home rule proposed a constitutional amendment that included a complete revision of Article X, which dealt with counties. Present Section 1 was adopted by the voters, along with the rest of new Article X, and, except for changes in Section 3 made in 1957, remains in the same form today as originally adopted. Section 1 authorizes the General Assembly to provide by general law for the organization and government of counties, for alternative forms of county government, and for the transfer by municipalities or townships of any of their powers to the county, and for the revocation of such transfers.

Classification of counties in Ohio has never been specifically authorized by the Constitution, although the Constitutional Convention of 1874 did propose a sectioon that could be interpreted as permitting clasification.

16. National Municipal League, *Model State Constitution*, Section 8.01.

Article II, Section 29, as proposed by the Convention read in part: "nor shall any act be passed conferring special powers or privileges upon any county . . . not conferred upon all counties . . . of the same general class." [17] The constitution submitted by the Convention of 1874, however, was defeated by the voters.

Section 1 of Article X, which requires the General Assembly to provide "by general law" for the organization and government of counties, and Section 26 Article II, which provides that "All laws, of a general nature, shall have a uniform operation throughout the state . . .", have been the basis for several Court opinions holding unconstitutional various legislative acts classifying counties for one purpose or another.[18] At the same time, classification of counties does exist in the statutes.[19]

Rationale and Intent of the Commission

At least 13 states classify counties for one or more purposes; some have specific constitutional provisions permitting classification and others apparently do it without specific constitutional authorization. In addition, at least 7 states permit special local legislation—something that the Commission feels is undesirable. The Commission believes that its proposal to permit classification of counties within certain limitations will avoid special legislation and the vast amount of legislative time it consumes.

One of the primary reasons leading the Commission to recommend this amendment to Section 1 is the division of opinion among legal authorities as to the present constitutional power of the General Assembly to classify counties. The Commission is convinced that the General Assembly should have the flexibility available through classification to deal with county government and organization problems, and believes that a constitutional amendment to that effect is desirable to remove doubt as to the constitutionality of existing classifications and to provide expressly for the conditions under which future classifications could be made.

Because the counties in Ohio are extremely diverse entities, varying greatly in such characteristics as population, density, taxing ability and effort, geography, urban-rural mix, and amount of industrialization, the Commission believes that classification of counties, as provided for in this amendment, will allow the General Assembly to tailor county government and organization to groups of counties bound by similar characteristics as the varying needs of Ohio counties are made known to the General Assembly. At the same time, counties which feel no need for changes in governmental structure need not be altered.

An indication that the differences among Ohio counties have long been recognized as factors having significant effect on the governance and organization of counties is found in the 1934 report of the Governor's Commission on County Government, which noted population differences, taxing ability differences, and further noted that, while the population of Ohio was nearly evenly distributed between urban and rural in 1900, by 1930 68% of the state's population lived in urban areas and 32% in rural.[20] The trend toward urbanization has continued. In 1970, 75.3% of Ohioans lived in urban areas.[21]

During its deliberations on the merits of allowing classification, the Commission's Local Government Committee, with the cooperation of the County Commissioners Association, sent a questionnaire to the boards of county commissioners in all 88 counties soliciting their opinions about classification. The committee received 34 replies, most indicating they were

17. *The Constitution of Ohio*, compiled by Isaac Franklin Patterson, Cleveland: The Arthur H. Clark Co., (1912) pgs. 192-193.
18. *State ex rel. Newell, Jr. v. Brown*, 162 Ohio St. 147 (1954); *State ex rel. Cooley v. Thrasher* 130 Ohio St. 434, (1936); *Davis v. Wiemeyer*, 124 Ohio St. 103 (1930).
19. For example, Sections 307.23 and 307.65 of the Ohio Revised Code.
20. Governor's Commission on County Government, *op. cit.*, pg. 3, pg. 20.
21. *Ohio Population Report*, 19th Federal Census, *op. cit.* pg. 8.

filled out on behalf of all commissioners. More than 60% (21) of the respondents favor classification, and all commissioners responding from counties over 150,000 population favored classification. The breakdown of responses, according to population, is:

County Population	% Favoring Classification	% Opposing Classification	Total Number of Responses	Number of Counties Category
over 150,000	100% (5)	0% (0)	5	13
50,000-150,000	73% (8)	27% (3)	11	30
under 50,000	44% (8)	56% (10)	18	45
Total All counties	62% (21)	38% (13)	34	88

One comment on the questionnaire indicated a reason smaller counties are often opposed to classification—a belief that it could be used as a device to confer monetary benefits on some counties but not on others. The Commission believes, however, that any arbitrary action of this type by the General Assembly would not fall within "organization and government" of counties and would be held unconstitutional. Moreover, the amendment recommended by the Commission requires that the criteria used for classification be related to the problem at hand and, therefore, no county that met the criteria could be disqualified from any programs devised by the General Assembly to solve county problems, and any benefits that accompany such programs.

Of the county commissioners who favored classification, 16 indicated that criteria other than population might also be used in classifications, including several which were suggested in the questionnaire—number of local units in the county, property valuation, area, and location. Additional criteria were also suggested by the respondents—source of revenue, drainage areas, complexities of services provided, summer population, budget, urban and rural population, size and poverty level of the core city, per capita income, tax effort, and the federal revenue sharing formula.

The recommended amendment is flexible enough, in the Commission's opinion, to permit the General Assembly, if it so desires, to allow counties to move from one class to another, depending on the county problems and the intended aim of the classification.

The Commission recognizes that some of the advantages of classification that it has cited could be secured by counties needing them through adoption of either a county charter or an alternative form of government. However, since no county has yet been successful in any attempts to do either of these, the Commission believes that the additional authority that this amendment would provide should be made available to permit the General Assembly by legislative action to provide for the needs of a group or groups of counties having common problems.

ARTICLE X

Section 2

Present Constitution

Section 2. The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such power of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.

Commission Recommendation

No recommendation.

Comment

The Local Government Committee and the Commission heard from township officials, county officials, and municipal officials concerning township problems, and considered several proposals for constitutional changes. Township problems appear to stem from both the structure of township government—like that of counties, the structure has remained virtually unchanged throughout Ohio's history—and powers, or lack of them. Township problems are concentrated in the so-called "urban" townships, for which there is no agreed, uniform definition. Townships with populations of over 5,000 constitute approximately 8% of the 1320 townships in Ohio.

The Commission is not recommending constitutional changes relating to townships. Township government is viewed as in a state of flux, and the Commission believes that, under such circumstances, the legislature is better equipped to recognize problems and solve them legislatively than constitutionally; governmental structure and powers tend to remain locked in the Constitution once they are placed there. Some urban townships appear to feel a need for powers similar to those of municipalities, but point to the difficulties inherent in the process of incorporating—difficulties imposed by law, not by the Constitution. The Commission takes no position on whether urban townships should incorporate, but notes that the Constitution poses no barriers.

The Commission believes that the General Assembly has ample authority to deal with the problems of townships, and recommends no constitutional changes, but believes that legislative study will point the way to solutions.

ARTICLE X

Section 3

Present Constitution

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of

Commission Recommendation

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in either case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment shall become effective if approved by a majority of the electors voting thereon.

such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a muncipality.)

Commission Recommendation

The Commission recommends the amendment of section 3 of Article X as follows:

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in ~~any such~~ EITHER case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment ~~which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both,~~ shall become effective if approved by a majority of the electors voting thereon. ~~In case of conflict between the exercise of powers granted by such charter and the exercise or powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality.)~~

Description of Changes

Section 3 presently provides for county charters, and for the powers which counties may have if they adopt charters. Two kinds of county charters are provided for: one under which the county could exercise municipal powers to the exclusion of municipalities within the county, or succeed to property or obligations of municipalities or townships without their consent or be organized as a municipal corporation; and one which could provide for alteration of county government form or offices and for the exercise of municipal powers concurrently with, but not to the exclusion of, the municipalities. The first requires approval by majorities in the county, in the largest municipality, in the county outside the largest municipality, and, in counties with a population of 500,000 or less, in a

majority of the combined total of municipalities and townships in the county. (Counties over 500,000 were exempted from the fourth majority requirement by a constitutional amendment in 1957.)

The Commission proposal, in essence, eliminates the distinctions between the two types of charters. It does this by eliminating the requirement for the "multiple majority" approval of the first type of charter; thus permitting the adoption of a county charter by a majority of the electors voting thereon. In addition, the proposal would remove a provision relating to the county charter requiring only a simple majority for approval which resolves any conflict in the exercise of powers by the county and a municipality or a township in favor of the municipality or township. The issue of whose authority prevails (the county's, or the municipality's or township's) in case of a conflicting exercise of power would be resolved in the county charter in any manner the charter prescribes, rather than constitutionally as is now the case. Removal of the conflict provision from the constitution would also serve to remove a distinction between the two types of charters.

The proposal retains the provision that any county charter must "provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." The intention of this provision seems to be to make it clear that even counties having charters continue to be administrative arms of the state for purposes of carrying out certain functions throughout the state. While, therefore, a county could by charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, those duties required by general law of counties and county officers would still have to be carried out.

The proposal retains the provision allowing a county to provide by charter for the concurrent or exclusive exercise by the county in all or part of its area, of any or all designated powers vested by the Constitution or laws of Ohio in municipalities, for the organization of the county as a municipal corporation and for the succession by the county to the rights, properties and obligations of municipalities and townships in the county incident to the municipal powers vested in the county. Since these provisions are optional, a county charter could provide for some, all or none of those powers, or the effect of a charter could be limited to changes in the form and existing powers of county government. The vote required for the adoption of any county charter would be the same regardless of the powers acquired.

History and Background of Section

Since 1933, when the sections permitting county charters were added to the Constitution, counties have had a 100% failure rate in their attempts to secure home rule. Voters have in some instances, however, agreed to the idea of drafting a charter and have elected a charter commission, only to reject the commission's work when it is completed.[22]

Of the state's 12 largest counties, eight have made a total of 17 attempts at getting the charter commission question on the ballot. Of these 17 attempts, ten resulted in the election of a charter commission, and nine of the ten resulting charters have been defeated at the polls. The tenth, recently elected in Summit County, has not yet completed its work. Eight

22. Analyses of county charter failures can be found in a number of publications, among them: Institute of Governmental Research, "Obstacles to County Reorganization: Constitutional Aspects", *op. cit.* (1971); a detailed analysis of the recent Summit County failure by John H. Bowden and Howard D. Hamilton, "Some Notes on Metropolitics in Ohio," in the Kent State University Book *Political Behavior and Public Issues in Ohio;* "Constitutional Problems of County Home Rule," by Earl L. Shoup, Western Reserve Law Review (1949); "Metropolitan Government in Metro Cleveland," by Watson and Romani, in 5 Midwest Journal of Political Science, No. 4, November 1961; and "Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas," by U.S. Advisory Commission on Intergovernmental Relations Washington, D. C.: U.S. Government Printing Office (1962).

of the 17 charter commission elections were held in the years 1934-1936, immediately following the adoption of the constitutional provision in 1933, and four charter commissions were elected in that period.

The language of section 3 as it was adopted in 1933 differed significantly from its present language, resulting from 1957 amendments. As originally adopted, section 3 read as follows:

> "Any county may frame and adopt or amend a charter as provided in this Article. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the Constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal powers so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality)."

A significant blow to the advocates of county charters came shortly after Section 3 was adopted. The question of electing a charter commission had been submitted and approved by the voters of Cuyahoga County in 1934. In order to avoid the requirement of four separate majorities (in the county, in the largest municipality, in the county outside the largest municipality, and in each of a majority of the combined total of municipalities and townships in the county) the charter commission limited its recommendations to those functions that the country was currently performing. The commission's proposed charter provided for a council-manager form of government, reorganized departments, established a merit system, provided for initiative and referendum, and specifically stated that "nothing herein shall be interpreted as transferring municipal powers to the county." In the 1935 election, the charter received a majority affirmative vote in the county as a whole and in Cleveland, but failed to receive the third or fourth majorities required by the Constitution for a charter vesting municipal powers in the County.

The Board of Elections refused to certify the charter as adopted, and the case brought to require the Board to certify resulted in a decision by the Ohio Supreme Court which dealt a blow to the county charter advocates and eventually resulted in the 1957 amendments to section 3 making a distinction between charters which give a county municipal powers concurrent with municipalities as distinguished from exclusive municipal powers. The Court, in the case of *State ex rel. Howland v. Krause,* 130 Ohio St. 456 (1936) cited four specific instances where the charter sought to vest in the county powers which the court believed were vested in municipalities by the constitution and laws of the state:

1) The power of the county council to enact "ordinances" rather than "resolutions", the term used for acts of boards of county commissioners;
2) Provision for the use of the initiative and referendum on county questions;

3) Establishment of a civil service commission;
4) Establishment of a department of safety instead of an elected sheriff.

"These powers," the Court said, "are not only generally recognized as municipal powers, but are specifically so treated by the laws of the state."[23]

Although the 1957 amendments were designed to overcome the obstacles presented in the Court's decision by permitting the adoption of a charter by a majority in the county without the other majorities so long as it did not give the county municipal powers to be exercised to the exclusion of the exercise of the same powers by municipalities, the fact that the decision appeared to be incorrect in a number of particulars [24] still can operate to cast some doubt on what are municipal powers. In any event, there have been no simple county majorities for any charter since the Cuyahoga County one in 1935, and the 1957 language remains uninterpreted by Court decision.

Rationale and Intent of the Commission

As noted above, there is substantial legal doubt about the correctness of the Court's interpretation of "municipal powers" in the *Howland* decision. Because of the failure of Cuyahoga County to achieve a charter that was not in any way intended to interfere with municipalities, the *Howland* decision, in spite of the 1957 comments, continues to cast a dark cloud on charter commission efforts. One noted commentator, Jefferson Fordham, has put the matter as follows:

> "The existing Ohio contitutional provisions for county home rule recognize that problems overreach municipalities and townships and that countywide jurisdiction may be desirable. It does not, however, permit county assumption of jurisdiction over township and municipal affairs without clearing the incredibly high hurdle of the well-known four-way vote in the governmental units in the county. As a consequence, the achievement of county home rule in Ohio is almost out of the question."[25]

The Commission, therefore, recommends the removal of the "multiple-majority" requirement for the adoption of a county charter, regardless of the range of powers or form of government it assumes for the country.

Besides the implications of the *Howland* decision, there is a further question involved in the multiple-majorities requirement. The effect of requiring three or four majorities in order to adopt a charter is that it permits the citizens of one or a few political subdivisions to veto a charter which is adopted by a majority of all the people voting on it in the county. In the Commission's opinion, this situation effectively constitutes minority rule.

The United States Supreme Court has held that equal protection of the laws requires that one person's vote be given the same weight as another's regardless of residence in elections of state legislators, United States Representatives, county governing bodies and other units of local government.[26] A recent New York case[27] addressed the question presented here — whether several majorities can be required for the adoption of a county charter which will apply to all. In November, 1974, a United States District Court in New York agreed that the New York State Constitution's multiple

23. *Howland v. Krause*, 130 Ohio St. 455, p. 459.
24. See, for example, Lowrie, S. Gale, "Interpretation of County Home Rule Amendment by the Ohio Supreme Court." University of Cincinnati Law Review No. 10, (1936) pg.454.
25. Fordham, Jefferson G. "Ohio Constitutional Revision—What of Local Government?" Ohio State Law Journal, Vol. 33 (1972) pg. 581.
26. *Baker v. Carr*, 369 U. S. 186 (1962) 7 L. Ed. 2d 663, 82 S. Ct. 691; *Reynolds v. Sims*, 377 U. S. 533 (1964) 12 L.Ed. 2d 506 S. Ct. 1362, and others.
27. *Citizens for Community Action v. Ghezzi et al.*, U. S. District Court, W. D. N. Y. Civil Action 1973-222, Nov. 22, 1974, 36 F. Supp. 1.

majority requirement for passage of a county charter violated the one man, one vote principle. State officials have recently determined not to appeal the decision.[28]

In another case, the New Mexico Supreme Court has found unconstitutional, under the one-man one-vote rule, a provision of that state's constitution which required a two-thirds vote in each county of the state in order to adopt an amendment to the state constitution. Thus, slightly more than one-third of the voters in a single county could thwart the will of a majority of voters in the state, and all of the other counties. The New Mexico court stated that, in one election, this made the vote of an elector in one county equal to 100 voters in another county.[29]

The Commission, having taken the view that strengthening county government offers a constitutional solution toward solving metropolitan problems, believes that the analogy between a state constitution, which, in Ohio, is adopted or amended by a majority of all the people in the state voting on it, and a county charter, which provides the government for the people of the county, is an apt one.

ARTICLE X

Section 4

Present Constitution

Section 4. The Legislative authority of any charter county or the Board of County Commissioners of any other county may by a two-thirds vote of its members, or upon petition of ten per cent of the electors of the county shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than sixty days thereafter. The ballot containing the question shall bear no party designation, and provision shall be made thereon for the election from the county at large of fifteen electors as such commission if a majority of the electors voting on the question shall have voted in the affirmative. Candidates for such commission shall be nominated by petition of one per cent of the electors of the county, which shall be filed with the election authorities not less than forty days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number; but not more than seven candidates residing in the same city or village may be elected. Within ten months after its election such commission shall frame a charter for the county or amendments to the existing charter, and shall submit the same to the electors of the county, to be voted upon at the next general election occuring not sooner than sixty days after such submission. Amendments to a county charter may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be voted upon at the first general election occurring not sooner than sixty days after their submission. The authority submitting any charter or amendment shall mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible. Except as provided in Section 3 of this Article, every charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each separately. In case of conflict between the provisions of two or more amend-

Commission Recommendation

The legislative authority (which includes the Board of County Commissioners) of any county may by a two-thirds vote of its members, or upon petition of six per cent of the electors of the county as certified by the election authorities of the county shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than ninety-five days after certification of the resolution to the election authorities. The ballot containing the question shall bear no party designation. Provision shall be made thereon for the election to such commission from the county at large of fifteen electors, if a majority of the electors voting on the question shall have voted in the affirmative.

Candidates for such commission shall be nominated by petition of one per cent of the electors of the county. The petition shall be filed with the election authorities not less than seventy-five days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number; but not more than seven candidates residing in the same city or village may be elected. The holding of a public office does not preclude any person from seeking or holding membership on a county charter commission nor does membership on a county charter commission preclude any such member from seeking or holding other public office. The legislative authority shall appropriate sufficient sums to enable the charter commission to perform its duties and to pay all reasonable expenses thereof.

The commission shall frame a charter for the county or amendments to the existing charter, and shall, by vote of a majority of the authorized number of members of the commission, submit the same to the electors of the county, to be voted upon at the general election next following the election of the commission. The commission shall certify the proposed charter or amendments to the election authorities not later than seventy-five days prior to such election. Amendments to a county charter or the question of the repeal thereof may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be

28. The New York Times, February 23, 1975, pg. 25.
29. *State ex rel. Wilt v. State Canvassing Board*, 78 N. M. 682, 437 P. 2d 143 (1968).

ments adopted at the same time, that provision shall prevail which received the highest affirmative vote. The basis upon which the required numbers of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the last preceding election therefor.

The foregoing provisions of this Article shall be self-executing except as herein otherwise provided.

voted upon at the first general election occuring not sooner than sixty days after their submission. The legislative authority or charter commission submitting any charter or amendment shall, not later than thirty days prior to the election on such charter or amendment, mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible, except that, as provided by law, notice of proposed amendments may be given by newspaper advertising. A charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment, which shall relate to only one subject but may affect or include more than one section or part of a charter, is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case more than one charter is submitted at the same time or in case of conflict between the provisions of two or more amendments submitted at the same time, that charter or provision shall prevail which received the highest affirmative vote not less than a majority. If a charter or amendment submitted by a charter commission is not approved by the electors of the county, the charter commission may resubmit the same one time, in its original form or as revised by the charter commission, to the electors of the county at the next succeeding general election or at any other election held throughout the county prior thereto, in the manner provided for the original submission thereof.

The legislative authority of any county, upon petition of ten per cent of the electors of the county, shall forthwith, by resolution submit to the electors of the county, in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, the question of the adoption of a charter in the form attached to such petition.

Laws may be passed to provide for the organization and procedures of county charter commissions, including the filling of any vacancy which may occur, and otherwise to facilitate the operation of this section. The basis upon which the required number of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the preceding election therefor.

The foregoing provisions of this section shall be self-executing except as herein otherwise provided.

Commission Recommendation

The Commission recommends the amendment of section 4 of Article X as follows:

Section 4. The legislative authority ~~of any charter county or~~ (WHICH INCLUDES the Board of County Commissioners) of any ~~other~~ county may by a two-thirds vote of its members, or upon petition of ~~ten~~ SIX per cent of the electors of the county AS CERTIFIED BY THE ELECTION AUTHORITIES OF THE COUNTY shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than ~~sixty~~ NINETY-FIVE days ~~thereafter~~ AFTER CERTIFICATION OF THE RESOLUTION TO THE ELECTION AUTHORITIES. The ballot containing the question shall bear no party designation~~;~~. Provision shall be made thereon for the election TO SUCH COMMISSION from the county at large of fifteen electors ~~as such commission~~, if a majority of the electors voting on the question shall have voted in the affirmative.

Candidates for such commission shall be nominated by petition of one per cent of the electors of the county~~;~~. ~~which~~ THE PETITION shall be filed with the election authorities not less than ~~forty~~ SEVENTY-FIVE days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number; but not more than seven candidates residing in the same city or village may be elected. THE HOLDING OF A

PUBLIC OFFICE DOES NOT PRECLUDE ANY PERSON FROM SEEKING OR HOLDING MEMBERSHIP ON A COUNTY CHARTER COMMISSION NOR DOES MEMBERSHIP ON A COUNTY CHARTER COMMISSION PRECLUDE ANY SUCH MEMBER FROM SEEKING OR HOLDING OTHER PUBLIC OFFICE. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF.

~~Within ten months after its election such~~ THE commission shall frame a charter for the county or amendments to the existing charter, and shall, BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION, submit the same to the electors of the county, to be voted upon at the general election ~~occurring not sooner than sixty days after such submission~~ NEXT FOLLOWING THE ELECTION OF THE COMMISSION. THE COMMISSION SHALL CERTIFY THE PROPOSED CHARTER OR AMENDMENTS TO THE ELECTION AUTHORITIES NOT LATER THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Amendments to a county charter OR THE QUESTION OF THE REPEAL THEREOF may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be voted upon at the first general election occurring not sooner than sixty days after their submission. The LEGISLATIVE authority OR CHARTER COMMISSION submitting any charter or amendment shall, NOT LATER THAN THIRTY DAYS PRIOR TO THE ELECTION ON SUCH CHARTER OR AMENDMENT, mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible, EXCEPT THAT, AS PROVIDED BY LAW, NOTICE OF PROPOSED AMENDMENTS MAY BE GIVEN BY NEWSPAPER ADVERTISING.

~~Except as provided in Section 3 of this Article, every~~ A charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment, WHICH SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER, is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case MORE THAN ONE CHARTER IS SUBMITTED AT THE SAME TIME OR IN CASE OF conflict between the provisions of two or more amendments SUBMITTED at the same time, that CHARTER OR provision shall prevail which received the highest affirmative vote NOT LESS THAN A MAJORITY. IF A CHARTER OR AMENDMENT SUBMITTED BY A CHARTER COMMISSION IS NOT APPROVED BY THE ELECTORS OF THE COUNTY, THE CHARTER COMMISSION MAY RESUBMIT THE SAME, ONE TIME IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION, TO THE ELECTORS OF THE COUNTY AT THE NEXT SUCCEEDING GENERAL ELECTION OR AT ANY OTHER ELECTION HELD THROUGHOUT THE COUNTY PRIOR THERETO, IN THE MANNER PROVIDED FOR THE ORIGINAL SUBMISSION THEREOF.

THE LEGISLATIVE AUTHORITY OF ANY COUNTY, UPON PETITION OF TEN PER CENT OF THE ELECTORS OF THE COUNTY, SHALL FORTHWITH, BY RESOLUTION SUBMIT TO THE ELECTORS OF THE COUNTY, IN THE MANNER PROVIDED IN THIS SECTION FOR THE SUBMISSION OF THE QUESTION WHETHER A CHARTER COMMISSION SHALL BE CHOSEN, THE QUESTION OF THE ADOPTION OF A CHARTER IN THE FORM ATTACHED TO SUCH PETITION.

LAWS MAY BE PASSED TO PROVIDE FOR THE ORGANIZATION AND PROCEDURES OF COUNTY CHARTER COMMISSIONS, INCLUD-

ING THE FILLING OF ANY VACANCY WHICH MAY OCCUR, AND OTHERWISE, TO FACILITATE THE OPERATION OF THIS SECTION. The basis upon which the required number of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the last preceding election therefor.

The forgoing provisions of this ~~Article~~ SECTION shall be self-executing except as herein otherwise provided.

Description of Changes; Rationale and Interest of the Commission

Section 4, added in 1933, provides the procedures for the election of county charter commissions and for the framing and submission to the electors of the proposed county charter and amendments. Some of the amendments proposed for this section are technical in nature and intended to remedy existing defects or ambiguities, while others represent significant departures from, or additions to, the existing provisions.

The major substantive changes recommended by the Commission are:

a) Reducing the number of petition signatures from 10% to 6%.

b) Establishing procedures for submitting a proposed charter or amendment to the board of elections.

c) Specifically permitting public officeholders to be members of charter commissions.

d) Specifying the vote necessary by the commission for submission of a proposed charter or amendment.

e) Establishing procedures for repeal of a charter.

f) Permitting a charter commission to resubmit or revise and resubmit, one time only, a charter that had been defeated at the polls.

g) Permitting direct submission of a charter by the county legislative authority upon petition of 10% of the electors.

It is the Commission's opinion that the amendments it has recommended will clarify Section 4 and possibly avoid future debates over application of the section.

The proposed changes will be discussed, to the extent possible, in the order in which they occur.

1) The term "legislative authority" is defined to include a board of county commissioners, so that a single term may be used throughout the section.

2) The number of signatures required on a petition to have the question of calling a charter commission placed on the ballot is reduced from 10% to 6% of the electors. The Commission believes that 10%, particularly in a very large county, is too great an obstacle and that 6% is a sufficient number to prevent vain and frivilous attempts, yet would be attainable by a serious group of citizens.

3) Responsibility for determining whether a petition has a sufficient number of valid signatures is transferred from the legislative authority (now board of county commissioners), which has limited ability to perform this function, to the board of elections, which has the facilities and personnel needed for this purpose.

4) The section presently does not specify the action required to be taken with respect to the board of elections to cause an election to be held on a proposed charter or amendment or the time by which it must be accomplished. The proposed amendment to this section would require certification of the resolution of the legislative authority to the board of elections not later than 75 days before the election. The Secretary of State's office is presently urging the adoption, as far as possible, of a uniform 75-day deadline for submission of questions for elections. Other

changes are also proposed which will conform to the Secretary of State's request that additional time is needed for ballot preparation and mailing to absent voters.

5) The section presently is silent on the question of whether membership on a county charter commission constitutes the holding of public office, but the Ohio Supreme Court in *State ex rel. Bricker v. Gessner*,[30] has held that such membership is a public office. As a result, those officers prohibited by the Constitution, laws or municipal charters from holding other public office may not be members of a county charter commission. The operation of the prohibition is thus not uniform, since not all public officers are forbidden to hold other public office. The proposed amendment removes the prohibition and permits all persons holding other public office to be members of county charter commissions. It is the Commission's opinion that most public officeholders have experience in the areas that would be under discussion in the drafting of a charter and, therefore, would be valuable, contributing members of the commission.

6) While the Ohio Revised Code[31] and case law[32] seem to establish the obligation of the board of county commissioners to provide funds necessary for a charter commission to carry out its duties, this has proved in some cases to be a matter of controversy. A specific requirement to this effect in the Constitution would resolve any question concerning the existence of the county commissioners' duty to provide the charter commission with funding to enable it to perform its assigned function.

7) Because the Office of the Secretary of State is urging adoption of a uniform 75-day deadline for submission of question for elections, the Revision Commission recommends that the provision requiring submission at the general election following the commission's election be added to Section 4 and that the 10-month deadline be removed since its need no longer would exist. The deadline for completion of the commission's work would be related to the time when the proposed charter or amendments must be certified to the board of elections.

8) No provision is presently made for the vote required by a charter commission to submit a proposed charter or amendment. The proposed amendment to the section would require for this purpose a majority of the total number of members authorized to be elected to the commission, and that number would remain constant even if the number of members on the commission were diminished by death, resignation or disqualification.

9) The procedure by which the proposed charter or amendment is placed before the voters is presently unclear. The amendment to the section provides for certification to the board of elections not less than 75 days before the election.

10) The Constitution presently makes no provision for the repeeal of an existing charter. Addition of such a provision would permit a return to the statutory form of government, if desired by the electors of the county, or for the repeal of an existing charter and adoption of a new one or an alternative form of county government at the same election. In the case of a repeal only, legislation by the General Assembly might be required to provide the procedure for reestablishment of the statutory form.

11) Responsibility for giving notice of the election on the proposed charter or amendments is presently not entirely clear, nor is the time by which the mailing or distribution is to be completed specified. The amendment provides that the authority (either legislative body or charter commission) submitting the charter or amendment is to give notice thereof, and that such mailing or distribution must be accomplished not less than thirty days before the election, which is the deadline for the similar municipal charter provision of Article XVIII Section 8.

30. *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290 (1935).
31. Section 307.70.
32. In *Merryman v. Gorman*, 69 O. L. Abs. 421 (1953) the court held that the city of Steubenville must appropriate funds for the mailing of charters to electors.

12) In the same manner as provided in the recent amendment to Article XVIII, Section 9[33] relating to amendments to municipal charters, the General Assembly could by law provide for notice of proposed county charter amendments to be given by newspaper advertising. In the absence of such a law, the requirements as to mailing or other distribution would apply.

13) The additional language as to what may constitute a single amendment is intended to reflect current case law on that subject as it relates to proposed constitutional amendments and to negate any inference that an amendment must relate to only a single section of a charter.

14) Presently a charter commission has one, and only one, opportunity to submit a proposed charter to the electors. This amendment would give the commission the opportunity to resubmit or to revise and resubmit the proposed charter at the following general election or any other countywide election prior thereto. In the case of a close vote initially or where the commission believes that it is able to identify the objectionable features of the proposed charter or other reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new charter commission and a two-year delay in resubmission, might be advantageous. The revised or resubmitted charter could be submitted to the voters one time only.

15) The election of a charter commission at a general election and submission of the proposed charter framed by it at the following general election entails considerable delay, and the electors have little or no control over the type of charter which the commission will propose. A new provision would permit direct submission, upon petition of 10% of the electors to the county legislative authority, of a charter drafted by a group other than an elected charter commission.

16) Because of the provision for direct submission of proposed charters by petition, the possibility would exist that more than one charter could be submitted at the same election. Should more than one of such proposed charters receive a majority vote, the one receiving the highest majority would be adopted.

17) The authority of the General Assembly to provide by law for matters involving the procedure for adoption of county charters is of limited and uncertain extent. This amendment would, in general terms, and similar to the provision relating to the initiative and referendum in Article II, Section 1g, authorize the General Assembly as necessary to facilitate the operation of the section. Procedures as to the printing, mailing, distribution or advertising of proposed charters and amendments is an example of the kind of provisions which might be made by statute. Such power might avoid the need for constitutional amendments with respect to some unforeseen problems as they arise in the future.

18) County charter commissions, presently have no authoritative or established procedures concerning such matters as the method of their organization, election of officers, rules of procedure, notice of meetings, filling of vacancies and other such matters. This amendment would allow the General Assembly to provide by statute for these procedural matters and for the filling of vacancies. Failure of the General Assembly to act, however, would not preclude charter commissions from organizing and carrying out their functions under rules adopted by themselves, as they presently do. The General Assembly would also provide by statute for procedures and rules which a charter commission could adopt at its option.

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33. An amendment to Article XVIII Section 9, adopted in 1970, permits newspaper advertising of municipal charter amendments, pursuant to general law, as a means of fulfilling the distribution requirement.

ARTICLE X

Section 5

Present Constitution
Commission Recommendation
New Section

Section 5. Counties may, except as limited by general law, adopt and enforce within their limits all measures for the local self-government of the county, including local police, sanitary, and other similar regulations, as are not at variance with the general laws or in conflict with the exercise by any municipal power authorized by this Constitution; provided, that no tax shall be levied by any county except as authorized by law.

Commission Recommendation

The Commission recommends the adoption of a new Section 5 in Article X as follows:

Section 5. COUNTIES MAY, EXCEPT AS LIMITED BY GENERAL LAW, ADOPT AND ENFORCE WITHIN THEIR LIMITS ALL MEASURES FOR THE LOCAL SELF-GOVERNMENT OF THE COUNTY, INCLUDING LOCAL POLICE, SANITARY, AND OTHER SIMILAR REGULATIONS, AS ARE NOT AT VARIANCE WITH THE GENERAL LAWS OR IN CONFLICT WITH THE EXERCISE BY ANY MUNICIPAL CORPORATION OF ANY MUNICIPAL POWER AUTHORIZED BY THIS CONSTITUTION; PROVIDED, THAT NO TAX SHALL BE LEVIED BY ANY COUNTY EXCEPT AS AUTHORIZED BY GENERAL LAW.

Description of Changes

The Commission proposes to add a new section to Article X which would provide for powers of all counties. It would put counties in substantially the same relationship to the state and to the General Assembly as that which now pertains to non-charter municipalities. It would resolve conflicts with municipalities in favor of the municipality. The language of the section is adapted from Section 3 of Article XVIII, familiar to all students of local government in Ohio, which reads:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

A series of Ohio Supreme Court decisions culminating in 1964 in *Leavers v. City of Canton,* [34] resulting in what may be regarded as an authoritative pronouncement by the Supreme Court concerning the powers of charter and noncharter municipalities and the differences between them.

The court said that:

> Any ordinance dealing with police regulations passed by either a charter or noncharter city, which is at a variance with state law, is invalid. Section 3, Article XVIII of the Ohio Constitution.
>
> An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute. *State ex rel. Canada v. Phillips, supra.*
>
> An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is no state statute at a variance with the ordinance. *Perrysburg v. Ridgway, supra.*

34. *Leavers v. City of Canton,* 1 Ohio St. 2d 33 (1964).

An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at variance with a state statute. *State ex rel. Petit v. Wagner, supra.*[35]

The language of the proposed section would not make a distinction between measures providing for local self-government and police, sanitary and other similar regulations;rather, the later provisions would be treated as being among the powers of local self-government of the county This seems to be the result of the *Leavers* case as to noncharter municipalities. In addition to the limitations on this grant of powers to counties that measures adopted by the county must not be at variance with the general laws, this section would also provide that any such exercise of powers by the county may not conflict with the exercise by any municipal corporation of its powers under the Constitution.

Under this proposed section the General Assembly could also establish limits upon the exercise of the power conferred. As an example, the General Assembly could put all matters involving the incurrence of debt or the levying of taxes outside the ability of counties to act without expressly granted powers. The proposed section 5 language regarding taxes probably would not be necessary, but it is deemed desirable to include it to assure any who might question whether unlimited taxing powers were being conferred upon counties, that it is not.

The section would be self-executing, as is Section 3 of Article XVIII.

A county having the powers granted by the section would have the freedom to act with respect to any matter of local self-government in those areas where the General Assembly has not already provided for the matter. The General Assembly has, of course, legislated with respect to a great many matters involving counties, but this section would eliminate the necessity for counties to request legislation from the General Assembly as to those cases where the statutes are silent. The section would not substantially affect the relationship between counties and municipalities now existing, except that it might permit counties to enter into agreements with municipalities in those areas where specific statutory authority cannot be found. Repeal or substantial revision of many existing statutes relating to counties by the General Assembly would give counties greater freedom of action and, since county officials complain that many of the existing statutes are greatly outmoded[36], the Commission believes this section would hasten the process of legislative review of county law.

Rational and Intent of the Commission

The often-quoted but little-implemented report on "The Reorganization of County Government in Ohio" by the Governor's Commission on County Government, submitted in 1934, states under its recommendation dealing with the Board of County Commissioners that:

> "Considerable ordinance-making power is needed as to unincorporated territory to permit the regulation of amusement places, nuisance industries, etc., and to meet other problems involving local legislation."[37]

That Commission noted Ohio's increasing urbanization, and the difficulties counties had dealing with the problems caused by urbanization under the restrictive and outmoded county laws. These problems have increased substantially since 1934.

Counties are today, and have been since the beginning of statehood, creatures of the state—state agencies—designed originally to carry out

35. *Ibid.*, pgs. 356-357.
36. Examples of outmoded county statutes are: Section 307.63 which requires the board of county commissioners to pay for antitoxin furnished to an indigent child suffering from diphtheria; Section 339.31, which permits the board of county commissioners in counties over 50,000 population to erect and operate a county hospital for the treatment of tuberculosis.
37. Governor's Commission on County Government, *The Reorganization of County Government in Ohio,* (1934) pg. 7.

essentially state functions in designated geographical areas. As a result of this legal theory of what a county is, the legal theory of what a county may do follows: a county may do only those things specifically provided by the General Assembly, and those necessarily required to carry out the mandated duties.

Such limitations means that counties have no ability to meet new situations. Each county needs to provide services, to regulate activities for the benefit of the citizens, and to provide for the better administration of government, but these can be met only by legislation enacted by the General Assembly. One county official, urging support during the 109th General Assembly of H.B. 435, which would have conferred upon all counties some powers of local self-government, listed a number of county needs that cannot be dealt with by county officials because of statutory silence. They included: placing delinquent water bills as a lien against property, street lighting of county roads, removing obstructions to good sight distance at intersections, hiring a financial consultant, establishing moving and razing regulations, requiring sanitary sewer connections, sign control, etc. Other commentators on this subject have noted that counties cannot adopt a fire prevention or housing code, and, if there is not adequate state legislation in these areas, residents may be denied essential protections

The Commission believes that the proposed section will help counties meet present-day problems without diminishing municipal powers. It became convinced, during its deliberations on local government and particularly the limitations placed upon counties, that conferral of limited "home rule" powers on counties is not only desirable, but is necessary in order to meet the increasingly complex problems of urbanization. It will give counties that need to act, the power to act; it will not force programs and burdens on counties that do not need them.

As is the case with classification, there is the possibility that the General Assembly could presently confer upon counties the powers provided for in this section. Indeed, there is even more reason to believe this would be possible for powers than for classification since a conferral of similar powers upon counties which might adopt an alternative form of government has been upheld by the Ohio Supreme Court against a challenge that it was an unlawful delegation of legislative powers.[38] The language of that statute (County commissioners may "by ordinance or resolution make any rule, or act in any manner not specifically prohibited by general law . . .," Division (M) of Section 302.13 of the Revised Code) was not selected by the Commission because its meaning is not as clear as that of Section 3 of Article XVIII, and it appears, on the surface, to be considerably more limited. No county has been able to take advantage of that provision, however, since no county has adopted an alternative form of government. During the 109th General Assembly, H.B. 435, which would have conferred upon all counties powers of local self-government similar to those being proposed in this section, was introduced but did not pass. A similar bill, upon all counties powers of local self-governmtnt similar to those being S.B. 220, failed to be passed in 110th General Assembly.

In spite of the apparent ability of the General Assembly to do by law what this section proposes, the Commission believes it is important enough to propose a constitutional amendment on the subject.

38. *Blacker v. Wiethe*, 16 Ohio St. 2d 65 (1968).

ARTICLE X

Section 6

Present Constitution
Article II, Section 30

Section 30. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and all laws creating new counties, changing county lines, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage therof, and be adopted by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose! but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.

Commission Recommendation
Article X, Section 6

Section 6. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and all laws creating new counties, changing county lines, reducing the number of counties, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adoptd by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose; but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.

Commission Recommendation

The Commission recommends the repeeal of section 30 of Article II and the adoption of a new section 6 of Article X as follows:

Section 6. NO NEW COUNTY SHALL CONTAIN LESS THAN FOUR HUNDRED SQUARE MILES OF TERRITORY, NOR, SHALL ANY COUNTY BE REDUCED BELOW THAT AMOUNT; AND ALL LAWS CREATING NEW COUNTIES, CHANGING COUNTY LINES, REDUCING THE NUMBER OF COUNTIES, OR REMOVING COUNTY SEATS, SHALL, BEFORE TAKING EFFECT, BE SUBMITTED TO THE ELECTORS OF THE SEVERAL COUNTIES TO BE AFFECTED THEREBY, AT THE NEXT GENERAL ELECTION AFTER THE PASSAGE THEREOF, AND BE ADOPTED BY A MAJORITY OF ALL THE ELECTORS VOTING AT SUCH ELECTION, IN EACH OF SAID COUNTIES BUT ANY COUNTY NOW OR HEREAFTER CONTAINING ONE HUNDRED THOUSAND INHABITANTS, MAY BE DIVIDED, WHENEVER A MAJORITY OF THE VOTERS, RESIDING IN EACH OF THE PROPOSED DIVISIONS, SHALL APPROVE OF THE LAW PASSED FOR THAT PURPOSE; BUT, NO TOWN OR CITY WITHIN THE SAME, SHALL BE DIVIDED, NOR, SHALL EITHER OF THE DIVISIONS CONTAIN LESS THAN TWENTY THOUSAND INHABITANTS.

Description of Changes

Present Article II Section 30 gives the General Assembly the authority to create new counties and change county boundaries, provided that no county contain less than 400 square miles or fewer than 20,000 inhabitants, and to remove county seats. Under the existing section, no law providing for any of these matters becomes effective until it is submitted to and approved by a majority of electors of each county affected voting separately.

The proposed new Section 6 of Article X would add a provision specifically permitting the General Assembly to reduce the number of counties, if the General Assembly desires to do so, while retaining all other provisions of Section 30. Any such law would also be subject to the approval of the voters in the affected counties.

The Commission also recommends moving this section from Article II (Legislative) to Article X because it relates solely to counties, which is the subject matter of Article X.

History and Background of Section

Present Article II Section 30 had its beginning in the state's first constitution in 1802. In that version (Article VII Section 3), the Legislature was

given the power to establish new counties provided that both the new and old counties contain at least 400 square miles. In the 1851 Constitution the section was rewritten to include all of the language in present Section 30 except the restriction that "no town or city within the same, shall be divided, nor, shall either of the divisions contain less than 20,000 inhabitants."

The addition of that clause was first proposed by the Constitutional Convention in 1874; however, the document drafted by that convention was defeated by the voters. The additional clause was again proposed by the drafters of the Constitution of 1912 and that time was approved at the polls.

Although the 400 square mile minimum area provision has been a part of the Constitution since statehood, several counties were created between 1832 and 1851 which contained less than the minimum area. In three of the counties — Carroll (390 square miles), Lucas (343 square miles) and Noble (398 square miles) — it appears that the establishment of the counties with smaller areas may not have been intentional and probably was due to surveying difficulties or errors. In three other counties — Erie (264 square miles), Lake (231 square miles) and Ottawa (261 square miles) — it appears that the Legislature deliberately ignored the Constitution and established undersized counties.[39] No one, however, appears to have challenged the legislature's actions in these matters.

The 88 counties of Ohio currently range in size from 700 square miles (Ashtabula) to 231 square miles (Lake), with an average size of 466 square miles.[40] There have been no changes in county boundaries, under provisions of Section 30, since 1888.

Conclusion

After studying this section, the Constitutional Revision Commission determined that present Section 30 was not clear as to whether the language providing for creation of new counties and changing of county lines authorized the consolidation of counties. Because the section was unclear on that point, the Commission recommended amending the section to include the phrase "reducing the number of counties."

The Commission also considered whether the provision requiring approval of any change by separate majorities in each county affected was an insurmountable obstacle to establishing new counties, reducing the number, or changing the county lines or county seats. The Commission could not uncover any instances in recent history of counties that tried to do any of these but were held back by the separate majorities provision, and therefore, made no recommendation to change the existing provision. (The last revision in the boundaries of any Ohio county was made in 1888 when the Auglaize-Logan line was changed.)

39. *Ohio Constitutional Convention Debates* (1851) Vol. 2, pg. 210.
40. *Ohio Population Report*, 19th Federal Census, *op. cit.*

CHAPTER 2

Municipal Corportions

Introduction

The Ohio Constitution provides for two classes of municipal corporations, cities and villages, requires the General Assembly to provide for their incorporation and government by general law, and grants the people of municipal corporations of both classes certain home rule powers and the right to adopt charters. In addition, Article XVIII deals with specific powers of municipal corporations, such as the power to acquire utilities and provide utility services.

Municipal corporations with populations over 5,000 are cities and the remainder are villages. According to the Secretary of State, there were 229 cities and 708 villages as of 1970, an increase of 37 cities over 1960 and a decrease of 25 villages since 1960.[1]

As of November 1, 1974, 148 cities (65% of all cities) and 24 villages (3%) had adopted charters. Of the charter cities, 73% (108) adopted their charters wihin the last 20 years, with 32% (47) adopting them between 1965 and 1974. Of the villages with charters, 80% (17) were adopted within the last 20 years, with 50% (12) adopting charters between 1965 and 1974.[2]

The populations for individual cities in Ohio range from 4.070 in Shadyside to 750,903 in Cleveland, with nine cities having populations over 100,000. The populations of villages range from 15 people in Valley Hi to to 4,997 in Canfield.[3].

Article XVIII was added to the Ohio Constitution in 1912, and was the result of dissatisfaction with the history of legislative special acts, passed to deal with the incorporation and problems of individual cities, with the classification system, which resulted in special acts through the guise of classification after special acts were prohibited by the 1851 Constitution, and, finally, with the Municipal Code itself, enacted when the classification system was invalidated by the Ohio Supreme Court.

The Local Government Committee and the Commission studied the provisions of Article XVIII with great care, and with particular attention to the grant of home rule as it is contained in the Constitution. Specific discussion of its interpretation and effect on municipalities and their powers since its adoption in 1912 will be discussed in the commentary to Sections 3 and 7. The home rule and charter provisions were compared to those of the Model State Constitution and to those of other states. In the final analysis, the committee concluded that no valid reason exists to propose changes in the classification, home rule, or power to adopt charter provisions of the Ohio Constitution, and the Commission agreed with this conclusion.

This report does recommend changes in some sections in Article XVIII. The power of the General Assembly to provide, by general law, for the resolution of municipal boundary problems and for the dissolution of municipal corporations would be clarified; municipal utility bonding powers would be made more flexible and modernized, and municipal utilities could sell unlimited amounts of transportation services and solid waste management services outside municipal boundaries, as is now possible with water and sewage services. Changes are proposed in the municipal charter sections to fill gaps presently existing in procedures, to provide a procedure for repeal of a charter and for election of a charter revision commission, and for other similar purposes. Other changes would rearrange sections and make corrective amendments.

1. *Ohio Population Report*, 19th Federal Census, pgs. 132-135.
2. "Ohio Charter Municipalities as of January 1, 1974," Ohio Secretary of State, updated.
3. *Ohio Population Report*, 19th Federal Census, pgs. 179-191.

RECOMMENDATIONS

ARTICLE XVIII

Section 1

Present Constitution

Section 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Commission Recommendation

No change.

Background of Section

Section 1 of Article XVIII was enacted in 1912 in an attempt to end widespread overclassification of municipal corporations. Although a constitutional provision was adopted in 1851 prohibiting the legislature from enacting special laws relating to municipalities, the legislature, under the guise of general law, managed to evade this restriction by use of the device of classification. The legislature created many classes of municipalities with varying powers, some classes consisting of only one municipality.[4]

Finally, in 1902, the state Supreme Court invalidated the entire classification structure.[5] The *Knisely v. Jones* opinion stated that:

> "The increasingly numerous classes of municipalities show that even where a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. The real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. The apparent legislative intent is to substitute isolation for classification." pg. 454

The Municipal Code of 1902 emerged from the resulting crisis at a special session of the legislature. The Code, as amended, still forms the basis of municipal government in Ohio except to the extent that it has been modified by charters adopted pursuant to and by court interpretations of the 1912 home rule provisions.[6]

The 1912 provision creates two classes of municipal corporation: those with populations of 5,000 or more are classified as cities; all others as villages. The framers of this section believed that the two divisions adequately met the requirements of municipal corporations. They reasoned that villages, because they are smaller units, would need less complex governmental structures than the larger units, cities. The framers intended the detailed regulations of the state code to lighten the work load of village officers. The section also provides that a village becomes a city and vice versa by a method established by general law.

Comment

The Constitutional Revision Commission recommends that no changes be made in Section 1.

Classification is unimportant when it is realized that both cities and villages have equal power to adopt charters, and the ability to structure the municipal government by charter adoption is not in any way limited or restricted by law or by the Constitution, regardless of the size of a

4. Gotherman, John E., "Municipal Home Rule in Ohio Since 1960," Ohio State Law Journal, Vol. 33 (1972) pg. 589.
5. *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 64 N.E. 424 (1902); *State ex rel. Attorney General v. Beacom*, 66 Ohio St. 491, 64 N.E. 427 (1902).
6. Gotherman, *op. cit.*, pg. 590.

municipal corporation once it has been created. In addition to charter adoption, many devices other than classification exist for solving municipal problems, including contracts with other political subdivisions for the transfer or joint exercise of powers, and cooperation through councils of government.

Consideration was given to the suggestion advanced by the constitutional authority, Dean Jefferson B. Fordham, that only municipal corporations over 5,000 population (cities) should be permitted to adopt charters and acquire home rule powers.[7] He argues that because of their small size and uncomplicated governmental activities, very few of the villages in Ohio have been compelled to draft and adopt charters, preferring instead to function under statutory law. (As of November 1, 1974, 24 of the state's 708 villages have adopted charters.)[8]

The Commission rejected the notion of limiting the charter option and home rule powers to cities. It believes that the 5,000 population demarcation between villages and cities established by Section 1 is an artificial distinction and that factors other than population level usually determine whether a municipality needs the governing latitude provided by a charter, or whether the statutory forms provided are sufficient. Some Ohio villages are more active governmentally than some cities in such matters as operating utilities and making or operating public improvements. The villages that have felt the need to adopt charters or that may feel that need in the future should not be restricted from exercising the charter option in governing their affairs.

Further, the Commission concluded that not only is 5,000 residents an artificial point of distinction, but that any population figure chosen for classification would be artificial. Many other factors, such as population density, poverty, or ability to raise taxes, may determine a corporation's needs and abilities to provide for those needs. It is neither practical nor necessary to attempt to write such standards in the Constitution.

7. Fordham, Jefferson B., "Ohio Constitutional Revision—What of Local Government?" Ohio State Law Journal, Vol. 33 (1972) pgs. 580-581.
8. "Ohio Charter Municipalities as of January 1, 1974," Ohio Secretary of State, updated.

ARTICLE XVIII

Section 2

Present Constitution

Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Commission Recommendation

Section 2. General laws shall be passed to provide for the incorporation, consolidation, division, dissolution, alteration of boundaries, and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Commission Recommendation

The Commission recommends amendment of Section 2 of Article XVIII as follows:

Section 2. General laws shall be passed to provide for the incorporation, CONSOLIDATION, DIVISION, DISSOLUTION, ALTERATION OF BOUNDARIES, and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Description of Changes

The proposed amendment to Section 2 would clarify and add to the constitutional requirement that the General Assembly provide by general law for the incorporation and government of municipal corporations. The amendment would provide clearly in the Constitution that the General Assembly does possess the general law power to set criteria and provide procedures for changing the boundaries of municipal corporations, specifically including the powers to consolidate, divide, dissolve or alter boundaries, in order to meet changing needs and demands placed upon both the state and local units of government in Ohio. The statutes currently provide three methods for municipalities to adjust their boundaries voluntarily: annexation, merger and detachment of territory. There is no statutory provision for dissolution of a municipality.

The General Assembly, in carrying out the constitutional mandate of Section 2, has provided statutorily for the incorporation of municipal corporations as villages. There is no provision for direct incorporation as a city, even though the population of the territory proposing to incorporate is over 5,000. To become a city, a territory must first become a village and then proceed to city status by one of the methods provided by general law. The Commission believes that the General Assembly should change this procedure and provide a statutory method for direct incorporation as a city.

