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Constitutional Revision Commission
Committee to Study the Legislature
September 30, 1971

Research Study No. 6-A

Compatibility (General Assembly Membership and Military Service)

At its meeting on September 13, 1971, the Committee to Study the Legislature considered and decided to recommend a revision of Art. II, Sec. 4, Ohio Constitution, governing compatibility of certain public positions with membership in the General Assembly. The revision, which would eliminate numerous questions of interpretation that have arisen under present Section 4, reads 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 revision was among those included in the Committee report presented to the Commission at the meeting on September 16, and on which a public hearing will be held on October 6.

Among questions raised and discussed by spectators and member participants at the committee meeting was whether the term "public officer" was intended to encompass commissioned or noncommissioned officer in any of the Armed forces, and whether the term would be so interpreted. Committee consensus was to the effect that the use of the term in Section 4 was not meant to prohibit membership in the General Assembly to officers of the Armed Forces. In light of the additional research set forth in this study, the committee may wish to discuss this matter again.

Present section 4, prohibiting a person "holding office under the authority of the United States, or any lucrative office under the authority of this State, "from eligibility to General Assembly membership, contains a proviso to the effect that "this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia." (Emphasis added.)

In 1917 the Ohio Attorney General construed the exception for "officers of the militia" to attach to state offices only in concluding that if a member of the General Assembly should accept "office" either in the civil or military service of the United States, he would thereby forfeit his office as a member of the General Assembly. He added that inasmuch as Art. II, Sec. 4 refers to officers only, he was of the opinion that a member of the General Assembly could enlist as a private in the U. S. Army and not forfeit his membership, but that an officer in the U. S. Army could not hold a seat therein. He reasoned that because of the last provision in the section (underlined above) "the framers of the Constitution, in using the term "office" had in mind not only offices in the civil service but also officers in the military service."

In State ex rel. Cooper v. Roth, 140 Ohio St. 377, (1942) service in the United States Army was held to constitute public employment within the meaning of a statute providing that members of city council "shall not hold any other public office or employment, except that of notary public or member of the state militia." The argument rejected was that membership in "the state militia" provided exemption from forfeiture of office. The Court ruled that the employment in question was not as member of the "state" militia and that induction into the armed forces of the United States under the National Selective Service Act operated as a forfeiture of office. The rationale, like that of the Attorney General in 1917, interpreted the express exemption for the state militia to mean that military service other than service in the state militia is included in public employment.

In State v. Outland, 149 Ohio St. 13 (1948) the Ohio Supreme Court faced the question of whether a commissioned officer in the active military service of the United States was eligible to qualify for the office of county prosecuting attorney. The Roth case was cited in the Outland opinion (and elsewhere) as authority for the proposition that a commissioned officer in the active military service of the United States is the holder of "public office."

In the Outland case the holder of commission for office of captain in the active military service of the United States was held ineligible to qualify for office of prosecuting attorney. Because he was unable to divest himself of the first held military office without concurrence of another authority, the Court said that these circumstances resulted in an exception to the general rule that the acceptance of a second office effects the abandonment of the first. The situation was one in which the commissioned officer in question was in the active service and had no opportunity to perform any of the duties of the office of prosecuting attorney.

Five annotations in American Law Reports have dealt with the question of the incompatibility of offices or positions in the military and the civil service under various constitutional and statutory sections, many comparable to Art. II, Sec. 4. In the first[1] the writer sets forth the common law rule that two offices whose functions are "inconsistent" are regarded as incompatible, explained that courts have evaded the formulation of a general definition of the term, and noted that the annotations therefore consisted of specific cases, not general rules. Later annotations on the same subject followed the same format.

The question of applying a constitutional provision prohibiting persons from holding an"office of profit or trust" under the United States and an "office of profit or trust" under the state, to commissioned officers in the National Guard divides the authorities. In finding no incompatibility some courts have stressed the fact that such is the rule so long as the Guard is not called into active service.

The division in authority is represented by several older cases. Under an 1880 Texas case a retired army officer was held "ineligible" to hold the office of mayor under a charter that said no person should occupy the position who held any lucrative office under the authority of the United States. The court reasoned that army officers on the retired list constitute part of the Army, retain rank, receive part pay, are subject to trial by court martial, and may be assigned to duty at soldiers' homes. State v. DeGress, 53 Tex. 387.

But a California case went the other way under an almost identical provision, holding that although a retired officer could be detailed to perform duties, the mere fact that he was subject to the remote contingency of being thus employed could not be regarded as such a duty as was contemplated in the definition of the term "officer" Reed v. Schon, 2 Cal. App. 55 (1905).

Similarly a New York statute prohibiting aqueduct commissioners from holding federal office did not apply to a retired brigadier general under a holding that the right to rank, uniform, and pay retained on retirement and liability to court martial and assignment to duty provide no test of the question of whether one holds a federal office. People v. Duane, 121 N. Y. 367 (1890).

1 Annot. 26 A. L. R. 142 (1912)

The aspect of "active duty" of course relates to physical possibility of performing two jobs. Where inconsistency of dual positions is emphasized, temporary enlistment in service during wartime has been held not to result in forfeiture of civil office, any more than any other temporary leave of absence. Additional cases are cited in later annotations upon this subject, respecting vacation of office upon acceptance of a "temporary" officer's commission.[2] A North Carolina court construed the "purpose" of excepting "officers in the militia" from a constitutional prohibition against holding an office of trust or profit under the U. S. and State at the same time in concluding that:

> "It was the purpose of the provision in this section to permit public officials to serve as officers in the militia without forfeiting their civil office, and it is reasonable to suppose that as the interdiction in the first part of the section was not intended to extend to civil officers serving as officers in the militia, for precisely the same reason it was not intended to extend to civil officers holding temporary commissions in the Army during a war emergency, as they both fall in the same category." Re Advisory Opinion to Governor, 28 S.E. 2d 567 (1944).

The Ohio Roth decision, however, is not in keeping with these cases, and is noted in American Law Reports as being on