Once incorporated, cities and villages alike share in the home rule powers of local self-government, whether or not they adopt charters, and in the ability to adopt charters.

Present Section 2 also authorizes passage of additional laws for the government of municipalities to become operative in a municipality only if approved by a majority vote of the electors of a municipality voting thereon. Optional forms of government are provided in the statutes for adoption by municipalities in this way.

Comment

Political subdivisions are usually incorporated in order to provide needed services to the residents and to provide a governmental structure acceptable to them. Over a period of time, however, political subdivision boundaries tend to become obsolete. In urban areas particularly service areas and political subdivision boundaries do not always correspond.

The Committee for Economic Development expressed the problem in these terms:

> The bewildering multiplicity of small, piecemeal, duplicative, overlapping local jurisdictions cannot cope with the staggering difficulties encountered in managing modern urban affairs. The fiscal effects of duplicative suburban separatism create great difficulty in provision of costly central city services benefiting the whole urbanized area. If local governments are to function effectively in metropolitan areas, they must have sufficient size and authority to plan, administer, and provide significant financial support for solutions to areawide problems.[9]

Until 1967, when the statutory restriction against incorporation within three miles of a municipal corporation was enacted, incorporation as a municipality in Ohio was relatively easy, whereas annexation of territory by a municipality and merger of two municipalities were more difficult.

9. Committee for Economic Development, *Reshaping Government in Metropolitan Areas*, 1970, pg. 16.

This former statutory policy contributed to the number of smaller municipalities surrounding the larger cities. The central cities may now lack the financial resources necessary to provide for needed services and regulation, and some of the surrounding communities may suffer the same problems, whereas others, perhaps because of a wealthy tax base or population, may be able to provide a level of services far above those available to their neighbors.

There exist in Ohio today some municipalities that cannot meet the population density and assessed valuation criteria presently required for incorporation, and thus, could not be incorporated under present statutes. A few have difficulty finding enough people to fill municipal offices. It is the Commission's belief that the General Assembly should have the powers to set minimum standards for municipalities, and, if a municipality falls below the standard, provide for its dissolution.

The Commission, through its deliberations and consultations with officials, citizens, and groups involved in the problems of local government, concluded that, if the General Assembly determines that boundary changes in municipal corporations are necessary for better government of metropolitan areas, or for better provision of services to the people, the Constitution should clearly give the legislature the needed authority to act.

The Commission believes that the amendment to Section 2 that it proposes will make it clear that the General Assembly does possess the powers to provide for modification of municipal boundaries, if necessary.

The method by which the General Assembly implements the proposed amendments to Section 2 is left entirely in the hands of the General Assembly, except that it must be by general law. This is in keeping with the general philosophy which has governed the recommendations of the Commission: that the General Assembly has, through the Constitution, the duty and responsibility to set overall policy for the state and that the Constitution should provide the General Assembly with the flexibility necessary for it to fulfill its functions effectively and equitably now and in the future. The Commission studied methods currently employed in other states to help alleviate boundary problems, including the use of boundary commissions on a local, regional or state level, with either recommending or enforcement powers. The Commission's conclusion, however, was that the legislature should have the freedom to provide for the best methods for implementing this proposal to make changes in the methods of adjusting boundaries or to adopt new ones as experience and knowledge about boundary problems increase.

The Commission is aware that inclusion of these specified powers in the Constitution will not, in itself, alter the present procedures relating to merger, annexation and incorporation. The General Assembly would have to change the statutes governing these procedures. It is the Commission's conclusion that, upon adoption of Section 2, the General Assembly should provide statutorily for the criteria and means by which a municipal corporation may be dissolved.

It is hoped that the General Assembly will be encouraged to seek new solutions to boundary problems. The Commission believes that adoption of the proposed amendments to Section 2 will support the General Assembly in its obligation to provide an effective framework for local government.

ARTICLE XVIII

Sections 3 and 7

Present Constitution

Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict wth general laws.

Section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all power of local self-government.

Commission Recommendation

Section 3. No change.

Section 4. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Commission Recommendation

The Commission recommends no change in Section 3 of Article XVIII and recommends only a change in the section number in Section 7 of Article XVIII, in order to place the sections in Article XVIII in better order, as follows:

Section ~~7~~ 4. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Background of Sections

Sections 3 and 7, considered together with Section 2, are the heart of the home rule provisions of the Constitution.

Section 3 authorizes municipalities to exercise all powers of local self-government and to adopt local police, sanitary and similar regulations that are not in conflict with general law. Section 7 permits any municipality to adopt a charter, and to exercise thereunder all powers of local self-government, subject to provisions of Section 3.

In order to understand the current status of the municipal home rule powers in Ohio, it is necessary to examine, briefly, home rule in its historical context.

Under the Ohio Constitution of 1802, municipalities were incorporated by special acts of the state legislature which granted charters establishing the form of government and enumerated the substantive powers of the chartered municipality. The first charter was granted to Chillicothe in 1804 and soon after the General Assembly chartered Steubenville, Dayton, Lancaster, St. Clairsville, Gallipolis and Springfield, each with powers that differed from the others in some respects. In 1817 the legislature passed a general law for the incorporation of municipalities, but in 1822 the precedent of passing special acts of incorporation in spite of the general law was set when Canton was incorporated by special act.[10]

During the next three decades, the use of special acts to grant municipal charters grew until dissatisfaction with the strict legislative control caused delegates to the Constitutional Convention of 1850-51 to recommend amendments prohibiting special acts of incorporation and requiring acts of a general nature to have uniform effect. The following speech, made by a convention delegate, indicates the degree of hostility special acts engendered, as well as the methods employed by the legislature to pass special acts of incorporation:

10. Walker, Harvey, "Municipal Government before 1912", Ohio State Law Journal, Vol. 9 (1948) pg. 5.

"It is well known that special charters are always 'got through' our legislature at will, and it must be evident that it will always be so in the absence of a constitutional provision. When was there ever an instance within the recollection of the oldest legislator on this floor, where a single special act of incorporation was defeated? It is but too generally known that these special acts are 'got through' by a log-rolling system as it is called, the friends of one bill voting for the bills of others in consideration of their aid when the final vote is taken upon their own. These acts will always pass a legislative body, the dignity and 'purity' of your own general assembly to the contrary notwithstanding." [11]

The problem of special treatment for municipalities, however, soon emerged again, in spite of the provisions of the 1851 Constitution, by way of the legislature's use of the device of classification to deal legislatively with the special demands of municipalities throughout the state. An elaborate classification structure for municipalities grew up, with the General Assembly creating many classes of municipalities with varying powers and structures. Eventually, each of the 11 largest cities in the state was placed in a class by itself.[12]

The entire classification structure was invalidated by the Ohio Supreme Court in 1902,[13] and the Municipal Code of 1902 emerged from a special session of the legislature to fill the gap in municipal law. (This code, as amended, remains the basis of Ohio statutory municipal law today.) The code provided for two classes of municipal corporations—cities and villages —and established one uniform plan of government for each.

Between 1902 and 1912, however, dissatisfaction with the Municipal Code grew, especially in the larger cities which felt constricted by the limited authority granted municipalities by the Code. Out of this dissatisfaction emerged Article XVIII as proposed by the 1912 Constitutional Convention. According to Professor Knight, who explained Article XVIII to the convention, it was intended to:

1. Empower each municipality to adopt a form of government of its own choosing;

2. Give each municipality authority to carry out municipal functions without statutory authority; and

3. Facilitate municipal ownership and operation of public utilities.[14]

Professor Knight told the convention delegates that the main purpose of the proposal "is to get away from what is now the fixed rule of law, seemingly also required by the constitution, that municipal corporations . . . shall be held strictly within the limits of the powers granted by the legislature to the corporation, and that no [municipal] corporation . . . may lawfully undertake to do anything which [it] has not been given specifically the power to do by the constitution or the lawmaking body. It has often been found under our present system, and would be found also in the future, that many things necessary from the standpoint of city life, which the city may need or urgently desire to do can not be done because of lack of power specifically conferred on the municipality itself. Therefore, this proposal undertakes pretty nearly to reverse that rule and to provide that municipalities shall have the power to do those things which are not prohibited." [15]

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11. Galbreath, C. B., *Constitutional Conventions of Ohio* (1911), pg. 27.
12. Farrell, James W. Jr., "Municipal Public Utility Powers," Ohio State Law Journal, Vol. 21 (1960) pgs. 391-393.
13. *State ex rel. Knisely v. Jones, op. cit., State ex rel. Attorney General v. Beacom, op. cit.*
14. Constitutional Convention of 1912, *Proceedings and Debates*, pg. 1433.
15. *Ibid.*, pg. 1433.

Very soon after the adoption of Article XVIII, questions arose relative to the conflict clause in Section 3 and to the powers of local self-government as they pertain to noncharter municipalities. Early court cases often resulted in conflicting interpretations of the points involved, although the Supreme Court has consistently held that the conflict clause applies only to police and sanitary powers.[16]

A series of cases on the question of the powers of noncharter cities culminated in 1964 in the case of *Leavers v. Canton,*[17] setting forth the following view regarding Section 3 as it applies to charter and noncharter municipalities:

1. Any ordinance dealing with police regulations passed by either a charter or a noncharter city, which is in variance with state law, is invalid.

2. An ordinance passed by a charter city, which is not a police regulation but deals with local self-government, is valid and effective even though it is at variance with a state statute.

3. An ordinance passed by a noncharter city, which is not a police regulation, is valid where there is no state statute at variance with the ordinance.

4. An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with state statute.

The issue of what constitutes a conflict with general laws in the adoption and enforcement of "local police, sanitary, and other similar regulations" was spelled out in an early case.[18] A conflict exists if (1) a municipality permits or licenses that which the state prohibits, or (2) the state permits or licenses that which the municipality prohibits. A conflict does not exist where (1) certain acts are omitted in an ordinance but covered by general laws, (2) certain acts made unlawful by the municipality are not covered by general laws, or (3) because there is a difference in penalties.

The Supreme Court, in several cases, has also made it clear that "all powers of local self-government" possessed by a municipality relate only to those matters which affect the municipality primarily and not those which are of more than merely local concern.[19]

Appendix A sets forth in more detail the development of the rationale of the home rule cases.

While it is clear from this brief discussion of home rule that its present interpretation is the result of a long and often conflicting history of judicial decisions, there has been a dearth of recent cases on the subject.

Comment

The Local Government Committee and the Commission, after long and careful study of the home rule provisions and their current interpretations, has concluded that no change should be made in present Sections 3 and 7.

The Commission believes that the state has sufficient power under the present interpretation of home rule powers to enact laws to solve the major urban problems facing Ohio municipalities in the areas of zoning,

16. *Fitzgerald v. Cleveland,* 88 Ohio St. 338, (1913); *State ex rel. Canada v. Phillips,* 168 Ohio St. 191, (1958).
17. *Leavers v. City of Canton,* 1 Ohio St. 2d 33, 203 N.E. 2d 354, (1964).
18. *Struthers v. Sokol,* 108 Ohio St. 263, (1923), p. 265.
19. *Village of Willoughby Hills v. Corrigan,* 29 Ohio St. 2d 39, (1972); *Cleveland Electric Illuminating Company v. City of Painesville,* 15 Ohio St. 2d 125, (1968); *City of Beachwood v. Board of Elections,* 167 Ohio St. 379, (1958).

land use and planning; transportation; crime and law enforcement; housing; pollution, water supply and waste disposal; welfare; recreation and parks; economic development and job opportunities; and health.

The Local Government Committee initially considered several language changes for Sections 2, 3 and 7 in order to clarify major questions that have arisen since adoption of Article XVIII in 1912. Appendix B sets forth the final committee draft. In seeking the opinions of municipal officials and others whose daily work brings them into close contact with the home rule sections, however, the committee found little sentiment for changing these sections.

As Daniel J. O'Loughlin, formerly Chief Counsel for the City of Cleveland, stated recently,

> "After almost 60 years of interpretation since its adoption as a result of the Constitutional Convention of 1912, municipal home rule in Ohio has traveled an uncertain and sometimes curious path. However, a review of the case law decided during the past few years begins to evidence a pattern of change, and to some hopeful degree, consistency in construction." [20]

It was the overwhelming opinion of the municipal officials that any attempt to change the language of Sections 3 and 7 would almost certainly lead to another long battle over reinterpretation, with no guarantee of the final result. The committee, therefore, made no recommendation to the Commission for changes.

The Local Government Committee also considered the home rule provisions of the Model State Constitution of the National Municipal League,[21] based on Dean Jefferson B. Fordham's proposal, which only gives to a municipal corporation that adopts a home rule charter the power to exercise any power or perform any function which is not denied to the corporation by its home rule charter, and is not denied to all home rule charter municipalities by statute, and is within such limitations as may be established by statute. The committee recommended against adoption of such a home rule provision because it would be a step backward in Ohio home rule history, requiring a reduction in present home rule powers and an increase in state control of internal municipal affairs, which the committee did not believe would benefit municipal corporations or the state.

The committee considered strengthening the home rule provisions for noncharter municipalities so that the General Assembly would not have to concern itself with problems brought to it relating to details of governmental structure, but decided against such a recommendation. The committee's decision was based on four reasons: First, any change is likely to upset the present interpretation of home rule. Second, when the courts reconsider the constitutional sections dealing with noncharter municipalities, if they were rewritten, the result could be a return to the *Perrysburg* docrine which held that all noncharter municipalities derive their powers of local self-government directly from Section 3 of the Constitution, thereby eliminating the General Assembly's present involvement in local self-government of noncharter municipalities. Third, the noncharter municipalities themselves have not expressed the view that this is an overriding concern to them. Finally, if a noncharter municipality feels that a problem does indeed exist in this area, it has recourse to a constitutional alternative, adoption of a charter.

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20. *Reference Manual for Continuing Legal Education Program*, Ohio Legal Center Institute, Publication number 73-1972.
21. National Municipal League, *Model State Constitution*,
Section 8.02. *Powers of Counties and Cities.* A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, not shall it include power to define and provide for the punishment of a felony.

ARTICLE XVIII

Section 8

Present Constitution

Section 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter". The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Commission Recommendation

Section 5. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of six per cent of the electors of the municipality, as certified by the election authorities having jurisdiction in the municipality, shall forthwith, provide by ordinance for the submission to the electors of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next general election occurring not less than seventy-five days after certification of the ordinance to the election authorities, or at a special election to be called and held not less than seventy-five days after such certification. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question have voted in the affirmative.

Candidates for such commission shall be nominated by petition of one per cent of the electors of the municipality filed with the election authorities not less than sixty days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number. The legistive authority shall appropriate sufficient sums to enable the charter commission to perform its duties and to pay all reasonable expenses thereof. The holding of a public office does not preclude any person from seeking or holding membership on a charter commission, nor does membership on a charter commission preclude any such member from seeking or holding other public office.

Any charter so framed shall be submitted by vote of a majority of the authorized number of members of the commission to the electors of the municipality at an election to be held at a time fixed by the charter commission and within nineteen months from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. The charter commission shall certify the proposed charter to the election authorities not less than seventy-five days prior to such election. Not less than thirty days prior to such election the charter commission shall cause to be mailed or otherwise distributed a copy of the proposed charter to each elector of the municipality as far as may be reasonably possible. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of the municipality at the time fixed therein. If such proposed charter is not approved by the electors, the charter commission may resubmit the same one time, in its original form or as revised by the charter commission and within thirteen months from the date of the first election on the proposed charter.

A charter commission may adopt rules for its organization and procedures and may fill any vacancy by majority vote of the remaining members of the commission.

Commission Recommendation

The Commission recommends the amendment of Section 8 of Article XVIII as follows:

Section ~~8~~ 5. The legislative authority of any city or village may be a two-thirds vote of its members, and upon petition of ~~ten~~ SIX per ~~centum~~ CENT of the electors OF THE MUNICIPALITY, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, shall forthwith, provide by ordinance for the submission to the electors of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next

~~regular~~ ~~municipal~~ GENERAL election ~~if~~ ~~one~~ ~~shall~~ ~~occur~~ OCCURRING not less than ~~sixty~~ ~~nor~~ ~~more~~ ~~than~~ ~~one~~ ~~hundred~~ ~~and~~ ~~twenty~~ ~~days~~ ~~after~~ ~~its~~ ~~passage,~~ ~~otherwise~~ ~~it~~ ~~shall~~ ~~provide~~ ~~for~~ ~~the~~ ~~submission~~ ~~of~~ ~~the~~ ~~question~~ ~~at~~ ~~a~~ ~~special~~ ~~election~~ ~~to~~ ~~be~~ ~~called~~ ~~and~~ ~~held~~ ~~within~~ ~~the~~ ~~time~~ ~~aforesaid~~ SEVENTY-FIVE DAYS AFTER CERTIFICATION OF THE ORDINANCE TO THE ELECTION AUTHORITIES, OR AT A SPECIAL ELECTION TO BE CALLED AND HELD NOT LESS THAN SEVENTY-FIVE DAYS AFTER SUCH CERTIFICATION. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question ~~shall~~ have voted in the affirmative.

CANDIDATES FOR SUCH COMMISSION SHALL BE NOMINATED BY PETITION OF ONE PER CENT OF THE ELECTORS OF THE MUNICIPALITY FILED WITH THE ELECTION AUTHORITIES NOT LESS THAN SIXTY DAYS PRIOR TO SUCH ELECTION. CANDIDATES SHALL BE DECLARED ELECTED IN THE ORDER OF THE NUMBER OF VOTES RECEIVED, BEGINNING WITH THE CANDIDATE RECEIVING THE LARGEST NUMBER. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF. THE HOLDING OF A PUBLIC OFFICE DOES NOT PRECLUDE ANY PERSON FROM SEEKING OR HOLDING MEMBERSHIP ON A CHARTER COMMISSION, NOR DOES MEMBERSHIP ON A CHARTER COMMISSION PRECLUDE ANY SUCH MEMBER FROM SEEKING OR HOLDING OTHER PUBLIC OFFICE.

Any charter so framed shall be submitted BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION to the electors of the municipality at an election to be held at a time fixed by the charter commission and within ~~one~~ ~~year~~ NINETEEN MONTHS from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. THE CHARTER COMMISSION SHALL CERTIFY THE PROPOSED CHARTER TO THE ELECTION AUTHORITIES NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Not less than thirty days prior to such election the ~~clerk~~ ~~of~~ ~~the~~ ~~municipality~~ CHARTER COMMISSION shall ~~mail~~ CAUSE TO BE MAILED OR OTHERWISE DISTRIBUTED a copy of the proposed charter to each elector ~~whose~~ ~~name~~ ~~appears~~ ~~upon~~ ~~the~~ ~~poll~~ ~~or~~ ~~registration~~ ~~books~~ ~~of~~ ~~the~~ ~~last~~ ~~regular~~ ~~or~~ ~~general~~ ~~election~~ ~~held~~ therein OF THE MUNICIPALITY AS FAR AS MAY BE REASONABLY POSSIBLE. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of ~~such~~ THE municipality at the time fixed therein. IF SUCH PROPOSED CHARTER IS NOT APPROVED BY THE ELECTORS, THE CHARTER COMMISSION MAY RESUBMIT THE SAME ONE TIME, IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION AND WITHIN THIRTEEN MONTHS FROM THE DATE OF THE FIRST ELECTION ON THE PROPOSED CHARTER.

A CHARTER COMMISSION MAY ADOPT RULES FOR ITS ORGANIZATION AND PROCEDURES AND MAY FILL ANY VACANCY BY MAJORITY VOTE OF THE REMAINING MEMBERS OF THE COMMISSION.

Description of Changes and Comment

Section 8 was proposed by the Constitutional Convention of 1912 and was adopted in its present form by the voters that year. It provides the procedure for electing municipal charter commissions and for the framing and submission to the electors of proposed municipal charters.

Several amendments proposed to Sections 8 and 9 (Section 9 deals with amending municipal charters) closely parallel the proposed amendments to Article X, Section 4 (county charter commissions) recommended by the Constitutional Revision Commission. Inclusion of similar amendments in Section 8 and 9 provides consistency, where possible and appropriate, to portions of both articles which deal with similar matters. The Commission recognizes, however, that municipalities and counties are different entities, with some differing demands and requirements. Consistency in this matter is not an overriding standard in proposing constitutional amendments.

The Commission, through this amendment, reaffirms the charter commission method of proposing a charter as the only method that should be allowed by the Constitution. It is the Commission's belief that no group should be permitted, either by petition or through legislative action, to submit a charter directly to the electors, without going through the deliberative process inherent in the commission method.

Some of the amendments proposed for Section 8 are technical in nature and intended to remedy existing defects or ambiguities, while others represent significant departures from, or additions to, the existing provisions. Major substantive changes proposed are, in summary:

1. Reducing the percentage of petition signatures required to place the charter commission question on the ballot from 10% to 6%.
2. Establishing uniform procedures for electing charter commissioners.
3. Clearly establishing the municipality's obligation to provide funding for a charter commission.
4. Allowing persons who hold other public office to be charter commission members at the same time.
5. Clearly establishing procedures required for submission of a proposed charter to the electorate.
6. Allowing the charter commission to resubmit a defeated charter to the voters one time.

The proposed changes will be discussed, to the extent possible, in the order in which they occur.

1. The section number would be changed to Section 5.
2. The number of signatures on a petition to have the question of choosing a municipal charter commission placed on the ballot would be reduced from 10% to 6% of the electors. It was determined that 10%, especially in large municipalities, is too great an obstacle; 6% is a sufficient number to discourage frivolous attempts, and still is reasonably within the power of a serious group of citizens to attain. (The Commission recommended the same reduction in the county provisions.)
3. The responsibility for certifying whether a petition has a sufficient number of valid signatures is specifically given to the board of elections, which has the necessary facilities and personnel to perform this function. Under existing Section 8, the municipal legislative authority with which the petition is filed has the responsibility of determining its sufficiency. (The proposed amendment is identical in this respect to provisions recommended by the Commssion in the county amendments.)
4. A regular municipal election is that general election held in November of odd-numbered years. The proposed amendment, substituting "general election" for "regular municipal election", would permit the charter question to be placed on the ballot at a general election in any year and, therefore, would lessen the likelihood or need for the question to be submitted at a special election, whether at the regular primary time or a specially-called election. The option of placing the commission question on the ballot at a special election, however, is retained.

5. The proposed amendment would require certification to the board of elections of the ordinance submitting the question of choosing a commission to frame a charter (the same procedure followed for tax levies and bond issues) not less than 75 days prior to the election, thus filling a gap in the present section. This is the same period of time required for filing with the Secretary of State of the ballot language and explanations relating to constitutional amendments proposed by the General Assembly. This amendment is similar to provisions in the county sections recommended by the Commission.

6. The present constitution makes minimal provision for procedures for electing municipal charter commission members. The proposed amendment would establish additional uniform procedures for electing such members. The amendment specifies the percentage of petition signatures necessary (1%) and the procedures for filing candidacies and determining who is elected. In this respect, the proposal is parallel to present constitutional provisions on county charter commissions. The original county provisions were placed in the Constitution twenty-one years after the municipal sections and were based substantially on the earlier municipal sections. However, some provisions were added to the county sections in order to fill gaps in the procedures that had become evident after enactment of the municipal sections. This amendment is intended to fill this gap in municipal procedures.

7. Controversy has arisen in some cases because there is no constitutional requirement clearly establishing the obligation of a municipality's legislative authority to provide the funds necessary for a charter commission to carry out its duties.[22] A specific requirement to this effect in the Constitution would resolve any question concerning the existence of the duty to provide the funds for the charter commission to perform its assigned function. The proposal is identical in this respect to the proposed county provisions recommended by the Commission.

8. The amendment would allow a person holding other public office to be a member of a municipal charter commission at the same time.

9. The present Constitution is silent on the vote required by a charter commission for submission of a proposed charter. Because of this, problems may arise over the number of affirmative votes by commission members required before a charter can be placed on the ballot. The proposed amendment would require an affirmative vote of a majority of the total number of members authorized to be elected to the Commission. This number would remain constant even if the number of members on the commission was diminished by death, resignation or disqualification.

10. A technical problem has arisen over the present constitutional provision which requires that the charter framed by the commission must be submitted "within one year" of the commission's election.

"One year" has been interpreted to be 365 days (366 in leap year), which means that if the charter commission is chosen at one general election and the general election for the following year is more than 365 days in the future, which will occur, for example, in the case of the November 2, 1976 and November 8, 1977, elections, a special election to vote on the charter must be called. The proposed 19-month deadline would not only clear up this problem, but it would also give the charter commission adequate time to do a thorough job, and would allow time for public comment and study of the proposed charter.

11. The procedure for placing the proposed charter before the voters is presently unclear, and if it is interpreted to require action by the municipality's legislative body before being sent to the board of elections, the legislative body has an opporunity to delay its submission. The amend-

22. In *Merryman v. Gorman*, 69 O. L. Abs. 421 (1953) the court held that the city of Steubenville must appropriate funds for the mailing of charters to electors.

ment specifically provides for direct submission by the charter commission to the board of elections not less than 75 days before an election.

12. Because the proposed amendment provides for direct submission of the proposed charter to the board of elections, the charter commission, rather than the clerk of the municipality, is charged with the responsibility of distributing copies of the proposed charter to electors. Problems have arisen in the past over failure of the municipality to allocate money or personnel to mail copies of the charter to the electorate,[23] despite the duty to do so, which is made explicit in the proposed amendment. The proposed amendment is so worded as to allow the charter commission to be given assistance in the printing and distribution of the charter by volunteer civic groups.

13. Technical problems have arisen dealing with the distribution of copies of the proposed charter "to each elector whose name appears upon the poll of registration books . . ." because of the differences between registration and nonregistration counties. The proposed amendment makes clear that what is required is an attempt to mail or otherwise distribute a copy to each elector in so far as may be reasonably possible as is the case with proposed county charter amendments, and does not actually require that every elector receive a copy. Newspaper publication of the charter to meet the distribution requirements has never been permitted, and the amendment retains this prohibition. The amendment, however, does permit door-to-door distribution when feasible.

14. Presently a charter commission has only one opportunity to submit a proposed charter to the electors. The proposed amendment would give the charter commission one opportunity to resubmit, or revise and resubmit, the charter at a general or special election within 13 months. In the case of a close vote initially, or where the commission believes it is able to identify the objectionable features of the proposed charter or the reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new commission and a two-year delay in submission, might be advantageous.

15. Although few insurmountable procedural problems have arisen to date in regard to the functioning of charter commissions, a constitutional provision that gives specific powers to the charter commission over adoption of rules and procedures and the filling of vacancies will eliminate any question of where this power lies.

23. *Ibid.*

ARTICLE XVIII

Section 9

Present Constitution

Section 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

Commission Recommendation

Section 6. Amendments to any charter framed and adopted as provided in section 5 may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by six per cent of the electors of the municipality, as certified by the election authorities having jurisdiction in the municipality, setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 5 as to the submission of the question of choosing a charter commission; and not less than thirty days prior to the election thereon, copies of proposed amendments shall be mailed or otherwise distributed by the clerk of the legislative authority to each elector of the municipality as far as may be reasonably possible, or, pursuant to laws passed by the General Assembly, notice of proposed amendment may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it

shall become a part of the charter of the municipality immediately upon its approval by the electors unless another time is specified in the petition or ordinance providing for the submission of the amendment. When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case of conflict between the provisions of two or more amendments submitted at the same election, the amendment which receives the highest affirmative vote not less than a majority shall prevail. An amendment shall relate to only one subject but may affect or include more than one section or part of a charter. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after the adoption by a referendum vote.

There may be submitted to the electors of any municipality having a charter the question "Shall a commission be chosen to amend or revise the charter of the (city or village) of .....?" and a charter commission may be elected for such purpose, in the manner provided in section 5 as to the question of choosing a charter commission. Such charter commission may frame and submit to the electors of the municipality, in the manner provided in section 5 for the submission of a proposed charter, one or more amendments to the existing charter or a new or revised charter for the municipality. Any such amendment or new or revised charter shall become effective, if approved by the affirmative vote of a majority of the electors voting thereon, at the time specified therein.

A charter may be repealed in the manner provided in this section for the amendment of a charter, by the submission to the electors of the municipality of the question "Shall the charter form of government for the (city or village) of ..... be repealed?" The effective date of such repeal and the election of the officers of the government of the municipality to become effective upon such repeal shall be as provided by general law except as otherwise provided in a charter approved by the electors of the municipality at the same time as or subsequent to approval of the question of repeal.

If the question of the repeal of an existing charter form of government is submitted to the electors of the municipality at the same time as the submission of the question to the electors of a commission to revise the charter or the question of the adoption of a new or revised charter that question which receives the largest number of votes, not less than a majority, shall prevail. The question of the repeal of an existing charter shall not be submitted to the electors at any time after a commission has been chosen to frame a new or revised charter for the municipality and before the submission of such new or revised charter to the electors, or within two years following the adoption of a charter or a new or revised charter.

Commission Recommendation

The Commission recommends the amendment of Section 9 of Article XVIII as follows:

Section ~~9~~ 6. Amendments to any charter framed and adopted as provided IN SECTION 5 may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ~~ten~~ SIX per ~~centum~~ CENT of the electors of the municipality, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, SETTING FORTH ANY SUCH PROPOSED AMENDMENT, SHALL BE SUBMITTED BY SUCH LEGISLATIVE AUTHORITY. The submission of proposed amendments to the electors shall be governed by the requirement of section ~~8~~ 5 as to the submission of the question of choosing a charter commission; and NOT LESS THAN THIRTY DAYS PRIOR TO THE ELECTION THEREON, copies of proposed amendments ~~may~~ SHALL be mailed OR OTHERWISE DISTRIBUTED BY THE CLERK OF THE LEGISLATIVE AUTHORITY TO ~~the electors~~ EACH ELECTOR ~~as hereinbefore provided for copies of a proposed charter,~~ OF THE MUNICIPALITY AS FAR AS

MAY BE REASONABLY POSSIBLE, or, pursuant to laws passed by the General Assembly, notice of proposed amendment may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality IMMEDIATELY UPON ITS APPROVAL BY THE ELECTORS UNLESS ANOTHER TIME IS SPECIFIED IN THE PETITION OR ORDINANCE PROVIDING FOR SUBMISSION OF THE AMENDMENT. WHEN MORE THAN ONE AMENDMENT IS SUBMITTED AT THE SAME TIME, THEY SHALL BE SO SUBMITTED AS TO ENABLE THE ELECTORS TO VOTE ON EACH SEPARATELY. IN CASE OF CONFLICT BETWEEN THE PROVISIONS OF TWO OR MORE AMENDMENTS SUBMITTED AT THE SAME ELECTION, THE AMENDMENT WHICH RECEIVES THE HIGHEST AFFIRMATIVE VOTE NOT LESS THAN A MAJORITY SHALL PREVAIL. AN AMENDMENT SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after the adoption by a referendum vote.

THERE MAY BE SUBMITTED TO THE ELECTORS OF ANY MUNICIPALITY HAVING A CHARTER THE QUESTION "SHALL A COMMISSION BE CHOSEN TO AMEND OR REVISE THE CHARTER OF THE (CITY OR VILLAGE) OF .....?" AND A CHARTER COMMISSION MAY BE ELECTED FOR SUCH PURPOSE, IN THE MANNER PROVIDED IN SECTION 5 AS TO THE QUESTION OF CHOOSING A CHARTER COMMISSION. SUCH CHARTER COMMISSION MAY FRAME AND SUBMIT TO THE ELECTORS OF THE MUNICIPALITY, IN THE MANNER PROVIDED IN SECTION 5 FOR THE SUBMISSION OF A PROPOSED CHARTER, ONE OR MORE AMENDMENTS TO THE EXISTING CHARTER OR A NEW OR REVISED CHARTER FOR THE MUNICIPALITY. ANY SUCH AMENDMENT OR NEW OR REVISED CHARTER SHALL BECOME EFFECTIVE, IF APPROVED BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING THEREON, AT THE TIME SPECIFIED THEREIN.

A CHARTER MAY BE REPEALED IN THE MANNER PROVIDED IN THIS SECTION FOR THE ADMENDMENT OF A CHARTER, BY THE SUBMISSION TO THE ELECTORS OF THE MUNICIPALITY OF THE QUESTION "SHALL THE CHARTER FORM OF GOVERNMENT FOR THE (CITY OR VILLAGE) OF ..... BE REPEALED?" THE EFFECTIVE DATE OF SUCH REPEAL AND THE ELECTION OF THE OFFICERS OF THE GOVERNMENT OF THE MUNICIPALITY TO BECOME EFFECTIVE UPON SUCH REPEAL SHALL BE AS PROVIDED BY GENERAL LAW EXCEPT AS OTHERWISE PROVIDED IN A CHARTER APPROVED BY THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS OR SUBSEQUENT TO APPROVAL OF THE QUESTION OF REPEAL.

IF THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER FORM OF GOVERNMENT IS SUBMITTED TO THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS THE SUBMISSION OF THE QUESTION TO THE ELECTORS OF A COMMISSION TO REVISE THE CHARTER OR THE QUESTION OF THE ADOPTION OF A NEW OR REVISED CHARTER THAT QUESTION WHICH RECEIVES THE LARGEST NUMBER OF AFFIRMATIVE VOTES, NOT LESS THAN A MAJORITY, SHALL PREVAIL. THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER SHALL NOT BE SUBMITTED TO THE ELECTORS AT ANY TIME AFTER A COMMISSION HAS BEEN CHOSEN TO FRAME A NEW OR REVISED CHARTER FOR THE MUNICIPALITY AND BEFORE THE SUBMISSION OF SUCH NEW OR REVISED CHARTER TO THE ELECTORS, OR WITHIN TWO

YEARS FOLLOWING THE ADOPTION OF A CHARTER OR A NEW OR REVISED CHARTER.

Description of Changes and Comment

Section 9 was originally adopted with the rest of Article XVIII in 1912. It was amended in 1970, however, to permit notice of charter amendments to be made through newspaper advertisements, pursuant to laws passed by the General Assembly. If amended as proposed by the Commission, section 9 would provide the procedures for (1) submitting municipal charter amendments to the electorate; (2) choosing an elected commission to revise the charter; and (3) repealing an existing charter.

As discussed in the commentary on Section 8, several amendments to Section 9 were framed to parallel proposed amendments to Article X, Section 4, which deals with county charter commissions. As with Section 8, some of the amendments proposed for Section 9 are technical changes designed to remedy existing defects or ambiguities. Others, however, represent significant departures from the existing provisions. The changes will be discussed, as far as possible, in the order in which they occur.

1. The section number would be changed from 9 to 6.

2. The number of required petition signatures would be reduced from 10% to 6%, which is the same percentage the Commission has recommended in Section 8 and in the county provisions. The Commission determined that 10%, especially in large municipalities, is too great an obstacle to attaining the required number of signatures, but that 6% is within the power of a serious group of citizens to attain.

3. Under existing Section 9, the municipal legislative authority with which the petition is filed has the responsibility of certifying whether the signatures are valid and of sufficient number. The proposed amendment would transfer the responsibility for verifying petitions to the board of elections which has the necessary facilities and personnel to perform this function. (The proposed amendment is similar to those recommended in Section 8 and in the county provisions.)

4. The proposed amendment to Section 9 requiring that charter amendments be distributed "to each elector of the municipality as far as may be reasonably possible" takes into account the technical difficulties that have arisen in counties that do not require registration of voters. The proposed amendment makes clear that what is required is an attempt to distribute a copy of the amendment to each elector, and does not require that each elector actually receive a copy. Since 1970, pursuant to requirements imposed by general law, newspaper publication of an amendment has been permitted. The proposed amendment to Section 9 retains that provision.

5. Present constitutional provisions do not provide for designation of a specified time an amendment approved by the voters becomes part of the charter. This amendment provides for a uniform time (immediately) for inclusion of an approved amendment, yet retains the voters' power to specify a different time in the charter amendment.

6. Presently the Constitution does not provide procedures for resolving a conflict between provisions of two or more charter amendments which are submitted and approved at the same time, but in a 1931 opinion[24] the Ohio Attorney General applied to municipal charter amendments the rule of Article II, Section 1b relating to initiated laws and constitutional amendments. Under that rule, which this amendment would apply specifically to municipal charter amendments, the proposal that receives the highest affirmative vote not less than a majority would prevail in the case

24. 1931 OAG 3626.

of conflict among two or more amendments submitted and approved at the same time.

7. No present provision specifically provides that a charter amendment must relate to only one subject. Inclusion of such a provision would specifically bring municipal charters under the same requirements for single-subject amendments as proposals for amending the state constitution, and for bond issues and tax levies. Single-subject amendments could, however, as provided for in the proposed provision, affect or include more than one section of the charter.

8. Presently, there is no constitutional provision for procedures for a comprehensive revision of a charter. While some municipal charters permit or require appointment of a commission or other group to review and propose amendments to the charter, the municipality's legislative body has the power to change or reject any such proposed amendments. The Constitution does provide for submission of amendments by petition of 10% of the electors of the municipality, but this type of approach is capable of resulting only in piecemeal amendment or revision. The proposal would allow the question of choosing a commission to revise or amend the charter to be placed before the voters. Any amendment framed and approved by a duly elected commission would then be directly submitted to the voters. This would eliminate, as to such proposed amendments, the legislative body's present prerogative to change or reject amendments submitted to it. This amendment is advocated by the Citizens League of Greater Cleveland. Consideration was given to placing an automatic provision in the Constitution similar to that which requires that the question of calling a state constitutional convention be placed on the ballot every 20 years, but this was rejected because the Commission believes its proposed amendment will better serve this purpose and because the voters of the state have rejected each constitutional convention proposal since 1912, thus indicating voter resistance to such automatic referrals.

The Commission also believes that proposals submitted by charter revision advisory groups, appointed by mayors or councils to make recommendations, should remain subject to the approval of two-thirds of the legislative authority before being placed on the ballot. In the absence of such approval, the proposals suggested by such a group could still be submitted pursuant to a petition.

9. In order to allow an elected charter revision commission flexibility in proposing changes and to avoid possible legal conflicts over the definitional differences between amending and revising a charter, the proposed amendment dealing with submission of the question of electing a charter revision commission specifically provides that "a commission be chosen to *amend or revise* the charter . . ." It is believed that it should be such a revision commission's prerogative to decide whether its proposed amendments are substantial enough to constitute a complete revision.

10. There is no present constitutional provision for repeal of a charter. Charter repeals that have occurred have been based on a 1933 Supreme Court decision [25] which held that a charter municipality may abolish its charter by initiative procedures. In upholding resort to the initiative to achieve charter repeal, the Court, in effect, held that a charter is a matter which a municipality may control by legislative action. This interpretation is considered faulty by some legal authorities, who believe that the Court's holding might not be followed if challenged today. Therefore, the Commission believes it is best to include specific provisions in the Constitution providing for repeal and specifying its procedures.

11. The Commission has proposed an amendment which would deal with the possibility that a conflict might arise if the question of repeal of

25. *Youngstown v. Craver*, 127 Ohio St. 195, 187 N. E. 715 (1933).

a charter were submitted to the electorate at the same election as a new or revised charter. The proposed amendment provides that in the case of conflicting questions on the same ballot, the question which receives the larger number of affirmative votes above a majority shall prevail.

12. Because the Commission believes stability is an important principle of municipal government, it has included in its proposed provisions for repeal the prohibition against placement of a repeal question on the ballot any time after a revision commission has been chosen or before submission of a new or revised charter by the commission, or two years following adoption of a charter of a new or revised charter. This not only insures an element of stability in governance, but also allows a period of time in which to prove whether or not a charter, once it has been adopted or revised, meets the needs of the community.

ARTICLE XVIII

Section 13

ARTICLE XIII

Section 6

Present Constitution

Article XVIII

Section 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Article XIII

Section 6. The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

Commission Recommendation

Section 7. Laws may be passed to limit the power of municipalities to levy taxes and assessments and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 6 of Article XIII and the amendment of Section 13 of Article XVIII as follows:

Section ~~13~~ 7. Laws may be passed to limit the power of municipalities to levy taxes AND ASSESSMENTS and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Description of Changes

Section 13 of Article XVIII would be amended to incorporate the only provision of Section 6 of Article XIII not already included in this, or other sections, of Article XVIII—the provision authorizing the General Assembly to pass laws limiting municipal power to levy assessments. Section 13 would be renumbered to provide better order in the sections in Article XVIII, and section 6 of Article XIII would be repealed because all its provisions would then be covered in Article XVIII.

Background of Sections

Article XIII (Corporations) was adopted in 1851 in part to prohibit the legislature from enacting special acts for the government of municipal corporations, a practice that had been greatly abused by the legislature since the Constitution of 1802 was adopted.[26] Section 6 authorizes the legislature to pass general laws for the organization of cities and incorporated villages. As noted earlier, in spite of the "general law" requirement, an extensive classification structure of Ohio municipalities was created by the legislature and eventually declared unconstitutional by the state Supreme Court in 1902. Adoption of Article XVIII in 1912 was an attempt to prevent any future efforts at overclassification.

The framers of Article XVIII in 1912 apparently intended to repeal Article XIII, Section 6 because its substance was contained in Article XVIII, Sections 1, 2 and 13.[27] The repeal of Article XIII section 6, however, was inadvertently forgotten or overlooked.

26. Farrell, James W. Jr., "Municipal Public Utility Powers," Ohio State Law Journal, Vol. 21 (1960), pg. 391.
27. Constitutional Convention of 1912, *Proceedings and Debates*, pgs. 1434-1435, 1493-1494.

ARTICLE XVIII

Section 4

Present Constitution

Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Commission Recommendation

Section 8. Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Commission Recommendation

The Commission recommends a change in the section number of Section 4 of Article XVIII in order to place the sections in Article XVIII in better order, as follows:

Section 4 8. Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or products of any such utility.

Background of Section

The sections of Article XVIII dealing with utilities (4, 5, 6, 12) were designed by the Constitution's framers to give municipalities utility powers completely independent of the General Assembly so that municipalities could have flexibility in dealing with their individual utility problems and needs.[28]

Present Section 4 provides municipalities the right to acquire, construct, own, lease or operate a public utility for its residents. The courts have consistently upheld the high degree of independenec and powers relating

28. Constitutional Convention of 1912, *Proceedings and Debates*, pg. 1433.

to ownership and operation of public utilities which were granted municipalities under Section 4.[29] However, the courts have ruled against complete municipal autonomy in the area of surplus utility revenues and have refused to permit the use of such revenues to pay general municipal expenses. The Supreme Court decided that a charge for a utility which produced an excess over the amount required to cover the cost of the utility service constituted a tax, and taxes are subject to regulation by the General Assembly pursuant to Article XVIII, Section 13 and Article XIII, Section 6 of the Constitution.[30]

Section 4 also gives municipalities the power to acquire land for utility purposes by condemnation, even though the land is outside the municipality. That power has been upheld in the courts.[31] Problems have arisen, however, when one municipality attempts to condemn land which is used for a public purpose by another municipality. This produces a conflict between co-equal governmental units with co-equal powers of eminent domain. In *Blue Ash v. Cincinnati*[32] the Supreme Court held that the power to condemn granted in Section 4 did not extend to the public lands of another municipality that are maintained as part of that municipality's governmental function, unless such power is expressly authorized by statute or arises by necessary implication.

Section 4's eminent domain powers were further limited by the Ohio Supreme Court in *Britt v. Columbus*,[33] in which the City of Columbus attempted to acquire unincorporated land through eminent domain in order to extend a sewer line and to sell sewer services to the Village of Dublin. The Court decided that the right of eminent domain is not available if the property acquisition is solely for the purpose of supplying customers outside the municipal border. While there is a statutory eminent domain power covering this circumstance, the municipality must make payment in lieu of taxes on such property.

Comment

Several alternatives to the present Section 4 that would alleviate the negative impact of the *Roettinger*, *Blue Ash* and *Britt* decisions were considered by the Commission and its Local Government Committee.

On the issue of surplus utility revenues to be used for general municipal expenses other than utilities, the Commission determined that, while it does not agree with the theory behind *Roettinger* that such revenues constitute a tax, a change in present Section 4 is not necessary, for several reasons.

1. As a practical matter, municipal officials are reluctant to raise utility rates, even when the need is compelling. The political process effectively acts to keep rates from rising to a point where they would create surplus funds. Municipal officers are unlikely to attempt to fund all or a large part of the operation of their municipality from utility rates because of the anticipated adverse reaction of the voters to such a policy.

2. Municipalities have a common law obligation to provide utility products and services at reasonable rates, so rates cannot be excessive or confiscatory.

3. While municipalities are restricted by common law and the effects of the *Roettinger* decision from charging rates in excess of utility operating costs, the accumulation of funds for the reasonable repair and replacement of the utility is allowed.

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29. Farrell, James W. Jr., "Municipal Public Utility Powers," Ohio State Law Journal, Vol. 21 (1960), pgs. 390-394.
30. *Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N. E. 6 (1922).
31. *Toledo v. Link*, 102 Ohio St. 336, 131 N. E. 796 (1921).
32. *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 182 N. E. 2d 557 (1962).
33. *Britt v. Columbus*, 38 Ohio St. 2d 1 (1974).

4. No municipal or civic group has proposed changing present Section 4. The Ohio Municipal League believes that, while the *Roettinger* decision does impose a theoretical restriction on municipalities, even if Section 4 were amended the results would be the same—a municipality would not set utility rates at a level high enough to raise revenues.

With respect to the negative effects of the *Blue Ash* and *Britt* decisions, the Commission concluded that the General Assembly could set out the conditions under which one municipality's utility needs are of higher priority than another's, permitting condemnation of one municipality's property by another. It believes that this would be very difficult to do in the Constitution and is essentially statutory material.

The second eminent domain problem concerns the statutory provision for payment in lieu of taxes by a municipality that acquires utility property from another municipality. While the Municial League expressed some interest in amending Section 4 to make it clear that the power of condemnation granted in Section 4 extends to the acquisition of property by a municipality solely for utility expansion outside its territory, the Commission determined that municipalities have statutory powers, if not power directly from the Constitution, to take property outside their territory solely for such purpose. The Commission also concluded that the statutory requirement of payment in lieu of taxes could be amended by the General Assembly in order to handle problems relating to those payments and concluded that the General Assembly is the proper forum for making such a decision, which should be viewed from the perspective of all units of government competing for taxes and weighing their various needs.

ARTICLE XVIII

Section 5

Present Constitution

Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Commission Recommendation

Section 9. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per cent of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 5 of this article as to the submission of the question of choosing a charter commission.

Commission Recommendation

The Commission recommends the amendment of Section 5 of Article XVIII, to place the sections in Article XVIII in better order, as follows:

Section ~~5~~ 9. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per ~~centum~~ CENT of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until sumitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section ~~8~~ 5 of this article as to the submission of the question of choosing a charter commission.

Comment

Section 5, adopted in 1912, provides for a referendum on any ordinance passed by a municipality to acquire, construct, own, lease or operate a public utility. The courts have consistently held that the only ordinance subject to referendum under Section 5 is that ordinance that first begins the process of exercising Section 4 powers, as opposed to subsequent ordinances which are merely continuations of or additions to the first.[34]

The Commission determined that present Section 5 does not pose any problems for municipalities that need clarification in the Constitution. It also concluded that it is not possible, nor even desirable, to constitutionally define what specific kinds of ordinances are subject to referendum under Section 5. Therefore, the Commission recommends that no change be made in present Section 5, except to change its number, to make an internal change in the reference to existing section 8 in order to be consistent with the proposed changes in section order, and to change "per centum" to "per cent" in accord with Ohio bill drafting rules.

34. *Fostoria v. King*, 154 Ohio St. 213, 94 N. E. 2d 697 (1950).

ARTICLE XVIII

Section 6

Present Constitution

Section 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty percent of the total service or product supplied by such utility within the municipality, provided that such fifty percent limitation shall not apply to the sale of water or sewage services.

Commission Recommendation

Section 11. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water, sewage, transportation, or solid waste management services.

Commission Recommendation

The Commission recommends the amendment of Section 6 of Article XVIII as follows:

Section ~~6~~ 11. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty ~~percent~~ PER CENT of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water, ~~or~~ sewage, TRANSPORTATION, OR SOLID WASTE MANAGEMENT services.

Description of Changes and Comment

Section 6 limits the amount of utility products or services that a municipality may sell outside its borders to 50% of the total service or product supplied by the utility within the municipality. An exemption to the 50% limit for water and sewage services was added to the constitution in 1959.

The Commission recommends the addition of transportation and solid waste management to the list of exemptions. This recommendation is based on the growing realization that the problems arising in these service areas cannot be solved adequately on the level of a single municipality. The large outlays needed, in terms of planning and operating costs, facilities and equipment, to begin or improve existing mass transit systems and solid waste management systems necessitates large scale operations in

order to benefit from economies of scale. Moreover, these two types of services are matters of areawide concern. Coordinated and efficient service, which will adequately meet the needs of citizens and the requirements of the state and federal governments, can probably be provided only on a relatively large scale. It is the Commission's intention that inclusion in proposed Section 6 of the term "solid waste management" would cover establishment of resource recovery plants for recycling or reuse of solid waste materials. Such plants need large areas, very often entire metropolitan areas, from which to collect in order to be economically viable.

The complete repeal of the 50% limitation on utility products or services sold by a municipality outside its borders was considered. The only major municipal utilities to which the 50% restriction now applies are the municipal electric utilities and the few municipally-owned gas companies.

The 50% restriction was originally placed in the Constitution at the urging of the private electric utilities in order to overcome some of the competition they were facing from rural electric co-ops. The framers of the section realized that economically, a municipality had to build in a surplus electric capacity when it erected its generating facility in order to be able to meet future electrical needs of its residents without expansion. They also knew that this surplus electricity could be sold outside the municipality in competition with private utility companies which did not enjoy the tax exemptions of municipal utilities. Therefore, the framers agreed upon the 50% limitation on municipal utility products or services sold outside a municipality in order to balance the economic needs of both private and municipal utility owners. The Constitutional Revision Commission concluded that the 50% restriction should be retained for municipally owned electric and gas utilities. The basic reasoning of the Commission is that there should be no limitation when the utility product or service is almost always supplied by the public sector; when there is competition beween the private and public utilities, however, the Commission believes that the 50% limitation is a fair and equitable solution to the competing interests.

ARTICLE XVIII

Section 10

Present Constitution

Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Commission Recommendation

No recommendation

Commission Recommendation

The Commission has no recommendation with respect to Section 10 of Article XVIII. Several changes were proposed, including repeal of the section, but none secured the necessary ⅔ Commission vote.

History and Background of Section

Section 10 provides that municipalities, when appropriating or otherwise acquiring property for public use, may, in furtherance of such public use, acquire property in excess of that actually to be occupied by the

improvement and to sell such excess. It also permits them to borrow money and issue revenue bonds to buy the excess property.

Although the present Section is not clearly worded to produce such an effect, one of the purposes of the framers of Section 10 in 1912 was to allow municipalities making improvements to acquire, either by purchase or condemnation, more property than needed for the improvements and then to sell the excess property, which would have increased in value because of the improvements, in order to offset a substantial portion of the cost of improvements.

The courts, however, have ruled that under the 14th Amendment to the United States Constitution, municipalities could not use the excess condemnation provisions of Section 10 unless the municipality, in its ordinance, clearly specified a valid purpose, other than raising revenue or paying part of the cost of the improvement, for the taking, as well as showing its necessity. (*Cincinnati v. Vester*, 33F. 2d 242, 1929 (aff. 281 U. S. 439); and *East Cleveland v. Nau*, 124 Ohio St. 433, 1931). The interpretation of Section 10 in the *Cincinnati* and *East Cleveland* decisions, in effect, limits municipalities to eminent domain powers they already possess, and negates the original intention of the section's framers.

Section 10 has been cited by the Ohio Supreme Court as support for the authority to acquire property by eminent domain for urban renewal purposes (*State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 1955).

ARTICLE XVIII

Section 11

Present Constitution

Section 11. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per centum of the cost of such appropriation.

Commission Recommendation

Section 13. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per cent of the cost of such appropriation.

Commission Recommendation

The Commission recommends a change in the section number in Section 11 of Article XVIII, in order to place the sections in Article XVIII in better order, but no substantive changes. The proposed amendment is as follows:

Section ~~11~~ 13. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per ~~centum~~ CENT of the cost of such appropriation.

Comment

Section 11, which was adopted with the rest of Article XVIII in 1912, permits the assessment of benefited property to provide money, in part, for public improvement appropriation. A limitation on the amount of such assessments is fixed at 50% of the cost of the appropriation. The limit is similarly provided for by statute in Section 727.08 of the Revised Code.

The Commission has not discovered nor been advised of any problems with Section 11 that necessitate constitutional change, and therefore recommends no change in Section 11, except in the number.

ARTICLE XVIII

Section 12

Present Constitution

Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Commission Recommendation

Section 12. Any municipality which acquires, constructs, improves, or extends any public utility and desires to raise money for such purposes, or to refund or provide for refunding at any subsequent date any bonds or notes, including general obligation bonds or notes, issued at any time for such purposes, may issue bonds and notes in anticipation of bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such bonds and notes issued beyond the general limit of bonded indebtedness be secured only upon the revenues of such public utility, and may be further secured by a mortgage upon all or part of the property of such public utility which mortgage may provide for a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Commission Recommendation

The Commission recommends the amendment of Section 12 of Article XVIII as follows:

Section 12. Any municipality which acquires, constructs, IMPROVES, or extends any public utility and desires to raise money for such purposes, OR TO REFUND OR PROVIDE FOR REFUNDING AT ANY SUBSEQUENT DATE ANY BONDS OR NOTES, INCLUDING GENERAL OBLIGATION BONDS OR NOTES, ISSUED AT ANY TIME FOR SUCH PURPOSES, may issue ~~mortgage~~ bonds AND NOTES IN ANTICIPATION OF BONDS therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such ~~mortgage~~ bonds AND NOTES issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such public utility, AND MAY BE FURTHER SECURED BY A MORTGAGE UPON ALL OR PART OF THE PROPERTY OF SUCH PUBLIC UTILITY WHICH MORTGAGE MAY PROVIDE FOR ~~including~~ a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Description of Changes and Comment

Section 12 permits municipalities to issue revenue bonds, which are not general obligation debt of municipalities, to purchase, construct, or extend a utility. These bonds require a mortgage on the utility property and the grant of a franchise upon foreclosure to the bondholder.

The Supreme Court, in *City of Middletown v. City Commissioners*,[35] ruled that Section 12 is self-executing and self sufficient, and that utility mortgage revenue bonds issued strictly within its terms are not affected by other parts of the Constitution or by the Uniform Bond Act.

The proposed amendments to Section 12 include four specific changes:

1. It specifically permits the issuance of bonds to improve the utility. Although municipalities presently possess this power, addition of the word "improve" to "any municipality which acquires, constructs, *improves* or extends any public utility . . ." makes it clear that bonds can be issued for that purpose, and eliminates any possible inference to the contrary.

2. It permits the issuance of notes in anticipation of bonds. This change would allow for temporary financing, especially during the period of construction, until final costs could be determined in order to issue bonds.

35. *City of Middletown v. City Commissioners*, 138 Ohio St. 596, 37 N. E. 2d 609 (1941).

This procedure is the same as in general obligation financing, and in certain other kinds of revenue bond financing.

3. It removes the designation of the bonds as "mortgage" bonds and makes optional the provision of a mortgage on the property or for a mortgage and a franchise to operate as security. Many municipal officials, as well as many bond underwriters and investment bankers, believe that a mortgage on the utility is unneeded in many cases and that no municipality would default and allow a bondholder to take over a utility except as a last resort in an economic depression. Furthermore, officials believe bond purchasers are primarily interested in the revenue anticipated by the operation of the utility, not in the mortgage or franchise. However, if a municipality and its bond underwriters, bankers, and financial advisors believe that the security of a mortgage, with or without a franchise, is needed, the proposed amendment permits this.

4. It allows refunding of notes or bonds, including those of general obligation, by revenue bonds. Section 12 now provides that revenue bonds can be issued only for the purposes of acquiring, constructing or extending a utility, so that if general obligation bonds have already been issued, the utility has already been acquired, constructed or extended. Therefore, under the present section, it is not clear that revenue bonds could be used simply to refund the general obligation debt. The proposed amendment also would permit either immediate refunding, refunding outstanding obligations at their maturity, or advance refunding.

The Commission determined that municipalities need more flexibility and the changes proposed are intended to make local decision making in the area of utility financing more flexible in that financing arrangements could be tailored by the municipality, with advice from underwriters, investment bankers and financial advisors, to fit particular needs and requirements.

ARTICLE XVIII

Section 14

Present Constitution

Section 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for heren shall be based upon the total vote cast at the last preceding general municipal election.

Commission Recommendation

No change

Commission Recommendation

The Commission recommends no change in Section 14 of Article XVIII.

Comment

Section 14, which was part of the original Article XVIII adopted in 1912, requires that the election authorities created pursuant to general law must conduct all elections and submissions of questions authorized in Article XVIII. It also requires that the percentage of signatures needed be based upon the total vote in the last general municipal election.

The Commission is not aware of any constitutional problems with present Section 14 and, therefore, recommends that no change be made in it.

MINORITY REPORT

TO: The Constitutional Revision Commission
Columbus, Ohio

I respectfully submit this Minority Report explaining the reason for my negative vote with respect to the Commission's recommendation for revising Section 3 of Article X of the Constitution relating to the adoption of county charters. I submit this report with reluctance since I have the highest regard for those many thoughtful members of the Commission and the Local Government Committee with whom I happen to disagree on this issue—but since I feel this recommendation is one of the most significant ones the Commission has yet presented, I feel an obligation to present my divergent views.

COUNTY CHARTERS

The recommended amendment to this Section would permit a simple majority of the population of any county in the state to adopt an all-powerful charter for the government of the entire county which, by its terms, could wipe out every vestige of local government theretofore existing within that county. Such a charter, if adopted, could obliterate every municipality and every township within the limits of the county and provide for the take-over by the county of all of the property and governmental rights and authority of those units of government without requiring the independent consent of their people. More alarming, if this amendment should be adopted, a county charter could be adopted which would obliterate only *some* of the existing municipalities and townships—permitting a simple majority of the county voters to "pick and choose" which municipalities and which townships should be obliterated. This would indeed represent a drastic change in Ohio's philosophy toward local government.

Since 1912, Ohio municipalities have enjoyed the benefits of "home rule" granted to them by the people under Sections 3 and 7 of Article XVIII. Municipal government flourished in Ohio under "home rule" and when some twenty years later the voters adopted Section 3 of Article X to permit counties to adopt "home rule" charters, the "four majorities" requirement was included to insure that any "take-over" of powers from municipalities and townships would be accompanied by a representative vote of those adversely affected by the change.

As the Commission's Report indicates, as recently as eighteeen years ago Section 3 was substantially amended by the people of Ohio and they saw fit at that time to retain the "four majorities" condition. So far as I am aware, neither the report of the Local Government Committee nor any testimony presented before the Commission presented any overwhelming need to facilitate the elimination of "home rule" municipalities or townships. I happen to believe that bigger government does not mean better government and that rather than make it easy to take away the opportunity for "home rule" government within counties, I think this opportunity should be carefully protected and indeed expanded.

Since the voters in 1957 approved substantial revisions in this section and still felt it desirable to retain multiple majorities in the case of a "strong charter", I think a very strong showing of need should be required before these constitutional protections, so recently reimposed, are stricken. I am not persuaded that such a case has been presented.

Any consideration of Section 3 should include an understanding that a wide range of changes and benefits can be accomplished through the adoption of a so-called "weak county charter". Through such a charter "home rule" and ordinance-making powers can be bestowed and the form and structure of county government can be altered. In addition, such a charter can specify which county officers are to be elected and the manner of their election. It can provide all of the benefits of an "alternate form of government" and much more. In fact, the only prohibited provision in a so-called "weak charter" is one which permits the county to invade or take over the authority of municipal or township governments.

The Commission Report bases this recommendation, in part, on the premise that the multiple majority requirement "permits the citizens of one or a few political subdivisions to veto a charter which is adopted by a majority of all the people voting on it in the county" and that "this situation effectively constitutes minority rule". This statement considerably oversimplifies the issues involved. First of all, the ability of the citizens of political subdivisions to veto a charter is possible *only* when that charter usurps the powers of existing units of local government. Secondly, it gives no recognition to the concept that people living in municipalities which have had the constitutional grant of "home rule" powers since 1912 are entitled to exercise some voice in their own destiny, separate from a majority of the voters in the county. I believe the proposition is more aptly stated as follows: Is it "right" to permit a simple majority of the voters to take away long-standing rights of a minority?

Another reason given in the accompanying report for the elimination of the multiple majorities is the fear that this condition might at some time be stricken down by the courts on a theory extending the "one man, one vote" principle. I do not share that fear since I do not believe the Equal Protection Clause of the United States Constitution will ever be stretched to prohibit the people of "home rule" municipalities from "consenting" in some reasonable manner to the transfer of their power of self-government to some higher level of government. The recent New York case cited in the report (*Citizens for Community Action at the Local Level, Inc. v Ghezzi*, 43 LW 2246, November 22, 1974)[1] is of interest but from the facts cited in that opinion, the case certainly does not seem to stand for the proposition that multiple majorities are not permissible where municipal or township powers are being taken away by a county charter. In fact, Judge Timbers in that case specifically relies upon the test enunciated in a 1971 opinion of the United States Supreme Court in *Gordon et al. vs. Lance et al.*, 403 U. S. 1, wherein Chief Justice Burger said: "The defect this Court found in those (earlier) cases lay in the denial or dilution of voting power because of group characteristics — geographic location and property ownership — *that bore no valid relation to the interest of those groups in the subject matter of the election . . .*" (Emphasis added). I cannot imagine any more "valid relation" than the interest of the citizens of municipalities and townships in a proposed charter that would eliminate, or usurp the powers of, their units of local government. Be that as it may, I believe that drastic amendments to the Ohio Constitution should be based on a more solid need than speculation that the United States Supreme Court might, at some future time, extend the "one man, one vote" rule into the area of adopting "strong charters" in Ohio.

Although I oppose the Commission's recommendation as presented, I do not oppose some thoughtful change in the multiple majorities provision. I believe a meaningful accommodation can be made which will permit more flexibility in the charter adoption process yet permit the people in smaller units of government to retain some right to determine whether their powers of self-determination should be ceded to the county. I would urge the General Assembly to consider this approach.

TOWNSHIP GOVERNMENT

I am also troubled by the fact that the Commission has not seen fit to recommend any constitutional solution to the plight of urban townships — and in fact as the report indicates, takes the position that township problems should be solved by the legislature, not by the Constitution. I strongly disagree. Urban townships in Ohio are experiencing rapid growth, yet are required to operate under a form of government which does not provide the necessary tools to solve the problems of the people. Townships remain today as they have always been — creatures whose powers are controlled solely by the General Assembly. This is perhaps appropriate in the case of rural townships where the population density is low and where the governmental problem-solving needs are more limited. Hundreds of thousands of Ohioans, however, live in so-called "urban" townships and their need for an effective local governmental structure is just as important as the need of those Ohioans who happen to live in nearby incorporated areas. I do not believe the needs of these people should be ignored by the Commission.

In Hamilton County alone, more than a quarter of a million people live in our 12 unincorporated townships. This represents nearly 30% of the population of the entire county and nearly 3% of the population of the State of Ohio. Eight of these twelve townships have a population in excess of 5,000 people; six of the twelve have a population in excess of 25,000 people; and one of them has a population in excess of 50,000 people — and yet the three trustees of each of these densely populated townships must continue to operate, as they have always operated, with the same tools of government available to the smallest, least complicated and most rural township in the State.

Critics of any effort to enhance township powers or to grant "home rule" to townships often suggest that the solution to the plight of urban township is annexation to an existing municipality or incorporation as a new municipality. Neither of these alternatives offers a solution. Annexation is not a viable proposition for townships since municipalities are justifiably interested in absorbing only those portions of unincorporated townships that have a tax duplicate or wage-earning population which will benefit the municipality or, at the least, be self-supporting — and annexing only the "wealthy" part of a township leaves those citizens who happen to live in the balance of the township with the same "non-government" they have always had.

Furthermore, township residents have the same desire for local government identity as do those citizens who choose to live in cities and villages — and forcing them to annex to an adjoining municipality in order to gain effective tools of government is not, in my view, a worthy objective. In any event, it is clear that annexation has not thus far proved to be a viable solution to township problems in Hamilton County, at least.

The incorporation statutes impose two hurdles which are insurmountable for all practical purposes. First of all, the law requires that for a township to be incorporated, a majority of all of the adult free-holders residing in the township must sign an incorporation petition. This means that the ownership of every parcel of land in the township must be determined and that the signatures of the specific owners of at least a majority of all those parcels must be obtained. In Anderson Township (Hamilton County) there are more than 28,000 residents. Assuming four family members to a household, and that most homes are owned by the husband and wife jointly, it would appear likely that in order to incorporate the township, the signatures of at least 5,000 or 6,000 individual land-owners would have to be obtained. This is an impossible task and the burden increases in proportion to the population of the township. The second in-

surmountable hurdle is the so-called "three mile limit" provision of the Ohio statutes which conditions any new incorporation upon securing the affirmative consent of all existing municipalities lying within three miles of any portion of the township. In order to incorporate Anderson Township, the consent of *nine* separate municipalities would have to be obtained. If Sycamore Township in Hamilton County should seek to incorporate, it would have to secure the consent of *nineteen* separate municipalities lying within three miles of its borders. The incorporation of six of the other townships in Hamilton County would require the following number of municipality consents: Springfield, seventeen; Columbia, fifteen; Symmes and Colerain, eight each; Whitewater and Miami, four each. Although I have not had the opportunity to extend this survey beyond the limits of Hamilton County, I trust that a similar problem exists in other counties of the state and that the future will only intensify the problems of townships as their populations grow.

I have advocated to the Local Government Committee of the Commission that either of two constitutional alternatives should be proposed. The first would be a provision permitting urban townships to have the "local option" through a vote of their electorate to assume "home rule" powers which, however, would yield in the event of a conflict with state law or with any powers exercised by the county or any municipality lying within the township boundaries. The alternative proposal would be a provision permitting an entire urban township to incorporate as a "home rule" municipality upon the favorable vote of the electorate of the township — thus, eliminating the adult free-holder petition and the "three mile limit" conditions when an entire township seeks to incorporate.

Up to this time, at least, the Commission has not seen fit to recommend either of these alternatives — nor in fact to recommend any remedy for township problems. If the full Commission should in the future decide to propose some constitutional assistance for urban township government, I trust a separate recommendation and report will be forwarded to the General Assembly. In the meantime, I urge that the General Assembly favorably consider implementing these or other proposals in order to provide effective tools of self-government to Ohio's urban townships.

Respectfully submitted,
NOLAN W. CARSON
Commission Member

1. 36 F. Supp. 1, February 26, 1975.

COMMENTS ON MINORITY REPORT

County Charters

It would indeed be a sad commentary on the work of the Commisison if some of its proposals were not so substantive as to produce disagreement. The fundamental nature of the proposal to amend Section 3 of Article X did indeed result in four negative votes out of a total of 31, and a respected member of the Commission, Mr. Nolan Carson, has submitted his views to you in the form of a minority report.

The proposed change in Section 3 of Article X is an extension of the basic philosophy adopted by the Local Government Committee at the beginning of its work, and is fully endorsed by the Commission. The Commission reached the conclusion that the people of Ohio are not yet ready for a regional form of government which would add a new layer of local government. They believe that an existing unit, the county, should be the vehicle for providing those services which cannot effectively or economically be provided on a smaller scale. To that end, the Commission, throughout its proposals for Article X, has endorsed the strengthening of the county. It seeks to provide the counties of Ohio with those tools which the people living within them wish them to have.

It is Mr. Carson's contention that:

> The recommended amendment to this Section would permit a simple majority of the population of any county in the state to adopt an all-powerful charter for the government of the entire county which, by its terms, could wipe out every vestige of local government theretofore existing within that county. Such a charter, if adopted, could obliterate every municipality and every township within the limits of the county and provide for the take-over by the county of all of the property and governmental rights and authority of those units of government without requiring the independent consent of their people. More alarming, if this amendment should be adopted, a county charter could be adopted which would obliterate only *some* of the existing municipalities and townships — permitting a simple majority of the county voters to "pick and choose" which municipalities and which townships should be obliterated.

While this is true, it may be said that it is true only in so far as it goes. In the present Constitution, and in the Commission's proposal, this section provides that the people within a county may adopt any kind of charter they desire for their county. They may choose to adopt NONE, or a very limited one, or a very far-reaching one, or one anywhere along the continuum.

Mr. Carson goes on to say that this proposal "would indeed represent a drastic change in Ohio's philosophy toward local government." The proposal, as is seen from the comparative drafts presented in the report, adds no new words — it only deletes. Thus it not only does not represent a drastic change from the powers presently possible under a county charter, it represents no change in them at all. What is changed, of course, is the vote necessary to adopt a type of charter already permitted and foreseen by the people when they adopted this section in 1933. Presently, adoption of a charter which would permit a county to exercise municipal powers exclusively in the county or take over municipal or township property

or obligations without consent of the legislative authority of such municipality or township, calls for either a three-way or four-way majority. They are as follows:

1. A majority in the county as a whole.
2. A majority in the largest municipality within the county.
3. A majority in the area outside of the largest municipality.
4. In counties with a population of 500,000 or less, a majority in each of a majority of the combined total of municipalities and townships in the county.

It is the Commission's proposal that the same vote, that is, a majority throughout the county, be used for adoption of any kind of charter that the people within that county desire. It is not an abrogation of local government but an exercise of the prerogatives of local government. It is a choice by the vote of the people as to how much home rule they wish to have retained in the local units and how much they feel a need to delegate to their county — presumably in the belief that the county can provide better management of those municipal functions delegated to it.

Mr. Carson objects that a charter could "provide for the take-over by the county of all governmental rights and authority of those units of government without requiring the independent consent of their people." However, the Constitution presently does not require the independent vote or consent of the people of a particular unit of government affected, except in the one largest city in the county.

It is frequently painful for the minority when the majority prevails. By definition, the minority has not gotten what it wants or believes in, and feels that its rights have not been protected. This is not, obviously, a problem restricted to the administration of local government in Ohio. It has been hammered out for 200 years in our country, beginning with the federal Constitution.

It seemed clear to the full Commission when it voted on this subject, that the wishes of a minority should not be permitted to prevail when the majority of the people in a county felt that the charter they had voted to adopt was necessary for the benefit of the county as a whole. If the people of a county wish to make that decision there really are no "governmental rights" of any unit of government in the county that should be superior to the right of the people to decide how they wish to exercise their home rule powers for local affairs.

In the view of the Commission the voice of each person in a unit has the same weight; his rights are not affected by his address. His vote should not be counted as two votes or even three votes because of that address. He is a single unit within a "unity" which is made up of all the other single units *equally*.

Township Government

Although the Commission has no recommendation with respect to townships other than urging thorough legislative study of the problems of the residents of at least the more heavily populated townships, I believe that it is not correct to say that the Commission has ignored the needs of these people.

The Local Government Committee spent many hours discussing township government, the relationship of township government to the Constitution, the governing statutes, and various proposals for constitutional (and, incidentally, statutory) change. The committee met with township representatives, who presented their points of view—as individual township officers, as well as of the official organization of township trustees and clerks. After reviewing all the proposals, and considering the problems of township government as part of the whole picture of local government in Ohio, the committee made a recommendation to the Commission for granting urban townships limited "home rule" powers on a local option basis, providing annexation and incorporation were tried first and could not be accomplished because of rejection by those outside the township. The Commission then discussed this proposal, and held a public hearing at which both municipal and township spokesmen rejected it; it was then withdrawn from further Commission consideration since it seemed to have no support from any quarters — even from Commission members themselves.

The Local Government Committee then, at Mr. Carson's request reopened the township question and once again discussed it, with specific consideration given to the two proposals he has outlined in his minority report. There was, however, no support in the committee for either of these proposals.

Mr. Carson has expressed very well the problems with the present statutes, those relating to annexation as well as those relating to incorporation. The committee and the Commission have both expressed the opinion that the legislature has established policy with respect to townships by its enactment of these statutes—policy about the status of townships as well as specific procedures for annexation and incorporation. The difficulties outlined by Mr. Carson are entirely within the scope of legislative review and correction; should the legislature determine, after study of the issues, that public policy about annexation and incorporation should be altered, there are no constitutional barriers to such alteration. There was no evidence that those who represent township interests before the General Assembly have made serious efforts to have the legislature alter these policies, and it seemed most appropriate to the committee to recommend that that approach be taken before serious consideration is given to altering them by constitutional mandate.

Linda U. Orfirer
Chairman, Local
Government Committee

APPENDIX A

One question raised in the aftermath of the adoption of Article XVIII, which culminated in the *Leavers v. Canton*[1] case cited in the text, was whether Section 3 confers the powers of local self-government on *all* municipalities. The existence of the separate section permitting charters, (Section 7) raised the question whether the powers of Section 3 are self-executing or come into play only when a charter is adopted. An early case, *State ex rel. Toledo v. Lynch*,[2] held that a charter is a prerequisite to the exercise of the home rule powers under Section 3. In *Perrysburg v. Ridgeway*,[3] however, the Supreme Court overruled *Lynch* and held that all municipalities derive their powers of local self-government from the Constitution and that the grant of powers in Section 3 is self-executing, not dependent on adoption of a charter.

From 1923 to 1953, the court reiterated the *Perrysburg* doctrine time and again, but also developed two devices to evade some of the impact of the doctrine: the concept of "statewide concern," and an extremely broad interpretation of the meaning of police regulations. In *Morris v. Roseman*,[4] however, the Court, while specifically reaffirming *Perrysburg*, held that the procedures used in governing a noncharter municipality (specifically those relating to the passage of zoning legislation) were controlled by statute through Article XVIII, Section 2, although the noncharter municipality's substantive powers exercised through those procedures were derived directly from Section 3 and were, therefore, not subject to statutory control.

The *Morris* decision brought up the question of the difference between procedural and substantive powers, but did not give an adequate answer.

The impact of *Morris* on noncharter municipalities has been analyzed as follows:

> "Even though *Morris* made no attempt to explain how its conclusion was reached, the implication of the decision seemed clear. Since *Perrysburg* was specifically reaffirmed; since both the opinion and the syllabus of *Morris* are specifically confined to the "procedure" or "method" of enacting legislation; and since it held that the "statutes in no way inhibit" home-rule powers granted by section 3; than a non-charter municipality must still derive its *substantive* powers directly from section 3. A statute, which is based on the general powers of the state, and which interfered with home-rule powers would still be void.
>
> The problem of *Lynch, Perrysburg* and *Morris* is an essentially political one—should safeguards against abuse of power by local officials be a responsibility of the municipalities' electorate or the General Assembly? The decision in *Morris* appears to leave the court without a clear answer to that problem and creates a new one where its only yardstick is "procedural v. substantive." That distinction is an even more elusive one than the distinction between "proprietory" and "governmental" activities in the fields of municipal tort and tax liability.[5]

In 1960, the decision in *Petit v. Wagner*,[6] eroded the *Perrysburg* doctrine. In *Petit*, the court held that noncharter municipalities may exercise their powers of local self-government only in a manner not at variance

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1. *Leavers v. City of Canton*, 1 Ohio St. 2d. 33, 203 N.E. 2d 354 (1964).
2. *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).
3. *Perrysburg v. Ridgeway*, 108 Ohio St. 245, 140 N.E. 595 (1923).
4. *Morris v. Roseman*, 162 Ohio St. 447, 123 N.E. 2d 419 (1954).
5. Duffy, John J., "Non Charter Municipalities: Local Self-Government," Ohio State Law Journal, Vol. 21 (1960) pg. 319.
6. *Petit v. Wagner*, 170 Ohio St. 297, 164 N.E. 2d 574 (1960).

with the statutory law.[7] In *Leavers v. Canton,*[8] which reinforced *Petit,* the Court's view of Section 3 as it applies to charter and non-charter municipalities was as stated in the text.

Recent cases relate the powers of local self-government to issues primarily of municipal concern. In the most recent of these cases, *Village of Willoughby Hills v. Corrigan,*[9] the Court upheld the validity of airport zoning regulations applicable to territory within a charter municipality enacted by an airport zoning board pursuant to statutory authority. This decision reaffirms the principle adopted earlier by the court in *Cleveland Electric Illuminating Company v. City of Painesville,*[10] striking down an ordinance requiring electrical transmission lines traversing, but not serving, the city to be placed underground, while the applicable statutes permitted overhead installation, and *City of Beachwood v. Board of Elections,*[11] holding invalid an ordinance providing for a method of detachment of territory from the municipality which differed from the statutory procedure.

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7. Gotherman John E., "Municipal Home Rule in Ohio Since 1960," Ohio State Law Journal, Vol. 33 (1972) pg. 596.
8. *Op. cit.*
9. 29 Ohio St. 2d 39 (1972).
10. 15 Ohio St. 2d 125 (1968).
11. 167 Ohio St. 379 (1958).

APPENDIX B

Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it ~~shall have~~ HAS been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

A NONCHARTER MUNICIPALITY MAY VARY FROM THE GENERAL LAWS FOR THE GOVERNMENT OF THE MUNICIPALITY, BUT NO SUCH VARIANCE SHALL BECOME OPERATIVE IN THE MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

Section 3. NONCHARTER municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. THE EXERCISE OF ANY POWER OF LOCAL SELF-GOVERNMENT, OTHER THAN LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS, WHICH VARIES FROM GENERAL LAWS SHALL NOT BECOME OPERATIVE IN A NONCHARTER MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

Section 7. Any municipality may frame and adopt or amend a charter for its government and may, ~~subject to the provisions of section 3 of this article,~~ exercise thereunder all powers of local self-government. SUCH A MUNICIPALITY MAY ADOPT AND ENFORCE WITHIN ITS LIMITS SUCH LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS AS ARE NOT IN CONFLICT WITH GENERAL LAWS.

APPENDIX I

Part 9

INITIATIVE AND REFERENDUM

March 15, 1975

INTRODUCTION

The initiative and referendum powers, often called "direct legislation", permit the people to propose laws and constitutional amendments for consideration by the electorate or to veto laws enacted by the legislative body. If applicable state law so permits, a proposal for a law or constitutional amendment is made by petition either directly, with the proposal appearing on the ballot without any intervening requirements, or indirectly, with presentation of the petition first to the legislature. If the legislature enacts the law, the petitioners have accomplished their objective. If the legislature fails to act or acts in a way unsatisfactory to the petitioners, they then have the right (usually by filing another petition with additional signatures) to have the proposed law placed on the ballot for approval or rejection by the voters.

In Ohio, constitutional amendments may be directly initiated by the people, and laws may be indirectly initiated; there are no provisions for doing either the other way.

South Dakota, in 1898, was the first state to include in its constitution a provision for direct legislation, permitting the use of the initiative and referendum for statutes. In the years from 1900 to 1909, six states[1] followed the example of South Dakota, and four of these states[2] extended the initiative provisions to include amendments to their state constitutions.

Between 1910 and 1915, the so-called "progressive era", twelve states, including Ohio, adopted the initiative and referendum. Since 1918, only two states, Alaska and Massachusetts, have added the initiative and referendum to their constitutions, and most recently, Illinois has added an initiative provision for constitutional amendments relating only to the Legislative Article of the new Illinois Constitution (1970).

The demand for the initiative and referendum arose from a crusade by various Populist movements prominent in the political scene in the 1890's and early 1900's. Numerous exposés of corruption in government raised a popular clamor to "turn the rascals out", instilling a widespread distrust of the usual legislative processes. The progressive movement of the 1900's, which was reflected in the 1912 Constitutional Convention of Ohio, placed great stress on the initiative, referendum and recall. Most delegates elected to the convention had taken a position on the initiative and referendum prior to their election, and substantially more than a majority had been recorded in favor of the direct legislation provisions. In spite of this, controversy about the specific provisions occupied the greatest amount of convention time of any subject, with the more radical delegates attempting to make the provision completely self-executing and as easy as possible for petitioners to reach the ballot, and the more conservative members attempting to write "safeguards" into the process to increase the difficulty of achieving success. Both sides of the controversy had some successes and some failures, and the resulting provisions in the Ohio Constitution were a compromise between two extremes.

Since adoption of the initiative and referendum provisions in 1912, issues have been placed on the ballot by initiative 43 times, 32 of which proposed constitutional amendments. Of the 11 initiated laws appearing on the ballot, five were passed and six defeated by the voters. In addition, at least three times petitions have been filed proposing laws which were placed before the General Assembly. In one case, the General Assembly passed the law; in the other two, although the General Assembly did not pass the law, the matter was not taken to the voters by the petitioners. Of the 32 initiated constitutional amendments since 1912, 23 have been defeated and nine have been adopted.

Ten laws passed by the General Assembly have been taken to the voters under the referendum provisions. Only once has the General Assembly's action been upheld by the voters. The referendum has not been used in Ohio since 1939.

The initiative, however, continues to be used. At the November, 1972, general election an initiated constitutional amendment was before the voters; it was defeated. The last election at which an initiated law appeared on the ballot was in 1965, but as recently as 1971 an initiative petition for a law was filed with the General Assembly.

The Constitutional Revision Commission, in its consideration of the initiative and referendum provisions and the problems that have occurred over the years in implementing and using them, discussed the basic question whether the Ohio Constitution should contain initiative and referendum provisions at all. The conculsion was that it should, and that they should be, as far as possible, self-executing. Initiative and referendum have not been a panacea for the solution of all societal and governmental problems, but neither have they resulted in the destruction of representative government as their opponents, more than 60 years ago, argued they would. These processes have been used with restraint by Ohioans in the past, and there seemed to be no reason why they should not continue to be available in the future.

In view of these conclusions, the Commission believes it wise to remove some of the administrative obstacles and needless "safeguards" written into the Ohio provision which frustrate use of the

1—Utah, Oregon, Montana, Oklahoma, Maine, Missouri.
2—Utah, Oregon, Oklahoma, Missouri.

initiative and referendum processes. The proposals contained in this report retain the basic features of the present provisions, make a few substantive changes, and clarify both the procedures and the language of the provisions. One such change would alter the method of determining the number of signatures required on an initiative or referendum petition. Present provisions establish the requirement as a percentage of the number who voted for governor at the preceding gubernatorial election. The proposal fixes the number of required signatures in the Constitution. The Commission debated the advantages and disadvantages of both methods and concluded to recommend a fixed number because it is easier to ascertain and apply than a percentage, moreover, it does not make the possible success of a petition depend on the number of voters who turned out at a particular election, which number varies widely depending on the issues, offices, and personalities on the ballot in a particular year. The Commission concluded that the purpose of requiring signatures on a petition is not to indicate that a given proportion of voters is concerned, since any selected percentage is arbitrary, but to indicate that a substantial number of electors wish to take a matter to the ballot for all to vote on. Another change is the removal of the requirement that signatures on petitions must come from half of the counties in the state—44 counties. This "safeguard", one of the compromises of the 1912 Constitutional Convention, is being recommended for removal because the Commission does not believe that the signature of a resident of one county should be given greater weight than the signature of a resident of another county.

The Commission gratefully acknowledges the assistance and suggestions of the office of the Secretary of State in the study and deliberations that led to these recommendations.

RECOMMENDATIONS

ARTICLE II

Section 1

Present Constitution

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

Commission Recommendation

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power of initiative and referendum as provided in Article XIV of this Contitution.

Commission Recommendation

The Commission recommends the amendment of Article II, Section 1 as follows:

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power OF INITIATIVE AND REFERENDUM AS PROVIDED IN ARTICLE XIV OF THIS CONSTITUTION ~~To propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided, and independent of the General Assembly to propose amendments to the Constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.~~

History and Background of Section

Section 1 of Article II vests the state's legislative power in the General Assembly. It was amended in 1912 to grant the rights of initiative and referendum to the people. The amendment, proposed by the 1912 Constitutional Convention, gave the people the right to propose constitutional amendments to be adopted or rejected at the polls, to propose laws to the General Assembly which could subsequently be taken to the people if the General Assembly failed to act in a manner satisfactory to the sponsors, and to refer to the people laws passed by the General Assembly for approval or rejection by the voters. The section appears to permit constitutional amendments to be submitted to the General Assembly by the people, but related constitutional provisions do not contain the necessary provisions for use of such procedure.

The power of the people to enact laws is limited by the same constitutional limitations as those applicable to the power of the General Assembly to enact laws.

Effect of Change

The Commission recommends that the initiative and referendum provisions be removed from Article II and re-enacted with changes in a

separate article of the Constitution; Article XIV, vacant since 1953, was selected for this purpose. The proposed amendment to Section 1 of Article II will remove the description of the reserved powers and refer, instead, to Article XIV. All the provisions being deleted in Section 1, including the final sentence which places the same limitations on the people to enact laws as are imposed by the Constitution on the General Assembly, are re-enacted without substantive change in Article XIV.

Rationale for Change

The Commission, viewing the entire body of constitutional language on the initiative and referendum concluded that the provisions were confusing and in need of revision. The Commission's objective was two-fold: to delineate clearly the legislative powers of the people, and to clarify the procedures by editing and updating the language.

No substantive change is contemplated in the proposed amendment of Section 1 of Article II. The people would retain the power to initiate constitutional amendments directly; to initiate statutes indirectly (initially proposing a law to the General Assembly which can then be taken to the voters if the sponsors are not satisfied with the legislature's action), and to refer to the voters for approval or rejection most types of enactments of the General Assembly. (Laws not subject to the referendum are discussed following in Section 1d.) The present language concerning indirect initiative for constitutional amendments, not effectuated elsewhere in the Constitution, has been dropped. The Commission saw no need for such a procedure.

Intent of the Commission

The Commission contemplates no substantive changes by the proposed amendment of Section 1. The suggested language changes and re-arrangement of sections are designed to achieve greater clarity and simplicity.

ARTICLE II

Section 1a

Present Constitution
Article II, Section 1a

Section 1a. The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors."

Commission Recommendation
Article XIV, Section 1

Section 1. The submission of a proposed amendment to this Constitution directly to the electors may be demanded by an initiative petition having printed across the top "Petition for an Amendment to the Constitution to be Submitted Directly to the Voters", signed by two hundred fifty thousand electors, certified as provided in Section 6 of this Article and filed with the secretary of state. The secretary shall submit the proposed amendment to the electors at the next succeeding general election, or at a special election on the date fixed by law for holding the primary election, whichever is earlier, occurring subsequent to one hundred twenty days after the filing of the petition. If the amendment is adopted by a majority of the electors voting on it, it becomes a part of the Constitution and shall be published by the secretary of state.

Commission Recommendation

The Commission recommends the repeal of Section 1a of Article II and the enactment of a new Section 1 in Article XIV with parallel provisions as follows:

Section 1. THE SUBMISSION OF A PROPOSED AMENDMENT TO THIS CONSTITUTION DIRECTLY TO THE ELECTORS MAY BE DEMANDED BY AN INITIATIVE PETITION HAVING PRINTED ACROSS THE TOP "PETITION FOR AN AMENDMENT TO THE CONSTITUTION TO BE SUBMITTED DIRECTLY TO THE VOTERS", SIGNED BY TWO HUNDRED FIFTY THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE AND FILED WITH THE SECRETARY OF STATE. THE SECRETARY SHALL SUBMIT THE PROPOSED AMENDMENT TO THE ELECTORS AT THE NEXT SUCCEEDING GENERAL ELECTION, OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. IF THE AMENDMENT IS ADOPTED BY A MAJORITY OF THE ELECTORS VOTING ON IT, IT BECOMES A PART OF THE CONSTITUTION AND SHALL BE PUBLISHED BY THE SECRETARY OF STATE.

History and Background of Section

Section 1a was added to the Constitution in 1912 and has not been amended. It sets forth the basic provisions regarding the constitutional amendment initiative. The procedure for submitting a petition to place an initiated amendment on the ballot is described, and the submission is direct, that is, there is no requirement for first submitting the matter to the General Assembly. The number of signatures required to qualify a petition is 10% of the electors. The proposal is submitted at the 'regular or general' election 'in any year', subsequent to 90 days after the petition is filed. Specific details concerning the petition and signatures are presently in Section 1g of Article II, including the fact that "electors" means the number voting for governor at the preceding gubernatorial election.

Proponents of the initiative and referendum at the 1912 Constitutional Convention argued that a fixed number of signatures, rather than a percentage of electors, should be required for submission of questions to the people. In 1939, a proposed constitutional amendment was submitted to the electors which would have, among other things, provided for the substitution of a fixed number of signatures—100,000 for submission of an initiated constitutional amendment for the 10% of electors requirement. The amendment contained a provision whereby proposed laws would be submitted directly to the voters without first being submitted to the Legislature, and also required the signatures of 50,000 electors for an initiative petition proposing a law. The measure was defeated.

The "90 day" provision has been the subject of several cases and Attorney General opinions. The election must be subsequent to 90 days after filing, counting the day of filing as the first day **(Thrailkill v. Smith,** 106 Ohio St. 1 (1922)). The determination of the validity of signatures and sufficiency of the petition must be made within the 90-day period. If there are not enough valid signatures, the sponsors are given an additional 10 days to obtain them, which fall within the 90-day period.

An undetermined matter in the present section is the meaning of a "regular or general" election. A general election occurs on the first Tuesday after the first Monday in November in every year, but it is not clear whether "regular" was intended merely as another term for "general" or whether it was intended to mean any election occurring regularly, such as a primary election. Section 1 of Article XIV authorizes the General Assembly to submit legislatively proposed constitutional amendments at a "general or a special" election—the term "regular" is not used.

The phrase "in any year" has been interpreted by the Attorney General to mean the year in which the petition is filed (1949 OAG 753). This ruling does not raise the problems for constitutional amendment that it does for initiated laws or the referendum, as will be discussed in greater detail in later commentary.

Effect of Change

All sections of Article XIV were repealed in 1953. The Commission recommends the enactment of the revised initiative and referendum sections as Article XIV. Section 1a of Article II will be re-enacted, as rewritten, as Section 1 of Article XIV.

The right of the people to place proposed constitutional amendments on the ballot is retained in the Commission recommendation. The signature requirement would be changed from 10% of those who voted for governor at the last gubernatorial election, to a fixed number of 250,000 signatures. Amendments could be submitted at either a general or primary election occurring subsequent to 120 days after the filing of the petition, whichever is earlier. The language has been revised to make it clearer and more understandable. The voter seeking information on how to submit an initiated constitutional amendment will be able to determine more easily what is required of him. The elimination of the "full text" requirement and the requirement of verification is discussed following Section 1g (proposed new Section 6).

Rationale for Change

Early in its discussion of the initiative and referendum, the committee concluded that if the provisions warranted substantive changes, they should be entirely rewritten in order to simplify and clarify the language. This section and the following sections have been reworded and rearranged. The Commission believes that the proposed language and organization will make it easier for persons wishing to use the initiative and referendum to find out precisely what they must do solely from the Constitution. The proposed revision of Section 1a and the sections following will also simplify the administrative process and lessen the necessity for Attorney General or court rulings on various procedural aspects. The Commission recommendation attempts to place all provisions applicable to a specific process: i.e., constitutional amendment; statutory initiative; referendum; each in a separate section, with rules of construction applicable to all of the processes in a separate section, and all procedural provisions applicable to all three procedures in a separate section.

One of the changes in this section, common to all three processes, is the expression of the number of signatures required on a petition in terms of a fixed number rather than a percentage. In this instance, the proposed section replaces the requirement that 10% of those voting for governor at the last gubernatorial election sign a petition proposing a constitutional amendment would be replaced with a requirement of 250,000 signatures. The signature requirement was one of the most controversial topics in the 1912 initiative and referendum debates. The discussion of the problem by the Elections and Suffrage Committee, and later, by the full Commission, revealed that the matter is still controversial.

Those who favored a percentage, whether of the previous vote for governor or some other base, argued that the number of signatures is thereby related to growth or decline in population (or in the number of voters—depending on the base used).

Those who favored a fixed number contended that there is no need to tie the number of signatures to the size of the electorate or population, because the only purpose of the requirement is to insure that a substantial number of voters want an issue placed before the General Assembly or

the electorate before officials go to the trouble to do so. Ultimately, it is all the voters who decide the substantive issue in question. Under the present arrangement the number of signatures varies not according to the size of the electorate, but accidentally according to the controversiality of the candidates or issues in a previous election. A fixed number avoids this arbitrary fluctuation and also has the advantage of permitting those wanting to use the process to ascertain how many signatures are needed by simply reading the provision.

The Commission, after lengthy debate, determined to recommend a fixed number of signatures. Most writers on the initiative and referendum agree that it should be more difficult to place a constitutional amendment on the ballot than to place an initiated or referred law before the voters, and this concept is reflected in the fact that nearly all states require more signatures for a constitutional amendment petition than for one proposing or referring a statute. The present Ohio requirement of 10% of the previous vote for governor, using the vote cast at the 1970 gubernatorial election, converts to 318,413 as the actual number of signatures required. The number of signatures required on an average of the last thirteen gubernatorial elections would be 297,000 signatures. The Commission selected a signature requirement of 250,000 signatures to qualify a petition proposing a constitutional amendment as a reasonable number, and the requirement for petition signatures for initiated laws and referred laws have roughly the same relationship to the constitutional amendment requirement as do the present percentage requirements.

Other changes in this section which are common to all the processes are that petitions must be certified rather than verified (explained in proposed new Section 6) and that initiated and referred measures may be placed on the ballot at a primary election as well as at a general election. Presently, such matters may be placed only on the general election ballot "in any year", interpreted to mean the year in which the petition is filed. Because legislative sessions are longer today than in 1912 and because the Commission is recommending that the length of time before the election for filing be increased, it would be impossible, under certain circumstances, ever to reach the general election ballot with a referendum or supplementary initiated statute petition. Although these time pressures are not applicable to initiated constitutional amendments, which do not have to be presented first to the General Assembly, the Commission considered that the procedures should be kept consistent; it also saw no reason why initiated constitutional issues should not go on the ballot at the primary election, especially since legislatively proposed constitutional amendments may be placed on the primary election ballot. The Commission also recommends the elimination of the language "in any year". The Commission recommends that the matter be placed on the ballot at the next general or primary election occurring subsequent to 120 days after filing, without regard to whether the election occurs in the following year.

The time for filing petitions for constitutional amendments is presently 90 days before the election. The Commission recommends that the time be extended to 120 days, consistent with the newly adopted provisions of Section 1 of Article XVI regarding legislatively proposed constitutional amendments. The additional time will provide a greater opportunity for proper challenges, absentee voting, and preparation of ballot language and arguments.

The elimination of the requirement for the "full text" of the proposal to appear in the petition is explained in proposed new Section 6.

Intent of the Commission

The rewording and rearrangement of the initiative and referendum provisions in the Commission's opinion, clarifies the procedures for the

person wishing to use the processes. The changes recommended in this section are not intended to make substantive changes in the power to place initiated constitutional amendments directly on the ballot. The Commission believes that the change in signature requirements, deadlines and petition requirements will remove unnecessary procedural barriers. The Commission believes, however, that the constitutional initiative process should and does remain sufficiently difficult to prevent the capricious submission of matters to the voters.

ARTICLE II

Section 1b

Present Constitution
Article II, Section 1b

Section 1b. When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection at the next regular or general election, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the general assembly, and such amended law passed by the general assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in 1a and 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting proposed laws or conflicting proposed amendments to the constitution shall be approved at the same election by a majority of the total number of votes cast for and against the same, the one receiving the highest number of affirmative votes shall be the law, or in the case of amendments to the constitution shall be the amendment to the constitution. No law proposed by initiative petition and approved by the electors shall be subject to the vote of the governor.

Commission Recommendation
Article XIV, Section 2

Section 2. (A) The submission of a proposed law to the general assembly may be demanded by an initiative petition having printed across the top "Petition for a Law to be Submitted to the General Assembly", signed by one hundred thousand electors, certified as provided in Section 6 of this Article, and filed with the secretary of state. The secretary shall transmit the full text of the proposed law forthwith to the general assembly.

A law proposed by initiative petition shall not be proposed nor enacted by the general assembly as an emergency measure. If a law proposed by initiative petition becomes law, either as proposed or in amended form, it shall be treated as in law originating in the general assembly, except that, if the proposed law is amended by the general assembly and becomes law, and if a supplementary petition is filed as provided in this section, the law enacted by the general assembly shall take effect only if the law proposed by a supplementary petition is rejected by a majority of the electors voting thereon.

If, within six months from the time the proposal is received by the general assembly, the proposed law has not become law as proposed, its submission to electors may be demanded by one or more supplementary petitions having printed across the top "Supplementary Petition for a Law First Considered by the General Assembly", signed by seventy-five thousand electors, certified as provided in Section 6 of this Article, and filed with the secretary of state within ninety days after the expiration of the six months except that if the proposed law has become law in amended form, the supplementary petition shall be filed within ninety days after the amended law has been filed with the secretary of state. A supplementary petition may demand submission of the proposed law either as first proposed or with one or more of the amendments which have been incorporated therein by either or both houses of the general assembly.

(B) Upon the filing of a supplementary petition under division (A) of this section the secretary of state shall submit the law proposed therein to the electors at the next succeeding general election, or at a special election on the date fixed by law for holding the primary election, whichever is earlier, occurring subsequent to one hundred twenty days after the filing of the petition. If such law is approved by a majority of the electors voting thereon, it takes effect thirty days after the election.

(C) No law proposed by initiative or supplementary petition shall contain more than one subject, which shall be clearly expressed in its title. No such law approved by the voters is subject to veto by the governor. The limitations expressed in this constitution on the power of the general assembly to enact laws shall be deemed limitations on the power of the people to enact laws.

Commission Recommendation

The Commission recommends the repeal of Section 1b of Article II and the enactment of new Section 2 in Article XIV as follows:

Article XIV

SECTION 2. (A) THE SUBMISSION OF A PROPOSED LAW TO THE GENERAL ASSEMBLY MAY BE DEMANDED BY AN INITIATIVE PETITION HAVING PRINTED ACROSS THE TOP "PETITION FOR A LAW TO BE SUBMITTED TO THE GENERAL ASSEMBLY", SIGNED BY ONE HUNDRED THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE. THE SECRETARY SHALL TRANSMIT THE FULL TEXT OF THE PROPOSED LAW FORTHWITH TO THE GENERAL ASSEMBLY.

A LAW PROPOSED BY INITIATIVE PETITION SHALL NOT BE PROPOSED NOR ENACTED BY THE GENERAL ASSEMBLY AS AN EMERGENCY MEASURE. IF A LAW PROPOSED BY INITIATIVE PETITION BECOMES LAW, EITHER AS PROPOSED OR IN AMENDED FORM, IT SHALL BE TREATED AS A LAW ORIGINATING IN THE GENERAL ASSEMBLY, EXCEPT THAT, IF THE PROPOSED LAW IS AMENDED BY THE GENERAL ASSEMBLY AND BECOMES LAW, AND IF A SUPPLEMENTARY PETITION IS FILED AS PROVIDED IN THIS SECTION, THE LAW ENACTED BY THE GENERAL ASSEMBLY SHALL TAKE EFFECT ONLY IF THE LAW PROPOSED BY A SUPPLEMENTARY PETITION IS REJECTED BY A MAJORITY OF THE ELECTORS VOTING THEREON.

IF, WITHIN SIX MONTHS FROM THE TIME THE PROPOSAL IS RECEIVED BY THE GENERAL ASSEMBLY, THE PROPOSED LAW HAS NOT BECOME LAW AS PROPOSED, ITS SUBMISSION TO ELECTORS MAY BE DEMANDED BY ONE OR MORE SUPPLEMENTARY PETITIONS HAVING PRINTED ACROSS THE TOP "SUPPLEMENTARY PETITION FOR A LAW FIRST CONSIDERED BY THE GENERAL ASSEMBLY", SIGNED BY SEVENTY-FIVE THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE WITHIN NINETY DAYS AFTER THE EXPIRATION OF THE SIX MONTHS EXCEPT THAT IF THE PROPOSED LAW HAS BECOME LAW IN AMENDED FORM, THE SUPPLEMENTARY PETITION SHALL BE FILED WITHIN 90 DAYS AFTER THE AMENDED LAW HAS BEEN FILED WITH THE SECRETARY OF STATE. A SUPPLEMENTARY PETITION MAY DEMAND SUBMISSION OF THE PROPOSED LAW EITHER AS FIRST PROPOSED OR WITH ANY ONE OR MORE OF THE AMENDMENTS WHICH HAVE BEEN INCORPORATED THEREIN BY EITHER OR BOTH HOUSES OF THE GENERAL ASSEMBLY.

(B) UPON THE FILING OF A SUPPLEMENTARY PETITION UNDER DIVISION (A) OF THIS SECTION THE SECRETARY OF STATE SHALL SUBMIT THE LAW PROPOSED THEREIN TO THE ELECTORS AT THE NEXT SUCCEEDING GENERAL ELECTION, OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. IF SUCH LAW IS APPROVED BY A MAJORITY OF THE ELECTORS VOTING THEREON, IT TAKES EFFECT THIRTY DAYS AFTER THE ELECTION.

(C) NO LAW PROPOSED BY INITIATIVE OR SUPPLEMENTARY PETITION SHALL CONTAIN MORE THAN ONE SUBJECT, WHICH SHALL BE CLEARLY EXPRESSED IN ITS TITLE. NO SUCH

LAW APPROVED BY THE VOTERS IS SUBJECT TO VETO BY THE GOVERNOR. THE LIMITATIONS EXPRESSED IN THIS CONSTITUTION ON THE POWER OF THE GENERAL ASSEMBLY TO ENACT LAWS SHALL BE DEEMED LIMITATIONS ON THE POWER OF THE PEOPLE TO ENACT LAWS.

History and Background of Section

Section 1b of Article II was added to the Ohio Constitution in 1912 and has not been amended. The section contains the procedure for initiating a law. The method prescribed is indirect: a proposed law must first be submitted to the General Assembly and, failing enactment, additional signatures are required to place it on the ballot. A proposed constitutional amendment in 1939 would have, among other things, replaced the indirect statutory initiative with the direct statutory initiative, thus requiring no intermediate consideration of a proposed law by the legislature. The 1939 proposition, which also would have changed the percentage requirements, was defeated.

Section 1b sets forth in detail the procedural rules for the indirect statutory initiative. It also contains some provisions applicable to both initiated laws and initiated constitutional amendments, as well as an effective date provision for initiated constitutional amendments.

The steps prescribed by the present language are as follows: Three per cent of the electors who voted for governor in the last gubernatorial election must file a petition proposing a law with the Secretary of State. The petition must contain the full text of the proposal. The Secretary of State is required to submit the proposal to the next "session" of the General Assembly commencing at least 10 days after filing. If the General Assembly passes the law as submitted, it is subject to the referendum. Since the initiators are presumably satisfied by such legislative action, no further right is granted for them to take the matter to the voters except through the regular referendum process. If the General Assembly passes the law in amended form, it is subject to the referendum or a supplementary petition demanding its submission to the voters, either in its original form or with any or all of the amendments adopted by the legislature. If the General Assembly fails to pass the bill or takes no action within four months from the time it is received, supplementary petitions may demand the submission of the proposal to the voters. A supplementary petition requires the signatures of 3% of the electors in addition to those signing the original initiative petition. The supplementary petition must contain the version of the law to be submitted to the electors. Supplementary petitions must be filed with the secretary of state within 90 days after the date the law is filed with the secretary of state, if it has been amended and enacted, or within 90 days after the expiration of six months if it has not become law. If the initiated law has been passed by the General Assembly in amended form and it is subsequently, by supplementary petition, submitted to the people for vote, the General Assembly version does not take effect until the people have voted on the proposal, and then, if the voters adopt the initiated version, the initiated version takes effect in lieu of the General Assembly version. The Constitution requires ballots to be printed so as to permit an affirmative or negative vote on each measure submitted to the electors. The effective date of a law or constitutional amendment submitted by the initiative to the voters is 30 days after the election if approved by a majority of the electors voting thereon. In the event of conflicting proposed laws and conflicting proposed constitutional amendments being submitted at the same time and both approved by a majority of those voting thereon, the version adopted is the one which received the highest number of affirmative votes. Laws proposed by initiative and approved by the people are not subject to the gubernatorial veto.

Effect of Change

The Commission recommends the repeal of the present language for initiating a law in Section 1b of Article II, and re-enactment of a parallel provision as Section 2 in Article XIV, reworded to make it easier to determine what is required for initiating a law in Ohio. Many of the changes proposed are concerned with timing and deadlines for the various steps involved in the initiative process. Testimony and proposals made by the Secretary of State described the difficulties presented for initiators under the present constitutional language.

The changes the Commission is proposing with respect to the indirect statutory initiative include replacing the present signature requirement of 3% for the original petition to the General Assembly and 3% for the supplementary petition to fixed numbers, 100,000 and 75,000 respectively. Other changes require the Secretary of State to transmit a petition to the General Assembly whenever it is filed; preclude the enactment of an initiated law as an emergency measure; require petitioners to wait six months after a petition has been received by the General Assembly; if in that time the law has not become law as proposed, the supplementary petition procedure may begin. Several timing changes with respect to supplementary petitions have been proposed, and a restriction has been added limiting an initiated law by the "one subject" rule, which presently regulates a law enacted by the legislature.

Rationale for Change

The Elections and Suffrage Committee, in its report to the Commission on the initiative and referendum, recommended that a direct statutory initiative procedure be added to the Constitution, permitting an alternative whereby proposed laws could also be placed directly on the ballot without first being submitted to the General Assembly. Research revealed that the number of laws which have reached the ballot since 1912 is much smaller than the interest shown in initiating laws. The section, as presently written, generates several timing problems concerning supplementary petitions, both for the Secretary of State and for initiators.

The Committee rejected a recommendation to replace the indirect initiative by a direct method, similar to that employed for constitutional amendments because of belief that there are good reasons for presenting a proposed law to the General Assembly first before it may go to the electorate. Being subjected to the legislative hearing process, which may bring to light aspects of the legislation of which the sponsors themselves may have been unaware, was deemed desirable. In addition, the form of the law may be improved by exposure to the legislative procedure, and the sponsors may be able to go to the voters with a better bill than originally proposed.

The committee, however, favored adding to the section a procedure for a direct statutory initiative, as an alternative method, requiring as many signatures as the two parts of the indirect initiative added together, but fewer signatures than a constitutional amendment. It considered it pointless to require petitions to go through the lengthy indirect process where the proposal has little chance of passage by the General Assembly. It also considered that the unavailability of direct initiative for laws drives such petitioners to use the direct initiative for constitutional amendments instead. This can result in the placement of provisions in the constitution which are more appropriately statutory material. The recommendation to add the direct initiative process was not approved by the Commission, which felt that only the indirect initiative should be provided.

The change in the number of signatures required for the statutory initiative petitions, presently 3% for original and 3% for supplementary

petitions accords with the Commission's decision to express all such requirements in terms of a fixed number (see discussion in Section 1, Article XIV). An average of 13 gubernatorial elections, covering the years from 1940-1970, was used as a guide for fixing the numbers. The proposed number requirement for the original petition, 100,000, is slightly higher than the 13 election average of 89,100, and the supplementary petition requirement is slightly lower, 75,000, as compared with the average of 89,100. Although a petition proposing a law may be submitted to the General Assembly at any time (and the proposal requires the Secretary of State to transmit the petition forthwith), supplementary petitions are governed by a 90-day deadline, making the second step signature requirement a critical factor. The Commission believes the proposed numbers are high enough to discourage the submission of frivolous matters, yet low enough to enable groups who are able to gain significant public support to avail themselves of the statutory initiative process.

Other changes made in the indirect initiative provisions include the following:

1. Requiring the secretary of state to transmit a petition to the General Assembly whenever it is filed. Presently, a petition filed at least 10 days before the beginning of the session is transmitted when the session begins; if filed later, it must presumably wait until the next session. The Commission believes the term "session" is somewhat ambiguous and that the petition should be sent to the General Assembly as soon as possible. The General Assembly will nearly always be in session sometime during the six months after a petition is filed, or the legislative body can be called into special session.

2. Prohibiting an initiated law from being enacted as an emergency measure. Under the present section, an initiated law, if passed by the General Assembly, is specifically made subject to the referendum. Two questions related to the present provision yet unanswered, raised by this requirement are whether the General Assembly, by attaching an emergency clause as an amendment to an initiated law, could effectively prohibit a referendum, and whether laws which are not otherwise subject to the referendum (tax levies, appropriations for current expenses), when initiated and enacted by the General Assembly, are subject to the referendum. The Commission seeks to solve both problems by specifically prohibiting an initiated law from being initiated or enacted as an emergency measure. The proposed language states that if an initiated law is enacted by the General Assembly either as proposed or as amended, it shall be treated as any other law enacted by the General Assembly, subject to gubernatorial action and subject to the referendum if it would be subject to the referendum as a legislatively-initiated law.

3. Clarifying the time when the supplementary petition procedures may begin. The present section makes "rejection" of the proposed law by the General Assembly and "no action" grounds for subsequent action by the petitioners. The Commission believes that these concepts require interpretation, and it proposes to remedy this by requiring the petitioners to wait six months after the petition has been received by the General Assembly and then, if the law has not become law as proposed, whoever wishes to take the matter to the voters may begin the supplementary petition procedure. A bill becomes law when it has been enacted by the General Assembly, presented to the Governor, signed by him and filed with the secretary of state, or permitted to become law without his signature, or, if vetoed, passed by the General Assembly over a veto, and filed with the secretary of state. Petitioners would not be required to wait six months if an amended law is passed by the General Assembly and becomes law before the expiration of the six months.

Division (B) of the new section contains provisions about submitting

a law to the voters and the effective date of a law approved by the voters. These are the same as the present provisions, except for the addition of the primary election.

Division (C) enacts general rules concerning all initiated legislation. It restricts such laws to "one subject", a new provision added by the Commission which believed that this rule, which presently applies to laws enacted by the General Assembly, would be a desirable addition to the rules of drafting initiated laws. The remainder is not substantively changed from the present provisions.

Certain provisions in the present section 1b but not in Section 2 have been transferred elsewhere, since they are applicable to other matters. Provisions for resolving conflicts between two or more laws appearing on the ballot at the same time have been placed in a separate section. A provision postponing the effective date of an initiated constitutional amendment to 30 days after the election at which it has been approved has been eliminated. The Commission believed that since a constitutional amendment proposed by the General Assembly takes effect immediately, there is no reason why an amendment initiated by the people should not also take effect immediately.

Intent of the Commission

Most of the changes in the language providing for the indirect statutory initiative are believed to make it easier to understand. The Commission does not proposed any substantive change to increase or diminish the power of the people to propose laws. Many of the modifications proposed have to do with timing and procedural changes regarding submission of the proposed law. These changes should facilitate the operation of the indirect initiative process.

ARTICLE II

Section 1c

Present Constitution
Article II, Section 1c

Section 1c. The second aforestated power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect.

Commission Recommendation
Article XIV, Section 3

Section 3. No law passed by the general assembly shall go into effect until ninety days after it is filed with the secretary of state, except as otherwise provided in this section, or Section 2, or Section 4 of this Article. During such ninety-day period, the submission to the electors of such law, section of such law, or item in any such law appropriating money may be demanded by a referendum petition having printed across the top "Referendum Petition for Voter Consideration of Law Enacted by the General Assembly", signed by one hundred thousand electors, certified as provided in Section 6 of this Article. The secretary shall submit such law, section, or item to the electors at the next succeeding general election or at a special election on the date fixed by law for holding the primary election, whichever is earlier, occurring subsequent to one hundred twenty days after the filing of the petition. No such law, section, or item shall go into effect unless approved by a majority of the electors voting on it. If so approved, it shall go into effect thirty days after the election. The filing of a referendum petition proposing the submission of a section or item does not thereby prevent the remainder of the law from going into effect.

Commission Recommendation

The Commission recommends the repeal of Section 1c of Article II and the enactment of a new Section 3 in Article XIV with parallel provisions as follows:

Article XIV

SECTION 3. NO LAW PASSED BY THE GENERAL ASSEMBLY SHALL GO INTO EFFECT UNTIL NINETY DAYS AFTER IT IS FILED WITH THE SECRETARY OF STATE EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, OR SECTION 2, OR SECTION 4 OF THIS ARTICLE. DURING SUCH NINETY-DAY PERIOD, THE SUBMISSION TO THE ELECTORS OF SUCH LAW, SECTION OF SUCH LAW, OR ITEM IN ANY SUCH LAW APPROPRIATING MONEY MAY BE DEMANDED BY A REFERENDUM PETITION HAVING PRINTED ACROSS THE TOP "REFERENDUM PETITION FOR VOTER CONSIDERATION OF LAW ENACTED BY THE GENERAL ASSEMBLY", SIGNED BY ONE HUNDRED THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE. THE SECRETARY SHALL SUBMIT SUCH LAW, SECTION, OR ITEM TO THE ELECTORS AT THE NEXT SUCCEEDING GENERAL ELECTION OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. NO SUCH LAW, SECTION, OR ITEM SHALL GO INTO EFFECT UNLESS APPROVED BY A MAJORITY OF THE ELECTORS VOTING ON IT. IF SO APPROVED, IT SHALL GO INTO EFFECT THIRTY DAYS AFTER THE ELECTION. THE FILING OF A REFERENDUM PETITION PROPOSING THE SUBMISSION OF A SECTION OR ITEM DOES NOT THEREBY PREVENT THE REMAINDER OF THE LAW FROM GOING INTO EFFECT.

History of Section

Since adopted in 1912, Section 1c has not been amended. The section sets forth the details relating to the referendum, except as they are found in section 1d, section 1g, and the statutes. An important provision in Section 1c is the fixing of the effective date for all laws passed by the General Assembly (with exceptions found in section 1d) as 90 days after filing in the office of the Secretary of State by the Governor. In counting the 90 day effective date, the day of filing is excluded; the following day is day number one and the law takes effect on the 91st day. A referendum petition, signed by 6% of the voters, may be filed at any time within the 90 day period, challenging "any law, section of any law or any item in any law appropriating money" passed by the General Assembly, Section 1d, however, limits the laws subject to referendum.

A single referendum petition may not attack two or more separate and distinct laws (**Patton v. Myers,** 127 Ohio St. 169, 1933). A referendum petition may attack part of a law, and the section provides that the portion not referred will go into effect at the time it otherwise would take effect, but the portion referred will not take effect until the people have voted on it, and a majority have approved it; thus, situations can arise in which part of a law takes effect but cannot be enforced because another portion of the law is held in abeyance waiting popular vote. No sections of laws nor items in appropriation acts have ever been referred to popular vote in Ohio; only whole laws.

Effect of Change

The Commission recommendation proposes no change in the basic provisions for the referendum. Because it did not consider desirable any extension of the 90-day period for the effective date of laws passed by

the General Assembly, it recommended a reduction in the number of signatures required for a referendum petition. The other major change in the section is the addition of a 30-day effective date for a law placed on the ballot by referendum. This was done to make the provisions parallel the initiative provisions.

Rationale for Change

It appeared from testimony before the Commission that the number of signatures presently required for a referendum is nearly impossible to obtain within the 90 days, and therefore the referendum provisions as presently written are rarely invoked. Attempts have been started, but none has succeeded in recent years. The Commission realizes that the referendum process is not viable under the present rules, and that some change is needed in order to allow people to use it. It is not desirable to change the 90 day requirement for the effective date of laws; therefore, the Commission recommends that the number of signatures required on a referendum petition be reduced. Presently, the requirement is 6% of the number who voted for Governor, which is the same as the total present requirement for the indirect initiative. The Commission's recommendation for the indirect initiative original petition is 100,000, and the Commission proposes the same for the referendum. Other procedural changes, which are dealt with in Section 6, will also simplify the process of getting a referendum petition filed and on the ballot within the allotted time.

The only other major change made in the section is the addition of a 30-day effective date to a law placed on the ballot by the referendum, making the provision parallel to the initiative provisions.

Intent of the Commission

The Commission recommendation with respect to the referendum process proposes a change (reduction in number of signatures required) which will make the referendum process available to the voters to a greater extent than it is under the present constitutional requirements which have greatly limited its use.

ARTICLE II

Section 1d

Present Constitution
Article II, Section 1d

Section 1d. Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum.

Commission Recommendation
Article XIV, Section 4

Section 4. Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health, or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each house of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote upon a separate roll call thereon. The laws included in this section are not subject to the referendum.

Commission Recommendation

The Commission recommends repeal of Section 1f of Article II and and the enactment of new Section 4 in Article XIV with parallel provisions as follows:

Article XIV

SECTION 4. LAWS PROVIDING FOR TAX LEVIES, APPROP-

RIATIONS FOR THE CURRENT EXPENSES OF THE STATE GOVERNMENT AND STATE INSTITUTIONS, AND EMERGENCY LAWS NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC PEACE, HEALTH, OR SAFETY, SHALL GO INTO IMMEDIATE EFFECT. SUCH EMERGENCY LAWS UPON A YEA AND NAY VOTE MUST RECEIVE THE VOTE OF TWO-THIRDS OF ALL THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, AND THE REASONS FOR SUCH NECESSITY SHALL BE SET FORTH IN ONE SECTION OF THE LAW, WHICH SECTION SHALL BE PASSED ONLY UPON A YEA AND NAY VOTE, UPON A SEPARATE ROLL CALL THEREON. THE LAWS INCLUDED IN THIS SECTION ARE NOT SUBJECT TO THE REFERENDUM.

History and Background of Section

This section was part of the initiative and referendum provisions adopted in 1912, and has not been amended. The section sets forth the types of laws which are not subject to the referendum and which go into effect as soon as they become law.

Comment

The Commission studied the history of the use of the emergency provision in Ohio to determine whether there was any need for change. Once the General Assembly has properly enacted a law as an emergency, the courts in Ohio will not inquire into the facts of the emergency. It is therefore possible for the General Assembly to place any law beyond the reach of the referendum, providing 2/3 of the members agree to do so. The Commission considered whether any change should be made in this situation and concluded that no change should be made, there being no indication of abuse of the emergency power. A law passed as an emergency can be repealed or altered through the initiative process, so the people are not without remedy if the General Assembly does abuse the emergency power.

The Commission discussed whether any laws should be permitted which are not subject to the referendum and concluded that it is appropriate that laws for tax levies and current governmental expenses should continue to be enacted by the General Assembly without being subjected to the referendum. There is no prohibition against using the initiative to propose or repeal a tax levy, or to propose or repeal an appropriation law.

Two language changes are proposed by the Commission: "included" is substituted for "mentioned" in the last sentence, and "house" replaces "branch" in the preceding sentence to refer to the Senate and House of Representatives. No other changes are proposed by the Commission.

ARTICLE II

Section 1e

Present Constitution
Article II, Section 1e

Section 1e. The powers defined herein as the "initiative" and "referendum" shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

Commission Recommendation
Article XIV, Section 5

Section 5. If conflicting amendments to the constitution are approved at the same election by a majority of the electors voting thereon, the one receiving the highest number of affirmative votes is the amendment to the constitution.

If conflicting matters of law are approved at the same election by a majority of the electors voting thereon, the one receiving the highest number of affirmative votes is the law.

Commission Recommendation

The Commission recommends the repeal of Section 1e of Article II, and the enactment of Section 5 in Article XIV as follows:

Article XIV

SECTION 5. IF CONFLICTING AMENDMENTS TO THE CONSTITUTION ARE APPROVED AT THE SAME ELECTION BY A MAJORITY OF THE ELECTORS VOTING THEREON, THE ONE RECEIVING THE HIGHEST NUMBER OF AFFIRMATIVE VOTES IS THE AMENDMENT TO THE CONSTITUTION.

IF CONFLICTING MATTERS OF LAW ARE APPROVED AT THE SAME ELECTION BY A MAJORITY OF THE ELECTORS VOTING THEREON, THE ONE RECEIVING THE HIGHEST NUMBER OF AFFIRMATIVE VOTES IS THE LAW.

Repeal of Section 1e of Article II

Proponents of the initiative and referendum at the 1912 Constitutional Convention included Section 1e as one of the compromises necessary to obtain approval of the provisions at the Convention. Fears were expressed that the initiative would be used to classify property or to enact a single tax on land based only on the land value. Proponents of the initiative and referendum noted that the section only prohibits the use of the initiative to pass laws classifying property or levying a tax on land at a higher rate or by different rule than applicable to improvements on personal property. It does not prohibit the use of the initiative to amend the Constitution to accomplish these objectives.

The Commission recommends the repeal of the section for two reasons. One, the Constitution has since been amended to permit the classification of personal property for tax purposes. Two, as long as Section 2 of Article XII requires that land and improvements be assessed and taxed by uniform rule, the Commission does not believe it would be constitutionally possible for the General Assembly or popular initiative to enact a law taxing land by a different rule than the improvements.

New Section 5

The Commission recommends that the rules about conflicting matters on the ballot be placed in one section of the initiative and referendum article. The new Section 5 combines the rules for conflicting laws and conflicting amendments in one section, and the new section retains the rule of construction presently in use, that the one which will prevail, if more than one receives a majority of the vote, is the one which receives the greatest number of votes.

By placing the rule in a separate section, the Commission hopes to make it clear that it will apply in all situations regardless of the origin of the conflicting provisions—whether the conflicting constitutional amendments are proposed by the General Assembly or by the people, and whether the conflicting laws have been initiated by the people or initiated by the legislature and referred to the people. "Matters of Law" is the expression since a referendum could apply to a section of a law or item in an appropriation act as well as to an entire law.

A question left unresolved under the present constitutional provision is, what is a conflict? The Commission believes that it is not possible to establish rules to enable this question to be resolved without court action. Even though the same section of law or of the constitution might be involved in two or more amendments or laws on the ballot at the same time, it does not necessarily follow that the provisions are conflicting. It might be possible to give effect to both or all. If there is a question of conflict, a court decision is necessary, and dealing with this matter in the Constitution is not deemed practical.

ARTICLE II

Section 1f

Present Constitution
Article II, Section 1f

Section 1f. The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Commission Recommendation
Article XIV, Section 7

Section 7. The initiative and referendum powers are reserved to the people of each municipality and each county on all matters which such municipality or county may now or hereafter be authorized to control by legislative action. Such powers shall be exercised in the manner now or hereafter provided by the charter of the municipality or county or, if not so provided, in the manner now or hereafter provided by law.

Commission Recommendation

The Commission recommends repeal of Section 1f of Article II and enactment of a new Section 7 in Article XIV with parallel provisions as follows:

Article XIV

SECTION 7. THE INITIATIVE AND REFERENDUM POWERS ARE RESERVED TO THE PEOPLE OF EACH MUNICIPALITY AND EACH COUNTY ON ALL MATTERS WHICH SUCH MUNICIPALITY OR COUNTY MAY NOW OR HEREAFTER BE AUTHORIZED TO CONTROL BY LEGISLATIVE ACTION. SUCH POWERS SHALL BE EXERCISED IN THE MANNER NOW OR HEREAFTER PROVIDED BY THE CHARTER OF THE MUNICIPALITY OR COUNTY OR, IF NOT SO PROVIDED, IN THE MANNER NOW OR HEREAFTER PROVIDED BY LAW.

History and Background of Section

Section 1f, adopted in 1912 and not amended, reserved to the people of municipalities (cities and villages) the power of the initiative and referendum with respect to matters which the municipality may control by legislative action. This constitutional provision was adopted at the same time that Article XVIII, dealing with the organization and powers of municipal corporations, was adopted. Municipalities have "home rule" powers under the Ohio Constitution, and the range of matters controlled by municipal legislative action is broad.

Initiative and referendum powers are provided for the people of municipal corporations in two ways: by statute, for cities and villages which do not have charters, or by charter. Cities and villages which do not have charters are bound by the statutes with respect to the procedures for initiative and referendum; city councils cannot, by ordinance, alter these provisions. On the other hand, charter cities and villages can write their own initiative and referendum provisions. The only restriction on charter cities and villages is that the questions on which initiative and referendum may be used by the people of a city or village must be a question which the municipality is authorized by law, including the constitutional home rule provisions, to control by legislative action.

Initiative and referendum powers are not required to be reserved for the people of counties, townships, or other political subdivisions, except for specific instances provided elesewhere by the Constitution. For example, the Constitution requires a county referendum on the adoption of an alternative form of county government or on changing county boundaries. Municipalities and townships may transfer powers to counties, but the people must be given initiative and referendum rights with respect to measures transferring powers or revoking such transfers. Initiative and referendum rights must also be reserved to the people of any county which has a charter, on all matters which the county may control by legislative action.

Effect of Change

The Commission recommendation extends the initiative and referendum power to the people of the counties as a further extension of the Commission's recommendation extending limited "home rule" powers to counties. This section, as proposed, states that the initiative and referendum power may be exercised as provided in a municipal or county charter, in order to clarify this question.

Rationale for Change

Language almost identical to that in Section If is found in Section 3 of Article X and gives the initiative and referendum rights to the people of a county which adopts a county charter. Since no county has adopted a county charter, this right has not been exercised. The General Assembly, however, in giving certain legislative powers to county commissioners (for example, the permissive tax law), has granted to the people of the counties similar referendum rights.

One of the recommendations of the Local Government Committee, already adopted by the Commission, would give counties limited "home rule" powers. It would, if adopted by the people, broaden the scope of the authority of the county commissioners to act legislatively. Therefore, it seemed appropriate to the Local Government Committee, to which this section was referred by the Elections and Suffrage Committee, that the initiative and referendum powers should also be broadened to cover legislative actions of the counties as well as those of municipalities.

Another change, one of clarification rather than substance, is to indicate that the initiative and referendum may be exercised as provided in a municipal or county charter. Most municipalities which have charters provide for the initiative and referendum in the charter; other municipalities are subject to the general law which provides for municipal initiative and referendum. If, however, the charter differs in any respect from the statute, it is always possible for a challenge to the charter procedures to be made. Although charter provisions have, thus far, been upheld, it seemed to the Commission better to clarify this point in the Constitution.

There is presently no statute providing, generally, for county initative and referendum procedures, and the Commission recognizes that such a statute will be necessary if this recommendation and the "county powers" recommendation, are adopted.

Intent of the Commission

The changes recommended in this section extend the power of initiative and referendum to the people of the counties, consistent with Commission recommendations for the extension of home rule to counties. Other changes which are not substantive in nature are made to provide greater clarity of meaning for the provision.

ARTICLE II

Section 1g

Present Constitution
Article II, Section 1g

Section 1g. Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer

Commission Recommendation
Article XIV, Section 6

Section 6. The style of all constitutional amendments submitted to the electors by petition shall be: "Be it Resolved by the People of the State of Ohio." The style of all laws submitted to the general assembly by initiative petition shall be "Be it Enacted by the General Assembly in Response to an Initiative Petition." The style of all laws submitted to the electors by supplementary petition shall be: "Be it Enacted by the People of the State of Ohio."

residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assmbly, if in session, and if not in session then by the governor. The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, shall be published once a week for five consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

Whoever seeks to file an initiative, supplementary, or referendum petition shall first file with the secretary of state and the Ohio ballot board a copy of the full text of the proposal to be submitted, together with the names, addresses, and written consents of not fewer than three nor more than five electors who have agreed to serve as members of a committee, with a designated chairman thereof, to represent the petitioners in all matters relating to the petition. The board shall, within fifteen days after it receives the text, prepare an identifying caption and a fair and truthful summary of the proposal and submit them to the secretary of state and to the chairman of the committee. The committee shall then prepare the petition which shall contain a true copy of the caption and the summary prepared by the board and shall file a copy of the petition with the secretary of state before solicitation of signatures to the petition. The petition may be circulated and filed in parts but each part shall be identical to the copy filed with the secretary of state. The petition need not contain the full text of the proposal, but if it does not, each solicitor of signatures to the petition shall carry a true copy of the full text while soliciting and the petition shall state, immediately following the summary: "The solicitor of your signature is required to have a true copy of the full text of the proposal summarized in this petition. Upon request, he must present it to you for examination."

Each signer of a petition must be an elector of the state and shall sign his own name indelibly on the part petition. The signer's address and the date of signing shall be placed on the petition after the name. Such address shall include the township and county for a resident outside a municipality and the street and number, if any for a resident of a municipality.

On each part petition shall appear the solicitor's certification, stating the number of the signers of such part petition, that each of the signatures was made on the stated date in the presence of the solicitor, and that at all times while soliciting signatures he carried and made available on request a true copy of the full text of the proposal: and stating that, to the best of his knowledge and belief, each signature is the genuine signature of the person whose name it purports to be and that such person is an elector residing at the stated address who had knowledge of the contents of the petition. No affidavit or other certification thereto shall be required. Every petition shall contain a statement to the effect that any falsification is subject to penalties as prescribed by law.

As soon as a certified petition containing a proposal to be submitted to the electors is filed with the secretary of state, the secretary shall transmit the proposal to the Ohio ballot board, which shall prescribe the ballot language and an explanation of the proposal in the same manner and subject to the same terms and conditions as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this Constitution. The ballot language shall be prescribed so as to permit an affirmative or negative vote upon each constitutional amendment, law, section, or item submitted.

The committee representing the petitioners shall prepare an argument supporting their position. The general assembly may provide by law for the preparation of opposing arguments. The explanation and the arguments shall not exceed three hundred words each. The proposal, the ballot language, the explanation, and the arguments shall be published once a week for three consecutive weeks preceding the election in at least one newspaper of general circulation in each county of the state, where a newspaper is published.

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

be held unconstitutional or void after the election because of an insufficiency of valid signatures or an invalid petition.

The initiative and referendum provisions of this constitution shall be self-executing, except as otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers reserved to the people.

Commission Recommendation

The Commission recommends repeal of Section 1g of Article II and enactment of a new Section 6 in Article XIV as follows:

Article XIV

SECTION 6. THE STYLE OF ALL CONSTITUTIONAL AMENDMENTS SUBMITTED TO THE ELECTORS BY PETITION SHALL BE: "BE IT RESOLVED BY THE PEOPLE OF THE STATE OF OHIO." THE STYLE OF ALL LAWS SUBMITTED TO THE GENERAL ASSEMBLY BY INITIATIVE PETITION SHALL BE "BE IT ENACTED BY THE GENERAL ASSEMBLY IN RESPONSE TO AN INITIATIVE PETITION." THE STYLE OF ALL LAWS SUBMITTED TO THE ELECTORS BY SUPPLEMENTARY PETITION SHALL BE: "BE IT ENACTED BY THE PEOPLE OF THE STATE OF OHIO."

WHOEVER SEEKS TO FILE AN INITIATIVE, SUPPLEMENTARY, OR REFERENDUM PETITION SHALL FIRST FILE WITH THE SECRETARY OF STATE AND THE OHIO BALLOT BOARD A COPY OF THE FULL TEXT OF THE PROPOSAL TO BE SUBMITTED, TOGETHER WITH THE NAMES, ADDRESSES, AND WRITTEN CONSENTS OF NOT FEWER THAN THREE NOR MORE THAN FIVE ELECTORS WHO HAVE AGREED TO SERVE AS MEMBERS OF A COMMITTEE, WITH A DESIGNATED CHAIRMAN THEREOF, TO REPRESENT THE PETITIONERS IN ALL MATTERS RELATING TO THE PETITION. THE BOARD SHALL, WITHIN FIFTEEN DAYS AFTER IT RECEIVES THE TEXT, PREPARE AN IDENTIFYING CAPTION AND A FAIR AND TRUTHFUL SUMMARY OF THE PROPOSAL AND SUBMIT THEM TO THE SECRETARY OF STATE AND TO THE CHAIRMAN OF THE COMMITTEE. THE COMMITTEE SHALL THEN PREPARE THE PETITION WHICH SHALL CONTAIN A TRUE COPY OF THE CAPTION AND THE SUMMARY PREPARED BY THE BOARD AND SHALL FILE A COPY OF THE PETITION WITH THE SECRETARY OF STATE BEFORE SOLICITATION OF SIGNATURES TO THE PETITION. THE PETITION MAY BE CIRCULATED AND FILED IN PARTS BUT EACH PART SHALL BE IDENTICAL TO THE COPY FILED WITH THE SECRETARY OF STATE. THE PETITION NEED NOT CONTAIN THE FULL TEXT OF THE PROPOSAL, BUT IF IT DOES NOT, EACH SOLICITOR OF SIGNATURES TO THE PETITION SHALL CARRY A TRUE COPY OF THE FULL TEXT WHILE SOLICITING AND THE PETITION SHALL STATE, IMMEDIATELY FOLLOWING THE SUMMARY: "THE SOLICITOR OF YOUR SIGNATURE IS REQUIRED TO HAVE A TRUE COPY OF THE FULL TEXT OF THE PROPOSAL SUMMARIZED IN THIS PETITION. UPON REQUEST, HE MUST PRESENT IT TO YOU FOR EXAMINATION."

EACH SIGNER OF A PETITION MUST BE AN ELECTOR OF THE STATE AND SHALL SIGN HIS OWN NAME INDELIBLY ON THE PART PETITION. THE SIGNER'S ADDRESS AND THE DATE OF SIGNING SHALL BE PLACED ON THE PETITION AFTER THE NAME. SUCH ADDRESS SHALL INCLUDE THE TOWNSHIP AND COUNTY FOR A RESIDENT OUTSIDE A MUNICIPALITY AND THE STREET AND NUMBER, IF ANY FOR A RESIDENT OF A MUNICIPALITY.

ON EACH PART PETITION SHALL APPEAR THE SOLICITOR'S CERTIFICATION, STATING THE NUMBER OF THE SIGNERS OF SUCH PART PETITION, THAT EACH OF THE SIGNATURES WAS MADE ON THE STATED DATE IN THE PRESENCE OF THE SOLICITOR, AND THAT AT ALL TIMES WHILE SOLICITING SIGNATURES HE CARRIED AND MADE AVAILABLE ON REQUEST A TRUE COPY OF THE FULL TEXT OF THE PROPOSAL: AND STATING THAT, TO THE BEST OF HIS KNOWLEDGE AND BELIEF, EACH SIGNATURES IS THE GENUINE SIGNATURE OF THE PERSON WHOSE NAME IT PURPORTS TO BE AND THAT SUCH PERSON IS AN ELECTOR RESIDING AT THE STATED ADDRESS WHO HAD KNOWLEDGE OF THE CONTENTS OF THE PETITION. NO AFFIDAVIT OR OTHER CERTIFICATION THERETO SHALL BE REQUIRED. EVERY PETITION SHALL CONTAIN A STATEMENT TO THE EFFECT THAT ANY FALSIFICATION IS SUBJECT TO PENALTIES AS PRESCRIBED BY LAW.

AS SOON AS A CERTIFIED PETITION CONTAINING A PROPOSAL TO BE SUBMITTED TO THE ELECTORS IS FILED WITH THE SECRETARY OF STATE, THE SECRETARY SHALL TRANSMIT THE PROPOSAL TO THE OHIO BALLOT BOARD, WHICH SHALL PRESCRIBE THE BALLOT LANGUAGE AND AN EXPLANATION OF THE PROPOSAL IN THE SAME MANNER AND SUBJECT TO THE SAME TERMS AND CONDITIONS AS APPLY TO ISSUES SUBMITTED BY THE GENERAL ASSEMBLY PURSUANT TO SECTION 1 OF ARTICLE XVI OF THIS CONSTITUTION. THE BALLOT LANGUAGE SHALL BE PRESCRIBED SO AS TO PERMIT AN AFFIRMATIVE OR NEGATIVE VOTE UPON EACH CONSTITUTIONAL AMENDMENT, LAW, SECTION, OR ITEM SUBMITTED.

THE COMMITTEE REPRESENTING THE PETITIONERS SHALL PREPARE AN ARGUMENT SUPPORTING THEIR POSITION. THE GENERAL ASSEMBLY MAY PROVIDE BY LAW FOR THE PREPARATION OF OPPOSING ARGUMENTS. THE EXPLANATION AND THE ARGUMENTS SHALL NOT EXCEED THREE HUNDRED WORDS EACH. THE PROPOSAL, THE BALLOT LANGUAGE, THE EXPLANATION, AND THE ARGUMENTS SHALL BE PUBLISHED ONCE A WEEK FOR THREE CONSECUTIVE WEEKS PRECEDING THE ELECTION IN AT LEAST ONE NEWSPAPER OF GENERAL CIRCULATION IN EACH COUNTY OF THE STATE, WHERE A NEWSPAPER IS PUBLISHED.

THE SECRETARY OF STATE SHALL CAUSE TO BE PLACED ON THE BALLOT THE CAPTION AND THE BALLOT LANGUAGE PREPARED BY THE BALLOT BOARD FOR EACH PROPOSAL CONTAINED IN A PROPERLY CERTIFIED PETITION FILED WITH NOT LESS THAN THE REQUIRED NUMBER OF SIGNATURES. THE PETITION AND THE SIGNATURES SHALL BE PRESUMED TO BE IN ALL RESPECTS SUFFICIENT, UNLESS NOT LATER THAN SEVENTY-FIVE DAYS BEFORE THE ELECTION, THE PETITION IS PROVED TO BE INVALID OR THE SIGNATURES INSUFFICIENT OR AN ACTION CHALLENGING THE VALIDITY OF THE PETITION OR ONE OR MORE SIGNATURES IS PENDING, WHICH ACTION WAS BEGUN NOT LATER THAN ONE HUNDRED DAYS BEFORE THE ELECTION. NO PROPOSAL VOTED ON BY THE ELECTORS SHALL BE HELD UNCONSTITUTIONAL OR VOID AFTER THE ELECTION BECAUSE OF AN INSUFFICIENCY OF VALID SIGNATURES OR AN INVALID PETITION.

THE INITIATIVE AND REFERENDUM PROVISIONS OF THIS CONSTITUTION SHALL BE SELF-EXECUTING, EXCEPT AS OTHERWISE PROVIDED. LAWS MAY BE PASSED TO FACILITATE THEIR

OPERATION, BUT IN NO WAY LIMITING OR RESTRICTING EITHER SUCH PROVISIONS OR THE POWERS RESERVED TO THE PEOPLE.

History and Background of Section

Section 1g was adopted in 1912 as proposed by the 1912 Constitutional Convention. The section was amended in 1971, effective January 1, 1972. The 1971 amendment deleted a requirement that the Secretary of State have the initiated or referred law, proposed law, or proposed constitutional amendment, together with the pro and con arguments, printed and mailed or otherwise distribute a copy of the printed information to each elector, as far as reasonably possible. It was replaced by the requirement that such information be published once a week for five consecutive weeks preceding the election in a newspaper of general circulation in each county. The 1971 amendment also deleted a requirement that the signer of a petition who is a resident of a municipality must place on the petition his ward and precinct.

Section 1g sets forth, in a long and involved paragraph, most of the procedural details for proceeding from idea to ballot. It was, of course, the intention of the framers of the initiative and referendum to write as many details as possible into the Constitution. The Convention was marked by sharp debate between those favoring the initiative and referendum and those opposed, but both groups agreed on one matter, and that was that the legislature was not to be left with the task of filling in the details by law. Those who favored the initiative and referendum feared that the people's rights would be eroded and the procedures would be made too difficult if left to the legislature. Those opposed to the initiative and referendum fought to get as many restrictions as possible into the Constitution; otherwise, they believed, the entire legislative process would became a shambles because of the great number of petitions filed.

The proponents of the initiative and referendum recognized that, in spite of their desires to make the provision self-executing, some details would, of necessity, have to be provided by law. Tacked on at the end of Section 1g are two significant sentences: "The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."

The General Assembly has enacted statutes, most of which are presently found in Chapter 3519. of the Revised Code, to facilitate the operation of the initiative and referendum. The first such enactment was in 1913, forbidding the payment of money or anything of value to the signer of an initiative or referendum petition. Opinions differ as to whether any of the requirements imposed by statute but not mentioned in the Constitution are unconstitutional limitations on the use of the initiative and referendum.

Effect of Change

The Commission proposes extensive rewording and rearrangement for Section 1g in new Section 6 setting forth in one section the initiative and referendum procedures that are common to all three processes—constitutional amendment initiative, statutory initiative, and referendum. Included in the several substantive changes that are proposed are several changes which remove some of the barriers to filing and circulating petitions, viewed as unnecessary by the Commission. The Commission proposal empowers the newly-created Ballot Board to prepare the summary which appears on each part petition. The recommendation proposes change in the time for filing and related deadlines, and removes the requirement that signatures must come from 44 counties. These and other changes discussed in greater detail below are aimed at giving potential initiators an opportunity to take their proposal to the ballot by meeting stringent, but not impossible, requirements.

1. Presently, provisions for the style clause of the laws and constitutional amendments submitted pursuant to initiative or supplementary petitions are found near the end of Section 1g, and the Commission recommends placing that material at the beginning of the new section since the style clause appears before the amendment or the statute being proposed. The present section does not provide a style clause for a law being presented to the General Assembly by initiative petition; the Commission is filing that gap.

2. The present constitutional provisions do not provide any steps preliminary to filing the petitions with the necessary signatures with the Secretary of State, but the statutes insert an important preliminary step. A petition with 100 signatures must be filed with the Attorney General and his approval given to a summary of the proposal before the petitioners may proceed. Although some have questioned whether or not this requirement is unconstitutional as a limitation or restriction on the people's powers contrary to the last sentence of present Section 1g, the Supreme Court of Ohio has not, so far, so held. The Commission felt that there is value in having an official or an official body approve or prepare the summary of the proposal, since the summary should be as accurate as possible. The summary is all that many people will read when their signatures to a petition are solicited. Rather than having the Attorney General perform this duty, with the potential for delay which presently exists, it seemed better to use the newly-authorized Ballot Board, which will be required to write the summary and an identifying caption within 15 days after the full text of the proposal is submitted to it.

3. Persons wishing to instigate an initiative or referendum petition would file the full text of the proposal with the Secretary of State and the Ballot Board, and the full text would no longer be required to appear on every part petition. The solicitor, however, would be required to carry the full text with him when he solicits signatures and any person wishing to do so could ask for it and read it. In the case of an involved and complicated statute, with many sections, requiring the full text to appear on each part petition greatly increases the costs of printing. The Commission felt that few people would take the time to read a long petition and that an accurate summary and caption would be sufficient as long as the full text is available for anyone wishing to read it.

4. The initial filing would consist of the full text of the proposal and the names and addresses of a committee of three to five persons, with their written consents, who will represent the petitioners in all matters relating to that petition. Presently, the Constitution authorizes the petition to name persons to prepare the arguments and explanations on behalf of the proposal, and the statutes have converted this group of persons into a committee to represent the petitioners in all matters. The Commission believed that the concept of the statutes was a good one and should be written into the Constitution so that any person wishing to start an initiative or referendum procedure can ascertain immediately what he must do to get started. Under the language proposed by the committee, no one could be named to an initiative or referendum committee without giving his written consent.

5. Once the summary and the identifying caption have been prepared, the committee would proceed to have the petitions printed, a copy of which must be filed with the Secretary of State before signatures are solicited. If the petition does not contain the full text of the proposal, a statement must be printed on it advising any person whose signature is solicited that the solicitor is required to have a true copy of the full text with him and present it to anyone wishing to read it.

6. Signatures must be affixed "indelibly" to petitions; the present provisions require that signatures be written in ink, but this has been

interpreted by the courts to include indelible pencil. A signature must be affixed by the person signing, but his address and the date of signing may be filled in by someone else. As is presently required, a signer must be an elector.

7. Presently, the solicitor is required to sign an affidavit to each part petition, and he must secure a notary public's seal and signature on each petition. Although the Commission believed that the requirement of the solicitor's statement on each petition with respect to the persons who signed the petition was a good one and should be continued, the Commission felt that requiring each petition to be notarized was not necessary. Therefore, the solicitor would be required, under the proposal, to certify to certain facts, as far as he is able to ascertain them, rather than sign an affidavit. The Commission has added to the material required to be in the solicitor's statement an affirmation that he carried a true copy of the full text of the proposal and made it available on request.

8. Under the present provisions, petitions, for the most part, must be filed 90 days before the election, and signatures can be proved invalid up to 40 days before the election. The petitioners are given 10 additional days for filing signatures if they do not have enough. The statutes provide procedures for the Secretary of State to transmit petitions to county boards of elections, and the Commission has not altered those provisions by any constitutional language. However, the Commission's proposal, which, as noted previously, would require filing 120 days before the election, requires that any proof of invalid signatures be submitted 75 days before the election and eliminates the 10 extra days for filing signatures. Approximately the same amount of time (45 instead of 50 days) is thus allowed for proof of invalid signatures. Elimination of the 10 extra days was done on the recommendation of the Secretary of State, and because the Commission felt that certain other provisions being changed will make it easier for persons to obtain signatures and that there is no need to give petitioners additional time which will bring the deadline too close to the election. If signatures are not proved invalid in the time given, that question and defects in the petition itself cannot be raised after the election to invalidate the issue if adopted. The Commission has altered the language of this rule by elimination of a sentence which seemed surplus, but intends that the rule remain the same.

9. Section 1g contains the rule for ascertaining the base upon which the percentage of required signatures is figured for all processes—the number of persons who voted for governor in the preceding gubernatorial election. As noted in the discussion in connection with the previous sections, the Commission recommendation is for a fixed number, but with the realization that there are valid reasons to keep the percentage concept. The Commission recommends that, if percentages are used, the base be the average of the "total number of votes cast for the office of governor at the last three preceding elections therefor," rather than simply the last election.

One other important change is recommended in computing whether the correct number of signatures has been affixed to a petition. Presently, the required number must include from "each of one-half of the counties of the state the signatures of not less than one-half of the designated percentage of the electors of such county." This means that, if a constitutional amendment is being sought requiring 10%, there must be filed petitions with at least 5% of the number voting for governor in the preceding gubernatorial election from at least 44 counties.

The Commission, and the Secretary of State, agreed that such a provision, which was inserted in 1912 as a part of the compromises made between those for and those against the initiative and referendum, is a protection to the residents of less populated counties which amounts to

giving signatures of electors from those counties greater value than signatures of electors from heavily-populated counties. Although no exact parallel has been found, the closest being holding invalid similar requirements for signatures to candidates' petitions, the Commission felt that the provision would very likely violate the one-man one-vote decision of the United States Supreme Court and should be eliminated.

10. The Commission has provided that the Ohio Ballot Board will prepare the ballot language and an explanation for issues to be placed on the ballot pursuant to initiative and referendum petitions. The time within which this would be done, and the possibility for court challenges, would be the same as under the new proposal for legislatively-adopted constitutional amendments, by reference to Section 1 of Article XVI. The Committee would prepare the arguments for the constitutional amendment or statute being submitted by initiative petition and against the law passed by the General Assembly being submitted by referendum petition, as the case may be, and the General Assembly could provide for the preparation of opposing arguments. Publication would also be parallel to the new provisions for legislatively-adopted constitutional amendments. In the case of initiative and referendum, however, there is no authority for such dissemination of information as is provided in the case of legislatively-adopted constitutional amendments.

Intent of the Commission

The Commission recommends the rearrangement and rewording of Section 1g of Article II as new Section 6 of Article XIV in order to make it easier for the potential petitioner to understand what is required. The substantive changes are designed to permit the initiator to go about the business of circulating petitions without undue complexities and delay. The Commission believes that the present section is confusing, because of its length, style, and excessive detail. Although the Commission has adopted a policy of removing as much statutory material as possible from the Constitution, Section 6 represents a departure from that policy. The Commission recognizes that provision for initiative and referendum procedures should not be left to legislative discretion, since the processes are basically a "safety valve" to circumvent the legislative process where a sufficient number of people believe this process has not responded to the wishes of a majority of the people.

APPENDIX A

Initiative Provisions by State

State	Constitutional Initiative	Statutory Initiative Direct	Indirect
Alaska		X	
Arizona	X	X	
Arkansas	X	X	
California	X	X	X
Colorado	X	X	
Florida	X		
Idaho		X (as provided by G.A.)	
Illinois	X		
Maine			X
Massachusetts	X		X
Michigan	X		X
Missouri	X	X	
Montana		X	
Nebraska	X	X	
Nevada	X		X
New Mexico		(*)	
North Dakota	X	X	
Ohio	X		X
Oklahoma	X	X	
Oregon	X	X	
South Dakota		(**)	X
Utah		X	
Washington		X	
Wyoming		X	X

November 4, 1974

(*) New Mexico constitution provides that in the event the direct initiative is allowed the people may enact only what the General Assembly may enact.

(**) Presently, the South Dakota constitution permits only indirect statutory initiative. A 1974 proposal will, if approved, permit the direct statutory initiative.

APPENDIX J

Part 10

JUDICIARY

March 15, 1976

THE JUDICIARY

Introduction

This Report, Part 10 of the Commission's report to the General Assembly, covers Article IV of the Ohio Constitution, governing the structure, jurisdiction and powers of the courts, and certain matters relating to judges, including the method of their selection, and their terms, duties, salaries, and retirement or removal. The report recommends complete state financing of the courts, the establishment of a full-time judiciary, the creation of a new class of judicial officers within the trial courts, the establishment of a single level of trial courts — the common pleas courts — and the abolition of all other trial courts.

Ohio has three levels of courts created by the Constitution: The Supreme Court, the courts of appeals, and the courts of common pleas. The other courts, namely municipal courts, county courts, and mayors' courts, are created by statute. The most recent major constitutional amendment affecting court structure is the 1968 Modern Courts Amendment, which vested the responsibility for superintending all courts in the Supreme Court, and brought about major changes in the structure of the common pleas courts by making several previously independent courts — notably the probate courts — divisions of the courts of common pleas. This amendment was followed by Issue 3, passed in November 1973, which permits two or more counties to be combined into common pleas court districts served by one or more judges residing in the district. The Modern Courts Amendment was itself an update of several provisions governing courts and judges which resulted from the Constitutional Convention of 1912, the last major effort at a comprehensive review and revision of the Ohio Consititution, including its Judiciary Article. (It was in 1912, for example, that the courts of appeals, as such, were established in place of the former circuit courts, and the courts of appeals were made the courts of last resort in most cases, in furtherance of the "one trial, one appeal" idea. It was also at this time that the entire original jurisdiction of the Supreme Court and the courts of appeals, and nearly their entire appellate jurisdiction, was spelled out in the Constitution. Another amendment provided for the election of one or more common pleas judges per county and imbedded the "one common pleas court per county" concept in the Constitution.) Relevant portions of the history of Ohio's judicial development are discussed in the comments contained in this report and the minority report on judicial selection attached to it.

The Commission regards the recommendations made here as logical extensions of the prior revisions in achieving a rationally structured and fully integrated, or "unified", court system. The recommended changes will strengthen the judicial system internally by simplifying trial court structure, thus eliminating needless duplication of effort and expense; by mandating a judiciary whose entire work time will be devoted to judicial business, thus permitting judges to concentrate exclusively on their duties; and by bringing together in one budget the financial requirements of the entire system, thus for the first time permitting an overview of present needs and planning for the future.

The Commission is keenly aware that the judicial system does not operate in a vacuum. Forces outside the system come into play, and other branches of government have a legitimate interest in what the judicial system does, how it goes about it, and how much it costs. No judicial article can succeed in bringing about the optimum benefits of sound judi-

cial administration unless it recognizes this fact and provides channels for the constructive interaction of these forces. To determine what these channels should be requires an understanding of the various functions of courts and of the relationship of courts to other branches of government, particularly the legislative branch.

There are basically five functions which courts must perform: (1) they must do justice by applying the law to the facts and imposing sanctions where needed; (2) they must protect the individual from the arbitrary use of governmental power; (3) they must provide forums for the resolution of disputes; (4) they must provide formal recognition of legal status (*e.g.*, marriage or minority) and (5) they must *appear* to be able to do justice, by handing down judgments which are as consistent as possible within a given legal framework and by providing an orderly procedure for appeal. The first two of these constitute the "reason for being" of the judicial branch. They are the essence of the judicial function, and as to them it is absolutely essential that judges have and retain "judicial independence" — a neutral and detached posture, free from any interference from another branch of government. On the other end of the spectrum is the function of writing the laws, which is strictly a legislative concern. Between these poles are areas of common concern to all branches, involving such questions as the number of judges, the number of courts, their subject-matter divisions, their staffing, and the source of their financing. In all of these areas, an *interdependence*, particularly of the legislative and the judicial branches, must be recognized. For example, the legislative branch controls fiscal matters. The judicial branch must have money to carry out its judicial function. Yet — except for the historically ineffective "inherent power" doctrine — it has no means to obtain it without legislative cooperation. In the same way, the judicial branch has an obvious interest in how many judges there are, how many courts there are, how courts are staffed, and what their subject-matter organization is. These all affect how *efficiently* the court system can dispose of its work. At the same time, the same considerations affect the *quality* of justice which the courts can deliver. Without in any way implying that courts do or should not concern themselves with this — quite the contrary — it must be recognized that the concern of legislatures as representatives of the People in retaining a voice, and in some instances a veto, in matters of this nature is a legitimate concern. Many court systems have historically either neglected their duty or been reticent about making known their needs and desires concerning internal organization, staffing, facilities, and other business aspects of judicial administration, thus leaving legislatures without any guidelines as to what was needed, and leaving much of what is properly a part of judicial administration to the workings of partisan politics.

Most state judicial articles — including that of Ohio as presently written — fail to recognize that many matters which have traditionally been labelled matters of judicial or legislative "prerogative" are in reality matters of mutual concern which can not be worked out except through mutual respect and cooperation. Constitutional provisions clearly delineating the responsibility of each branch in regard to a given matter, and providing for means of communication between the branches, can further such cooperation. The recommendations made in this report are made with the conscious aim of providing both the judiciary and the General Assembly more effective constitutional tools to safeguard their respective legitimate interests in the administration of justice, to aid them

to more effectively carry out their respective roles in the process, and to communicate and interact more effectively.

The major recommendations contained in this report must have delayed effective dates to assure a smooth transition. Some questions, such as state financing, will require extensive study by the General Assembly of data which is not presently available and some, like the status of employees of courts which will be abolished, will require decisions on statutory matters which it is not the function of the Commission to make or to suggest. However, the Commission is confident that if its recommendations are implemented in the spirit in which they are proposed, Ohio will have a Judicial Article and a judicial system which will serve her citizens well for a long time to come.

RECOMMENDATIONS

Article IV

Section 1

Present Constitution

Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

Commission Recommendation

Section 1. The judicial power of the state is vested in a judicial department consisting of a supreme court, courts of appeals, courts of common pleas, and such special subject matter courts having statewide jurisdiction, inferior to the supreme court, as may be established by law.

Commission Recommendation

The Commission recommends the amendment of Section 1 as follows:

Section 1. The judicial power of the state is vested in a JUDICIAL DEPARTMENT CONSISTING OF A supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof, and~~ such ~~other~~ SPECIAL SUBJECT MATTER courts HAVING STATEWIDE JURISDICTION, inferior to the supreme court, as may ~~from time to time~~ be established by law.

Comment

In discussing the benefits of the Modern Courts Amendment before the Cincinnati Bar Association on January 5, 1972, the Honorable C. William O'Neill, Chief Justice of the Ohio Supreme Court, added: "The next task in judicial reform which I believe the General Assembly should undertake is the unification of the courts of this state, including such realignment as is necessary to equalize the work burden for all courts. . ."[1] Like so many others who have studied ways to improve court systems, the Commission favors the unification of courts, also, and makes its recommendation for the amendment of Section 1 of Article IV with that objective uppermost in mind.

The term "unification" in the context of court organization has no single definition. Rather, it is a concept which has some definitely identifiable characteristics, including (a) uniform jurisdiction of all courts at the same level (b) simple jurisdictional divisions between courts, especially courts of original jurisdiction and appellate courts (c) uniform standards of justice, implemented through uniform rules of procedure promulgated by a common authority, uniform rules of administration, continuous programs of professional education, consultation between the bench, the bar, and the public on needed improvements in administering justice, and by consistent administration of policy (d) clearly established policy-making authority for the court system as a whole vested either in the Supreme Court or a council of judges, and (e) a clearly established line of administrative authority within the court system. It is obvious that no existing court system is completely unified on the basis of these criteria. It is also obvious that many court systems, including that of Ohio, already exhibit various degrees of unification. The Commission recommendation

made here is for the purpose of furthering the concept by eliminating in Ohio the multi-level trial court system, which lacks cohesive state-wide planning and accountability, and in the Commission's view is inherently wasteful of judicial time, the time of support personnel, available facilities and financial resources.

According to a 1974 Legislative Service Commission study, there were 261 trial courts having separate status in Ohio, excluding the Ottawa Hills Police Court and excluding mayors' courts, whose exact number was undetermined. Of these 261 courts, 88 were common pleas courts — one per county — 106 were municipal courts, and 67 were county courts. The Ottawa Hills Police Court has since been merged into the Toledo Municipal Court. Under present statute, there are 110 municipal courts and 59 areas of jurisdiction in the county courts. There are 296 common pleas court judgeships, 181 municipal court judgeships, and 67 county court judgeships. Twenty additional common pleas court judgeships and one municipal court judgeship are authorized and will be filled by election during the period 1976-1978. During the same period, four county court judgeships (and county court areas of jurisdiction) will be abolished. The above figures illustrate the recent trend of expanding the number or territorial jurisdiction of municipal courts and the contraction of the number of county courts.

Ohio's present system of courts of limited jurisdiction is traced chiefly to the 1951 Uniform Municipal Court Act and the 1957 Uniform County Court Act. The Uniform Municipal Court Act was the first general law applicable to municipal courts. Prior to the Act, municipal courts were created through special laws. However, even under the Uniform Municipal Court Act, there were variations in the civil monetary jurisdiction of the courts until 1974. Generally, the limit was $5,000, but courts of Franklin and Hamilton Counties had $7,500 limits and the municipal courts in Cuyahoga County had a $10,000 limit. A 1974 amendment to the statute, Revised Code Section 1901.17, finally made the monetary jurisdiction uniform at $10,000. However, Section 1901.18 of the Revised Code still confers on the Cleveland Municipal Court certain unique jurisdiction in actions for the sale, foreclosure or recovery of realty and in injunction actions based on violations of ordinances and regulations of the City of Cleveland. In these classes of cases, the Cleveland Municipal Court has concurrent jurisdiction with the Cuyahoga County Common Pleas Court. No other municipal court appears to have a similar grant of jurisdiction.

On the criminal side, all municipal courts have jurisdiction in cases involving municipal ordinances, in misdemeanor cases, and in preliminary hearings in felony cases, in accordance with Section 1901.20 of the Revised Code.

County courts, which replaced justice of the peace courts and have jurisdiction in areas of a county not within the jurisdiction of a municipal court, have a civil monetary limit of $500, in accordance with Section 1909.04 of the Revised Code. Section 1907.012 grants the courts jurisdiction in motor vehicle violations and all other misdemeanors.

Mayors' courts, the exact number of which has never been determined but which the Legislative Service Commission estimated at 500, may function in municipalities that are not the seat of a municipal court. In accordance with Section 1905.01 of the Revised Code, a mayor's court has jurisdiction over violations of municipal ordinances and moving violations occuring on state highways within the boundaries of the municipal corporation.

Since there is no provision for jury trials in mayors' courts, and Sec-

tion 2945.17 of the Revised Code provides that an accused is entitled to a jury trial in any matter in which the potential penalty exceeds $100, this provision effectively limits the jurisdiction of mayors' courts to that amount.

The Ohio Constitution gives the Supreme Court supervisory power over all courts in the state. In the case of common pleas, municipal, and county courts, this power is exercised under specific Rules of Superintendence, which govern aspects of administrative structure and procedure and contain requirements for the reporting of caseloads and certain other information directly to the Supreme Court. Also, all judges must meet the standards set forth in the Code of Judicial Conduct. However, the judges of the various courts of limited jurisdiction in a county conduct the day-to-day business of their respective courts on a largely autonomous basis, free from administrative control by the common pleas court. One exception is the power granted common pleas courts in Section 1907.071 of the Revised Code to divide counties having more than one county court judge into areas of separate jurisdiction, and to designate the area in which each judge has exclusive jurisdiction. The same statute gives the common pleas courts authority to redefine county court areas from time to time, to be equal in population as nearly as possible.

While there is a statutory provision for transferring judges for temporary duty from one area of a county court to another, there is no provision of any kind for assigning municipal court judges to county courts, or county court judges to municipal courts, or judges of county or municipal courts to common pleas courts or vice versa. As a result, some judges in a county where these three types of trial courts exist may not have enough to do while others are overburdened. Likewise, some court facilities may stand idle while others are crowded beyond their capacity and there may be a needless and expensive duplication of supporting personnel as well. In addition, this system of courts is financed under a highly complex, if not bewildering, welter of statutes, from both state and local sources. The fines, fees and forfeitures collected by the trial courts, including common pleas courts, are distributedanderan qually complex maze of statutes to the state, to political subdivisions, or for designated purposes, depending on which court collects them and whether they are collected under state law or local ordinance.[2]

Not every type of court of limited jurisdiction is found in every county. Some counties have county-wide municipal courts. Some counties have county-wide county courts, while other counties have both one or more municipal courts and a county court. The county court, in turn, may function as a single county court district or, in the case of a multi-judge court, may be divided into "areas" by the common pleas court, as previously stated. The entire patchwork has apparently developed on a strictly *ad hoc* basis.

Further, while most municipal court clerks are appointed, municipal courts which serve populations in excess of a statutory minimum may and do have elected clerks; and while the clerk of the court of common pleas is statutorily designated as the clerk of the county court, if one exists in the county, the county court with the concurrence of the board of county commissioners may appoint its own clerk, and some courts have done so.

There is, of course, also a certain amount of overlap of subject-matter jurisdiction, both on the civil and criminal sides, between common pleas and municipal courts. For example, in civil cases in which the amount involved is less than $10,000, suit may be filed in either the common pleas court or the municipal court, since the jurisdiction of the municipal court

is not exclusive; and in a criminal case, since the municipal court's jurisdiction in misdemeanors is not exclusive, either, a prosecutor has at least the theoretical choice of filing such a charge in the common pleas court or in the municipal court. The Commission has been advised that, at least in civil matters, a choice of courts has resulted in a good deal of "forum shopping" for strategic purposes, in those areas where a choice of courts in available, a situation which is not in the best interests of justice.

The Commission considered two alternatives on trial court structure in depth — the possibility of consolidating all courts of limited jurisdiction within a county into one court below the level of the common pleas court, and the possibility of absorbing the jurisdiction of all courts of limited jurisdiction into the common pleas court. The Commission concluded that the latter alternative is preferable.

As noted in one recent study: "The consequences of maintaining two separate trial courts have been generally adverse. These consequences include reduced flexibility in assigning judges and other court personnel in response to shifts in workload; complexity and conflict in processing cases between courts, especially between the preliminary and plenary stages of felony cases; and unnecessary emphasis on hierarchial rank among judges and other court personnel. Perhaps most important, the differentiation of the trial court of limited jurisdiction expresses an implicit differentiation in the quality of justice to be administered. It induces a sense of isolation and inferiority among the judges and court personnel who are called upon to perform one of the judiciary's most difficult and frustrating tasks — individualizing justice in the unending stream of undramatic cases that constitute the bulk of the court system's work."[3]

Idaho,[4] Illinois[5] and Iowa[6] presently have court systems in which there is a single level of trial courts. Hawaii has a two-tier trial court structure[7] but is otherwise highly unified. All of these states also have magistrates or associate judges working within the framework of the trial courts to hear relatively minor matters or matters of a strictly local nature. Parenthetically, in the new Section 7 of Article IV included in this report, the Commission recommends the creation of the office of magistrate, within the common pleas courts, to carry out such duties as are prescribed by law.

Finally, the proposed Section 1 permits the establishment of special subject-matter courts of statewide jurisdiction by law. This provision accommodates such courts as the newly created Court of Claims, and perhaps other special subject-matter courts at a future date. The requirement that any such court have statewide jurisdiction precludes the possibility that the territorial jurisdiction of these courts is split in the haphazard fashion now typical of courts of limited jurisdiction. The General Assembly is free to prescribe which special subject-matter courts are established.

Two further explanations are in order with respect to the proposed Section 1. The first is that the insertion of the reference to a judicial department is for the purpose not of bringing about a substantive change, but to give emphasis to the fact that the courts are parts of a single organizational entity. Precedent for describing a branch of government as a department exists in the Ohio Constitution in Section 1 of Article III, which is the Executive Article. That section begins "The executive department shall consist of . . ."

Also in need of explanation is the removal of references to divisions of the common pleas courts from this section. The Commission is not recommending the abolition of subject-matter divisions in the common pleas

courts. In fact, in proposed Section 4 of this Article, specific provisions are recommended to govern the *creation* of subject-matter divisions in common pleas courts. The reason for recommending the deletion of references to such divisions from Section 1 is strictly for the purpose of removing what the Commission considers to be a redundancy. The phrase "common pleas courts, and divisions thereof" suggests that subject-matter divisions of a court are somehow separate from the court itself while, of course, such divisions are integral parts of the courts within which they are created. For the same reason, the same phrase in other sections of Article IV is similarly modified.

The establishment of a single level of trial courts will, in the view of the Commission, best serve the people and the administration of justice by tending to encourage the most efficient and rational use of judicial time, the time of support personnel, and available facilities and resources, resulting in a more orderly, speedier, and more economical disposition of cases. By cutting down the number of courts, it will undoubtedly minimize "forum shopping" and, more importantly, it will result in the more uniform implementation of standards of justice and of administrative policy decisions within the trial court system as a whole.

A minority report opposing the unified trial court concept is attached as an appendix.

Section 2

Present Constitution

Section 2. (A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Commission Recommendation

The Commission recommends no change in this section.

Comment

The Commission recommends no changes in this section, which was last amended by the Modern Courts Amendment in 1968 and prescribes the membership, organization, and jurisdiction of the Supreme Court.

However, a *caveat* is in order. If special subject-matter courts of statewide jurisdiction, such as could be created under the proposed Section 1 of Article IV are to be established as courts of original jurisdiction — as opposed to being courts of appeals — and it is desired to permit appeals of their orders or judgments directly to the Supreme Court, this section would have to be amended to broaden the appellate jurisdiction of the Supreme Court for this purpose, since this provision presently specifies appellate jurisdiction only in appeals from the courts of appeals, and revisory jurisdiction from orders of administrative officers or agencies.

Section 3

Present Constitution

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of

Commission Recommendation

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of a minimum of three judges. Unless the parties agree to have a case heard by two judges, three judges shall participate in the hearing and disposition of each case. The judges of each court of appeals shall select one of their number, by majority vote, to act as presiding judge, to serve at their pleasure. Until the judges make such selection, the judge having the longest total service on such court shall serve as presiding judge. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court. A court of appeals may select one of the counties in its district as its principal seat. The court shall hold sessions in each county of the district as the necessity arises. Each county shall provide a proper and convenient place for the court of appeals to hold court, as provided by law.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and in cases transferred from another court of appeals pursuant to supreme court rule, and shall have such appellate jurisdiction as may

Present Constitution — Continued

the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Commission Recommendation — Continued

be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of A MINIMUM OF three judges. ~~Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges~~ UNLESS THE PARTIES AGREE TO HAVE A CASE HEARD BY TWO JUDGES, three judges shall participate in the hearing and disposition of each case. THE JUDGES OF EACH COURT OF APPEALS SHALL SELECT ONE OF THEIR NUMBER, BY MAJORITY VOTE, TO ACT AS PRESIDING JUDGE, TO SERVE AT THEIR PLEASURE. UNTIL THE JUDGES MAKE SUCH SELECTION, THE JUDGE HAVING THE LONGEST TOTAL SERVICE ON SUCH COURT SHALL SERVE AS PRESIDING JUDGE. THE PRESIDING JUDGE SHALL HAVE SUCH DUTIES AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY RULE OF THE SUPREME COURT. A COURT OF APPEALS MAY SELECT ONE OF THE COUNTIES IN ITS DISTRICT AS ITS PRINCIPAL SEAT. The court shall hold sessions in each county of the district as the necessity arises. ~~The county commissioners of each~~ EACH county shall provide a proper and convenient place for the court of appeals to hold court, AS PROVIDED BY LAW.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

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

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all ~~three~~ judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Comment

The changes recommended in Section 3 are mainly procedural, affecting the internal workings of the courts of appeals. The substantive jurisdiction of these courts is unchanged.

Division (A) is amended, first, to provide that each court of appeals shall consist of a *minimum* of three judges; the second sentence, concerning the passage of laws increasing the number of judges, is struck because the first sentence as amended would make clear that the number of judges could be increased beyond three, and the matter of the standard to be applied ("volume of business") would be covered by a new provision (in Section 5) giving the Supreme Court the duty to establish criteria, and to make recommendations to the General Assembly, concerning the need for change in the number of judges. The foregoing language changes in Section 2 are not intended to be substantive or to be construed as limiting the power of the General Assembly to determine the number of courts of appeals judges.

The second change is the inclusion of a provision specifying that parties may agree to the submission of a case to two judges, giving formal recognition to a practice which the Commission understands is not uncommon in Ohio today. In order to make most effective use of the working time of appellate judges, some commentators suggest a reduction in the number of judges sitting on multi-judge panels,[8] and while the Commission recognizes that on occasion it may be necessary to rehear an appeal if the two judges hearing it cannot agree on a decision, the Commission also believes that this will not present an insurmountable obstacle. The option to submit a case to a two-judge panel is, at any rate, one which can be

exercised only by agreement of the parties, and unless they agree, three judges will decide a case, as at present.

The third and principal change in division (A) is the insertion of a provision prescribing the method of selecting the presiding judge of a court of appeals. The recommended method parallels the method presently prescribed in the Constitution for the election of the presiding judge of a court of common pleas, namely by a vote of the judges of the court. This is a more logical alternative than is now prescribed, by law, for the courts of appeals. Section 2501.06 of the Revised Code bestows the post automatically on the elected judge with the shortest time left to serve in his term, without regard to his administrative ability, his willingness to serve, or his acceptability to other judges on the court.

The last sentence in division (A), concerning the prescription of the duties of the presiding judge of a court of appeals also parallels language presently found in the Constitution with regard to common pleas courts. Strictly speaking, this sentence may not be necessary, since the Supreme Court could prescribe the duties of a presiding judge of a court of appeals under the general power of superintendence, although it has not promulgated rules of superintendence for the courts of appeals as of this writing.

The following changes should also be noted: Granting permission to select one county as a principal seat confirms a practice now permitted by Section 2501.181 of the Revised Code and followed by at least one multi-county court in the state. Wider implementation of the practice may, in the view of the Commission, increase administrative efficiency and cut costs of operation, two factors which are of particular importance in view of the Commission's recommendation, made elsewhere in this report, that the state assume the payment of all judicial salaries and the expenses of the judicial department. The amendment of the last sentence of division (A) is for the purposes of emphasizing that providing space for holding court is a county responsibility, to be carried out as provided by law, and not the responsibility of the county's executive or legislative body, which may change at some future date, as for example, if county charters were adopted. And finally, the expansion of the jurisdiction of the courts of appeals in division (B) (2), to include cases transferred from another court of appeals complements the recommendation, also made in this report, that the Supreme Court be empowered to make rules governing the transfer of cases between such courts. The purpose of the recommendation is to provide an alternate method to the assignment of judges outside their districts to help in the disposition of court of appeals cases, as needed. This, too, is intended to result in a saving, both of judicial time and of travel expenses.

Section 4

Present Constitution

Section 4. (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically

Commission Recommendation

Section 4. (A) There shall be a court of common pleas, with such divisions thereof as may be established, serving each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into compact districts having one or more judges resident in the district and serving all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In courts of common pleas having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. Until the judges make such selection, the judge having the longest total service on such court of common pleas shall serve as presiding judge. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas. Judges shall be elected specifically to such probate division. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(D) There shall be such divi-

Present Constitution — Continued

to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

Commission Recommendation — Continued

sions of the courts of common pleas, in addition to probate, as may be established pursuant to supreme court rules subject to amendment by concurrent resolution of the general assembly. The general assembly may, by law, at any time provide for the election of judges specifically to such other divisions. Rules governing the establishment of such other divisions, and the assignment of judges thereto if judges are not specifically elected thereto, shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof. Such rules shall take effect on the following first day of July, unless prior to such day, the general assembly adopts a concurrent resolution of disapproval. Except as provided in this section, all laws in conflict with such rules shall have no further force and effect after such rules have taken effect.

This section shall not be construed to limit the power of the supreme court to assign judges for temporary duty pursuant to division (A) (3) of section 5 of this article.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 4. (A) There shall be a court of common pleas, ~~and~~ WITH such divisions thereof as may be established ~~by law~~, serving each county of the state. Any judge of a court of common pleas ~~or a division thereof~~ may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into COMPACT districts having one or more judges resident in the district and serving ~~the common pleas courts of~~ all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In ~~counties or districts~~ COURTS OF COMMON PLEAS having more than one judge ~~of the court of common pleas~~, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. ~~If~~ UNTIL the judges ~~are unable because of equal division of the vote to~~ make such selection, the judge having the longest total service on ~~the~~ SUCH court of common pleas shall

serve as presiding judge ~~until selection is made by vote~~. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas ~~and divisions thereof~~ shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division ~~and such other divisions~~ of the courts of common pleas ~~as may be provided by law~~. Judges shall be elected specifically to such probate division ~~and to such other divisions~~. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(D) THERE SHALL BE SUCH DIVISIONS OF THE COURTS OF COMMON PLEAS, IN ADDITION TO PROBATE, AS MAY BE ESTABLISHED PURSUANT TO SUPREME COURT RULES SUBJECT TO AMENDMENT BY CONCURRENT RESOLUTION OF THE GENERAL ASSEMBLY. THE GENERAL ASSEMBLY MAY, BY LAW, AT ANY TIME PROVIDE FOR THE ELECTION OF JUDGES SPECIFICALLY TO SUCH OTHER DIVISIONS. RULES GOVERNING THE ESTABLISHMENT OF SUCH OTHER DIVISIONS, AND THE ASSIGNMENT OF JUDGES THERETO IF JUDGES ARE NOT SPECIFICALLY ELECTED THERETO, SHALL BE FILED BY THE COURT, NOT LATER THAN THE FIFTEENTH DAY OF JANUARY, WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY DURING A REGULAR SESSION THEREOF. SUCH RULES SHALL TAKE EFFECT ON THE FOLLOWING FIRST DAY OF JULY, UNLESS PRIOR TO SUCH DAY, THE GENERAL ASSEMBLY ADOPTS A CONCURRENT RESOLUTION OF DISAPPROVAL. EXCEPT AS PROVIDED IN THIS SECTION, ALL LAWS IN CONFLICT WITH SUCH RULES SHALL HAVE NO FURTHER FORCE AND EFFECT AFTER SUCH RULES HAVE TAKEN EFFECT.

THIS SECTION SHALL NOT BE CONSTRUED TO LIMIT THE POWER OF THE SUPREME COURT TO ASSIGN JUDGES FOR TEMPORARY DUTY PURSUANT TO DIVISION (A) (3) OF SECTION 5 OF THIS ARTICLE.

Comment

While there are a number of proposed changes in this section, most of them are grammatical only and recommended for the purpose of removing ambiguities which may lead to confusion in the interpretation of existing language. The principal substantive change, that of giving the Supreme Court rule-making power with respect to the creation of subject-matter divisions of common pleas courts subject to legislative amendment or rejection, is found in proposed division (D), which has no counterpart in the present Article IV.

One example of an ambiguity which would be eliminated by Commission recommendations is previously discussed in the comment to proposed Section 1. It results from use of the phrase "common pleas court *or a division thereof*", or a variation of this phrase, in this section (emphasis added). The recommended deletion of references to divisions at the places indicated is solely to dispel the possibility of an interpretation that subject-matter divisions of courts of common pleas are separate entities from the courts themselves, which interpretation would not be consonant with the concept of a unified trial court. The recommendation is not intended to bring about the abolition of subject-matter divisions. Indeed,

the Commission makes specific recommendations with respect to the *creation* of subject-matter divisions in this section.

A second ambiguity in the present language is corrected by another proposed amendment to division (A). This provision now reads in part that "two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas *courts* of all counties in the district. Judges serving a district shall sit in each county in the district as the business of the *court* requires" (emphasis added). The use of the plural of "court" here suggests that there can be more than one court in a district, which is inconsistent with the full sentence quoted above, and with other present references to "court" in division (A), which are all in the singular. Changing the above-quoted phrase to read "two or more counties may be combined into compact districts having one or more judges resident in the district and serving all counties in the district" removes any possible doubt as to proper interpretation. The Commission wishes to assure to the extent possible that common pleas court districts, where created, shall be of convenient and manageable size, and for that reason recommends the insertion of the word "compact", a word presently used to describe appellate districts, at the place indicated in the above-quoted sentence.

The change from "[i]n counties or districts having more than one judge" to "[i]n common pleas courts having more than one judge" is grammatical only, and is not intended to be substantive. However, the changes in the sentence referring to the selection of the presiding judge are substantive. Deleting the reference to equal division of the vote recognizes that there may be reasons other than equal division of the vote which may prevent the judges of a multi-judge court from selecting a presiding judge. Also, changing the language to provide that *until* the judges make such selection, the judge with the longest total service on the court shall serve as presiding judge, assures that every multi-judge court will at all times have a presiding judge. The present language could lead to the interpretation that the position of presiding judge does not devolve upon the judge with the longest total service until the judges have met, voted, and been unable to make a selection. This could in certain circumstances leave a court without a presiding judge until such time as that event had occurred. In the view of the Commission, this result would be harmful to the proper administration of the court, and it will be avoided if the recommended change is adopted.

The reasons for deleting the phrase "and divisions thereof" with reference to courts of common pleas from division (B) are the same as those previously discussed with reference to this phrase in the comment to division (A).

The proposed amendments to division (C) and the new division (D) of this section, both of which refer to the creation of subject-matter divisions in the courts of common pleas, should be viewed together. Presently, division (C) establishes the probate division and grants certain powers to probate judges. The General Assembly is authorized to create other subject-matter divisions, and the language requires that judges be elected specifically to divisions. The Commission recommends the deletion of references to subject-matter divisions other than probate from division (C). Probate judges would continue to be elected specifically to the probate division so long as such division continued to exist, as provided by law. No change is recommended with respect to the probate division because testimony before the Commission indicated that the function of a probate judge is a highly specialized one, and should be kept separate from the

rest of the court's work in order that the necessary expertise can be developed and maintained.

However, the Commission recommends that other subject-matter divisions of the courts of common pleas be created, as needed, pursuant to Supreme Court rule subject to amendment or rejection by the General Assembly. Election to divisions other than probate would no longer be required by the Constitution, although the General Assembly could at any time impose a requirement for specific election by law. In the absence of law, assignment to divisions other than probate would be governed by Supreme Court rule. It should be noted that any such rule could be overriden by law even after the rule had gone into effect.

The last sentence of division (D) would make clear that nothing in that division is to be construed as limiting the authority of the Supreme Court to assign a judge for temporary duty on any court as presently provided in the Constitution.

The Commission does not expect its recommendations with regard to subject-matter divisions, if adopted, to result in any immediate or drastic changes in presently existing divisions of common pleas courts, nor in the requirement that judges be elected specifically to them. What the Commission intends is that the Constitution become more flexible with respect to common pleas court structure in order to accommodate possibly desired changes in the future. There are a number of subject-matter areas of the law for which it may be thought appropriate to create subject-matter divisions. Some of these divisions may need to be established only on a temporary basis; some of them may perhaps deal with subjects unusually repetitious or routine in nature or involving especially taxing work to which a judge should not be, or may not wish to be, limited for his entire term. A requirement of specific election to every division also undoubtedly introduces an element of rigidity into the organization of courts which, as a matter of constitutional principle, should be kept to a minimum. The Commission believes that this recommendation accomplishes that objective without disrupting any existing organizational arrangements. Furthermore, by granting the Supreme Court the authority to promulgate rules pursuant to which divisions other than probate are created and judges assigned, the recommendation shifts the burden of initiating changes in this area to the Supreme Court which, because of its unique position at the apex of the court system is, and should be, in the best position to ascertain where changes are needed. However, in the final analysis, the recommendation leaves to the General Assembly the ultimate decision on what changes should be implemented, in recognition of the Assembly's unique capacity to receive, and to react to, concerns expressed at the local level, especially by those who are not associated with the court system, and in recognition of the fact that — perhaps by default — prescription of court structure has traditionally been the prerogative of legislatures in Ohio and elsewhere.

Section 5

Present Constitution

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in

Commission Recommendation

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) (1) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right, and may prescribe rules governing the transfer of cases from one court of appeals to another. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be filed not later

Present Constitution — Continued

that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Commission Recommendation — Continued

than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(2) Courts may adopt additional rules concerning local practice and procedure in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(3) The supreme court shall establish uniform criteria for determining the need for increasing or decreasing the number of judges, except supreme court justices, and for increasing or decreasing the number of magistrates, and for altering the number or the boundaries of common pleas and appellate districts. Before each regular session of the general assembly, the court shall file with the clerk of each house its criteria, findings, and any recommendations, for increasing or decreasing the number of judges or magistrates or changing the number or the boundaries of common pleas or appellate districts. The general assembly shall consider such criteria, findings, and recommendations at the next regular session. No decrease in the number of judges shall vacate the office of any judge before the end of his term.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of

Commission Recommendation — Continued

any judge of the courts of appeals or courts of common pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas ~~or a division thereof~~ temporarily to sit or hold court on any other court of common pleas ~~or division thereof~~ or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas ~~or division thereof~~ and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) (1) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right, AND MAY PRESCRIBE RULES GOVERNING THE TRANSFER OF CASES FROM ONE COURT OF APPEALS TO ANOTHER. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July,unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(2) Courts may adopt additional rules concerning local practice AND PROCEDURE in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(3) THE SUPREME COURT SHALL ESTABLISH UNIFORM CRITERIA FOR DETERMINING THE NEED FOR INCREASING OR DECREASING THE NUMBER OF JUDGES, EXCEPT SUPREME COURT JUSTICES, AND FOR INCREASING OR DECREASING THE NUMBER OF MAGISTRATES, AND FOR ALTERING THE NUMBER OR THE BOUNDARIES OF COMMON PLEAS AND APPELLATE DISTRICTS. BEFORE EACH REGULAR SESSION OF THE GENERAL ASSEMBLY, THE COURT SHALL FILE WITH THE CLERK OF

EACH HOUSE ITS CRITERIA, FINDINGS, AND ANY RECOMMENDATIONS, FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES OR CHANGING THE NUMBER OR THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS. THE GENERAL ASSEMBLY SHALL CONSIDER SUCH CRITERIA, FINDINGS, AND RECOMMENDATIONS AT THE NEXT REGULAR SESSION. NO DECREASE IN THE NUMBER OF JUDGES SHALL VACATE THE OFFICE OF ANY JUDGE BEFORE THE END OF HIS TERM.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas ~~or division thereof~~. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Comment

Divisions (A) and (C) of this section are amended only by the deletion of unnecessary references to divisions of the common pleas courts, in line with the Commission's position expressed in the comment to Section 1.

Division (B) contains two minor amendments and one major one. One minor amendment authorizes the Supreme Court to adopt rules governing the transfer of cases from one court of appeals to another. This recommendation complements the one made in Section 3 that courts of appeals be permitted to transfer cases among themselves pursuant to Supreme Court rules. As stated, the purpose of this procedure would be to provide a more expeditious and less expensive alternative to the assignment of judges outside their districts to hear and dispose of cases. Another minor amendment is the addition of rules of procedure to rules of practice as those which local courts are authorized to adopt, as long as they are not inconsistent with Supreme Court rules. This amendment is not intended to be substantive, and merely parallels the language now in the Constitution describing the power of the Supreme Court in this area.

The major recommendation in this section concerns the question of determining the number of judges and magistrates, and the question of altering the number or the boundaries of common pleas or appellate courts. While the proposal put forth in this recommendation leaves the ultimate question of what changes are enacted into law up to the General Assembly alone, it does place responsibility on the Supreme Court to develop criteria to be used as the basis for suggestions, and to make suggestions and recommendations to the General Assembly in this subject area.

Traditionally, this subject has been considered to be within the exclusive province of legislatures. The legislatures, however, have had little or no guidance or standards on which to base their determinations. As a result, the number of judges on a particular court was, more often than not, determined by local political pressure. To alleviate such pressure, some states have enacted statutes which tie the number of judges to population, thus making a change in the number of judges automatic and dependent on a contingency outside the immediate political arena. For example, in Ohio the number of county judges is determined in accordance with a statutory formula, set forth in Revised Code Section 1901.041, which prescribes basically one judge per 30,000 population, and Revised Code Section 1901.05, which sets forth a formula for determining the number of municipal court judges and calls for one judge for the first 100,000 of population, and an additional judge for each additional 70,000 or fraction thereof. This general provision, however, is overridden by the

specific provisions of Section 1901.08, which prescribes the number of judges to be elected to a specific court at a designated time. *State ex rel. Leis v. Board of Elections*, 28 Ohio St. 2d 7 (1971). Either by providing for a specific exception to Section 1901.05 (as in the case of the Cleveland and Youngstown Municipal Courts) or by providing for the election of a smaller or larger number of judges than is called for by the formula contained in Section 1901.05 (as in the case of the Hamilton County and Portage County Municipal Courts), the General Assembly has on a number of occasions sidestepped the formula for determining the number of municipal judges. And the number of common pleas judges is determined strictly on an *ad hoc* basis.

In recent years, several states have adopted constitutional provisions giving their respective supreme courts some recognized duty in regard to the question of determining the number of judges and the boundaries of judicial districts. For example, Section 3 of Article V of the South Dakota Constitution provides in part that "the circuit courts consist of such number of circuits and judges as the Supreme Court determines by rule"; and the 1968 Amendment of the Pennsylvania Constitution, in Section 11 of Article 5, provides in part that "the number and boundaries of judicial districts shall be changed by the General Assembly only with the advice and consent of the Supreme Court."

The Commission wishes to emphasize that its recommendation would not give the Ohio Supreme Court the power to decree changes by rule, nor require its assent before any change could be made. The role given the Court would be one of advising the General Assembly on the basis of criteria developed by the Court, which criteria themselves would have to be filed with the Assembly, thus giving the Assembly full access to the basis for the Court's recommendations.

At the present time, the Supreme Court collects and analyzes statistics primarily in terms of filings and dispositions and caseloads, per court or per judge, per period. This aids the Court in carrying out its duties in superintending the existing court structure of the state. Such statistics might also be the basis for recommending changes in that structure, especially when filings, dispositions, and caseloads are considered along with other factors, such as the time lag between filing and disposition; shifts in the types of cases pending; shifts in population; effects of tourism; and judge-to-population ratios.

In some states, such as California and Florida, the cases themselves are subjected to minute analysis in terms of categories and in terms of the likelihood of any procedural step (*e.g.*, motion to dismiss; jury trial) occurring in a case as it moves through the court system, as well as the amount of judicial time required for each step. This method of analysis results in "judge-years", each judge-year justifying a recommendation for the election of an additional judge to a court.

The systematic analysis of the need for judicial manpower on a basis other than population is of relatively recent origin and is an evolving science. While opinions differ as to the most meaningful and reliable factors to be taken into account and the method of analysis to which such factors should be subjected — as to which the Commission expresses no position — it is clear that there is a fundamental need to continually monitor the performance of the state's judicial system in order to make rational suggestions for change where needed. The Commission believes that the Supreme Court, which is charged with the superintendence of the courts, is in the best position to make such suggestions, and for that reason recommends the adoption of the proposed new division (B) (3) of

Section 5. Parenthetically, the last sentence of this division, which would prevent the cutting short of the term of an incumbent judge by any change, is intended to carry forward the protection afforded by the corresponding part of present Section 15 of Article IV, the repeal of which is recommended in this report. This change is not intended to be substantive, and would bring together related matter in one section of the Constitution.

Section 6

Present Constitution

Section 6. (A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any

Commission Recommendation

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties or districts in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside during his term of office in the county or district from which he is elected.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas and all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. The compensation of all judges of the courts of common pleas shall be the same. Judges shall receive no fees or perquisites, except such perquisites as may be provided by law, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge for any elective office, except a judicial office, shall be void.

Present Constitution — Continued

other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Commission Recommendation — Continued

(C) No person shall be elected or appointed to any judicial office if on or before the day when he assumes the office and enters upon the discharge of its duties, he has attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 6. (A) (1) The chief justice and justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties~~,~~ OR districts~~, or, as may be provided by law, other subdivisions,~~ in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas ~~or division thereof~~ shall reside during his term of office in the county~~,~~ OR district~~, or subdivision~~ FROM WHICH HE IS ELECTED ~~in which his court is located~~.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas and ~~divisions thereof, and~~ of all courts of record established by law, shall, at stated times, receive~~,~~ for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. THE COMPENSATION OF

ALL JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE THE SAME. ~~Common pleas judges and judges of divisions thereof and judges of all courts of record established by law shall receive such compensation as may be provided by law.~~ Judges shall receive no fees or perquisites, EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge~~,~~ for any elective office, except a judicial office, ~~under the authority of this state, given by the general assembly, or the people~~ shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he ~~shall assume~~ ASSUMES the office and ~~enter~~ ENTERS upon the discharge of its duties, he ~~shall have~~ HAS attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Comment

The only changes in division (A) occur in the third paragraph. In line with the Commission recommendation discussed earlier in this report to eliminate unnecessary references to subject-matter divisions of common pleas courts from the Constitution, such references are struck from this provision. Also deleted are references to election of common pleas judges from "subdivisions". This word was introduced into Section 6 in a constitutional amendment adopted in November 1973. It is not defined for purposes of this section, and it is unclear whether it is intended to refer to a political subdivision as presently defined in Ohio law (*e.g.*, a municipal corporation or county) or whether it is intended to refer to some other territorial unit which is smaller than the entire territory served by a court. In either event, election from a political subdivision or such a territorial unit would be contrary to the Commission's view that the judges serving on a court ought to be elected by all the people resident within the territorial jurisdiction of the court, on the basis of elemental fairness.

The change from requiring a judge to reside during his term in "the county, district, or subdivision in which his court is located" to "the county or district from which he is elected" is intended to clear up another potential ambiguity. The present language of this provision could be interpreted to require that any judge of any court is required to reside in the political subdivision in which his court is physically located or headquartered, regardless of the court's territorial jurisdiction. Such a strict residence requirement is unwarranted, and would be even more restrictive than the residence requirement now imposed on municipal judges by statute. Substitution of the requirement that a judge must reside within "the county or district from which he is elected" is intended to eliminate the potential for such interpretation. Under this language, it is clear that if a judge is elected to a court whose territorial jurisdiction encompasses only one county, he must reside within that county, but if he is elected to a court whose territorial jurisdiction encompasses a district of two or more counties, he may reside in any county in that district, regardless of the physical location or headquarters of the court.

The major changes in division (B) are that it would make the salaries of all common pleas judges equal and that it would permit the General

Assembly to provide judges with some perquisites by law. The first of these recommended changes is based on the assumption that the workload inequities which may be found to exist under Ohio's present common pleas court structure will be corrected legislatively, to the extent that this is reasonably possible. At present, the salaries of common pleas judges come from two sources: first, a uniform and fixed amount paid by the state under Section 141.04 of the Revised Code; second, an amount determined according to a population formula and paid by the counties under Section 141.05 of the Revised Code. Effective November 1973, the state paid $20,000 of the salary of each judge, and the counties an amount equal to eighteen cents per capita, but not less than $3500 nor more than $14-,000. This resulted in the possibility of a $10,500 salary gap between the lowest paid and the highest paid common pleas judges in the state. As workloads are equalized, the rationale for any salary differential will cease to exist. The second substantive amendment of this division permits the receipt of such perquisites as are authorized by law. The Commission does not view perquisites (such as a car for official use, where needed) as necessarily inappropriate, but believes that it is more honest to recognize and sanction them in the Constitution. The last sentence of this division, which refers to votes cast for a judge, is broadened to state that votes cast for any judge for any elective office except a judicial office shall be void. The present section voids such votes only if cast for an office "under the authority of this state". The proposed amendment thus applies the rule to any elective office other than a judicial office, whether local, state or national. The sentence makes a simple statement concerning the evil it is intended to prevent, namely the election of a judge to a partisan political office while he is still a judge — a statement fully in accord with the Canons of Judicial Ethics, which even forbid a judge to become a candidate for non-judicial office.

The Commission does not recommend a change in the method of selecting judges, although the Commission's Judiciary Committee did make a proposal to change the method in its report to the Commission. The committee devoted a substantial amount of time to the study of the alternate methods of selecting judges, and heard a number of nationally recognized authorities on the subject, including Glenn R. Winters, then the Executive Director of the American Judicature Society. At the conclusion of its study, the committee proposed a constitutional provision making the appointive-elective system of selection mandatory for Supreme Court and courts of appeals judges and optional, through the vote of the citizens affected, for each common pleas court. This proposal did not receive a sufficient number of votes from Commission members to constitute a Commission recommendation.

A minority report favoring the adoption of an appointive-elective method of judicial selection, mandatory for Supreme Court and courts of appeals judges and optional for common pleas judges, is attached to this Commission report as an appendix.

Section 7

Present Constitution

Vacant. Former Section 7 repealed effective May 8, 1968.

Commission Recommendation

Section 7. Judges shall devote their full time to the performance of judicial duties. The general assembly may, by law, provide for magistrates of the courts of common pleas, who shall be attorneys licensed to practice in this state and who need not devote their full time to the performance of judicial duties. Such magistrates shall be appointed by the courts of common pleas they are to serve, and shall serve at the pleasure of the respective courts. Laws shall be enacted to prescribe the times and mode of their appointment, their powers and duties, and their compensation.

Commission Recommendation

The Commission recommends the enactment of a new Section 7, to read as follows:

Section 7. JUDGES SHALL DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES. THE GENERAL ASSEMBLY MAY, BY LAW, PROVIDE FOR MAGISTRATES OF THE COURTS OF COMMON PLEAS, WHO SHALL BE ATTORNEYS LICENSED TO PRACTICE IN THIS STATE AND WHO NEED NOT DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES. SUCH MAGISTRATES SHALL BE APPOINTED BY THE COURTS OF COMMON PLEAS THEY ARE TO SERVE, AND SHALL SERVE AT THE PLEASURE OF THE RESPECTIVE COURTS. LAWS SHALL BE ENACTED TO PRESCRIBE THE TIMES AND MODE OF THEIR APPOINTMENT, THEIR POWERS AND DUTIES, AND THEIR COMPENSATION.

Comment

The Commission considers the recommendation to create a single level of trial courts in Ohio as one of the two most significant ones in this report, equalled only by the recommendation for complete state financing. A full-time judiciary, required by this proposed section, is an integral part of the entire concept. As of January 1, 1976 there were 296 common pleas court judgeships in Ohio, 181 municipal court judgeships, and 67 county court judgeships. All common pleas judges were full-time, approximately 30 of the 181 municipal judges were part-time, and all of the county judges were part-time.

In the Commission's view, a full-time judiciary, free from the distractions and pressures of having to maintain a private practice, free from even the appearance of a possible conflict of interest, and at all times available to meet the demands of judicial business, best serves the interests of the administration of justice. Full-time judges, equal in rank and pay, have a tendency to raise the morale of the court on which they serve.

At the same time, the Commission recognizes the potential need for judicial officers other than judges within the framework of a single level trial court. Other states which have recently adopted single level trial court systems, including Idaho, Iowa, and Illinois also provide for magistrates (or associate judges) within their trial courts. The range of functions they perform, and the types of cases they may hear and decide, varies. For example, Article VI, Section 8 of the Illinois Constitution of 1970 permits the Supreme Court of Illinois to designate the types of cases which may be heard by associate judges (who were, or replaced, judges of courts inferior to the circuit courts). Under this authority, the Supreme Court has promulgated Rule 295, pursuant to which the presiding judge of the circuit may assign an associate judge to hear and decide any case other than a felony. More typical is the prescription of the function of magistrates, and the types of cases they may hear, by statute. Magistrates generally may perform marriages, grant bail in non-capital offenses, issue search warrants, hear traffic cases and at least a limited class of other misdemeanor cases. These functions, of course, were historically performed by justices of the peace, some of whom were not trained in law. The latter would not be the case in Ohio where, in fact, it may be that at least a large percentage of the magistrates initially appointed would be former part-time judges of municipal or county courts. While the Commission believes that designating the functions of magistrates and the types of cases they hear is a matter for the General Assembly, and its recommendation recognizes this fact, the Commission also expresses the hope that the statutes enacted to implement this recommendation will recognize the fact that magistrates functioning within the framework of the trial court of general jurisdiction can, and should be permitted to, perform a range of functions beyond those ordinarily associated with justices of the peace, or even with judges of courts of limited jurisdiction which function autonomously of the trial courts of general jurisdiction. As stated in the comment to Standard 1.12 (b) of the American Bar Association's *Standards Relating to Court Organization*: "There is a wide range of functions that judicial officers can perform. These include conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as a referee or master, hearing short causes and motions, and sitting in lieu of judges by stipulation or in emergency. These functions can be classified into two general types. The first is the hearing of parts or stages of larger proceedings that are before regular judges in their main aspects. The other is presiding over the trial of smaller civil and criminal matters, under the general authority and supervision of regular judges. In the latter capacity, the judicial officer would perform the functions now performed in many instances by judges of courts of limited jurisdiction. This arrangement economizes the time of the regular judges and recognizes the fact that smaller civil and criminal cases ordinarily do require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases. At the same time, it brings the trial of smaller cases within the ambit of the principal trial court and makes them subject to the supervision of its judiciary. It can serve also as a training ground for judicial advancement."

The feature that such judicial officers, who would be called magistrates under the Commission recommendation, would work within the common pleas court framework and be responsible directly to the court which appointed them distinguishes such officers from the former justices of the

peace, who functioned in a largely autonomous manner. In addition, as previously indicated, the range of judicial functions magistrates perform could be much broader, limited only by the discretion of the General Assembly as expressed in statute.

The Commission recognizes that the combined effect of recommending a three-tier court system staffed by full-time judges could, if implemented without adequate preparation and a transition period, disrupt the functioning of the courts as well as the careers of judges and support personnel who hold office in, or are employed in, the existing court structure. The establishment of a single level of trial courts necessarily means the abolition of municipal courts, county courts, and mayors' courts. Such a changeover involves, in addition to consideration of the financial impact on the units of government, the consideration of how the caseloads of the courts to be abolished are to be absorbed by the common pleas courts, and the distribution of, and adjustments in the number of, judges and support personnel. This will require extensive study. Also, there may be judges or court employees who do not wish to be a part of the reorganized court system and therefore may wish to find other pursuits. For all of these reasons, the Commission strongly recommends to the General Assembly that a changeover to single level trial courts, staffed by full-time judges and both full-time and part-time magistrates, not be put into effect until sufficient time has elapsed for adequate study and the enactment of necessary and well-considered legislation.

Section 8

Present Constitution

Vacant. Former Section 8 repealed effective May 7, 1968.

Commission Recommendation

Section 8. The salaries of all judges and expenses of the judicial department shall be paid from the state general fund as provided by law. There shall be a unified judicial budget as provided by law.

Commission Recommendation

The Commission recommends the adoption of a new Section 8, to read as follows:

Section 8. THE SALARIES OF ALL JUDGES AND EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID FROM THE STATE GENERAL FUND AS PROVIDED BY LAW. THERE SHALL BE A UNIFIED JUDICIAL BUDGET AS PROVIDED BY LAW.

Comment

This recommendation contains two elements: state financing of the courts and the establishment of a unified budget. The Commission regards both of these as indispensable to making Ohio's courts, particularly the trial courts, more effective instruments for the administration of justice. This conviction is shared by many who have commented on the subject in recent times. As an example, the U. S. Advisory Commission on Intergovernmental Relations in a comprehensive examination of state-local relations in the criminal justice system devoted several sections of its 1972 report on this subject to a discussion of the responsibility for financing state and local courts. Noting great variations in the degree to which state and local governments share the costs of operating the judicial branch of government, this report acknowledges rising interest in transferring judicial costs to state government.

As to the relationship of state financing of the courts to court unification, the writers assert:

> "Full state assumption of court expenses is a logical concomitant of a unified and simplified state-local judicial system. Such a system is designed to achieve greater uniformity in the administration of justice through simplified structure and state prescription and policing of standards of performance. Included in the latter are the vesting in the highest court of responsibility for promulgation of rules of practice and procedure, exercise of administrative oversight through an administrative office, and assignment and reassignment of judges to meet fluctuations in workloads. These objectives of unification and simplification are more likely to be achieved if the state supplies the necessary funds instead of relying on county or city governments to provide any substantial portion."[9]

It is further observed:

> "A state constitutional provision for a unified court system administered by the chief justice of the supreme court permits the judges to control the system of justice. But when the courts must go hat in hand to various local departments of government for the wherewithal

to support their needs, the judgment of the financier may be substituted for that of the judge. Conflicts between courts and branches of local government respecting personnel often arise."[10]

Regrettably, such conflicts between local government units and judges are not uncommon in Ohio. In one two-week period in early 1976, two items on the subject appeared in a central Ohio newspaper. On January 22, it was reported that a Ross County Common Pleas Court judge had filed an action in mandamus against the Ross County Commissioners "over their refusal to grant the amount of money sought by the courts for 1976 operations", the judge holding the view that the certification of funds made by the commissioners was incorrect.[11] On February 6, it was reported that the Madison County Commissioners had retained legal counsel to resist a request for appropriations made by a Madison County Common Pleas Court judge, which request was in the form of a court order, and which request had been cut by $22,000 from the original $112,500. "We only have so much money to appropriate. If it is decided we have to come up with the money, then cuts will have to be made in other offices" said a Madison County Commissioner, according to the report.[12] These two instances illustrate two cardinal arguments in favor of state financing of the courts. The first is that the inherent power doctrine, as a method for securing the financing of the courts, has severe limitations and, at times, negative consequences; and the second is that in arrangements in which the burden of financing trial courts falls heavily on local units of government, such courts are, and are treated as, competitors for funds which would otherwise be expended on local services. Courts are, in fact, primarily representatives of the judicial power of the state and, especially since many standards under which they operate emanate from state law or policy, in the Commission's view they should be financed by the state.

Furthermore, the present system, under which a large share of the cost of operating the courts is borne locally and much of the revenue generated by the courts is retained locally and treated as part of the general fund, presents all too much temptation for law enforcement officers to use the threatened nonenforcement of laws as a bargaining tool to gain economic ends.[13] The Commission regards this as no more appropriate than fee-supported justice of the peace courts, in which the enforcement of laws is tied on an economic incentive. There is also some evidence that because the distribution of moneys collected for prosecutions under state statutes varies from that collected under local ordinances — the latter being retained locally — there have been policy decisions to prosecute relatively more often under local ordinances than under state statutes, sometimes under local ordinances which are for all practical purposes identical to such statutes. At best, this situation has resulted in an unnecessary proliferation of criminal or regulatory law; at worst, it may involve considerations of denial of equal protection of the law. State financing of the court system would, in the Commission's view, tend to minimize citizen apprehension concerning the enforcement of law for any other reason than the demands of justice.

In 1969, state financing existed in at least seven states: (1) Alaska (93%); (2) Colorado (100%); (3) Connecticut (99%); (4) Hawaii (99%); (5) North Carolina (91%); (6) Rhode Island (99%); and (7) Vermont (100%).[14] The movement toward state financing stems primarily from the realization that (1) if the state sets the standards by which its courts operate, it should provide the fiscal support to implement them and (2) that the present local-state methods of sharing the cost of court systems produce

situations where the true cost of the court systems can not be determined at all.

The Institute of Judicial Administration conducted a study of state and local financing of the courts and in 1969 published a tentative report based in large part upon responses to questionnaires submitted to state supreme courts and court administrators. The writers make the point at the outset that the study was undertaken to obtain information about states and local financing that is virtually impossible to obtain through ordinary research methods. In fact, complete and accurate information about the financing of courts other than federal courts is unobtainable. The introduction to the IJA report states:

> "Even an intelligent guess as to the total amount of state funds expended on the judiciary within a state is almost impossible, except in the relatively few states where the entire, or almost the entire, judiciary is supported exclusively by state funds."[15]

The introduction further notes the difficulty in attempting to pinpoint a "typical" court:

> "The entire cost of one or more courts will be borne by the state government. Other courts will obtain funds from both state government and local government units. Still other courts are completely financed by local government units, sometimes by both county and municipal governments. This means that in order to determine total appropriations for the judiciary within a single state, it is necessary to consult numerous county and municipal budgets and supplemental appropriations measures. Inconsistent inclusions on and exclusions from the local judicial budgets make an intelligent estimate of the actual total expenditures for the support of the judiciary within the state exceedingly difficult."[16]

Many of the criticisms voiced in the 1969 IJA report concerning the lack of adequate information on court budgets and costs of operation are equally applicable to this state. It is impossible to give an exact figure of the cost of Ohio's trial court system, for example, or even to estimate it with any degree of assurance, because the true cost is hidden in so many local budgets — some of which are not judicial budgets — and there is no requirement that items be shown in a uniform manner in these budgets or that amounts budgeted for the court system be reported, as such, to a central point in state government.

In 1974 a Legislative Service Commission study was conducted to try to determine the income and expenses of these courts — common pleas, municipal, county and mayors' courts. The study was based on an examination of the reports required to be filed by county auditors with the Auditor of State for calendar 1972 and on questionnaires prepared and distributed for this purpose. Mayors' courts, as an example, showed no expenses for that year, while showing a total income of several million dollars. This appears to indicate that the expenses of mayors' courts (the *pro rata* share of a mayor's salary and the salary of a deputy or secretary, the cost of overhead, etc.) were simply not attributed to court expense. In this study, too, it proved impossible to determine the state's share of the income of common pleas courts from such sources as fines collected for violation of state statutes, because these amounts, which are deposited in the state general fund, are not shown as separate items in the local reports, and neither the State Auditor nor the State Treasurer keeps a

separate account of them. It appears proper to conclude from this study, however, that the total expenses of common pleas courts, taken as a whole, exceeded the income of such courts by some amount while the income of the courts of limited jurisdiction, taken as a whole, exceeded their expenses by several millions of dollars in 1972. The practical impossibility of determining the exact cost of the trial court system for that year — or any other — in the Commission's view underscores the evident need for uniform accounting and financial reporting in the judicial department and the desirability of a unified judicial budget. If the state is to assume the cost of the court system — which the Commission strongly urges — a unified budget is indispensable. Such a budget would also form the basis for long-range planning for the court system as a whole, something which is presently completely lacking, and permit the allocation of its human and material resources more equitably and rationally than is possible today.

However, the Commission is well aware that a changeover from the present method of financing, which includes a highly complex maze of laws under which fines, forfeitures and court costs paid into court are a source of revenue for local government — in effect a substitute for tax revenue — can not be implemented without a thorough investigation and evaluation of the fiscal impact of the proposal, both on the state and its political subdivisions, and of the statutory changes needed to avoid unfairness or hardship. Such an investigation, and the decisions on what statutory changes should be made, are in the Commission's view properly in the domain of the General Assembly. The Commission, therefore, recommends that the effective date of its recommendations for a new Section 8 be delayed until a time sufficiently in the future to enable the General Assembly to complete the study and to enact appropriate implementing legislation.

Section 9

Present Constitution

Vacant. Former Section 9 repealed effective September 3, 1912.

Commission Recommendation

Amend and transfer present Section 20.

Commission Recommendation

The Commission recommends that present Section 20 be retained, and amended by being renumbered Section 9.

Comment

See comment following present Section 20.

Section 10

Present Constitution

Vacant. Former Section 10 repealed effective May 7, 1968.

Commission Recommendation

Amend and transfer Section 13.

Commission Recommendation

The Commission recommends that present Section 13 be retained, and amended by being renumbered Section 10.

Comment

See comment following present Section 13.

Section 13

Present Constitution

Section 13. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

Section 10. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

The Commission recommends that this section be amended by being renumbered Section 10, to read as follows:

Section ~~13~~ **10.** In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Comment

The Commission makes no recommendation for change in the manner in which judges are chosen, nor in the manner in which vacancies are filled. However, the Commission does recommend that Section 13 be renumbered Section 10. It will be the last section of Article IV as revised pursuant to the recommendations contained in this report.

Although the Commission makes no recommendation for change, a minority report advocating the appointive-elective method of judicial selction (including the filling of vacancies) is attached as an appendix, as previously noted.

Section 15

Present Constitution

Section 15. Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The repeal of this section was previously recommended to the General Assembly by the Commission in Part 1 of its report, relating to the administration, organization, and procedures of the General Assembly, on the basis that the two-thirds vote requirement contained in it was "an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting courts specifically named in the Constitution or as may be established by law." (Part 1, page 64) If the recommendations on the Judicial Article contained in this report are adopted, there will be even less justification for imposing a special majority requirement on the General Assembly when it votes on a change in courts or judges, because the recommendations for such change by the Supreme Court will be a matter of public record and will be based on criteria which themselves will be public, thus eliminating any element of "log-rolling" from the decision process. An additional reason for repeal is the fact that the last sentence of proposed Section 5 (B) of Article IV states as follows: "No decrease in the number of judges shall vacate the office of any judge before the end of his term." That portion of Section 15 which would save the office of any judge would therefore be superfluous, as would that portion which states that any existing court heretofore created by law shall continue in existence until otherwise provided by law, since such courts, except for those specifically authorized in proposed Section 1, would cease to exist as of the effective date of proposed Section 1.

Section 17

Present Constitution

Section 17. Judges may be removed from office, by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which, shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

There are at present five methods for removing a judge from office in Ohio, two of them prescribed in the Constitution, one prescribed by law, one prescribed by law and implemented through Rule VI of the Supreme Court's Rules for the Government of the Bar of Ohio, and one prescribed by Rule IV of these rules.

The older of the constitutional methods is impeachment, which was found in Article I, Section 23 of the Constitution of 1802, and was carried over with minor changes as Article II, Section 23 of the Constitution of 1851. This section is thus part of the Legislative Article, and reads as follows:

> "The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the Senators, when sitting for that purpose, shall be upon oath of affirmation to do justice according to law and evidence. No person shall be convicted, without the concurrence of two-thirds of the Senators."

The grounds for impeachment are set forth in Article II, Section 24, which states:

> "The Governor, Judges, and all State officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law."

There have been few impeachments of judges in the history of Ohio, and none have occurred in this century. Two of the earliest such impeachments occurred when the state was not yet a decade old. In the culmination of a power struggle between the judicial and legislative branches of the state government, Supreme Court Judges Tod and Pease

were impeached as the result of their decisions, in separate cases, that aspects of a statute defining the powers and jurisdiction of justices of the peace were unconstitutional. Early in 1809, Tod and Pease were tried separately before the Senate. When the votes were taken, the two-thirds majority necessary for conviction was missed by a single vote in each case, and the judges were acquitted.

As with the federal counterpart of this provision,[17] there are open questions as to what constitutes a "misdemeanor" in office, although there appears to be agreement that the word "misdemeanor" as used in this context has a broader meaning than a misdemeanor as defined by statute. There is also a question as to whether the judgment of the Senate is subject to judicial review. Some have called impeachment a "cumbersome, unmanageable, impractical process."[18] That it may be, but it is also a powerful and historic tool for maintaining public confidence in the judiciary as well as other state officers, and the Commission believes it should continue to remain available.

The second constitutional method for the removal of judges is by concurrent resolution of the General Assembly under Section 17 of Article IV, whose repeal the Commission hereby recommends. This section had no equivalent in the Constitution of 1802. It is an original part of the Constitution of 1851 and, unlike the impeachment provision, it applies only to judges. Judicial removal under Section 17 may be classified for comparison with other state constitutions as a form of address. Traditionally, an address is a nonobiligatory request made by the legislative branch to the executive branch that an officer of the government be removed from his position. It usually applies to the removal of judges only, as does Section 17, but some constitutions make nonjudicial officers subject to address as well. Address procedures or proceedings in the nature of address are available in approximately one-half of the states.

The Ohio provision differs from the classical concept of address in that the executive takes no part in the removal process. Section 17 requires only the concurrent decision by both houses of the General Assembly that a judge be removed from office. The section provides that no judge may be so removed without the posting of the legislative complaint, notice to the judge, and the opportunity for the judge to be heard. Unlike impeachment, there is no requirement that a trial be held, but only that the responding judge be allowed to present his position. However, in one sense Section 17 establishes a procedure which is more difficult to apply successfully than impeachment: whether the judicial removal be by impeachment or under Section 17, a two-thirds vote of the entire Senate is required; but while articles of impeachment may be founded upon a simple majority in the House, a Section 17 removal demands the approval of a two-thirds majority of both the House and the Senate.

Section 17 is like the provisions in most state constitutions which allow proceedings in the nature of address in that a two-thirds vote is set as the standard, and in that no specification of cause for removal, such as the commission of a "misdemeanor" in the case of impeachment, is made. While no delineation of what constitutes sufficient cause for removing a judge exists in Section 17, the requirement that the substance of the complaint against the judge be included in the legislative journal does imply that some despicable act must have been committed or an otherwise unacceptable situation must have been created by the judge in question. Still, no appeal normally exists for one removed from office by address or proceedings in the nature of address, and one can infer from this that the legislature may have the power to remove a judge arbitrarily, so

long as the procedure of enrolling the complaint, providing notice, and allowing the judge a hearing is followed.

The inclusion of Section 17 in the Constitution of 1851 received only passing debate on the floor of the Convention. The first report of the Convention's Standing Committee on the Judicial Department included a suggestion that removal of judges be allowed upon a mere concurrent vote of two-thirds of both houses of the General Assembly. Subsequently, the proposal was amended to provide for journalizing the complaint and giving notice and an opportunity to be heard. There was recognition that a constitutional method of removal other than impeachment did not exist as to nonjudicial officers and the argument was made that judges should not be exposed to a greater liability of removal. The delegates who presented this argument reasoned that the judiciary was chartered as a separate branch of government and should not be subject to a threat of legislative control.

The history of Ohio shows that whether the address-like proceeding provided for in Section 17 is or is not more expeditious than impeachment as a method of judicial removal, and whether or not it presents a threat of potential legislative control over the judicial branch, it, like impeachment, has not been favored as an approach to dealing with unfit judges. As with impeachment, the address-like method of removal has not been used during the twentieth century. In fact, it has never been used.

The two statutory methods of removal can also be traced to a constitutional provision, namely Article II, Section 38, adopted as part of the 1912 revision of the Constitution. This section is in the nature of a mandatory direction to the General Assembly to provide statutory methods of removal for state officers, judges, and members of the General Assembly. The provision reads:

> "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

The thrust of Section 38 is that judges and other officers should be subject to removal from office for moral turpitude and other statutorily stated causes, and that such removal need not be accomplished by impeachment or, in the case of judges, by the address-like proceeding of Article IV, Section 17. The provision singles out "misconduct involving moral turpitude" as cause for statutory removal, but does not limit the General Assembly in denominating other types of misconduct as causes for removal. Section 38, while in part the result of dissatisfaction with the removal procedure under Article IV, Section 17, includes the procedural safeguard of that earlier provision by requiring that any removal made possible by statute shall be "upon complaint and hearing".

One statutory method is set forth in Sections 3.07 to 3.10 of the Revised Code. These sections specifically refer to Article II, Section 38 in establishing a procedure for removal of public officers which is initiated directly by the public and to which judges are subject. These statutes require the removal of an officer upon a judicial finding that he is guilty of "misconduct in office."

The first sentence of Revised Code Section 3.07 not only sets the framework for removal under this method and refers directly to Article

II, Section 38, but also defines the "misconduct in office" which, when found, creates a vacancy in the office. The sentence reads:

> "Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office."

The procedure for removal based upon a finding of "misconduct in office" is codified in Revised Code Section 3.08. The proceedings are instituted by the filing of a complaint which delineates the charge and which is signed by a designated number of electors of the state or of the political subdivision whose officer it is sought to remove. The statute also prescribes the court in which the complaint is to be filed, requires notice to the officer who is the subject of the complaint, a prompt hearing, and that the hearing be a matter of public record. The Supreme Court has ruled that a judge may not be found guilty of misconduct in office and removed except upon clear and convincing evidence.

The decision of a court in a removal case under these statutes has been held to be a judicial rather than a political decision and subject to appellate review. Revised Code Section 3.09 allows a single appeal, whether the first hearing be in a common pleas court or a court of appeals. Statistics on the frequency with which judicial removal under Revised Code Sections 3.07 to 3.10 has occurred are unavailable, although reported decisions show at least three instances which have arisen under these sections and analogous provisions of the predecessor General Code.

The second statutory method the General Assembly has authorized for the removal of judges is found in Revised Code Sections 2701.11 and 2701.12. This method applies exclusively to judges, and these statutes are expressly subject to the rules of the Supreme Court and outline the procedure more fully implemented by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio. Briefly stated, Revised Code Section 2701.11, which also concerns the retirement and suspension of judges who are physically or mentally disabled, provides for a proceeding before a commission of five judges, appointed by the Supreme Court, who may cause the removal of a complained-of judge when cause, as defined in Revised Code Section 2701.12, exists. As required by Article II, Section 38 and prescribed in Rule VI, these sections provide for a complaint and a hearing. Revised Code Section 2701.12 states in pertinent part:

> "(A) Cause for removal or suspension of a judge from office . . . exists when he has, since first elected or appointed to judicial office:
> (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of pulic respect for the office;
> (2) Been convicted of a crime involving moral turpitude; or
> (3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment."

The statute clearly indicates that the cause for removal must arise

after the judge assumes his office. But, in applying this rule care should be taken to note just what event constitutes the cause. For example, under (A) (2) the conviction is the pivotal event which must occur while the judge is in office, although the commission of the crime involving moral turpitude might be before taking office, and (A) (3) recognizes disbarment or suspension *while in office* for misconduct *prior to taking office* as cause for removal.

Rule VI, entitled "Removal of Judges", was adopted by the Supreme Court in 1972. (This rule was originally enacted as Supreme Court Rule XXI in 1969.) Not only does Rule VI deal with judges who are accused of some act or omission which makes them unfit to hold the office, but it also provides for removal of those judges who are physically or mentally disabled. It is explicit that this rule was adopted pursuant to the authority granted by the General Assembly in Revised Code Sections 2701.11 and 2701.12. The rule reiterates many of the aspects of judicial removal set forth in these statutes, but is primarily directed to supplying needed definitions and details of procedure.

The full range of procedural details prescribed in Rule VI can best be seen in a direct comparison of Revised Code Section 2701.11 and 2701.12 to the Rule, but only the major steps of the procedure, which are contained in both the statutes and the rules, are outlined here. First, the grievance committee of a regularly organized bar association investigates a suspicion or charge of judicial misconduct. If it is believed that a full hearing should be held, a complaint is filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The seventeen member board then investigates the complaint, and if twelve or more members find substantial credible evidence in support of the complaint, the investigation is certified to the Supreme Court. The Court then appoints a commission of five judges to determine by a majority the question of removal. This commission is composed of judges of courts of record located in any five appellate districts other than that in which the complained-of judge resides. If the commission orders removal, the judge so removed may appeal directly to the Supreme Court.

Rule VI adds several noteworthy elements to the statutes. For example, the Rule affirmatively states that a judge is disqualified from performing his duties while awaiting the disposition of any indictment or information charging him with the commission of a felony. The current practice under this part of the Rule is for the Supreme Court to issue an order suspending the subject judge as soon as the indictment or information becomes a matter of public record. The theory behind this practice is to remove from the bench judges who might be unable to rule impartially, given concerns over their personal futures, or whose very presence on the bench might incite public distrust in the judiciary, regardless of the presumption of innocence.

Rule VI also expands the causes for which a judge may be removed as set forth in Revised Code Section 2701.12 by adding "if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute. . ."

Rule IV of the Rules For the Government of the Bar, entitled "Professional Responsibility and Judicial Ethics", provides an alternate rule-based approach to the removal of judges. Rule IV binds all attorneys to the Code of Professional Responsibility and all judges to the Canons of Judicial Ethics. New standards of judicial behavior became effective in December 1973, when the Code of Judicial Conduct was adopted. This

Code is designed to replace the Canons of Judicial Ethics and binds all person not in a judicial office on the effective date of the Code when they take a judicial office and all incumbent judges upon the beginning of their next term in office. The procedure for imposing discipline under these sets of standards is set out in Rule V. By prescribing suspension from the practice of law and disbarment for willful breaches of these tenets of behavior, Rule IV establishes the basis for another approach to removing an unfit judge.

The statute[19] and the Rules [20] clearly state that a judge's loss of the privilege to practice law constitutes cause for his removal from office, but the fact that judges must be attorneys and that attorney-judges have an obligation to follow the Codes and Canons has been interpreted by the Supreme Court to mean that an indefinite suspension or a disbarment works a forfeiture of judicial office and is in itself grounds for removal.[21] The Court has further held that an action in *quo warranto* lies to enforce the vacating of the office.[22]

The situation results that the disbarment of a judge can give rise to his direct removal under the forefeiture of office concept or it can constitute cause for a proceeding under the statute or rule which exposes him to the liability of removal. It must be borne in mind here that a judge may also be disbarred or suspended for a willful violation of the Code of Professional Responsibility, which establishes generally more inclusive standards of behavior than are in the Canons of Judicial Ethics or the Code of Judicial Conduct and which violation might conceivably not be a violation of the ethical rules which apply only to judges.

The authority of the courts to consider the professional discipline of an attorney who is serving as a judge and to remove that judge from the bench if he is deemed unfit as an attorney has been challenged unsuccessfully on several occasions. Challenges usually assert the exclusivity of constitutional and statutory methods of removal. The Supreme Court has ruled that it, "through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member."[23]

While the states are divided on whether a judge may be disciplined while in office for his actions as an attorney before taking office, Ohio holds that elevation to the bench does not cut off an attorney's liability to discipline for his previous professional misconduct.

The supervision of judicial fitness and the removal of judges by a combined use of Revised Code Sections 2701.11 and 2701.12 and the Supreme Court Rules has been successful. Several judges have been removed from office in recent years by the use of these approaches.

The Commission concludes that there are adequate means, other than a concurrent resolution of the General Assembly under Section 17 of Article IV, to remove unfit judges from office in Ohio, and the Constitution as presently written is flexible enough on this point to allow the General Assembly or the Supreme Court to prescribe new, and perhaps even more effective, means in the future. Both existing constitutional methods have in the past been criticized as being too cumbersome to be of effective use. The total lack of use of either the impeachment method or the concurrent resolution method in this century would seem to bear out that judgment. The Commission is advised that, in fact, most resignations of judges for reasons other than age, health or other legitimate cause have in recent years been accomplished without formal proceedings

under threat of Supreme Court action. It may well be argued that there is a practical need for a procedure not dependent on the judgment of the Supreme Court, to hear and determine possible cases involving one or more members of the Court itself. If that is so, then the impeachment approach, the basis for which is set forth in the Constitution, however imprecisely, as "any misdemeanor in office", and which specifically requires a trial, is preferable to the concurrent resolution approach, the basis for which is not set forth in the Constitution and which, while it requires a hearing, does not require a trial. Thus, the very presence of the latter method in the Constitution poses a threat of possible confrontation between the legislative and judicial branches of government for reasons other than judicial fitness — a situation which should be avoided if at all possible. For this reason, and the conviction that the remaining methods are adequate now and capable of improvement or change in the future, the Commission recommends the repeal of Section 17 of Article IV.

Section 18

Present Constitution

Section 18. The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The Commission views this provision as unnecessary. This section became part of the Constitution in 1912, and the exact reason for its addition is uncertain, although its aim appeared to be the prevention of the issuance of *ex parte* orders in chambers. However, since the powers of any court are derived either from the Constitution, the statutes, or to a more limited extent, are inherent, this provision is in one sense unduly limiting and in another sense simply surplusage. It should, therefore, be removed from the Constitution.

Section 19

Present Constitution

Section 19. The General Assembly may establish courts of Conciliation, and prescribe their powers and duties; but such courts shall not render final judgment, in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

This provision also became part of the Constitution in 1912. The Debates of the Convention shed little light on its intended purpose, although the general tenor of the discussion which is recorded there indicates a desire to provide a forum in which parties could settle legal differences by means short of a formal trial. It is interesting to note that the statutory references following this section in Page's Ohio Revised Code are to Revised Code Section 2711.01 *et seq.*, which govern arbitration clauses in written contracts generally, and to Revised Code Section 4129.02 *et seq.*, which govern the powers and duties of the Industrial Commission and procedures before that body. The Commission believes that the validity of the foregoing statutes would not be affected by a repeal of Section 19. And, although courts of conciliation as such never have been established in Ohio, there is no reason to believe that a subject-matter division serving the same function — that is, the settlement of disputes in a less formal atmosphere and with simplified rules and procedures — could not be established within the structural framework for common pleas courts which the Commission recommends in this report.

Section 20

Present Constitution

Section 20. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the State of Ohio."

Commission Recommendation

Section 9. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude "against the peace and dignity of the State of Ohio."

Commission Recommendation

The Commission recommends that this section be amended by being renumbered Section 9, to read as follows:

Section ~~20~~ 9. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the State of Ohio."

Comment

This section prescribes certain formalities to be followed in relation to the style of process and the form of indictments, and states that all prosecutions shall be carried on in the name and by the authority of the State of Ohio. It states sound constitutional principles, and its parameters are well known and understood. The Commission believes that the section should be retained, but, because Section 9 is presently vacant, this section should be renumbered Section 9. No substantive change is intended.

Section 22

Present Constitution

Section 22. A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General As-

Commission Recommendation

Repeal.

Present Constitution — Continued

sembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

Commission Recommendation

The Commission again recommends that this section be repealed.

Comment

This section was adopted in 1875. It authorized the creation of a Supreme Court Commission to serve for three years beginning in 1876, and it further authorized the General Assembly, by a two-thirds vote, to establish such commissions by law, if requested to do so by the Supreme Court, not oftener than once in ten years nor for terms of more than two years. The purpose of the provision was to alleviate extraordinary circumstances in the workload of the Supreme Court. Pursuant to this provision, one other Supreme Court Commission was established, also in the last century. The section has not been used since that time.

In Part I of its report, relating to the administration, organization and procedures of the General Assembly, the Constitutional Revision Commission has once before recommended the repeal of this section as obsolete. This recommendation was accepted by the General Assembly and placed on the May 1973 ballot. At that time it was defeated, apparently as the result of inadequate voter information. However, the Commission concludes that the reasons given in support of the original recommendation to repeal this section are valid, and for that reason renews the recommendation here.

Section 23

Present Constitution

Section 23. Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten percent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such county the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.

Elections may be had in the same manner to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The overall concept of the Commission's recommendations for a revised Article IV is the establishment of a three-tier court structure in which there is only one level of trial courts of general subject-matter jurisdiction, namely the courts of common pleas. It is contemplated that existing county and municipal courts will be absorbed into the common pleas courts, and mayors' courts will be abolished. The creation of subject-matter divisions except probate, and the assignment of judges to such other divisions, would be governed by Supreme Court rule subject to amendment or rejection by the General Assembly, unless the General Assembly by law required special election to a division. Section 23 is inconsistent with this concept, and for that reason the Commission recom-

mends its repeal. However, the effective date of the repeal of this section should be delayed to coincide with the effective date of proposed Section 1, so that consolidation under Section 23 can take place until proposed Section 1 becomes operative.

Footnotes

1. Remark reprinted in *Ohio Briefs, No. 20* (Columbus: League Women Voters of Ohio, September 1972), p. 2.
2. For examples of the disposition of fines in state cases, see *Minor Courts in Ohio* (Columbus: Legislative Service Commission, Staff Research Report No. 35, 1959), Appendix D.
3. American Bar Association, *Standards Relating to Court Organization* (1974), Commentary on Section 1.11 (b), pp. 9-10.
4. Idaho Constitution, Article 5, Section 20.
5. Illinois Constitution, Article 6, Section 1.
6. Iowa Code, Section 602.1.
7. Hawaii Revised Statutes, Section 601-1 *et seq.*
8. Glenn R. Winters, "New Approaches to Appellate Court Problems", *Louisiana Bar Journal*, June 1970, p. 29.
9. U. S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (1971), p. 207.
10. *Ibid.*
11. "Judge is Assigned for Ross County Budget Hearing", *Columbus Dispatch*, Thursday, January 22, 1976, p. B-1.
12. "Judge Questions His Court Budget", *Columbus Dispatch*, Thursday, February 5, 1976, p. D-5.
13. "Police Slowdown May Reduce Jobs", *Columbus Dispatch*, Thursday, January 22, 1976, p. A-1.
14. See U. S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System*, "State-Local Sharing of Court Expenditures, 1968-1969", p. 108.
15. Institute of Judicial Administration, *State and Local Financing of the Courts* (Tentative Report, April 1969), p. 4.
16. *Ibid.*
17. Constitution of the United States, Article II, Section 4.
18. *State of Ohio, Debates and Proceedings, Constitutional Convention, 1850*, p. 240 (May 30, 1850).
19. Revised Code Section 2701.12 (A) (3).
20. Rule VI, Section 1 (c) of the Rules for the Government of the Bar of Ohio.
21. *State ex rel. Saxbe v. Franko*, 168 Ohio St. 338 (1958).
22. *Ibid.*
23. *Mahoning County Bar Association v. Franko*, 168 Ohio St. 17 (1958).

APPENDIX A
Minority Report

Appointive-Elective Method of Judicial Selection

Introduction

The Commission's Judiciary Committee submitted its report in April 1975 after nearly two years of study of the questions relating to judicial administration, including extensive research and discussion of the methods of judicial selection. Based on its study, the committee decided to propose an extensive revision of Section 6 of Article IV providing for the appointive-elective method of selection, mandatory for the Supreme Court and the courts of appeals and optional, by vote of the electorate affected, for courts of common pleas. This proposal was contained in the April 1975 committee report. It was debated at the June and July, 1975 Commission meetings, during the course of which debate it was amended in a few relatively minor respects. Subsequently, it was submitted to a vote of the Commission, and received 15 votes. Twenty-two votes are needed under Commission rules for a proposal to be adopted as a Commission recommendation.

The proposal, as amended, is attached to this minority report. We, the undersigned, support the proposal, as amended, and hereby offer our reasons for this support.

Methods of Judicial Selection Currently in Use Among the States

There are five methods of judicial selection currently in use in the United States. These are:

1. Gubernatorial appointment. In this method, the governor makes the original appointment, usually with the approval of the legislature or a house thereof, or of a body especially established for this purpose.

2. Legislative election. In this method, the selection is made by a vote of the legislature.

3. Nonpartisan election. In this method, judicial candidates are formally excluded from identification with a political party on the election ballot, although they may be chosen at partisan primaries.

4. Partisan election. Here, judges may be identified on the election ballot with a political party and are nominated in partisan primaries.

5. Appointive-elective method. This method, which has come to be known popularly as the merit plan or Missouri plan, has three essential elements: first, slates of candidates are chosen by a nonpartisan nominating commission usually composed of some designated members of the judiciary, several lawyers appointed or elected by bar associations, and several lay persons appointed by the governor; second, the governor selects a judge from the list of names submitted by the commission; finally voters review the appointment by means of a referendum in which the judge runs unopposed on his record.[1]

History of Judicial Selection in the United States

During colonial times, judges were appointed by the Crown. After the Declaration of Independence, six of the new states vested the responsibil-

ity for judicial appointments in the governor, subject, however, to the approval of a group of citizens or to the state legislature. In Pennsylvania and Delaware, the approving authority was the state legislature. In Massachusetts, New Hampshire and Maryland it was the Governor's Council, consisting of various state officers, and in New York it was a special "Council of Appointment", consisting of four state senators as well as the governor. In contrast, seven of the original states entrusted the election of judges to their legislatures, as an indication of distrust for the executive. These were Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, South Carolina and Georgia. In 1789 no state obtained its judges by popular election. Georgia was the first to do so, in 1793.

Several reasons have been advanced for the rising demand for popular control of the judiciary. First, there was the impact of *Marbury v. Madison*, 1 Cranch 137 (1803), in which the Supreme Court unequivocally asserted the power of the judicial branch to pass on the constitutionality of legislation. This declaration generated a great deal of controversy over the possible dire consequences of unchecked judicial power, and in fact led to an attempt to impeach several members of the Court. Thomas Jefferson, who before he became President advocated the appointment of judges to serve during good behavior, suggested after the *Marbury* decision that the popular election of judges might, indeed, be desirable. Second, judges of American courts were called upon to play a more active role in the *creation* of law than their English counterparts, because many English common-law precedents simply did not fit the circumstances and needs of a frontier society. The vacuum thus caused forced American judges to create new law for the resolution of particular legal conflicts, but many citizens regarded this as the usurpation of what they saw as a properly legislative function. Third, following the American Revolution there began a period of distrust for the legal profession as a whole, resulting from the fact that many prominent attorneys had been Loyalists during the war, and that, following the war, attorneys had participated extensively in debt collection and in the foreclosure of mortgages. Finally came the impact of Jacksonian Democracy, which was firmly premised on the belief that all men are created equal, and that, as a consequence, all men are equally capable of assuming any public office. In his first inaugural address, Jackson proceeded from the premise that all men are in fact equal to the conclusion that judges "were as fungible in public office as potatoes."[2]

The prevalent method of election during the nineteenth century was by means of partisan primaries and elections. The excesses and evils of this approach were most starkly exemplified by the workings of the Tweed political machine in New York City from 1866 to 1871. While the Tweed Era probably represented the bleakest picture of the consequences of the partisan election of judges, the fact was that many citizens recognized the need for some reform in this area. The most notable of these reforms was the emergence of the nonpartisan judicial ballot, which was a product of the turn-of-the-century Progressive Movement and which, in theory at least, was supposed to eliminate the worst feature of the election of judges — *de facto* domination of judicial selection by partisan political bosses and organizations.

However, no fundamentally new approach to judicial selection was put forward until 1913, when Professor Albert M. Kales of Northwestern University Law School proposed a plan which in his view combined the advantages of the appointive and elective methods and eliminated the faults of both. The original Kales proposal was that an elected officer (he

suggested an elected chief justice) do the appointing to fill judicial vacancies from a list of names submitted by an impartial, nonpartisan nominating body (he suggested a judicial council), the appointees to go before the voters at stated intervals thereafter on the sole question of their retention in office. The rejection of a judge by the voters was to create a vacancy to be filled again by appointment. This concept was from its beginning championed by the American Judicature Society and in 1937 the American Bar Association also formally declared its support for it.

For reasons apparently grounded in a widely shared desire for reform sparked by bitter partisanship and scandal in the state's judiciary over a period of several decades, Missouri in 1940 became the first state to adopt the Kales-ABA principles in a constitution. The ABA's support for the appointive-elective method or plan was reaffirmed when its principles were incorporated in that organization's Model Judicial Article, published in 1962. Today, the states of Alaska, California, Colorado, Indiana, Idaho, Kansas, Missouri, Nebraska, Oklahoma, Utah and Vermont select at least their supreme court and court of appeals judges by this method.[3] About a half dozen states use aspects of merit selection on a more limited basis, and some states have established nominating commissions for the filling of vacancies by executive order even though they still employ the elective method. Significantly, no state has changed an existing method of judicial selection to anything but the appointive-elective method during the post World War II period.

History of Judicial Selection in Ohio

Under the Constitution of 1803, Ohio joined the Union with a judiciary appointed by the General Assembly. The Ohio Constitution of 1851, written near the height of Jacksonian Democracy, put Ohio into the ranks of those states which elected their judges. As one commentator remarked:

> "Most of Ohio's 'founding fathers' had gone to their rewards by the time of the Ohio Constitutional Convention of 1850, and the Jacksonian version of what came to be called 'populism' was sweeping the country, bringing with it the spoils system, and a belief that no special talents were needed for public office. The populists buried under an 'elitist' label anyone who cautioned that, at least in the case of those offices which required some professional or technical competence, popular election would cost more in mediocre government than it would ever gain from the largely theoretical increase in citizen involvement."[4]

By 1850, many Ohioans had concluded that courts staffed by the legislature had become "undemocratic", because party service had become an indispensable qualification for a judgeship. So, the new Constitution provided for the nomination of judges by party convention and election on a partisan ballot. This, presumably, at least gave the voters a choice of candidates. By the end of the century, however, political thought had evolved to the position that judicial selection would be made "more democratic" by the elimination of partisan politics from the selection process altogether. Progressive forces were thereafter instrumental in securing the passage of the Nonpartisan Judiciary Act of 1911, which required nonpartisan ballots for the election of judges, and the rotation of judges' names on the ballot. In 1912, the Progressives at the convention held that year succeeded in incorporating into the Constitution a provision for the direct primary nomination of all state officers including judges, except for

those nominated by petition, and the election of judges on a nonpartisan ballot. The new structure for judicial selection, like its predecessors, soon came under severe criticism, including that "the ability to get publicity rather than judicial fitness" had become the pathway to judicial office in Ohio.[5] However, despite such criticsm, several attempts to substitute the appointive-elective method for the present method have failed. In 1938, Ohio voters rejected a proposed constitutional amendment to adopt a plan similar to the one adopted two years later in Missouri, and none of several subsequent proposals has reached the ballot in Ohio since that time.

Why an Appointive-Elective System?

We believe that the present method of selecting judges in Ohio is not in the best interests of the people. Any elective method involves essentially a choice of judges by political party officials who are primarily concerned with political factors such as a candidate's support within a party organization, prior service to the party, and political charisma. In our view, the only acceptable basis for selecting a judge is a thorough knowledge and evaluation of his personal conduct and integrity, and his professional competence. The appointive-elective method of selection, in which the superior screening process of the nominating commission is the central feature, is much more likely to establish the facts necessary for a decision as to fitness for judicial office than an election campaign. Particularly in metropolitan areas in which a large number of judges may be elected at once, the average voter faces a hopeless task in trying to educate himself sufficiently to make a truly informed choice. All too often, he ends up relying on the familiarity of a name, which may depend on incumbency or ethnic origin, both of which are basically irrelevant factors. There is another facet to the "name game" in Ohio judicial races.[6] It has on occasion resulted in the loss of judicial office by individuals who, by every test we can apply, deserved to remain in office on the basis of their records. And we wonder how many other qualified persons have not offered themselves as candidates for judicial office for fear of one day facing defeat because they did not have the "right" name or because it was not "the right year" for their party.

Supporters of the elective system argue that election assures that judges who share the policy views of a majority of the electorate hold such office. Even if we concede that judges should be policy makers — and we are not prepared to do so unequivocally — there are two factors which strongly mitigate against an elected judge's accurately reflecting the policy viewpoint of the citizens he serves. The first of these is the now well-documented "voter dropoff" phenomenon in judicial races, which may result from the fact that judicial opinions seldom arouse much public fanfare, so that policy decisions which *are* made public may well go unnoticed. Whatever the reason for it, studies show that the phenomenon tends to operate in favor of well-educated middle and upper class voters, who are in a better position to acquire the necessary information than the less educated, and who thereby are in a better position to assure the election of judges who more closely reflect their own political orientation.[7] The second factor is the essentially cloistered nature of judicial work itself, which makes it difficult to determine its quality. As one observer states:

> "Once we have named a man as a judge, the quality of his performance as a judge passes almost completely outside our effective surveillance and control, unless his performance is extremely bad ... Any notion that the public or the bar may have any genuine control

over the quality of judicial performance by judges already on the bench is simply not realistic."[8]

Again, we are compelled to recognize the importance of the selection process, and again we emphasize the inherent suitability of a nominating commission for the purpose. Such a commission will by its very nature either contain elements of those segments of society which have a constant interest in the high quality of courts and judges or receive input from them, and over time it will develop an expertise in detecting and cataloging qualities which make a good judge, something which the average voter has no way to do under the present, elective system. The public interest sparked by the operation of a commission will of itself serve an educational function, and the voter will retain ultimate control over who occupies judicial office through the retention election. Thus, the ultimate result of an appointive-elective system will be a better screened and qualified judiciary, accountable to a more informed electorate.

Richard A. Watson and Rondal G. Downing point out in their in-depth study of the Missouri experience, *The Politics of the Bench and the Bar*, that "[w]hether the plan eliminates politics in judicial selection is a false issue. Instead, the key issue is whether the particular kind of politics that evolved under the plan adequately represents the legal, judicial, public and political perspective thought to be important in determining who shall sit on the bench."[9] In those courts of Missouri in which the appointive-elective method is in effect, both the public and the legal profession, in the main, agree that it has produced a more respectable judicial climate than existed in the state before the method was adopted, and while no empirical proof is available that the method produces "better" judges in terms of there being fewer reversals of their decisions by higher courts, there has been a positive psychological impact on both the public and the bar as the result of its adoption in that state. Watson and Downing conclude that the method has had a tendency to eliminate highly incompetent judges from the bench, and has placed on the bench persons with qualities Missouri lawyers — and presumably also Missouri citizens — rate most highly in a "good" judge: (1) knowledge of the law; (2) open-mindedness; (3) common sense; (4) courtesy to lawyers and witnesses; and (5) diligence.[10]

Data from states which have more recently adopted the appointive-elective system have not yet been as thoroughly analyzed as those of Missouri, but judging from the trend toward the adoption of the method which began in the 1950's and is continuing at the present time, it appears that a majority of the citizens who are concerned with the improvement of the courts and the quality of their judges, and who have had an opportunity to voice their beliefs at the ballot box have concluded that the appointive-elective method is more likely to produce the results they desire than any other method of judicial selection now available. We join in that conclusion and strongly endorse the adoption of an appointive-elective method of judicial selection for Ohio.

Respectfully submitted,

Craig Aalyson	Don W. Montgomery
Richard H. Carter	William H. Mussey
Robert G. Clerc	Francine M. Panehal
Warren Cunningham	Marcus A. Roberto
Richard E. Guggenheim	Katie Sowle
Robert K. Huston	Paul A. Unger

Footnotes, Appendix A

1. Henry R. Glick and Kenneth N. Vines, *State Court Systems* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973), p. 39.
2. Roger J. Traynor, "Who Can Best Judge the Judges", *Selected Readings – Judicial Selection and Tenure*, ed. Glenn R. Winters (Chicago: American Judicature Society, 1967), p. 141.
3. *Montana Constitutional Convention Studies*, Report No. 14, "The Judiciary", (Helena: Montana Constitutional Convention Commission, n.d.), Table 14, p. 145.
4. Bruce I. Petrie, "The 122-Year Cop-out", *Cincinnati Bar Association Journal* (Fall, 1973), p. 12.
5. Francis R. Auman, "The Selection, Tenure, Retirement and Compensation of Judges in Ohio", 5 U. Cin. L. Rev. 408 at 414 (1931).
6. See editorial, "In this Ohio Name Game, the Real Loser is You", *Akron Beacon Journal*, Sunday, September 1, 1974, p. E-2.
7. Kathleen L. Barber, "Ohio Judicial Elections — Nonpartisan Premises with Partisan Results", 32 Ohio State L. J. 762 at 788 (1971).
8. Robert A. Leflar, "The Quality of Judges", 35 Ind. L. J. 289 at 299 (1960).
9. Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar* (New York: John Wiley and Sons, Inc., 1969), pp. 331-332.
10. Watson and Downing, *op. cit.*, p. 345.

Article IV

Section 6

Section 6. (A) (1) ~~The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.~~ THE FULL TERMS OF THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT, OF THE JUDGES OF THE COURTS OF APPEALS, AND OF THE JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE SIX YEARS.

(2) (a) ~~The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.~~ WHENEVER A VACANCY OCCURS IN THE OFFICE OF CHIEF JUSTICE, OR OF ANY JUSTICE OF THE SUPREME COURT, OR OF ANY JUDGE OF A COURT OF APPEALS, OR WHEN ANY ADDITIONAL JUDGESHIP ON THE SUPREME COURT OR A COURT OF APPEALS IS ESTABLISHED BY LAW, THE GOVERNOR SHALL FILL THE SAME BY APPOINTMENT UNDER AN APPOINTIVE-ELECTIVE SYSTEM, FROM A LIST OF NOT FEWER THAN THREE QUALIFIED PERSONS, WHOSE NAMES SHALL BE SUMBITTED BY A JUDICIAL NOMINATING COMMISSION.

(b) THE NUMBER OF JUDICIAL NOMINATING COMMISSIONS AND THEIR ORGANIZATION, THE NUMBER, METHOD OF SELECTION, COMPENSATION AND EXPENSES, QUALIFICATIONS, AND TERMS OF OFFICE OF MEMBERS OF EACH COMMISSION, AND PROVISIONS FOR FILLING OF VACANCIES, SHALL BE ESTABLISHED BY LAW; PROVIDED, THAT NOT MORE THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE FROM THE SAME POLITICAL PARTY, AND THAT LESS THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE MEMBERS OF THE BAR OF OHIO; AND PROVIDED THAT THE TERMS OF OFFICE OF SUCH MEMBERS SHALL BE STAGGERED. HOLDERS OF PUBLIC OFFICE EXCEPT MEMBERS OF THE GENERAL ASSEMBLY MAY SERVE ON A JUDICIAL NOMINATING COMMISSION.

(c) ANY JUSTICE OR JUDGE OF THE SUPREME COURT OR A COURT OF APPEALS WHO IS APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM ESTABLISHED PURSUANT TO THIS CONSTITUTION SHALL SERVE AN INITIAL TERM OF TWO YEARS FROM THE DATE OF HIS APPOINTMENT AND UNTIL FEBRUARY FIFTEENTH FOLLOWING THE NEXT GENERAL ELECTION OCCURRING IN AN EVEN-NUMBERED YEAR. AT SUCH TIME AS PROVIDED BY LAW, ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION AS PROVIDED BY LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE "YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY VOTING ON THE QUESTION VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE ON THE FIFTEENTH DAY OF FEBRUARY FOLLOWING THE ELECTION, WHICH VACANCY

SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

(d) THE CHIEF JUSTICE, ANY JUSTICE OF THE SUPREME COURT, OR ANY JUDGE OF A COURT OF APPEALS SERVING ON THE EFFECTIVE DATE OF THIS AMENDMENT IS ENTITLED, UNLESS REMOVED FOR CAUSE, TO REMAIN IN OFFICE. AT SUCH TIME AS PROVIDED BY LAW, PRIOR TO THE ELECTION PRECEDING THE END OF THE TERM TO WHICH HE WAS ELECTED OR APPOINTED ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM TO BEGIN ON THE DAY PROVIDED BY LAW UNDER WHICH HE WAS ELECTED OR APPOINTED, SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION, AS PROVIDED BY LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE"YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY OF THOSE VOTING ON THE QUESTION AS TO ANY JUSTICE OR JUDGE VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE AT THE END OF THE TERM, WHICH SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

(3) (a) The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties~~,~~ OR districts~~, or, as may be provided by law, other subdivisions,~~ in which their respective courts are located, ~~for terms of not less than six years,~~ and each judge of a court of common pleas ~~or division thereof~~ shall reside during his term of office in the county~~,~~ OR district~~, or subdivision~~ FROM WHICH HE IS ELECTED ~~in which his court is located~~. IN CASE THE OFFICE OF ANY JUDGE OF A COURT OF COMMON PLEAS BECOMES VACANT BEFORE THE EXPIRATION OF THE TERM FOR WHICH HE WAS ELECTED, THE VACANCY SHALL BE FILLED BY THE GOVERNOR, UNTIL A SUCCESSOR IS ELECTED AND HAS QUALIFIED, AND SUCH SUCCESSOR SHALL BE ELECTED FOR THE UNEXPIRED TERM AT THE FIRST GENERAL ELECTION THAT OCCURS MORE THAN FORTY DAYS AFTER THE VACANCY OCCURS, EXCEPT THAT WHEN THE UNEXPIRED TERM ENDS WITHIN ONE YEAR IMMEDIATELY FOLLOWING THE DATE OF SUCH GENERAL ELECTION, AN ELECTION TO FILL SUCH UNEXPIRED TERM SHALL NOT BE HELD AND THE APPOINTMENT SHALL BE FOR SUCH UNEXPIRED TERM.

(b) (1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, JUDGES OF ANY COURT OF COMMON PLEAS MAY BE APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM, UPON THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION WITHIN THE TERRITORIAL JURISDICTION OF THE COURT. ELECTIONS MAY BE HELD IN THE SAME MANNER TO DISCONTINUE THE PRACTICE OF APPOINTING SUCH JUDGES. THE METHOD OF SUBMISSION OF EITHER QUESTION SHALL BE PROVIDED BY LAW.

(2) THE PROVISIONS OF DIVISION (A) GOVERNING AN APPOINTIVE-ELECTIVE SYSTEM FOR THE CHIEF JUSTICE, JUSTICES OF THE SUPREME COURT, AND JUDGES OF THE COURTS OF APPEALS APPLY TO JUDGES OF ANY COURT OF COMMON PLEAS MADE SUBJECT TO SUCH A SYSTEM BY THE ELECTORS, EXCEPT THAT THE LIST SUBMITTED BY THE JUDICIAL NOMINATING COMMISSION SHALL CONTAIN NOT FEWER THAN TWO NAMES,

AND THE DATE OF COMMENCEMENT AND EXPIRATION OF THE TERM OF EACH COMMON PLEAS JUDGE SHALL BE PROVIDED BY LAW.

~~(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.~~

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof, and~~ of all courts of record established by law, shall, at stated times, receive~~,~~ for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. THE COMPENSATION OF ALL JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE THE SAME. ~~Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law.~~ Judges shall receive no fees or perquisites, EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, ~~under the authority of this state, given by the general assembly, or the people~~ shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he ~~shall assume~~ ASSUMES the office and ~~enter~~ ENTERS upon the discharge of its duties he ~~shall have~~ HAS attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

APPENDIX B

Minority Report

Opposing the Unified Trial Court Concept

The majority in this report recommends eliminating the existing mayors' courts, county courts, and municipal courts in Ohio and merging all such trial courts into the common pleas courts, thus retaining the common pleas courts as the only trial courts in the state. We wish to be recorded as opposing the single trial court.

The courts sought to be eliminated by the recommendation of the majority are the so-called "statutory courts" of Ohio, that is, those which the Constitution authorizes the General Assembly to create by statute, but which it does not require to be established. While we subscribe to the theory that court structure and procedure should be simple so that cases can be decided fairly, inexpensively, and quickly, we do not believe that this recommendation will necessarily lead to that result. "Bigger" does not always "make better". Futhermore, Ohio's statutory courts have a particularly local character, dealing as they often do with matters involving local ordinances, local disputes, traffic violations, and other relatively minor degrees of criminal offenses. It is in these courts that most citizens come in contact with the judicial system, if they come in contact with it at all during the everyday course of their lives. So they regard such local courts as "their" courts, as institutions in whose maintenance and continuation they have a particularly personal stake. While it is conceivable that "unification" of trial courts might bring about some operating efficiencies which can not be realized under the present system, we do not believe these are worth the cost in terms of the loss of personal identification with an institution of government — an identification which is a positive force in our society.

Finally, since the courts which it is proposed to abolish by this recommendation were created by law, they can be altered or abolished by law, without any need for constitutional amendment. Should the General Assembly at some future time decide that a change in the structure of statutory courts is warranted, that will be soon enough to make the changes. They should not come about by constitutional fiat.

Respectfully submitted,

Richard F. Maier
Donna Pope

APPENDIX K

Part 11

THE BILL OF RIGHTS

April 15, 1976

PART 11: THE BILL OF RIGHTS

Introduction

"It is no accident that a bill of rights constitutes the first article of most state constitutions. Man's struggle for constitutional government is centuries old and has been demanding in material and human sacrifice. Where he has been successful the symbol of his victory is civil liberty or right — the constitutional protection of the individual against arbitrary or tyrannical treatment by his government. Realizing the difficulty in securing and holding these rights we have stated them in the most prominent position among our constitutional principles." [1]

The protection of individual freedom against government power is the general purpose of a bill of rights. Those who wrote the Federal Constitution omitted a general statement of rights, arguing that it was unnecessary to write specific protections into the Constitution. The Federal Government, they stated, was one of limited powers, and it was inherent in its very nature that it could not encroach upon individual rights in the absence of a specific provision in the Constitution granting power to the government. This argument, however, did not convince the states nor the people in them, with the result that the first ten amendments, known as the Bill of Rights and providing specific individual rights against which the Federal Government could not encroach, were demanded as a condition to ratification.

The Federal Bill of Rights was intended to place limitations on the Federal Government, and each state constitution contains a bill of rights with similar — sometimes greater and sometimes fewer — restrictions on the state government in the form of similar guarantees for individuals in the state. A few provisions in the Federal Constitution itself prohibit state action of particular types — for example, Section X of Article I which prohibits states from passing any bill of attainder or ex post facto law — but the major provisions of the Bill of Rights of the Federal Constitution did not begin to be applied directly to the states until the adoption of the 14th Amendment following the Civil War. That amendment — and the 13th and the 15th adopted at about the same time — were directly applicable to the states. The key provisions of the 14th Amendment — ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" — have led to the gradual application of many, although not all, of the provisions of the Federal Bill of Rights as guarantees of individual rights against state governmental encroachment.

Since many of the rights in the Federal Bill of Rights are applied to the states today, and since most of the significant rights cases involve interpretation of the Federal, and not a state, Constitution, it may be questioned whether state bills of rights continue to have vitality. The response seems to be that they do have. They offer individual protections not found in the Federal Constitution, or greater in degree than the present federal guarantees as interpreted by the courts. They offer protection in areas found in the Federal Bill but not yet applied to the states through the 14th Amendment. They offer protection to the individual in the event federal courts alter their interpretations. Finally, and perhaps most importantly:

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1. Rankin, Robert S., "State Constitutions: The Bill of Rights", National Municipal League, 1960, p. 1.

> For those who would halt, or at least slow down, the expansion of federal power and who would revitalize state governments, the careful drafting of a state bill of rights to include all liberties which should be guaranteed against state action (even if they may also be protected by the Fourteenth Amendment) offers a major challenge. If the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic fundamental vitality of state governments is immeasurably weakened.[2]

It is significant that none of the new or rewritten state constitutions have omitted a bill of rights. Some have shortened them by omitting expressions of political philosophy or "constitutional sermons" and some have modernized language and removed ambiguous or obsolete expressions, but all state constitutions still contain the basic, fundamental guarantees of freedoms and rights believed essential to the protection of individuals against governmental power.

Each section of Article I, and a section in Article XIII related to eminent domain, was reviewed by the study committee and by the Commission. The studies included comparison with the Federal Constitution, history of the Ohio section, discussion of possible problems and legal interpretations of each section, and a comparison with a few other state constitutions. The committee and the Commission also heard testimony from any person interested in commenting on any section, or in proposing additions to the Ohio Bill of Rights.

The committee and the Commission determined that changes should not be recommended in the Bill of Rights unless a demonstrated need existed for the change. Changes for the sake of modernizing language or spelling, omitting obsolete provisions, rearranging, and similar matters are not recommended. A proposal to change sex-specific words — for the most part, the use of the masculine gender — to neutral words or to rewrite the sections involved so that references to a particular gender could be eliminated was rejected.

The research studies and the testimony noted provisions in the Bill of Rights that have not yet been fully explored in court decisions, or about which questions have been raised. The committee examined these problems and determined that most of them can be handled legislatively, and that others — such as balancing the rights of the property owner and the government in eminent domain proceedings — do not lend themselves to constitutional solution. Other potential problems, the committee believes, should wait for the problem to materialize, at which time changes in the constitutional language will be easier to draft and explain, and more acceptable to the voters.

Several new provisions were proposed by persons appearing before the committee and the Commission. These included an equal rights amendment and an amendment giving people the right to know and the right to participate in governmental affairs. The committee and the Commission concluded that too little was known about the meaning of some of the terms used, and about the potential effect and meaning of the proposals.

Mr. Joseph W. Bartunek of Cleveland was chairman of the Education and Bill of Rights Committee of the Commission, which was responsible for the study of the Bill of Rights and this report. Other committee members were: Mr. Robert Clerc of Cincinnati, Dr. Warren Cunningham of

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2. Hart, James P., "The Bill of Rights: Safeguard of Individual Liberty", *Texas Law Review*, October, 1957, p. 924.

Oxford, Mr. D. Bruce Mansfield of Akron, Representative Alan Norris, Representative Marcus Roberto, Mr. James W. Shocknessy of Columbus, and Mr. John A. Skipton of Findlay.

Each section of the Bill of Rights and section 5 of Article XIII is discussed in this report, with the Commission recommendation, a brief Ohio history, comparison with the Federal Constitution, and a brief interpretative comment that includes the rationale of any changes proposed by the Commission.

Summary of Recommendations

PART 11

THE BILL OF RIGHTS

The Commission submits the following recommendations to the General Assembly on Article I of the Ohio Constitution, the Bill of Rights, and on section 5 of Article XIII:

Article I

Section	Subject	Recommendation	Page
Section 1	Inalienable rights	No change	14
Section 2	Where political power vested; special privileges	No change	16
Section 3	Right to assemble	No change	18
Section 4	Bearing arms; standing armies; military power	No change	19
Section 5	Trial by jury	Assigned to a special committee	20
Section 6	Slavery and involuntary servitude	No change	21
Section 7	Rights of conscience; the necessity of religion and knowledge	No change	24
Section 8	Writ of habeas corpus	No change	25
Section 9	Bailable offenses; bail, fine and punishment	Amend	25
Section 10	Trial for crimes; witness	Amend; assigned to a special committee	29
Section 11	Freedom of speech; of the press; of libels	No change	33
Section 12	Transportation for crime; corruption of blood	No change	35
Section 13	Quartering troops	No change	36
Section 14	Search warrants	No change	37
Section 15	No imprisonment for debt	No change	38
Section 16	Redress in courts	No change	39
Section 17	Hereditary privileges	No change	42
Section 18	Suspension of laws	No change	43
Section 19	Private property inviolate, exception	No change	43
Section 19a	Damages for wrongful death	Assigned to a special committee	48
Section 20	Powers reserved to the people	No change	50

Article XIII

Section 5	Right of way	Amend	51

The Commission recommends very few changes in the Ohio Constitution's Bill of Rights, believing that its provisions have served the people of Ohio well in the past, most of them since the first days of statehood, and will continue to play an important role in the lives of Ohioans in the future. The Commission determined that further information was needed

regarding grand juries and civil trial juries, and has appointed a special committee to study those sections — sections 5, 10, and 19a of Article I. A change is recommended in section 9, relating to bail, in order to permit the denial of bail to some persons accused of serious crimes under certain circumstances, and in section 5 of Article XIII, to remove a reference to a jury "of twelve men" in a section permitting the granting of eminent domain powers to corporations. An amendment to section 10 of Article I would remove language permitting comment by counsel in a criminal trial on the failure of a defendant to testify.

Following the conclusion of the committee's work, correspondence was received from Mr. Wilmer D. Swope, chairman of the Trustees of Fairfield Township, in Columbiana County. Mr. Swope sent copies of petitions to the General Assembly and other materials proposing changes in several provisions in the Ohio Bill of Rights and in the Preamble to the Ohio Constitution. Mr. Swope's proposals are on file in the Constitutional Revision Commission office, and can be examined by any interested persons.

ARTICLE I

Section 1

Present Constitution

Section 1. All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 1 is derived from Article VIII, section 1 of the 1802 Constitution and was adopted in 1851 with minor modifications of the language. It has not been amended since 1851. In both Constitutions, it is the first section; indicating, perhaps, that it is a statement of principle as well as a guarantee of rights. It resembles the beginning of the second paragraph of the Declaration of Independence which states:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The section has no direct parallel in the United States Constitution.

Comment

Section 1 falls within the category some scholars of state constitutional law classify as "political theory" and unenforceable. Indeed, no Ohio case was found in which this section alone was cited by a court as setting forth an enforceable right or guarantee. However, the section is cited together with other sections in Article I as providing for due process in a manner somewhat similar to the 14th Amendment and thus has an indirect parallel with the Federal Constitution. To provide the full protection of the due process clause of the 14th Amendment, it is also necessary to consider sections 16 and 19 of Article I of the Ohio Constitution. In *D. P. Supply Co. v. Dayton,* 138 Ohio St. 540 (1941), the Ohio Supreme Court identified the limits of due process as guaranteed by these sections by saying that all freedoms of the Bill of Rights are subject to the properly exercised police power, which limitation is expressly recognized

in Article I, section 19. The rights granted in section 1 are absolute and "inalienable" but, although absolutely given, they are not absolute in their scope; they are limited in a manner that is in accord with due process and the police power.

The police power includes that which is reasonable and necessary to secure the health, safety and welfare of the community, as long as it does not otherwise violate the United States Constitution or the Ohio Constitution, and is not exercised in an arbitrary or oppressive manner. The Supreme Court of Ohio has established guidelines to evaluate the exercise of the police power; in *City of Cincinnati v. Cornell,* 141 Ohio St. 535 (1943) it said,

> Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.

Personal freedom may be curtailed as punishment for crime. Guardians may be appointed, thus giving, under certain circumstances, exclusive control over an individual's personal freedom or power to handle property to another.

The individual has the right to enjoy and defend his liberty. In *Palmer & Crawford v. Tingle,* 55 Ohio St. 423 (1896), the Court said that "liberty did not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to enjoy his naturally endowed faculties restrained only as much as is necessary for the common welfare."

Section 1 also provides for the freedom to acquire, possess, and protect property. The freedoms attached to property, though, are also circumscribed, but the same standards must be met in order for a legislative body to effectively limit the right to enjoy and use property as one wishes. The concept of property is broad, and it is difficult to define one specific type of regulation limiting absolute freedom in the use of property; regardless of the myriad forms of property, however, the requirement that certain standards be maintained in its regulation in order to satisfy the requirements of due process does not change.

In *Frecker v. Dayton,* 88 Ohio App. 52, *affd.* 153 Ohio St. 14 (1949), the Court found that street vending was a legitimate business and the owner had a property right in the business, affording him the protection of Article I, section 1. Any attempt to interfere with that property interest must be supportable on the basis of a reasonable exercise of the police powers. A set of Columbus ordinances that prohibited the use of pinball or similar machines, enforced by the threat of a misdemeanor penalty and confiscation of the machines, was upheld in *Benjamin v. Columbus,* 167 Ohio St. 103 (1957). The appellant sought to overturn the ordinances, arguing that they were arbitrary and unreasonable and deprived him of his property without due process — not only because they would authorize the police to seize his machines, but also because the ordinances would drive him out of business in Columbus. The Court held that this injury was unavoidable. Justice Taft, writing for the Court, said that almost every exercise of the police power will either interfere with the enjoyment of liberty or the acquisition, possession, or production of property within the meaning of section 1, or would involve an injury within the meaning of the 14th Amendment. Nevertheless, if the act is not unreasonable or arbitrary and bears a substantial relation to the protection of the health, safety or welfare of the public, it will not be overturned because of its

harmful effects on certain people. The courts would only interfere if the legislature had made a clearly erroneous decision about the act's reasonableness or relationship to the public welfare.

Benjamin also illustrates the principle that private property may be subject to confiscation or destruction if the property is in some way violative of certain acts passed pursuant to the police power. Statutes providing drastic measures for the elimination of disease whether in humans, crops, or stock, are in general authorized under the police power as preservation of public health. (e.g., *Kroplin v. Truax*, 119 Ohio St. 610, 1929)

The enjoyment, possession and protection of real property is also subject to regulation. Building codes and zoning ordinances which are not purely fanciful or aesthetic but which are measurable and have a rational relationship to the preservation of the health, safety and welfare of the public are not unconstitutional. (*State ex rel. Jack v. Russell*, 162 Ohio St. 281, 1954)

The police power can also be used to regulate the use of property in another way, through licensing and regulation of licensed businesses, not only to prevent crime but to protect the public. In *Auto Realty Service, Inc. v. Brown*, 27 Ohio App. 2d 77 (Franklin County Ct. A., 1971) the appellant was found to be engaging in the sale of automobiles without the necessary license and without following the required regulations for such sales. Finding against his claim that the requirements violated his freedom under Article I, section 1, to engage in business, the Court held that while the individual has the constitutional right and freedom to engage in business, the State has the right to regulate this freedom, subject to certain restraints, for the safety of the public. Regulations may not be arbitrary and must have a real relationship to the public health, safety, or welfare. They must not destroy lawful competition or create trade restraints tending to establish a monopoly.

Finally, the individual has the right to seek and obtain happiness and safety. The pursuit of happiness has been interpreted as the right to follow or pursue any occupation or profession without restriction and without having a burden imposed on one not imposed on others. This provision, though, has been rarely litigated and the possible ramifications of its guarantee are not known.

ARTICLE I

Section 2

Present Constitution

Section 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 2 has remained unchanged since its adoption in 1851. It is derived from Article VIII, section 1 of the 1802 Constitution and the Declaration of Independence. Much of the 1851 section is basically the same as its 1802 counterpart, with slight language alterations. The last clause, though, was added in 1851 after considerable debate. It was seen as a move to return the power of the government in all its manifestations

to the people and to curb the power of individuals and corporations who had achieved wealth, influence and position in part through privileges granted them by the state. The supporters of this clause argued successfully that all power is inherent in the people and cannot be bartered away. Grants of privileges, they contended, diminished or partitioned that power; therefore, the grants violated the people's right to control their government and the government failed to provide equal protection and benefits.

This section contains the "equal protection" clause of the Ohio Constitution, although its language is not identical to the parallel clause of the United States Constitution, Amendment 14, section 1. The major portion of Article I, section 2, however, is derived from the Declaration of Independence and has no federal constitutional parallel.

Comment

The first sentence of section 2 is, like section 1, more of a statement of principles than an enforceable right or guarantee. In *Ohio ex rel Atty. Gen. v. Covington, et al.*, 29 Ohio St. 102 (1876), the Ohio Supreme Court stated that this declaration enunciates the foundation principle of government — that the people are the source of all political power — but the Court said that this was not intended as a denial of the power or right of delegation and representation.

The "equal protection" clause of section 2 — "Government is instituted for their equal protection and benefit" — differs from the federal parallel in the 14th Amendment which is as follows: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The ramifications of the federal "equal protection" clause are extensive, and will not be discussed here. Since the 14th Amendment applies directly to the states (many other provisions of the Federal Bill of Rights having been made applicable to the states through the 14th Amendment), the state cannot diminish those rights or guarantees found in the 14th Amendment. The only relevant inquiry would seem to be whether Ohio courts have interpreted the Ohio provision significantly differently from the federal provision, or found in the Ohio provision any rights not found in the federal provision. No cases have been found that would seem to give the Ohio provision any special significance.

The "privileges or immunities" clause was an issue in *Railway Company v. Telegraph Association*, 48 Ohio St. 390 (1891). The question raised was whether a franchise granted to the Telegraph Company to operate a telephone service could subsequently be altered or revoked when it was later found that the operation of the Railway Company interfered. Did the Telegraph Company have a vested interest in the telephone system as operated that not even the legislature could limit, reduce, or revoke? The Court held that special privileges and immunities were under the control of the legislature and that according to Article I, section 2, if granted, they could be altered, revoked, or repealed by the General Assembly. If the exercise of rights conflicted, it would be construed as the intention of the legislature to deny an exclusive franchise, if not repeal the antecedent grant. Having received their corporate franchises from the state, the companies hold them in implied trust for the benefit of the community at large, and to the constitutional grant of legislative power to control the exercise of those franchises, which are privileges, in the future as the public good might require.

The people's rights to alter, reform, or abolish the government is another statement generally classified as "political theory". Article XVI

of the Ohio Constitution sets forth the methods of amending the Constitution, including the calling of a Convention to revise, alter, or amend it, and this statement in section 2 does not appear to add anything of substance.

ARTICLE I

Section 3

Present Constitution

Section 3. The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their Representatives; and to petition the General Assembly for the redress of grievances.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Originally adopted as Article VIII, section 19 of the Constitution of 1802, this section was included in the Constitution of 1851 almost word for word, and has remained unchanged since 1851.

Section 3 has had little effect in recent years because of the impact of its federal counterpart in the Bill of Rights, the First Amendment, clause 3, which has been incorporated through the 14th Amendment to apply to the states, providing the full extent of the federal guarantee to all (*Elfbrandt v. Russell*, 384 U.S. 11 (1966)). The federal guarantee provides that:

> Congress shall make no law . . . . abridging . . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Comment

Freedom to associate for the advancement of beliefs and ideas or to petition for redress of grievances is so fundamental to the concept of ordered liberty that its protection is assumed by the due process clause of the 14th Amendment, even though actions taken under the protection of this clause may be controversial, political, social, or economic actions, *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

Like other rights, though, this freedom is not absolute and is circumscribed by the legitimate exercise of police powers by state and municipal authorities to protect the health and safety of the citizens. The police power, however, cannot be used merely to prevent or disperse annoying gatherings, but only to enforce statutes reasonably designed to protect life and order.

The people also have the right to petition for the redress of grievances. Interference with this right to petition, to express ideas, or to act in a concerted way by either a government, through its agents or officers, or an individual, with the purpose of preventing such legal action, is forbidden by the First and 14th Amendments, *McQueen v. Druker*, 317 F. Supp. 1122, *aff.* 438 F. 2d 781 (D.C., Mass., 1970). Further, unless there is some overriding state concern, an association or an individual's right to belong to the association cannot be interfered with by laws prohibiting people belonging to the association from holding certain jobs, or by rules against joining an organization for those holding certain jobs.

The presence of a threat of violence or a clear danger to persons or property is normally a sufficient basis for the restriction of the rights to free speech or assembly, but governmental officials may not selectively

or discriminatorily enforce statutes that deal with disturbances, by using these laws to either allow or prohibit constitutionally protected activities at their discretion. (*United States v. Crowthers*, 456 F. 2d 1074 (4 Cir. 1972)) The interests of government in regulations that infringe upon constitutional rights must be balanced against those of the individual, and the state must show a compelling interest in overriding individual interests to do so.

Ohio's section allows similar freedom and restriction, subject to the same valid exercise of police power. In *Toledo v. Sims*, 14 Ohio Ops. 2d 66 (1960), a municipal court held that the people of Ohio had affirmed, through Article I, section 3, the right of the inhabitants of the state to assemble or congregate. Ohio courts have repeatedly interpreted the section in a manner consistent with the First Amendment of the U.S. Constitution. Where they have failed to provide the level of protection required by the 14th Amendment, they have been reversed, *Coates v. Cincinnati*, 402 U.S. 611 revg. 21 Ohio St. 2d 66 (1971).

ARTICLE I

Section 4

Present Constitution

Section 4. The people have the right to bear arms for their defence and security; but standing armies, in time of peace, are dangerous to liberty and shall not be kept up; and the military shall be in strict subordination to the civil power.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 4 has not been altered since its 1851 adoption. The second and third clauses are identical in content to section 20 of Article VIII of the 1802 Constitution; the 1851 Constitution merely modernized the language. The first clause, however, in the 1802 Constitution, stated that the people had the right to bear arms for the protection of themselves and the State. The 1851 Constitution says that the people have the right to bear arms for their defense and security. The earlier Constitution ties the possession of arms by individuals more closely to the concept of the protection of the State in keeping with the concepts, then prevalent, of the vigilant citizenry or the citizen-soldier. This was followed in a natural transition, by the statement that standing armies were dangerous and that the military should be subordinated to the civilian powers. The 1851 section altered the language, stating that individuals could bear arms for their defense and security. Whether any significant change in meaning was intended is not clear, because of the lack of debate.

The first clause guarantees the right to bear arms, as does the Second Amendment of the Federal Bill of Rights. The second clause provides for civilian control over the military. While this has no specific parallel in the United States Constitution, the concept is implied in Article II, section 2 which names the President as Commander-in-Chief of the armed forces. The Ohio Constitution contains a similar implied subordination of the military to the civil authorities, Article III, section 10 and in Article IX, which provide that the Governor is the Commander-in-Chief and shall appoint the adjutant general and other such officers of the militia as provided by law.

Comment

The "right to bear arms" of the Ohio Constitution is worded differently from the Second Amendment and could be construed to have a different effect on an individual's rights, especially since the Second Amendment has not been held applicable to the states. The Second Amendment begins: "A well-regulated militia being necessary to the security of a free state . . ." and thus the right to bear arms is intimately connected with the concept of a citizen soldier and individual states' rights. Ohio's section appears to be an absolute affirmation of the right to bear arms without any governmental interference or limitation of that right. The Supreme Court of Ohio, though, has held that to fully understand Article I, section 4, it must be read in conjunction with the Second Amendment; a form of reverse incorporation. When both are read together, it is seen that the primary purpose in permitting people to bear arms is to dispense with the need for a standing army and to enable the people to prepare for their own defense by retaining their arms, *State v. Nieto,* 101 Ohio St. 409 (1920). Further, the existence of this right does not restrict the legislature's power and responsibility under its police powers to pass laws and establish regulations that may be necessary to protect the safety and welfare of the citizens of Ohio. Consequently, the protection of the general public by the regulation of the use and transportation of dangerous weapons, through the exercise of the legislative power, is a legitimate use of that authority; *Akron v. White,* 28 Ohio Op. 2d 41 (Mun. Ct., 1963). Under these same powers, the legislature can enact laws that totally regulate the sale of arms and that govern the possession of concealed weapons, *Nieto.* Although an ordinance prohibiting the bare possession of arms by the people will generally be unconstitutional, the extent of the police powers of the State allow restrictions to be placed on this right.

It is beyond the scope of this report to analyse the federal provision. The reader is referred to other materials, such as Levin, *The Right to Bear Arms: The Development of the American Experience,* 48 Chi.-Kent L. Rev. 148 (1971).

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.

Commission Recommendation

The Commission has appointed a special committee to study civil trial juries.

History; Comparison with Federal Constitution

"The right of trial by jury shall be inviolate" was section 8 of Article VIII of the 1802 Constitution and section 5 of Article I of the 1851 Constitution. The exception—that, in civil cases, verdicts could be rendered by ¾ of the jury—was proposed by the 1912 Constitutional Convention and subsequently adopted by the people. No changes have been made in the section since 1912.

The Federal Constitution guarantees the right to a trial by jury in criminal cases in Article III, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury . . ." and in the Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to a

speedy and public trial, by an impartial jury . . .". The Seventh Amendment provides for jury trials in civil cases as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Comment

Section 10 of Article I of the Ohio Constitution contains a guarantee of a jury trial in criminal cases similar to that found in the Sixth Amendment to the Federal Constitution (and in the Constitution itself). Discussion of the various aspects of jury trials as found in those provisions will be found following section 10. The committee concluded that no changes in the Constitution were desirable with respect to the requirements for juries in criminal cases.

A number of issues have been raised in recent years by lawyers, judges, and others expert in the administration of justice concerning civil trial juries. The questions include: under what circumstances is there a right to a jury trial? what are permissible jury sizes? is a unanimous verdict a constitutional requirement? can jury verdicts be reduced in size without violating the Constitution?

After discussion of these issues and the research papers presented to it on these topics, the committee concluded that it did not have sufficient information on which to base any recommendations for change in the Ohio Constitution, but that the questions were important and should be studied further by a special committee, with particular emphasis on the problem of sizes of verdicts.

The Commission has appointed a special committee, and a further report on juries will be issued in the future.

ARTICLE I

Section 6

Present Constitution

Section 6. There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

This section had its basis in Article VI of the Ordinance of 1787, the first clause of which said, "There shall be neither slavery nor involuntary servitude in the said territory (Northwest Territory), otherwise than in punishment of crimes . . .". Article VI contained a further provision, though, that allowed for the recapture of slaves and indentured servants notwithstanding the previous guarantee. Article VIII, section 2 of the Constitution of 1802 retained the opening clause and limited indenture to children until the age of 21 years for males and 18 years for females unless an individual entered into indenture in perfect freedom for good consideration received or to be received. Indenture of negroes or mulattoes residing in the state, regardless of the origin of the contract, was limited to one year except in cases of apprenticeships. The Constitutional Convention of 1850-1851 retained only the opening clause after modernizing the language, and the section has not been altered since 1851.

The Thirteenth Amendment to the Federal Constitution provides in section 1:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

The 13th Amendment is one of the post-Civil War amendments to the Federal Constitution and, therefore, postdates the Ohio provision.

Comment

There are no Ohio cases construing section 6, and the history and origins of Ohio might help account for this. Ohio was admitted to the United States as a free state, just as previously it had been part of a free territory, and it became a hotbed of abolitionist sentiment. Harriet Beecher Stowe lived in Cincinnati, Joshua R. Giddings taunted Southern adversaries with stinging invective in Washington, and Oberlin College became an important center for the abolitionist movement. So, slavery was never an issue except in cases of slaves who were escaping through Ohio. Other forms of servitude, as indenture, were dying out by the end of the 18th Century and never became widespread in Ohio. The substitute for indentured whites was enslaved blacks but this, of course, was prohibited throughout the Northwest Territory.

The 13th Amendment forbids all shades and conditions of slavery, including apprenticeships for long periods or any forms of serfdom. The general purpose of the Amendment, when read with the 14th and 15th, was found to be the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made citizens from the oppressions of those who formerly exercised dominion over them (*Slaughter-House Cases,* 83 U.S. 36, 1872). The Court asserted, though, that this protection was not limited to the Negro, saying that while Congress only had Negro slavery in mind when it passed the Amendment, it prohibited other forms of slavery as well, including any type of peonage or coolie system. This opinion was supported by the "Civil Rights" Cases, 109 U.S. 3 (1883). There, the Court said that the 13th Amendment has respect, not to distinctions of race, or class or color, but to slavery; not merely prohibiting state laws establishing or upholding slavery, but absolutely declaring that slavery or involuntary servitude should not exist in any part of the United States. Further, the Enabling Clause gave Congress the power to pass all laws necessary and proper for abolishing all badges and incidents or burden and disabilities of slavery in the United States which includes all restraints on fundamental liberties which are the essence of civil freedom.

The 13th Amendment prohibits any type of forced labor contracts when the employer may use debt or criminal fraud statutes to enforce the contract or punish the employee. This was the issue dealt with in *Pollock v. Williams,* 322 U.S. 4 (1944). Commenting on the Thirteenth Amendment, the Court said that the Thirteenth, as implemented by the Antipeonage Act, was not merely to end slavery, but to maintain a system of completely free and voluntary labor in the United States. While certain forced labor, as a sentence of hard labor for the punishment of crime, may be consistent with the Thirteenth Amendment in special circumstances, generally, it violates the Amendment. The defense against oppressive hours, pay, and working conditions or treatment is to change employers, but when the employer can compel and the employee cannot escape his obligation to work, there is no power below to redress, and no incentive above to relieve harsh or oppressive labor conditions. Whatever

social value there is in enforcing contracts and obligations of debt, Congress has established that no indebtedness warrants a suspension of the right to be free from compulsory service. This meant, the Court held, that no state could make the quitting of work a component of a crime or make criminal sanctions available for holding unwilling persons to labor. In *United States v. Shackney*, 333 F. 2d 475 (2 Cir., 1964), the Court said the 13th Amendment applied to direct subjection, by a state using its power to return the servant to the master, and to indirect subjection, by the state using criminal penalties to punish those who left the employer's service. The Court contended, though, that the term went further. Various combinations of physical violence, of indications that more would be used against an attempt to leave, and of threats of immediate physical confinement, it said, were sufficient to violate the 13th Amendment, although where the employee has a clear choice about leaving even when the alternative is unappealing there is no violation.

ARTICLE I

Section 7

Present Constitution

Section 7. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 7 has remained unchanged since it was included in the Constitution of 1851. Largely copied from its predecessor, Article VIII, section 3 of the Constitution of 1802, it was re-written and enlarged in 1851 by the addition of three new clauses. Of those clauses added in 1850-51, the first provides that no person shall be incompetent as a witness because of his religious beliefs. The second states that nothing within the section shall be construed to dispense with oaths or affirmations, and the final one extends the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceful mode of public worship.

The First Amendment to the Federal Constitution provides several guarantees of fundamental liberties: freedom of religion, freedom of speech and press, and freedom of assembly. Section 7 of Article I of the Ohio Constitution deals with freedom of religion. The relevant portion of the First Amendment is "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .". Obviously, much of section 7 of Article I of the Ohio Constitution is not found in the Federal Constitution nor any of its Amendments.

Comment

The First Amendment's religious freedom provision has been applied to the states through the due process clause of the 14th Amendment (*Cantwell et al. v. Connecticut,* 310 U.S. 296, 1940). Federal cases expounding on various aspects of religious freedom cover such matters as military conscientious objectors, tax status of property associated with a religious institution, solicitation of funds for religious purposes, public support for schools associated with a religious group, prayer in public schools, and other topics, and are too numerous to discuss. Since Supreme Court decisions interpreting the First Amendment apply to the states, it is possible to affect the constitutional wall separating church and state in Ohio only if the Ohio Constitution, and its interpretation by the legislature or the courts, goes beyond the federal by making the wall higher, not by lowering it.

Early Ohio cases contained no surprises in interpreting the Ohio provisions. The Ohio Constitution adopts a hands-off policy towards religion and requires that each religious denomination maintain that same policy towards the others. It also recognizes the constitutional privilege to worship God according to the dictates of conscience, and the right to teach these beliefs to children; the commitment to this right has been formalized by Article I, section 7 of the Constitution of 1851. There can be no interference with the exercise of this right, and Ohio courts have permitted no prior restraint on its use, whether by legislative, judicial or executive action (*Bloom v. Richards,* 2 Ohio St. 387, 1853). This right to freedom of religious belief is not limited to Christian belief, but extends to any type of belief and neither Christianity nor any other religious belief can be part of the laws of Ohio. The legislature cannot promote Christianity or any other belief beyond passing laws to protect them from outside interference, *Board of Education of Cincinnati v. Minor,* 23 Ohio St. 211 (1872).

Section 7 also sets out the fundamental guarantee, recognized as a fundamental principle in both state and federal constitutional law, that no religious test can be required by law for qualification for holding office, *Clinton v. State,* 33 Ohio St. 27 (1877). Ohio, further, specifically states that an individual's religious beliefs will not disqualify him as a witness; Article I, section 7 goes on to state that this will not dispense with any oath or affirmation. In *Clinton,* this was held to mean that, although a religious belief would not affect a witness's competency, to be held competent to take an oath as a witness, the individual's beliefs would have to be such that he believed a Supreme Being would inflict punishment for false swearing. Generally, though, any form of oath or affirmation, which appeals to the conscience of the person to whom it is administered and binds him to speak the truth, is sufficient.

Ohio courts had held that the Constitution does not enjoin or require religious instruction or the reading of religious books in the schools because the legislature placed control of these matters in the hands of those who managed schools. Recent decisions, however, starting with *Engel v. Vitale,* 370 U.S. 421 (1962) in the federal courts, have removed this freedom of choice from the hands of Ohio public school administrations.

Since the application of the First Amendment's religious freedom guarantee to the states, no Ohio cases have been decided that would alter the federal rules by interpreting the Ohio constitutional provision more strictly than the federal.

ARTICLE I

Section 8

Present Constitution

Section 8. The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 12 of Article VIII of the 1802 Constitution combined the provisions relating to the writ of habeas corpus with those relating to bail; in 1851 the bail provisions were separated and made part of section 9. The habeas corpus language was not changed in 1851. In 1874, the Constitutional Convention proposed adding at the end of the section: ". . . and then only in such manner as may be provided by law." The proposals of that Convention, however, were not adopted by the people. Section 8 has, therefore, not been changed since 1851.

The second paragraph of section IX of Article I of the Federal Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety require it." Thus, only minor language and punctuation differences distinguish the federal from the Ohio version.

Comment

Both the Ohio and the Federal Constitutions deal only with the instances in which the writ of habeas corpus can be suspended, and neither Constitution attempts to set forth those instances when the writ is, or must be made, available, nor what can, or should, be accomplished by its issuance. The writ is an ancient common law one, and its development, through cases and statutes, is a lengthy one. Examination of both federal and state cases dealing with the writ did not disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language.

ARTICLE I

Section 9

Present Constitution

Section 9. All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Commission Recommendation

The Commission recommends the amendment of section 9 as follows:

Section 9. All persons shall be bailable by sufficient sureties, except AS PROVIDED IN THIS SECTION AND EXCEPT for capital ~~offences~~ OFFENSES where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

PERSONS MAY BE DENIED BAIL PRIOR TO TRIAL IF THE OFFENSE CHARGED IS A FELONY THAT WAS COMMITTED WHILE THE PERSON WAS RELEASED ON BAIL.

NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION OR SUPREME COURT RULE ADOPTED PURSUANT THERETO, THE GENERAL ASSEMBLY MAY PASS LAWS IMPLEMENTING THIS SECTION.

History; Comparison with Federal Constitution

Article I, section 9 was adopted in 1851 and has remained unchanged. It was a combination of two sections from the Constitution of 1802: Article VIII, section 12 which guaranteed the right of bail in all but capital offenses and Article VIII, section 13, which prohibited excessive bail and fines, and cruel and unusual punishments. Aside from this reorganization, the sections were preserved intact with only minor changes in the language. In 1912, there was an attempt to add to this section to abolish capital punishment, until such time as the legislature decided to reinstate it, and replace it with life imprisonment. The proposal, though, failed to attract voter support and was not ratified.

The Eighth Amendment to the Federal Constitution reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Comment — Bail

A significant difference exists between the Ohio and the federal constitutional bail provisions, and it is this difference that led to the Commission's recommendation to amend the section. The Eighth Amendment prohibits "excessive" bail but does not grant a right to bail. Ohio is one of about 23 states whose constitution guarantees a right to bail, except, in Ohio, in capital cases "where the proof is evident, or the presumption great".

The traditional right to bail permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction (*Stack v. Boyle,* 342 U.S. 1, 1951). Its purpose is to ensure that one accused of a crime would return to stand trial and submit to sentence if found guilty. The Supreme Court of the United States has held that an excessive bail is that greater than is necessary to assure this, stating that it would be unconstitutional to fix bail to ensure that the individual would not obtain his freedom (*Bandy v. United States,* 364 U.S. 477, 1960).

The Court has not yet ruled on the question whether the Eighth Amendment's "excessive bail" prohibition incorporates, from the common law, an absolute or limited right to bail before trial or before conviction. Nor is there a United States Supreme Court case clearly applying the excessive bail provision of the Eighth Amendment, whatever its interpretation, to the states, probably because every state has such a provision in its own constitution or has, as is the case in Ohio, an even greater right expressed in the Constitution in terms of a right to bail. A number of decisions, however, in both lower federal courts and in state courts at all levels, assume that the excessive bail provision of the Eighth Amendment applies to the states through the 14th Amendment, particularly since the "cruel and unusual punishments" provision of the Eighth Amendment has clearly been so applied.

The absence of express language in the Eighth Amendment guaranteeing the right to bail appears to imply that no absolute constitutional right was intended, and indeed, the historical development of the bail system so indicates. This concept was upheld in *Mastrian v. Hedman,* 326 F. 2d 708, *cert. den.* 376 U.S. 965 (1964) where the Court ruled that neither the Eighth nor the 14th Amendments require that everyone charged with an offense must be given his liberty or the right to bail pending trial.

The *Hedman* Court further held that while the right to bail was inherent in the American system of law, this did not mean that a legislature was required to make all crimes subject to that right or to administer it in such a way as to provide everyone with that right. As noted above, however, the Supreme Court has not ruled on this point.

Federal Statutes and Rules of Criminal Procedure applicable to persons charged with the commission of federal crimes grant a right to bail in all noncapital cases (18 U.S.C. 3146-3149 and Rule 46 of the Federal Rules of Criminal Procedure). Congress, however, has exercised its apparent authority to permit the denial of bail to certain persons charged with crimes in the District of Columbia. The D. C. statute has as its goal preventing the pretrial release of persons whose appearance at trial cannot be assured by any conditions of release or whose release might endanger the safety of any other person or the community. Specifically, persons charged with crimes of violence may be denied bail if they have been convicted of a crime of violence within a ten-year period immediately preceding the alleged crime or if the crime was allegedly committed while the person was on bail pending trial for the alleged commission of another crime of violence or on probation or other release pending completion of a sentence imposed upon conviction of another crime of violence. The statute permits detention in other limited areas, also. However, it is the permissible detention of the alleged "repeat offender" that is the goal of the Commission's proposed amendment to section 9.

Section 9 clearly states that "all persons shall be bailable . . ." except for capital offenses (the proposed amendment would correct the spelling of "offenses") and such case law as exists on the subject in Ohio states that the right to bail except in capital cases is absolute, *Locke v. Jenkins,* 20 Ohio St. 2d 45 (1969). Rule 46 (B) of the Ohio Rules of Criminal Procedure provides for pre-trial release on recognizance or unsecured appearance bond and for further conditions of release in felony cases and other cases in the discretion of the judge. The judgment of whether a person accused of a capital crime should be released prior to trial is within the sound discretion of the trial court, *State ex rel. Reams v. Stuart,* 127 Ohio St. 314 (1933). The absolute right to bail has been held, in Ohio, not to apply to juveniles pending a delinquency proceeding, since the bail provision applies only to offenses, *State ex rel. Peaks v. Allaman,* 51 Ohio Op. 321, (1952).

The Commission has concluded, as did the Ohio Crime Commission in 1969, that, in the Crime Commission's words, "there should be some means for holding the accused in detention where the public safety requires it." Bail has traditionally been the means of assuring the defendant's appearance at the trial; recent changes in the bail system, including those in Ohio, have assured pre-trial release to almost everyone except, of course, in capital cases. However, those in the criminal justice system who are concerned about the number of serious crimes committed by persons previously convicted of a crime believe that denial of pre-trial release to persons charged with a serious crime while awaiting trial for another crime may be one means of preventing the commission of further crimes.

The final portion of the proposed amendment would make it clear that the General Assembly may pass laws to implement this section, which cannot be superceded by Supreme Court Rule.

Comment — Cruel and Unusual Punishments

The "cruel and unusual punishments" clause of section 9 is identical to that of the Eighth Amendment. Moreover, the Eighth Amendment, with respect to prohibiting cruel and unusual punishments, has been applied to

the states by the Supreme Court through the 14th Amendment. (*Robinson v. California,* 370 U. S. 660, 1962) In the *Robinson* case, the Court held that a state statute making it a crime for a person to "be addicted to the use of narcotics" inflicted cruel and unusual punishment.

"Cruel and unusual punishments inflicted" comes from the British 1688 *Declaration of Rights,* and was originally thought to proscribe tortures employed during the reign of the Stuarts. Its meaning has, of course, been considerably broadened as society has evolved more humane standards for the treatment of persons convicted of crimes. Most recently, the imposition of the death penalty, under certain conditions, has been held by the Supreme Court to be "cruel and unusual punishment". (*Furman v. Georgia,* 408 U. S. 238, 1972) Because of the split nature of the decision and the fact that each judge filed a separate opinion, the ramifications of the decision are still being tested in courts and in legislatures across the country.

Matters other than the penalty imposed are being brought to the courts' attention today as violations of the prohibition against "cruel and unusual punishments". Prior to 1969, the Supreme Court had refused to consider prison conditions because it was felt that prison discipline and administration in the states was within the jurisdiction and competence of the states. In *Johnson v. Avery,* 393 U. S. 483 (1969), the Court changed that policy. Since then, courts have examined prison conditions and prison practices in relationship to "cruel and unusual punishment".

Even prior to the incorporation of the clause through the 14th Amendment, the Ohio Supreme Court followed the United States Supreme Court's interpretation of "cruel and unusual punishments" (*Holt v. State,* 107 Ohio St. 307, 1923). With the exception of *Zenz v. Alvis,* 66 Ohio Law Abs. 606 (Franklin Co. Ct. A., 1951) which held that consecutive life sentences were not violative of the Ohio Constitution, there is little other litigation on this clause and, since *Robinson,* there has been none.

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 opportunityto 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.

Commission Recommendation

The Commission recommends the amendment of Section 10 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 in 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 in 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.

In addition, the Commission has appointed a special committee to study the subject of the grand jury.

History: Comparison with Federal Constitution

Article I, section 10 is one of the few sections of the Ohio Bill of Rights that has been altered and enlarged from 1802 to the present. The guarantees of this section, which now largely follow both the Fifth and the Sixth Amendments of the Federal Constitution, originally appeared in Article VIII, section 11 of the Constitution of 1802. That section provided for the right to counsel, the right to know the nature and cause of the charge, the right to confrontation, and the right to compulsory service of process in approximately the same manner in which they were guaranteed in the Sixth Amendment. In prosecutions by indictment or presentment, it guaranteed the right to a speedy public trial by an impartial jury in the county where the offense was committed. It also provided two Fifth Amendment guarantees; the right against self-incrimination and the right against double jeopardy.

The Convention of 1850-51 added the first sentence and altered the remaining language of section 11 to follow more closely that of the Sixth Amendment. The first sentence, though, does not follow the Fifth Amendment exactly; several explanatory phrases were included. The Convention added "Except . . . cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary . . ." the opposite of "infamous crimes". The Fifth Amendment does not mention misdemeanors. Instead, it states that a grand jury presentment or indictment is necessary only for "capital and infamous crimes". Article I, section 10 also adds material dealing with grand juries only implied by the Fifth Amendment — that their size and the number necessary to return an indictment will be determined by law. With these additions but without the parts dealing with depositions or a failure to testify, Article I, section 10 was passed by the Convention.

The Convention of 1912 added those portions dealing with depositions and the failure to testify. Alarmed by the high crime rate and the small number of convictions, some members of the Convention of 1912 decided to counter what they believed was an overemphasis on the rights of criminals. The proponents of change cited several areas where changes could be made to neutralize at least some of the advantages the criminals enjoyed in any prosecution. Previously, depositions could be used only by the defendant. The reformers contended that this gave an unfair advantage to the defendant and often resulted in a guilty man being freed. Therefore, they proposed that the state also be given the opportunity to use depositions. Another addition in 1912 was permitting prosecutors in criminal cases to comment about the failure of defendants to testify. There have been no further changes since 1912.

As noted above, Article I, section 10 of the Ohio Constitution largely copies similar Amendments of the United States Bill of Rights.

The Fifth Amendment reads:

> No person shall be held to 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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment reads:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Not all provisions of the Fifth Amendment are incorporated in section 10; some are found elsewhere in the Ohio Bill of Rights.

Comment — The Grand Jury

The grand jury requirement of the Fifth Amendment is the only provision of the Fifth or Sixth Amendment that has not been applied to state criminal proceedings through the due process clause of the 14th Amendment. The states are, therefore, free to use or reject the use of a grand jury.

A considerable amount of controversy has surrounded the grand jury in recent years. Its use is viewed by some as one of the most important protections in the Bill of Rights against false accusations of crime being made public; others, however, tend to view the grand jury as a "witch-hunting" arm of government or the prosecutor.

The Commission has appointed a special committee to consider grand juries, and a report on that subject will be made in the future.

Comment — the Sixth Amendment Rights

Section 10 sets forth a series of rights of persons accused of crimes that are essentially the same as those found in the Sixth Amendment. In the Ohio order, they are:

1. Right to appear and defend in person and with counsel;
2. Be informed of the nature and cause of the accusation and demand a copy;
3. Confront witnesses;
4. Compulsory process to secure witnesses on the accused's behalf;
5. Speedy and public trial in the county where the crime was committed;
6. Jury trial.

The Sixth Amendment places the speedy and public trial first and the right to counsel last; the right to "appear and defend in person" does not appear in the Sixth Amendment but is certainly implicit in all the other rights. There are other language differences, but they do not appear to be differences of substance.

All the Sixth Amendment rights have been applied to state criminal proceedings through the due process clause of the 14th Amendment. The leading cases are:

1. Right to counsel — *Gideon v. Wainwright,* 372 U. S. 335 (1963)
2. Be informed of the nature of accusation — *Cole v. Arkansas,* 333 U.S. 196 (1948)
3. Confront witnesses — *Pointer v. Texas,* 380 U. S. 400 (1965)
4. Compulsory process — *Washington v. Texas,* 388 U. S. 14 (1967)

5. Speedy and public trial — *Klopfer v. North Carolina,* 386 U. S. 213 (1967)
6. Trial by jury (felonies) — *Duncan v. Louisiana,* 88 S. Ct. 1444 (1968)

Of course, the recitation of these rights and the citation of cases making them applicable to the states does not say much about them. Volumes can, and have been, and will be written about each one. The limits and extensions of each are not yet fully known and perhaps never will be. For the purposes of studying whether the Ohio Constitution should be revised with respect to any of these provisions of section 10, however, it seems sufficient to inquire whether any Ohio cases or statutes or rules go beyond present federal interpretations of the Sixth Amendment in any way that would seem to call for constitutional amendment in Ohio. No such cases, statutes, or rules have been found, and no person has appeared before the committee or the Commission recommending any change in any of these provisions.

Comment — Right to Take Depositions

Section 10 next provides for depositions of witnesses who cannot attend the trial to be taken either by the prosecution or the defendant, by authorizing the General Assembly to so provide by law. This provision has no parallel in the Federal Constitution nor is it generally found in the constitutions of other states. As noted above, it was one of the proposals of the 1912 Convention, and was added because delegates to that Convention believed that defendants had an unfair advantage over prosecutors because the statutes apparently only authorized defendants to secure testimony of absent witnesses by deposition. Although the provision does not guarantee either the defendant or the state the right to take depositions, it does guarantee the accused, if such depositions are authorized and taken, the right to be present and examine the witness face to face.

Comment — Self-Incrimination; Failure to Testify

The next provision in section 10 repeats one of the provisions of the Fifth Amendment — that no person shall be compelled, in any criminal case, to be a witness against himself. The privilege against self-incrimination was applied to the states as part of due process in *Malloy v. Hogan,* 378 U. S. 1 (1964).

The right not to incriminate oneself has been much litigated. It is available to witnesses as well as to defendants and is available in civil litigation, before grand juries, before legislative committees and before administrative agencies. As with the Sixth Amendment rights it has been, and undoubtedly will continue to be, explored for limits and uses, and much written about.

One aspect of self-incrimination deserves comment, because the Ohio provision contains language not found in the Fifth Amendment — ". . . but his failure to testify may be considered by the court and jury and may be believed that defendants had an unfair advantage over prosecutors be- the subject of comment by counsel." This clause was added in 1912. The United States Supreme Court, in *Griffin v. California,* 380 U. S. 609 (1965), overturned a conviction appealed from the California Supreme Court on the grounds that the judge and the prosecutor had violated the defendant's rights by commenting on his failure to testify. Under the California Constitution, with a section closely resembling its Ohio counterpart, the judge and prosecutor had been allowed to comment on this failure. The Supreme Court said that the rule of evidence that allowed this gave the state the privilege of tendering to the jury for its consideration the failure of the

accused to testify without any formal offer of proof having been made. The Court continued by saying that the prosecutor's comment and the court's acquiescence were the equivalent of an offer of evidence and its acceptance. This, the Court held, violated the defendant's Fifth Amendment rights, specifically the spirit of the Self-Incrimination Clause. It said that comment on the refusal to testify was a remnant of the inquisitorial system of criminal justice which the Fifth Amendment outlaws because it was a penalty imposed by courts for exercising a constitutional privilege.

The Commission concluded that, in light of the *Griffin* case, the permission for counsel to comment on the failure of a defendant to testify is unconstitutional, and proposes that this language be removed from section 10.

Comment — Double Jeopardy

Finally, section 10 says that "No person shall be twice put in jeopardy for the same offense." The Fifth Amendment provides that: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb."

In 1969, in *Benton v. Maryland* (395 U. S. 784), the Supreme Court applied this provision, also, to the states as part of the due process clause of the 14th Amendment. Its meaning, also, has been the subject of considerable litigation. However, neither research nor testimony disclosed any reason or recommendations to change the Ohio provision.

ARTICLE I

Section 11

Present Constitution

Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquited.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The predecessor of section 11 was Article VIII, section 6 of the 1802 Constitution. Section 11 in 1851 altered the rights protected under the original section and subtly changed its focus. The first sentence of the original section was concerned with protecting freedom of the press and the right to publish information about the government and public officials, a burning issue in the colonies in the Eighteenth Century and in England well into the Nineteenth Century. The second sentence provided a general guarantee of freedom of speech and press and it is this guarantee which forms the opening clause of Article I, section 11 of the 1851 Constitution. One could surmise that the press's right to comment on government and political figures by 1850-51 was a recognized right and no longer a controversial issue and that emphasis was dropped in 1851. The second portion of the opening sentence of section 11 was added to further protect the basic rights of freedom of speech and press.

Another major change in 1851 was to make truth a complete defense for criminal libel. Under the common law, the truth of a statement was not a defense to criminal libel. The 1802 Constitution allowed the truth to be admitted into evidence. The 1851 Constitution provides that the truth,

when published with good motives and for justifiable ends, is sufficient for acquittal. The final clause of Article VIII, section 6 of the 1802 Constitution, which provided that the jury would determine the law and the facts in all indictments for libel, was dropped in its successor and the section was then adopted in its present form.

Freedom of speech and of the press is guaranteed by the First Amendment to the Federal Constitution, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

There is no federal constitutional provision regarding libel. The First Amendment rights of freedom of speech and press are applicable to the states through the 14th Amendment (*Gitlaw v. New York,* 268 U. S. 652, 1925).

Comment

As was the case in the rights relating to persons accused of crimes, the rights of freedom of speech and of the press are vast, complex, and in a continual state of flux. Important social issues such as censorship and obscenity come under First Amendment scrutiny, as well as political utterances, civil rights behavior, expressions regarding governmental policies on matters such as war, labor disputes, publication of material relating to criminal trials, and many more. The history and interpretation of First Amendment decisions is beyond the scope of this report.

The rights guaranteed by Article I, section 11 of the Ohio Constitution are very similar to the freedom of speech and press guaranteed by the First Amendment and many recent cases demonstrate a high degree of interchangeability between the two. There are, however, differences. In *Cincinnati Gazette Co. v. Timberlake,* 10 Ohio St. 548 (1860) the Ohio Supreme Court noted that the Ohio guarantee of the right to freely speak, write, and publish sentiments on every subject was specifically tied to responsibility for the abuse of the right, and every person for any injury done him on his land, goods, person or reputation would have a remedy by due course of law (Article I, section 16). Liberty of the press is not, therefore, inconsistent with the protection due to private character. The decision defined freedom of the press as the right to publish with impunity the truth, with good motives and for justifiable ends, concerning government, the judiciary or individuals. In *State v. Kassay,* 126 Ohio St. 177 (1932), the Court noted that the Federal Amendment was much more sweeping in its provisions than its Ohio counterpart, since the Ohio provision did not guarantee the rights without restraint.

In *State v. Davis,* 21 Ohio App. 2d 261, (Franklin Co. Ct. A., 1969), the Court averred that the maintenance of the opportunity for free political discussion was a fundamental principle of our constitutional system, and that the opportunity for free political speech could encompass the freedom of "pure speech" as well as freedom of other activities constituting expression. Such freedom could well envision the hanging of a red flag, and could encompass the wearing of a sign or a badge or involve gestures, including making the "V" sign. Absolute prohibitions of these gestures or symbols, the Court reasoned, would be unconstitutional, but not if they were used in such a manner that the rights of others were violated.

A Federal District Court, commenting on both the Ohio and federal guarantees, said that censorship in any form was an assault on freedom of the press, *New American Library of World Literature, Inc. v. Allen,* 114 F. Supp. 823 (D.C., Ohio, 1953). The power to censor, a drastic power, could only be vested by a valid express legislative grant. Otherwise, law enforcement officers only had the authority to examine suspected publica-

tions for violations of the obscenity laws to determine if there was probable cause to prosecute.

Licensing has also been attacked by the Ohio courts when it acts to restrain section 11 rights. In *Bowling Green v. Lodico,* 11 Ohio St. 2d 135 (1967), the Court overturned a conviction for failing to obtain a license to sell a purely political magazine, saying that initially the right to publish is unconditional. To the extent that the police are permitted to limit publication or circulation, the right to publish is diminished. An ordinance requiring a license to sell a political magazine in the streets is a prior restraint on speech and publication, and unconstitutional.

Door to door canvassing involves a balancing of convenience between some householders' desire for privacy and the publisher's right to distribute publications. Street soliciting does not involve the same balancing. Peripatetic solicitors on public streets do not invade privacy, and the right to be free from even the slightest interruption on a public street does not weigh as heavily in the balance as does the right to privacy in the home. In public the citizen must accept the inconvenience of political proselytizing as essential to the preservation of a republican form of government.

If a statute regulating the freedom of speech and press is not an unreasonable, arbitrary, or oppressive exercise of the police power, and if it is designed to accomplish a purpose within the scope of the police power, every reasonable presumption is given in favor of its constitutionality, and if it bears a reasonable relation to the public welfare, the courts will not declare it unconstitutional, *Davis v. State,* 118 Ohio St. 25 (1928).

Limits on freedom of the press, and the responsibility of the press, are still being debated.

ARTICLE I

Section 12

Present Constitution

Section 12. No person shall be transported out of the State, for any offence committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

Commission Recommendation

The Commission recommends no change in section 12.

History; Comparison with Federal Constitution

The first clause of section 12 originally was Article VIII, section 17 of the 1802 Constitution. The Constitutional Convention in 1851 added the second clause of Article VIII, section 16 to that section to form the present section 12. It has remained unchanged since 1851.

There is no federal constitutional parallel to the prohibition against transportation as punishment for crime. Article III, Section 3 of the Federal Constitution provides a limited parallel to the second clause of section 12:

> "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

Comment: Banishment

Limited types of exportation from the United States are imposed by the federal government on aliens and citizens who have lost their citizenship or been denaturalized. However, a citizen cannot be stripped of his citizenship as punishment for a crime, and a naturalized citizen can be de-naturalized only for fraud or concealment of facts upon attaining citizenship, not as punishment for a crime. At least one state court has held that it is

against public policy for a state to banish a person from the state as punishment for a crime (*People v. Baum,* 251 Mich. 187, 1930). There is no case law on the subject in Ohio, since the legislature has never authorized the imposition of such a penalty.

Comment: Corruption of Blood and Forfeiture of Estate

Corruption of blood and forfeiture of estate is generally defined as loss of all civil rights, a forfeiture of all estates and the loss of the ability to transfer them during the life of the person convicted. The federal provision limits this punishment for treason to the life of the guilty person. The Ohio provision prohibits the imposition of the punishment of corruption of blood and forfeiture of estate for any crime.

The Supreme Court held that there was no constitutional violation in *Miller v. State,* 3 Ohio St. 476 (1854) for a seizure to abate an existing nuisance. The property involved was seized and closed for a violation of the state liquor laws, and such actions were upheld since the property was being used illegally at the time of the seizure. During Prohibition, a similar case arose under the "Padlock" Law which authorized the closing of premises maintained for the keeping and selling of liquor. Following *Miller,* interpreting section 12, the Court held that there was no violation of the constitutional prohibition where the use of property, declared a public nuisance, was lost for one year (*State ex rel. v. Richardson,* 24 N. P. (n. s.) 540, Butler Co. C. P., 1923).

A beneficiary under a life insurance policy who murders the insured thereby forfeits all rights under the policy (*Filmore v. The Metropolitan Life Insurance Co.,* 82 Ohio St. 208, 1910). The Probate Court of Franklin County held that a statute which prohibits a person convicted of first or second degree murder from inheriting from his victim, does not act to divest an heir of property in violation of Article I, section 12. The Court noted that the statute does not provide that one shall be divested of property, but rather that he shall not be allowed to inherit. Therefore, he would have lost no property rights by operation of the statute. (*Egelhoff v. Presler,* 32 Ohio Op. 252, 1945) In *Thomas v. Mills,* 117 Ohio St. 114 (1927), the Ohio Supreme Court held that, absent any statutory provision, one sentenced to life imprisonment was not civilly dead although under the common law conviction of a felony did result in a corruption of blood (civil death).

ARTICLE I

Section 13

Present Constitution

Section 13. No soldier shall in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 13 was adopted as it now stands as part of the Constitution of 1851. It repeats Article VIII, section 22 of the 1802 Constitution with only minor word changes.

Except for punctuation, the section is identical to the Third Amendment to the Federal Constitution.

Comment

Litigation dealing with the Third Amendment is rare, and there are no Ohio cases. In *United States v. Valenzuela,* 95 F. Supp. 363 (D. C. Cal.

South. Dist., Central Div. 1951), involving reparations for rents for violations of the "Housing and Rent Act of 1947", the defendant charged that the Act was an incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers on the people. The Court held the charge was not supported and that the Act, which gave certain preferences to soldiers and others in housing and established certain types of rent controls, was not violative of the Third Amendment. In one of the few other cases in which this Amendment is mentioned, the Supreme Court said that the Third Amendment protects one aspect of privacy from governmental intrusion, *Katz v. United States*, 389 U. S. 347 (1967).

ARTICLE I

Section 14

Present Constitution

Section 14. The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 14 is the successor to Article VIII, section 5 of the Constitution of 1802, which guaranteed that people would be free from unwarrantable searches and seizures, and proscribed the use of the general warrant. The Constitutional Convention of 1850-51 replaced it with the present guarantee which has since remained unchanged.

Section 14 is nearly identical to the Fourth Amendment to the Federal Constitution. The differences are not significant.

Comment

The Fourth Amendment serves as a restraint on government officials invading the privacy of the individual and his home to look for evidence of crime. It does not prohibit all searches and seizures, only unreasonable ones; it does not outlaw warrants, only "general" warrants by requiring that warrants may be issued only upon probable cause and only after the officer seeking the warrant is able to identify the object of the search. The Fourth Amendment, and its parallel in nearly all state constitutions, is a direct result of colonial experience with British law enforcement practices of that day.

In *Weeks v. United States*, 232 U. S. 383 (1914), the Supreme Court first set out the federal exclusionary rule. The Court in *Weeks* said that it had the power to inquire into the source of any evidence it received as a prerequisite to its power to exclude evidence. Further, it said that evidence in violation of the Constitution was illegally obtained and was therefore inadmissible. The purpose was both to show disapproval of illegal acts by the government, removing any benefit obtained by these acts, and to maintain the dignity of the federal judiciary.

In 1949, in *Wolf v. Colorado*, 338 U. S. 25, the Supreme Court held that the proscriptions of the Fourth Amendment were implicit in the concept of liberty, and therefore applicable to the states through the due process clause of the Fourteenth Amendment. Interestingly, though, the exclusionary rule was not held to be implied in this concept of liberty. A series of decisions culminating in *Mapp v. Ohio*, 367 U. S. 643 (1961), applied the exclusionary rule, also, to state criminal procedures.

It is beyond the scope of this report to set forth the meaning and interpretations of the Fourth Amendment. Leading cases cover such matters as when a warrant is necessary for a search, the permissible extent of a search, electronic surveillance, administrative searches (such as housing and health searches), the requirements for securing a warrant, and similar matters.

As noted, the Fourth Amendment standards were made applicable to the states through *Weeks* and *Mapp*, and these cases established minimal standards for the states in the areas of search and seizure. This principle was recognized, at least in part, in *State v. Haynes*, 25 Ohio St. 2d 264 (1971). There, in a case dealing specifically with the sufficiency of a search warrant, the Court said, "It is now well established that the validity of a state search must be determined by federal standards." Rule 41 of the Ohio Code of Criminal Procedure requires that all the presently mandated technical Fourth Amendment requirements be satisfied, and in the area of reasonableness of the search, at least one Ohio court has ruled that the Fourth Amendment test of reasonableness for a search or seizure must meet federal constitutional standards. The Court said, "To hold otherwise would permit a situation where acts would violate the Fourth Amendment in Ohio which would not violate the Fourth Amendment in another state", *State v. Denning*, 32 Ohio Misc. 1 (Piqua, M. Ct., 1972).

Ohio courts have interpreted Article I, section 14, if used at all recently, in exact accordance with the Fourth Amendment.

ARTICLE I

Section 15

Present Constitution

Section 15. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 15 is derived from section 15 of Article VIII of the 1802 Constitution. The earlier version permitted imprisonment when the debtor refused to deliver his property to the creditor, after judgment, as prescribed by law.

There is no federal constitutional parallel to section 15.

Comment

An early Ohio case, *Spice and Son v. Steinruck*, 14 Ohio St. 213, (1863), held that the provision regarding fraud was not self-executing. Current Ohio statutes provide for debtor imprisonment after judgment under limited circumstances, including fraud in incurring the obligation or contracting the debt, removing property from the jurisdiction, or assigning or otherwise disposing of property with an intent to defraud creditors.

A number of cases have dealt with the distinction between debt and other obligations, for which imprisonment may be obtained for failure to pay. Among the latter are alimony and child support. (*Cook v. Cook*, 66 Ohio St. 566, 1902, and *State v. Ducey*, 25 Ohio App. 2d 50, Franklin County Ct. of A., 1970)

In a recent case, *Cincinnati v. DeGolyer*, 25 Ohio St. 2d 101 (1971), the Ohio Supreme Court ruled that a taxpayer may be imprisoned for a willful failure to pay a tax obligation, or for refusal, but not otherwise.

Although Ohio courts have upheld the practice of imprisoning one convicted of a criminal offense who is unable to pay a fine and court costs, the Supreme Court has outlawed this practice on the basis of the equal protection clause of the 14th Amendment. In *Williams v. Illinois*, 399 U. S. 235, (1970), the Court held that this practice, of imprisoning one beyond the maximum term for the offense or in lieu of a fine if imprisonment is not imposed for the offense, was unlawful discrimination because it imposed jail terms on the indigent whereas those who could afford the fine were not jailed or were not jailed for as long a term.

Following the *Williams* and subsequent Supreme Court decisions, the Ohio Supreme Court, in *In re Jackson*, 26 Ohio St. 2d 51 (1971), voided a court rule providing for holding a defendant in jail for nonpayment of a fine (credited at $10 per day) as long as failure to pay the fine was based on indigency and not refusal.

ARTICLE I

Section 16

Present Constitution

Section 16. All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The first sentence of section 16 is an almost verbatim copy of its predecessor, Article VIII, section 7 of the Constitution of 1802. The original section, though, was not automatically included in the original draft of the Bill of Rights for the Constitution of 1851. It is not clear why this section was omitted, but its omission was noticed by a delegate who introduced a motion to include the original section in the new Bill of Rights. The motion carried among general laughter at the thought of being able to receive a speedy trial, and after some minor changes became what is now the first sentence of Article I, section 16.

The second sentence was added in 1912. A proposal to abrogate governmental immunity was made to the 1850-51 Convention, but was not adopted.

There is no federal constitutional parallel to this section as a whole, although both the Fifth and the 14th Amendments provide for due process of law. The relevant portions of these two amendments are as follows:

> Fifth — ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."
>
> Fourteenth — ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Comment: First Sentence

"Due process of law", as used in the 14th Amendment, expresses evolving concepts of justice and judicial processes, and applied them to the states on a one-by-one basis. These concepts are variously described as requiring "fair play" in judicial processes, restraining arbitrary or uncontrolled governmental action, or prohibiting governmental activity that

shocks the conscience or is oppressive, arbitrary or unreasonable in relationship to the individual's life, liberty, or property.

Due process is a set of principles that are "the very essence of a scheme of ordered liberty", *Palko v. Connecticut,* 302 U. S. 319 (1937). It is not limited to criminal cases, but is a requirement also of civil proceedings and in administrative law.

Article I, section 16 of the Ohio Constitution provides for an "open" court as well as for "due course of law". According to court interpretations, these are distinct and severable rights, although in certain cases, "open courts" is one aspect of due process in the sense of "public" trial as used in the Sixth Amendment of the United States Constitution and Article I, section 10, of the Ohio Constitution. It is also a specific right for which there is no direct federal parallel.

State, ex rel. Christian v. Barry, 123 Ohio St. 458 (1931), raised the issue of an "open" court. The plaintiff, a policeman, brought suit against several superiors who had dismissed him because of his violation of a departmental rule stating that no police officer could submit to the prosecutor or an attorney any case without permission. In violation of the rule, the plaintiff secured an attorney in a personal injury suit and consequently was fired. The Supreme Court ordered him reinstated, holding that the rule violated the guarantee that all courts be open, and every person have a remedy by due course of law for an injury done him. In *Armstrong v. Duffy,* 90 Ohio App. 233 (Columbiana Co., Ct. A., 1951), the National Brotherhood of Operative Potters sought to discipline several of its members who had gone to court to prevent certain national officers from continuing alleged illegal acts. The suits violated union rules. The court ruled against the union discipline holding such rules violated section 16, Article I.

In *Scripps Co. v. Fulton,* 100 Ohio App. 157 (Cuyahoga Co., Ct. A., 1955), the plaintiff sued a Common Pleas judge to prohibit him from excluding reporters from a felony case or at any other time the court was in session. The order had been given solely upon the request of an alleged felon that part of the trial be conducted in secret. Basing its reasoning on Article I, sections 10 and 16, the Court of Appeals held that, where there was no question of public morals, safety or health advanced or considered in making the order of exclusion, the court must be open. To permit trials of persons charged with a felony to be held in secret entirely upon the defendant's request would take from the court its most potent force in support of the impartial administration of justice according to law. The Court continued by stating that the open court is as necessary and important in the interest of supporting the administration of justice as in the protection of the right of a person on trial for a criminal offense.

"Due course of law" was designed to provide the same protections as the Fifth or 14th Amendment "due process" clauses. (*In Re Appropriation for Highway Purposes,* 104 Ohio App. 243 (Lorain Co., Ct. A., 1957))

In *State ex rel. Smilack v. Bushing,* 159 Ohio St. 259 (1953), the Court held that an individual cannot be committed, even temporarily, for mental disabilities without due process which must include evidence tending to prove insanity.

Due process also acts to limit legislative acts or the use of the police power. Laws must have a reasonable relation to proper legislative purpose, and cannot be arbitrary or discriminatory. In *Akron v. Chapman,* 160 Ohio St. 382 (1953), the issue was whether the city could use zoning laws to terminate a lawful nonconforming use in existence prior to the passage of the zoning laws involved. The Supreme Court held that the right to continue to use one's property in a lawful business in a manner not constituting a nuisance, which was lawful at the time it was acquired, is within

the protection of Article I, section 16, which provides that no man shall be deprived of life, liberty, or property without due course of law. In a similar case, the City of Columbus attempted to force improvements to be made in a dwelling that had previously been conforming, by the use of new housing regulations, *Gates Co. v. Housing Appeals Board of Columbus,* 10 Ohio St. 2d 48 (1967). The cost of the improvements would be equal to half the value of the building, as would the possible fines for a failure to make the improvements. There was no evidence to support an inference that the failure of the building to conform would constitute an imminent threat to the health, safety, morals, or welfare of the public. The Court ruled against the city, holding that Article I, section 16 protected the lawful nonnuisance use of property. The Court concluded that to hold otherwise would permit requiring improvements of any real property merely upon a legislative finding that the improvements are required to promote the public health, safety, or welfare, rather than upon a factual determination that continued use of the property without improvements immediately and directly imperilled the public health, safety, or welfare.

This section, like sections 1 and 19, with which this section must be read, is limited by the police powers of the state. The police power of the state extends to the protection of the health and safety of all persons, and the protection of all property within the state. It is within the range of legislative action to define the mode and manner in which everyone may use his own life or property so as not to injure others. By this general police power, persons and property are subject to restraints and burdens in order to secure the general comfort, health, and prosperity of the state. (*The Cincinnati, Hamilton, and Dayton Railroad Company v. Sullivan,* 32 Ohio St. 152 (1877)) A Toledo statute which limited the hours of grocery stores while expressly excluding other stores from the operation of the law, was held unconstitutional on the basis of due process, *Olds v. Klotz,* 131 Ohio St. 447 (1936), since the Court held that the regulation was not within the police power, having no substantial relation to the public health, safety, or welfare.

Courts cannot usurp the legislative function by substituting their judgment for that of the legislative body, particularly since governing bodies are better qualified in light of their knowledge of the situation. The courts will not interfere unless such power is exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guarantees, *Willott v. Village of Beachwood,* 175 Ohio St. 557 (1964).

A legislative enactment may be void as violating "due process" for failure to comply with the common law requirement that laws, to be valid, must be sufficiently certain and definite to permit courts to be able to enforce them and individuals to know their rights and obligations. A statute which either forbids or requires the performance of an act in terms so vague that men of common intelligence must guess at the meaning and differ as to its interpretation, violates the first essential for due process, *Chicone v. Liquor Control Commission,* 20 Ohio App. 2d 43 (1969).

"Persons" has a broad scope as defined by the courts in Ohio. It includes an enemy alien, who has the right to prosecute a civil action unless restrained by statute or executive order (*Lieberg et al. v. Vitangeli,* 70 Ohio App. 479 Stark Co. Ct. A., 1942). In *Williams v. Marion Rapid Transit, Inc.,* 152 Ohio St. 114 (1949), the Supreme Court held that it was natural justice to allow a child, if born alive and viable, to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of his mother. Being born and living, after having been injured as a viable fetus, qualifies the individual as a "person" within the scope of Article I, section 16.

Comment: Second Sentence

The doctrine of sovereign immunity — i.e. that a state cannot be sued without its consent — is one that legal historians have traced to outgrowths of the maxim, "The King can do no wrong". "The real basis of the king's immunity from suit," writes an Ohio commentator,[1] "was the impossibility of enforcing a judgment against him".

The sovereign immunity that was inherited by American states has thus come to be viewed as immunity from unconsented-to suits. The explanation for adoption of the doctrine following the American Revolution is said to be one of practicality — the necessity of protecting economies of the early states, which were at that time faced with huge debts and slim revenues. The Ohio Constitutions of 1802 and 1851 were silent on the question of governmental immunity, but case law shows that it was recognized from an early date.

After lengthy debate, the Constitutional Convention of 1912 proposed the addition to section 16 of the second sentence, reading "Suits may be brought against the state, in such courts and in such manner, as may be provided by law." It was subsequently adopted by the people. Although the 1912 debate on the question of sovereign immunity indicates that the delegates thought the section gave the people the *right* to bring suit against the state, the *method* by which such suits could be brought had to be established by the legislature. The section was apparently intended to end the practice of petitioning the legislature for a settlement of claims against the state.

The Ohio Supreme Court consistently held that the provision for suits against the state is not self-executing. (See, for example, *Krause Admr. v. State*, 31 Ohio St. 2d 132 (1972)) And, until recently, the General Assembly failed to provide for the bringing of suits against the state except in specific instances, and the method of settling claims against the state remained subject to legislative action, either by award in small claims by the Sundry Claims Board (if money was appropriated to cover the awards) or by direct legislative action, subject to gubernatorial veto.

In 1974, the General Assembly created a Court of Claims, waived its sovereign immunity and gave consent to be sued in the Court of Claims in both contract and tort claims, subject to the limitations set forth in the act.

To some degree, the state's immunity from suit has extended to political subdivisions in Ohio, and the new Court of Claims act does not waive immunity with respect to political subdivisions. The General Assembly has permitted suits against various political subdivisions for various types of actions.

ARTICLE I

Section 17

Present Constitution

Section 17. No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 17 is another original section of the Constitutions of 1802 and 1851. First adopted as part of the Constitution of 1802, after

1. Comment, "Ohio Sovereign Immunity: Long Lives the King", 28 Ohio St. L. J. 75 (1967).

the deletion of one word and the alphabetizing of "emoluments, privileges, or honors," it was made a part of the Constitution of 1851 and has not been changed.

This section is similar to Article I, section 10, cl. 8 of the United States Constitution. The United States Constitution prohibits the grant of any title of nobility by the United States. This is self-explanatory, and courts have further held that this clause prohibits American-born citizens from adding words to their names which have noble connotations, as "von"; *Application of Jama*, 272 N.Y.S. 2d 677 (Civil Ct. 1966). This section in the Ohio Bill of Rights was designed to serve the same purpose "so that there shall be no Lord Stanbury, nor Earl Nash, no Baron Von Groesbuck, no Count Von Mason", nor any person holding hereditary privileges conferred by the State, 2 *Ohio Convention Debates* 335 (1851).

No cases construing section 17 have been found.

ARTICLE I

Section 18

Present Constitution

Section 18. No power of suspending laws shall ever be exercised, except by the General Assembly.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

With minor changes, section 18 as adopted in 1851 is section 9 of Article VIII of the 1802 Constitution. No changes have been made since 1851.

There is no federal parallel.

Comment

Few instances in which this section is cited have been located. In an early case, *Fox v. Fox*, 24 Ohio St. 335 (1873), it was determined that the power given to certain officials to issue permits providing an exception to a law (in this case, a law prohibiting certain animals from running loose) did not violate this section. Giving the Civil Service Commission the power to make and enforce rules was not an unlawful delegation of legislative power and did not violate section 18 (*Green v. State Civil Service Commission*, 90 Ohio St. 252, 1918). The power of a city to enact ordinances falling within its home rule powers, which ordinances are contrary to a state law, does not violate this section (*Hile v. City of Cleveland*, 107 Ohio St. 144, 1923).

ARTICLE I

Section 19

Present Constitution

Section 19. Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The predecessor of this section was Article VIII, section 4 of the Constitution of 1802, which provided that private property would be held inviolate but subservient to the public welfare, and that compensation would be paid to the owner of any property condemned. In 1851, the 1802 section was felt to be inadequate to protect the property rights of the people. Eminent domain, it was believed, was used for personal enrichment. The abuse arose because of the absence of guidelines specifying when property could be taken, who was to determine the amount of compensation, when such compensation was to be paid and how possible benefits accruing to the property owner due to public improvements should affect his compensation. The framers of the 1851 Constitution directed their efforts to resolving these issues and added new language to the old section to form what is now section 19. The section has remained unchanged since 1851.

The last clause of the Fifth Amendment to the Federal Constitution provides: ". . . nor shall private property be taken for public use without just compensation."

Comment

The last clause of the Fifth Amendment, requiring just compensation to be paid for private property taken for public use, has been made binding on the states through the due process clause of the 14th Amendment. (*Griggs v. Allegheny Co.* 369 U. S. 84, 1962)

The Federal Constitution does not confer on the federal government (nor, of course, on the states) the right of eminent domain — that is, the right to take property, or to authorize others to take property, without the owner's consent, for public use. However, the right to take is an inherent right of sovereignty and is an attribute of both the federal and the state governments without express constitutional language. The United States can exercise its right of eminent domain without the consent of the state in which the land is located. (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 1893). It may not only take land for governmental purposes but may also authorize the taking of land by a private corporation for public uses within the sphere of federal control, such as interstate commerce.

Eminent domain power is necessary for the independent existence and perpetuation of government, *Kohl et al. v. United States,* 91 U. S. 367 (1875). The power is also very extensive, and may be used to aid in accomplishing any permissible governmental enterprise, *Berman et al. Executors v. Parker*, 348 U. S. 26 (1954).

In early cases, the property had to be touched for there to be a taking. More recently, the trend has been away from the physical touching or taking requirement, although blocking access or interfering with certain riparian rights might not result in compensation. However, an owner has a right to be free from certain kinds of annoying activity from occupants of other land, and if the occupant is the government and if the harm is serious and peculiar to the plaintiff, the owner can receive compensation even though there has been no touching of his land, *Richards v. Washington Terminal Company*, 233 U. S. 546 (1914).

Compensation has come to be regarded as a fundamental principle of law by the courts, even in the absence of any express constitutional requirement. The Fifth Amendment, though, provides this express requirement for the federal government and this principle has been applied to all the states through the due process clause of the Fourteenth Amendment. The extent of compensation is determined by the highest and best

use rule; the market value of the land determined by an appraisal of its value for the best use to which the land could be used. In *Goodlin v. Cincinnati and Whitewater Canal Co. et al.*, 18 Ohio St. 169 (1868), the court ruled that the value for possible use had to be considered rather than merely present value for present use. Later, following this same reasoning, the Supreme Court of the United States ruled that the inquiry into the value of the land should go beyond its present value for the uses to which it was being put and consider its worth from its availability for valuable uses, *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1878).

The Ohio provisions restrict the freedom of local and state governmental bodies in their actions by placing limitations on their ability to condemn beyond those required by the Fifth Amendment and the requirements of due process.

In *Pontiac Improvement Co. v. Bd. of Commissioners of Cleveland Metropolitan Park District*, 104 Ohio St. 447 (1922), the plaintiff sought to enjoin park commissioners appropriating his land. There were two parcels involved, and the commissioners sought to obtain outright possession of one-half of the first and controls over the remainder and easements over the second. The court held that, under an appropriate statute, a park board had the power to acquire land by appropriation and that either a fee or a lesser interest could be acquired. However, the rights and privileges to be secured in the second parcel were not certain and their exercise would be entirely too indefinite. When an interest less than a fee is sought to be acquired, the owner should be appraised of the exact extent of the interest involved and this lesser interest to be taken must be described with sufficient accuracy to enable a jury to assess the compensation to be paid. Section 19 contemplates physical possession and use, not the regulatory power exercised under the police power, which is different from eminent domain. All interference with an individual's use of his land, however, does not constitute a seizure requiring compensation and may be a legitimate exercise of the police powers. A statute regulating billboards, irrespective of ownership or location, was upheld in 1964, in *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425.

There are other types of interference with the use and enjoyment of property that are not of a regulatory or prohibitory nature which are not violative of Article I, section 19. In *McKee v. City of Akron*, 176 Ohio St. 282 (1964), the plaintiff brought suit against the city for damages to her property from odors arising from a sewage treatment plant which she alleged constituted a compensable taking. The Court held that the section limited the right to compensation to cases where private property is *taken* for public use, and that if the framers of the Ohio Constitution had intended to provide for compensation whenever property is damaged, they would have provided so in unmistakable language.

Physical displacement, though, is not always necessary. A person may be deprived of his property by an invasion of the airspace above his property because a property owner has the right to so much of the airspace above his property as he might reasonably use. If flights over private land are so low and frequent that they constitute a direct and immediate interference with the enjoyment and use of the land, there is a "taking" in the constitutional sense of an air easement for which compensation must be made (*State ex rel. Royal v. City of Columbus*, 3 Ohio St. 2d 154, 1965).

A later case succinctly summarized the problem of damage (*State ex rel. Frejes v. City of Akron*, 5 Ohio St. 2d 47, 1966). The case involved damage caused by vibrations from nearby road construction. The damage, it was alleged, constituted a *pro tanto* taking. However, the Court held

that construction of public improvements often results in the lessening of the value of nearby property; this was not a taking but rather *damnum absque injuria*. Citing *McKee* and its emphasis on the "unmistakable language" of Article I, section 19, the Court noted that the constitutional phrase "taken or damaged" found in some constitutions is much broader and more comprehensive in the scope of its protection than "taking" where it is used as in the Ohio Constitution. The Ohio Constitution did not provide the fuller protection that would be afforded by the words "taken or damaged".

A direct encroachment upon land which subjects it to public use that restricts or excludes the dominion of the owner is a compensable taking. For adjoining property owners, any use of land for a public purpose which inflicts an injury upon adjacent land, and deprives the owner of a valuable use if it would be actionable if caused by a private owner, is a taking within the meaning of the Constitution. (*Lucas et al. v. Carney et al. Bd. of County Commissioners of Mahoning County*, 167 Ohio St. 416, 1958) Section 19 is an available protection in a court against any actual confiscation of property made under a power of assessment, *Rogers v. Johnson*, 21 Ohio App. 292 (Athens Co. Court of Appeals, 1926). In *Domito v. Maumee* (140 Ohio St. 229, 1942) the assessment was substantially equal to or greater than the value of the property. No advantage accrued and there was no justification for the assessment. A special assessment against property in excess of its value after the improvement is made is not an assessment at all, but constitutes a taking of property for public use without compensation.

Section 19 operates as a limitation of the sovereign power of eminent domain in the same manner as the Fifth Amendment by requiring compensation, and further restricts this power by requiring payment or deposit before land may be taken for public use except in certain specified exceptions. "Quick take" is available only in those circumstances. (*Biery v. Lima* 21 Ohio App. 2d 154, Allen Co., Ct. A., 1969, *Worthington v. Carskadon*, 18 Ohio St. 2d 222, 1969) The City of Columbus attempted to use "quick take" by depositing the money as security before acting, and the owner withdrawing the money; on this basis, the city claimed to have the authority to proceed under Article I, section 19. The court (*Cassady v. Columbus*, 31 Ohio App. 2d 100, Fr. Ct. Ct. A., 1972) said that only under the specific circumstances outlined in the section would a quick take be valid. Depositing money is not enough; the amount may or may not adequately compensate the property owner, and this would not be known until a jury returned its appraisal. The deposit of the money and its withdrawal, though, acted to remove the owner's power to maintain full property rights.

The Ohio rule for valuation in land appropriation proceedings is not what the property is worth for any particular use, but what it is worth generally for any and all uses for which it might be suitable including the most valuable use to which it would reasonably and practically be adopted (*Sowers v. Schaeffer*, 155 Ohio St. 454, 1951).

Although damages are not recoverable in Ohio, where the value of a piece of property taken by appropriation has depreciated because of the actions of the authority in appropriating surrounding property and destroying the buildings with an attendant loss of income to and the deterioration of the property remaining, the owner is entitled to compensation which reflects the value of the property before its depreciation. (*Bekos v. Masheter, Dir. of Highways*, 15 Ohio St. 2d 15, 1968) In somewhat similar situations, a court held that where depreciation had resulted from changing government purposes and appropriations, the value would be estab-

lished at the time prior to the commencement of appropriation proceedings. (*In Re Appropriation for Highway Purposes*, 18 Ohio App. 2d 116, Montgomery Co., Ct. A., 1969)

Compensation must be assessed by a jury, although the right to a jury determination may be waived. Further, although the legislature may not limit the right to a jury trial, it can establish procedures by which a jury appraisal is obtained. In *Cincinnati v. Bossert Machine Co.*, 16 Ohio St. 2d 76, 1968, the Court held that the operation of section 163.08 of the Revised Code which limits the length of time available to answer an appraisal by the state for appropriation purposes, to refuse their offer and to seek a jury determination, was valid.

Zoning regulations often raise due process and equal protection questions involving the Fifth and 14th Amendments of the United States Constitution and Article I, section 1, 2, 16, 19 of the Ohio Constitution. The problems in Ohio, though, are more specifically related to Article I, section 19, so these issues will be considered here but within the framework of due process. Do zoning regulations constitute a "taking"? *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) was the first major zoning case decided by the Supreme Court of the United States. By 1919 the Supreme Court had upheld governmental power to set height limits and to eliminate near nuisance uses for particular zones or areas. It had also indicated that the imposition of restrictions could not be delegated to neighbors and had held that zoning could not be used, at least openly, to discriminate on the basis of race. *Euclid* involved a number of large contiguous parcels of land suited for industrial development, but zoning had restricted this growth to a small area while the remainder had been zoned for less profitable uses. Ambler attacked the zoning as a violation of their property rights. The question involved was the same for both the Ohio and the United States Constitutions — whether the city's comprehensive zoning regulations, operating under the police power, were unreasonable and confiscatory in regulating the use of the plaintiff's land. In upholding the zoning ordinance, the Supreme Court said that Euclid was a separate municipality and as such had the right to exercise its police power to relegate industries to locations separated from residential districts. Segregation of the land into residential, business, and industrial areas had many more benefits for the community. These reasons, it continued, were sufficiently cogent to preclude it from saying that the zoning laws were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, general welfare and, in the absence of such a showing, the court could not find against Euclid. Succeeding cases more clearly defined the extent of the new decision. Then, for about 30 years, the Supreme Court added nothing new to its position on zoning until, in dictum in *Berman et al. Executors v. Parker*, 348 U. S. 26 (1954), Justice Douglas suggested that the government had a legitimate concern in the beauty of cities and that aesthetics might be one criterion used to establish the legitimacy of governmental use of the police power. More recently, in *Village of Belle Terre v. Boraas*, 416 U. S. 1 (1974), the Supreme Court upheld a New York village ordinance that restricted land use to one-family dwellings with certain exceptions. The ordinance, in defining a family, prohibited occupancy by more than two unrelated individuals and on this basis ordered Boraas to comply and to remove extra people from the house he had leased to students. He refused claiming that he was being deprived of liberty and property without due process. The Court did not agree, saying that the definition of a family and this ordinance were within the realm of economic and social legislation, where the legislature had drawn lines in the exercise of its discretion, and that these discretionary de-

cisions would be upheld if they were not unreasonable or arbitrary and bore a rational relationship to a permissible governmental objective.

Ohio courts have followed the lead of the United States Supreme Court. In 1942, the Village of Upper Arlington sought to prevent the building of a church in the village by the denial of a permit to build in a residential district (*The State, Ex Rel. The Synod of Ohio of the United Lutheran Church in America v. Joseph et al., Commissioners of Village of Upper Arlington et al.*, 139 Ohio St. 229, 1942). The Ohio Supreme Court though, ruled in favor of the church. Noting that *Euclid* decided nothing with regard to the exclusion of public or semi-public humanitarian uses like churches, schools and libraries, the Court ruled that the power to interfere with the general rights of the landowner by use of zoning restrictions was not unlimited, and that the act enabling municipalities to adopt comprehensive zoning plans clearly indicated a legislative recognition that the restrictions upon uses which could be imposed were limited to those designed to achieve some objective within the scope of the police power. Therefore, restrictions could not be imposed if they did not bear a substantial relationship to the health, safety, morals or welfare of the public. The village's reasons for the attempted exclusion of the church could not be justified on the basis of the protection of health, safety, or welfare.

Even though *Joseph* held that there are limits to the police powers, these powers are extensive. The regulation by a municipality of the use of property within its borders is within the Ohio constitutional powers of local self-government, including its police powers. The exercise of this power does not create any obligation to provide for any particular use nor can a court question the laws on the grounds of inexpediency and the question of reasonableness is, in the first instance, for the determination of the council which enacted it, *Valley View Village v. Proffett*, 221 F. 2d 412 (6th Cir. 1955). In *Willott v. Village of Beachwood*, 175 Ohio St. 557 (1964), the Court in finding for the village, said that, where a municipal council makes a determination of land-use policy which involves considering the control, burden and volume of traffic, the effect of the policy upon land values, the revenues produced, and the use consistent with the first interests of the general welfare, prosperity and development of the whole community, the courts are without authority to interfere. A court cannot usurp the legislative function by substituting its judgment for that of the legislative body. The power of a municipality to establish zones, to classify property, to control traffic, and to determine land use policy is a legislative function not to be interfered with by the courts unless such power is exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guarantees.

ARTICLE I

Section 19a

Present Constitution

Section 19a. 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.

Commission Recommendation

The Commission has appointed a special committee to study civil juries and the question of reduction of the amount of verdicts in civil cases.

History; Comparison with Federal Constitution

Section 19a was added by the 1912 Convention and adopted by the people. No changes have been made since then. There is no federal counterpart.

Comment

In both the English and American common law, no right existed at all for the recovery of damages founded upon the tortious death of a person. While, of course, one could recover actual, special, and exemplary damages for injuries to his person, it was consistently held that a victim's cause of action did not survive his death. The English law was first to recognize a cause of action for damages after the victim's death when, in the mid-nineteenth century, a statute was adopted allowing surviving relatives of a deceased whose death was wrongfully caused to recover for their losses.

After 1850, wrongful death statutes became increasingly common and presently they exist in one form or another in every state. Two basic types of acts are found, survival acts and death acts. The survival acts provide for a decedent's personal representative to recover damages suffered by the victim during his life. Death acts recognize a new cause of action after death for loss to the decedent's estate or his surviving relatives. The Ohio wrongful death statute (section 2123.01 *et seq.* of the Revised Code) is a death act for the benefit of the surviving spouse, the children, and other next of kin.

By the time of the Convention of 1912, Ohio had adopted its death act, but the legislature had placed a limitation upon the amount of damages recoverable regardless of damages shown. At the Convention, a rather vigorous debate occurred over whether or not a constitutional amendment prohibiting such limitations was advisable.

Proponents of the provision which eventually became Article I, section 19a asserted several arguments in support of their position. A basic rationale put forward suggested that the primary purpose of a statute allowing persons who were dependent upon a victim killed by the wrongful acts or omissions of another was to keep such dependents from becoming public charges. Advocates of prohibiting limitation upon recovery argued that a limitation prevented any reasonable consideration of future increases in the living expenses of the victim's survivors. It was even suggested that limiting recovery to actual pecuniary loss not to exceed a stated amount had a direct and highly undesirable result in shamefully and ridiculously small compensation for the loss of human life. Proponents of the section said that limiting compensation to pecuniary loss only denied full compensation and offended the sense of natural justice.

The delegates who opposed adoption of a prohibition upon limiting the amount of recovery in wrongful death actions asserted that the potential of unlimited liability for contributing to the wrongful death of an employee would greatly discourage manufacturing businesses. However, this argument loses its force in the light of section 35 of Article II which provides for workmen's compensation in which recovery for death is limited. Opponents also argued that the possibility of unlimited loss would cause the necessary premiums on casualty insurance to be so exorbitant as to make coverage impractical.

Perhaps because of the very direct language of Article I, section 19a, the provision has not been tested by the General Assembly, nor been the subject of any substantial court interpretation. The brevity and clarity of the statement in section 19a has obviated the need for extensive construction.

Potential Effects on "No-Fault" Insurance Programs

Significant attention, in both the legal profession and the general public, has been devoted in recent years to proposed and enacted changes in casualty and liability, particularly automobile, insurance laws from traditional systems to plans which have been popularly styled "no-fault" insur-

ance. There are several fundamental approaches to no-fault insurance, but the basic proposition is to have an injured party's own insurance compensate him for his damages up to a set dollar amount and to abrogate the right to seek redress in court for damages less than that set amount, or "threshold". The cause of action for damages above the threshold amount survives in a "no-fault" system.

When no-fault insurance with its threshold concept is placed in juxtaposition to the Article I, section 19a prohibition upon statutory limitation of the amount recoverable in an action for wrongful death, the question arises as to whether or not the abrogation of the right to sue when damages do not exceed the threshold amount is a violation of the constitutional bar on limiting recovery. If the damages arising from the wrongful death are less than the threshold amount imposed by the insurance statute, a conflict would occur. Many no-fault proposals solve this problem by preserving the cause of action in every case involving a wrongful death, regardless of the amount of damages.

ARTICLE I

Section 20

Present Constitution

Section 20. This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 20 had its origins in Article VIII, section 28 of the 1802 Constitution, although the first part of the section is substantially different from the 1802 version. The result is that Article I, section 20 provides two guarantees, similar to the Ninth and Tenth Amendments of the United States Constitution.

The Ninth Amendment to the Federal Constitution reads:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others maintained by the people.

The Tenth Amendment is as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Comment: The Ninth Amendment

Ohio has few cases exploring the meaning of the first part of section 20, perhaps because cases involving the Ninth Amendment are more recent than those interpreting other sections of the Federal Bill of Rights, and are applied to the states through the 14th Amendment.

Ninth Amendment cases are varied in subject matter, and are beyond the scope of this report. Recent cases of interest have dealt with subjects such as the right of privacy, enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1964), and further explored in the abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973). The latter held that the right to privacy is not absolute. Once again, the interests of the state and those of the individual must be balanced.

Comment: The Tenth Amendment

The Tenth Amendment of the United States Constitution reserves those powers not delegated to the federal government to the states and to the

people. A full explanation of its working is unnecessary since it exists entirely to protect state rights against their infringement by the federal government. Where the Tenth Amendment is concerned with the balance between state and federal rights, Article I, section 20, cl. 2 is concerned with the balance between private and state rights.

In dealing with the question of delegation of power, the Ohio Supreme Court, in *C., W., and Z Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77 (1852) said that all power resides with the people, which may be delegated. The manner and extent of this delegation is contained in the Constitution and all government officers and agencies must look to this document as the source of any authority to exercise governmental powers. To prevent the enlargement of this power, Article I, section 20 declares that nondelegated powers remained with the people.

ARTICLE XIII

Section 5

Present Constitution

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Commission Recommendation

The Commission recommends that Section 5 of Article XIII be amended as follows:

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury ~~of twelve men~~ in a court of record, as shall be prescribed by law.

History; Comparison with Federal Constitution

Section 5 of Article XIII, dealing with appropriation of right of way by corporations, was adopted in its present form by the 1851 Convention, to curb the abuses of the commission system of assessing the value of condemned land then in use. Under this prior system, the value of land to be condemned was fixed by three commissioners appointed by the court and there was no means of appeal available. Many landowners felt that they had been cheated by pro-railroad commissioners appointed by pro-railroad courts and that they were left completely without recourse.

Section 5 was designed to alleviate these problems by providing for the determination of property values by a twelve man jury in a court of record and payment of the value prior to the taking. The convention debates indicate that the delegates intended the phrase "in a court of record" to provide for a hearing in accordance with the due process and accompanied by the right of appeal. Some discussion was heard in the floor debates that section 5 might be too pro-property owner and would thus impede capital improvements. Other delegates greatly feared the abuses of private corporations and their ability to influence the legislature.

It was argued that there is no difference in a taking by a public body and a taking by a private corporation, and that they could be governed

by the same provision (i.e., section 19 of Article I). This argument, however, did not prevail.

There is no comparable federal provision.

Comment

The state could grant to private corporations the power of eminent domain as part of its inherent governmental power, and this section is intended only to place limits on the corporate use of such power. The basic elements of eminent domain are discussed in the comments to section 19 of Article I, and it is unnecessary to repeat them here. Since the state can take property only for the public use or benefit, it cannot confer a greater right on private persons, so whatever restrictions are placed on the state are also applicable to corporations which derive their power from the state.

The section 5 requirement that a jury consist of twelve men uses the word "men" in the generic sense and does not exclude women from sitting on condemnation juries. *Thatcher v. Pennsylvania, Ohio and Detroit Road Co.*, 121 Ohio St. 205 (1929)

Because a delegation of the eminent domain power is a delegation of sovereign power and contravenes the rights of property owners, such delegations are strictly limited to their stated purposes and terms. *Currier v. Marietta and Cincinnati Railroad Co.*, 11 Ohio St. 228 (1860) for example, in *Iron Railroad Co. v. City of Ironton*, 19 Ohio St. 299 (1869), the Ohio Supreme Court held that the wharf owned by the railroad was not within the specific purpose of its grant of eminent domain and not entitled to the special exemptions which it granted. In *Currier, supra*, the court held that a grant of eminent domain to build a railroad did not, without special provisions to that effect, permit the company to condemn land for temporary tracks. In *Little Miami Railroad v. Naylor*, 2 Ohio St. 236 (1853), the court, again narrowly construing a delegation of eminent domain, held that a grant to build a railroad between two named points did not give the railroad the right to relocate the tracks once they had been initially located.

The language of section 5 can be seen to be elaborate compared to that of section 19 of Article I.

However, after examination of the differences, the Commission concluded that, although section 5 of Article XIII gives more explicit protections to the property owner than does section 19 of Article I, these differences have been almost entirely eliminated by court decisions. The Commission could see no reason to recommend either a repeal of the section nor any changes in its provisions, except to recommend the removal of the words "of twelve men" as a requirement for a jury under section 5. The committee believes that the number of persons to serve on a jury should not be fixed at 12, but should be more flexible as is the case for other civil juries.

Appendix L

The Ohio Constitutional Revision Commission Law

(Ohio Revised Code Sections)

Sec. 103.51. There is hereby established an Ohio constitutional revision commission consisting of thirty-two members. Twelve members shall be appointed from the general assembly as follows: three by the president pro tem of the senate, three by the minority leader of the senate, three by the speaker of the house of representatives, and three by the minority leader of the house. On or before January 10 of every even-numbered year, the twelve general assembly members shall meet, organize, and elect two temporary co-chairmen, who shall be from different political parties. The members shall then, by majority vote, appoint twenty commission members, not from the general assembly. All appointments shall end on January 1 of every even-numbered year, or as soon thereafter as successors are appointed, and the commission is re-created in the manner provided above. Members may be re-appointed. Vacancies in the commission shall be filled in the manner provided for original appointments. After all members are appointed, the commission shall organize and select a chairman and vice-chairman.

The members of the commission shall serve without compensation but each member shall be reimbursed for actual and necessary expenses incurred while engaged in the performance of his official duties. Membership in the commission does not constitute holding another public office.

Sec. 103.52. The members of the Ohio constitutional revision commission shall meet for the purpose of:

(A) studying the constitution of Ohio;

(B) promoting an exchange of experiences and suggestions respecting desired changed in the constitution;

(C) considering the problems pertaining to the amendment of the constitution;

(D) making recommendations from time to time to the general assembly for the amendment of the constitution.

All commission recommendations must receive a two-thirds vote of the membership.

Sec. 103.53. The Ohio constitutional revision commission may receive grants, gifts, bequests, appropriations, and devises and may expend any funds received in such manner for the purpose of reimbursing members for actual and necessary expenses incurred while engaged in official duties, or for the purpose of meeting expenses incurred in any special research or study relating to the constitution of Ohio. The commission shall file annually with the auditor of state, on or before the fifteenth day of March, a full report of all grants, gifts, bequests, and devises received during the preceding calendar year, stating the date when each was received and the purpose for which such funds were expended.

Sec. 103.54. The Ohio constitutional revision commission may employ such research assistants and other personnel as may be required to carry out the purpose of the commission. Funds for the compensation and reimbursement of such employees shall be paid from the state treasury out of funds appropriated for such purpose. All disbursements of the commission shall be by voucher approved by the chairman of the commission.

Sec. 103.55. The Ohio constitutional revision commission shall make its first report to the general assembly no later than January 1, 1971. Thereafter, it shall report at least every two years until its work is completed.

Sec. 103.56. The Ohio Constitutional revision commission shall complete its work on or before July 1, 1979, and shall cease to exist at that time. The terms of all members shall expire July 1, 1979.

Sec. 103.57. In the event of a call for a constitutional convention, the Ohio constitutional revision commission shall report to the general assembly its recommendations with respect to the organization of a convention, and report to the convention its recommendations with respect to amendment of the constitution.

History: Am. Sub. H.B. 240 enacted by the 108th General Assembly, eff. November 26, 1969; Am. H.B. 999 enacted by the 109th General Assembly, eff. August 31, 1972

The Ohio Constitution: A Brief History

The present Constitution of Ohio was adopted by the people in 1851. It is not the oldest state constitution still in effect today, but not many are older. The present Indiana Constitution was adopted the same year and that of Wisconsin three years earlier; only the constitutions of five of the six New England states (Massachusetts, New Hampshire, Vermont, Maine and Rhode Island) surpass these three midwestern ones in age.

Although the basic Ohio document has not been entirely rewritten for more than 120 years, it has been amended. Amendments agreed to by the voters have included proposals placed on the ballot from all three sources authorized by the Constitution—the General Assembly, a convention, and initiative petition.

In November, 1972, the voters will be asked to answer "yes" or "no" to the question: Shall there be a convention to revise, alter, or amend the constitution? Twice before in this century (1932 and 1952) and once in the last (1891), Ohio voters answered "no" to that question, which is placed on the ballot every 20 years pursuant to a constitutional directive adopted in 1851. In 1871 and again in 1910, the voters approved a convention call, but the new constitution proposed by the 1874 convention was rejected at the polls and the 1912 Convention submitted separate amendments for voter action rather than a new constitution. Thus the 1851 Constitution, as amended, remains today Ohio's basic government document.

The 1851 Constitution is the state's second. The first was written and adopted by a convention of elected delegates in 1802, when Ohio became the first state carved out of the northwest territory. The Northwest Ordinance, adopted by Congress in 1787, provided for the government of the northwest territory ("the territory of the United States northwest of the River Ohio") prior to statehood and is, in many respects, the territory's first constitution. It provided for the government of the territory in two stages, and looked forward to the day when not less than three nor more than five states would be formed in the territory and admitted to the union "on an equal footing" with the original states, with their own "permanent" constitutions, with republican forms of government, and in conformity with the principles expressed in the Ordinance.

The first stage of government in the territory under the Northwest Ordinance consisted of the appointment by Congress of a Governor, a Secretary, and three judges. When the free male adult inhabitants in the territory numbered 5,000, a representative assembly was to be chosen, (one representative for each 500 free male inhabitants) and the lawmaking authority, previously vested in the Governor and the judges, would then be given to the Assembly, which consisted of the elected representatives, the Governor, and a legislative council of five persons chosen by Congress from a list of 10 names submitted by the representatives, each of the ten to be possessed of a freehold in 500 acres and resident of the district. By 1798, the population of the territory had increased to the point of at least 5,000 free male adult inhabitants (although slavery was prohibited in the territory by the provisions of the Northwest Ordinance, runaway slaves from other states were reclaimable, and therefore all men were not free) and the first Assembly was elected and met in Cincinnati early in 1799. Not too long thereafter, Congress divided the territory into two parts—Ohio and Indiana—and the residents of the Ohio portion elected their own territorial assembly. Finally, in 1802, Congress enacted a law enabling the people of Ohio to "form a constitution and state government" and be admitted to the union as a state.

The push for statehood may have been premature under the terms of the Northwest Ordinance, which required 60,000 free inhabitants in order to form a state. The 1800 census showed a population of 45,365 in the entire Ohio portion of the territory, with an additional 5,000 or so in the Indiana portion. However, Governor St. Clair, who was reappointed several times as Governor of the territory, was very unpopular, and those opposed to him and his regime prevailed upon Congress to pass the law providing for a constitutional convention, for the admission of Ohio as a state, and defining the state's boundaries to separate it from the remainder of the Ohio portion of the already-divided Northwest Territory.

The 1802 constitutional convention met in Chillicothe on November 1, 1802 and had drafted and adopted a Constitution before the month was ended. It was not submitted to the people for their approval, although there is little reason to believe it would not have been approved if it had been submitted. In establishing a framework of government for the new state, the Constitution shows clearly the unpopularity of St. Clair which, together with "the general distrust of executives during the post-colonial period, and . . . the Democratic tendencies of the Jeffersonians"[1] resulted in greatly restricting the Governor's powers. Under the Northwest Ordinance, for example, the Governor had an absolute veto over all legislative acts; the new Constitution gave him

[1]Roseboom, Eugene H. Weisenburger, Francis P. "A History of Ohio" 2d Ed. Columbus: The Ohio Historical Society, 1967, p. 69.

no veto power whatever. He was stripped of practically all powers of appointment; these were to be exercised, instead, by the General Assembly.

Many excellent histories of Ohio review the content of the 1802 Constitution and the state government which resulted from its provisions, and these matters will not be discussed here. The Constitution formed the basis for government for nearly fifty years, during which time the state increased in population, in agriculture, in commerce and in industry to an extent not envisioned at the beginning of the century. The Constitution itself provided no method of amendment except by the calling of a convention, and the only convention call in the fifty-year period was rejected by the people in 1819. By the middle of the century, the serious deficiences in the judicial system, the size of the state debt, and other matters led to such public dissatisfaction that the general Assembly again submitted to the electors the question of calling a convention, and this time it was approved. The convention of elected delegates began meeting in 1850 and completed its work in March, 1851. A new Constitution was drafted and approved by the voters at a special election in June, 1851.

The new Constitution was notable for greatly restricting the operations of the legislature without granting the Governor substantial additional powers. Additional state executive officials were provided for, to be elected by the people, and existing powers of appointment were taken away from the legislature. Judges were now elected rather than appointed by the legislature, and the judicial system was changed substantially. Among the limitations placed on the legislature were prohibitions against special laws conferring corporate powers, and a debt limit of $750,000. Other limitations in the article on debt were designed to prohibit further state and local involvement in private enterprises such as railroads. General laws were required to be of uniform application, and retroactive laws were prohibited; the legislature was expressly forbidden to grant divorces or exercise judicial power. Taxes were required to be uniform on both real and personal property. The question of holding a convention to revise, alter or amend the Constitution was to be submitted to the people every 20 years (a Jeffersonian principle) but the new Constitution also provided for amendments to be proposed by 3/5 of the members of the General Assembly and then submitted to the voters. A majority of those voting at the election was required for approval of the amendment. This latter provision made amending the Constitution still a difficult job, since those who voted at an election but failed to vote either for or against the constitutional amendment were, in effect, casting negative votes. Between 1851 and the next convention, in 1873-74, the legislature had seven proposed constitutional amendments placed on the ballot, and all failed, although six of them received the approval of a majority of those voting on the amendment.

The 20-year convention was put to the voters in 1871 and was approved. At least part of the success in securing a favorable convention call in both 1871 and 1910 is attributable to the party ballot or straight party voting when the party has designated a position for or against a convention. Prior to 1912, few amendments were successful at the polls, and those that were adopted secured the necessary votes by the same method of voting.

Although the convention call was approved in 1871, the new Constitution submitted to the voters in 1874 was rejected. The 1851 Constitution, not yet successfully amended, continued to form the basis of government in Ohio. In the years following 1874, and prior to the 1912 convention, 25 amendments were submitted to the voters, and nine of these were adopted. Some of these were changes which had been proposed in the 1874 Constitution. The nine amendments adopted included providing for a Supreme Court Commission to "dispose of such part of the business on the dockets of the Supreme Court" as might be transferred to it by the Court; a major issue in calling the 1873-74 convention was the general lag in the judicial system, especially in the Supreme Court, in disposing of pending cases. The number of judges was increased, and other changes in the judicial system were effected by constitutional amendment. The date of the general election for state and county officers was changed from October to November, to coincide with the date for the election of federal officials. The famous—or infamous—"Hanna" amendment was adopted in 1903, giving each county at least one representative in the Ohio House of Representatives, and thus destroying the approximation of equal representation which had existed prior to that time. The Governor was given the veto power, also in 1903—a political issue which had been debated for 100 years in Ohio, ever since the 1802 Constitution failed to give the Governor this power. Double liability of corporate stockholders was prohibited by amendment in 1903, and in 1905 public bonds were exempted from taxation, and state and county elections were changed to the even-numbered year. The people defeated the convention call when it appeared on the ballot in 1891.

The convention call would have appeared automatically on the ballot again in 1911, but the General Assembly did not wait. The question was submitted to the voters in 1910 and approved. The following year the General Assembly passed the necessary enabling legislation, and delegates were elected to the convention, which took place

in 1912. The 1912 convention has been called "the most outstanding single event in the political evolution of the state of Ohio"[1] and the convention call was supported by diverse groups of people, advocating such "progressive" platforms as the initiative and referendum, recall of public officials, woman suffrage, compulsory workmen's compensation and other provisions designed to benefit workers, home rule for cities, direct primaries, and civil service. Business groups wanted a classified property tax, temperance groups wanted a liquor license system and other groups wanted other things. Political party endorsement of the convention call undoubtedly helped to increase the votes in favor.

The delegates to the 1912 convention determined to submit separate amendments to the people rather than an entirely new Constitution. Forty-one amendments were adopted by the convention and placed on the ballot; 33 of these were approved. The convention and the subsequent ratification of its results "took place in a mood of public excitement, the climax of the Theodore Roosevelt-Woodrow Wilson-Robert M. LaFollette Progressive era."[2] The progressives and the unions predicted the arrival of the millenium as a result of the approval of measures such as the initiative and referendum, assuring the people an opportunity to participate directly in the enactment of laws, and compulsory workmen's compensation, which shifted some of the burden of industrial injuries from the worker to the employer. Conservatives predicted disaster.

The 1851 Constitution was further changed in 1912 by the inclusion of a merit system requirement for employment in the civil service of the state, counties, and cities; by the enactment of Article XVIII, which provides for municipal home rule; by giving the Governor veto power over items in the appropriation act; by reducing from $\frac{2}{3}$ to $\frac{3}{5}$ the number required to override a gubernatorial veto; by establishing an eight-hour day on public works and authorizing laws regulating hours and working conditions, and fixing minimum wages for employees; by authorizing laws to encourage forestry and to conserve natural resources; and others. Among the defeated proposals were woman suffrage and removing the word "white" from the description of those entitled to vote; also defeated was the abolition of capital punishment.

A significant change to the amending procedures adopted in 1912 was enabling a majority of those voting on the question to amend the Constitution. That change, together with the provisions for the initiative and referendum, has resulted in increasing both the number of constitutional amendments submitted to the people and the number adopted in the years since 1912. Prior to 1920, 14 initiated constitutional amendments were placed on the ballot; four of these were adopted. Use of the initiative tapered off over the years, but submission of amendments by the General Assembly increased. Since 1912, and prior to 1972, the General Assembly has submitted 79 proposals to amend the Constitution to the voters, and 53 of these have been adopted.

Significant changes in Ohio's Constitution since 1912 include: application of the uniform rule of taxation to real property only; property taxation limited to one per cent of true value without vote; income and inheritance taxes required to be distributed, in part, to local governments; authorization of debt for various purposes — capital improvements, industrial development, soldiers' bonuses; permitting counties to adopt charters and acquire "home rule" powers; reapportionment of both houses of the General Assembly following the one man-one vote decisions of the United States Supreme Court; major changes in the court system pursuant to the "modern courts" amendment adopted in 1968; prohibition of the use of motor vehicle related taxes for other than highway purposes; elimination of straight party voting by requiring that electors must vote individually for a candidate for office; creation of the state board of education; four-year terms for elected state executive officials and senators and limiting the Governor to two successive terms. This list is, of course, incomplete; many other changes have been adopted which may be just as significant to particular subjects as those listed. The liquor question, for example, generated controversy and issues of various types over the years, some adopted and some defeated. As a constitutional issue, however, it no longer seems as significant as it was in the past.

Twice since 1912 the voters have rejected the proposal to call a constitutional convention — in 1932 and again in 1952. In 1932, little interest seems to have developed for calling a convention in Ohio; both government and governed were preoccupied by economic conditions. Prior to 1952, a flurry of interest in the convention question was shown by the publication by The Stephen H. Wilder Foundation of Cincinnati of "An Analysis and Appraisal of the Ohio State Constitution, 1851-1951." Articles on various portions of the Constitution were prepared for this booklet by members of the Social Science Section of the Ohio College Association, and edited by Dr. Harvey Walker, of Ohio State University. The Ohio Program Commission created a Constitutional Convention Committee and printed a short history of the development and content of the Ohio Constitution written by its Executive Secretary, Lauren

[1] Glosser, Lauren A., "Ohio's Constitution in the Making," Ohio Program Commission, 1950

[2] Downes, Randolph C., unpublished speech, February 1968, LWV, Toledo

A. Glosser. The history was designed "to give the average person an understanding of the Constitution." The *Ohio Bar,* in 1949 and 1950, carried articles concerning the calling of a convention, including one by Jefferson B. Fordham, Dean of the College of Law at Ohio State University, entitled "Some Aspects of Constitutional Revision in Ohio."

Groups such as the League of Women Voters and the Ohio Chamber of Commerce studied the Constitution and the convention question prior to the 1952 vote, as they are doing today. The Wilder Foundation has published, in 1970, a new look at Ohio's Constitution, "State Government for Our Times" prepared by W. Donald Heisel, Director and Iola O. Hessler, Research Associate of the Institute of Governmental Research of the University of Cincinnati, and the Ohio Constitutional Revision Commission, pursuant to its legislative directive, is studying Ohio's much-amended 1851 Constitution and making recommendations for amendments to the General Assembly.

Location of Commission Materials

The Commission's Proceedings and Research, incorporating the minutes of all meetings of the Commission and its committees and the Research Studies prepared for the Commission or a committee, have been reproduced in limited quantities and, together with this Final Report, may be found in the Ohio libraries that are part of the State Library depository system, in the libraries of all Ohio law schools, and in a few other public libraries selected to make them accessible to more people. The Index to the Proceedings and Research is part of this volume. Copies of the Proceedings and Research and the Final Report are also available on microfiche from Computer Micromation Systems, Columbus, Ohio at a cost of $25.25 plus postage for the set.

The Commission's files and records have been deposited with the Ohio Historical Society and are part of the State and Local Archives collection. They may be examined at the Ohio Historical Center, Interstate 71 and 17th Avenue, Columbus, Ohio.

Extra copies of this Final Report and of several of the Commission's interim reports to the General Assembly may be obtained from the Ohio Legislative Service Commission, State House, Columbus, Ohio.

The books and documents listed have been selected from among many possibilities for their relevance to the Ohio Constitution and the work of the Ohio Constitutional Revision Commission. A more extensive bibliography may be found in card files deposited with Commission materials with the Ohio Historical Society in Columbus.

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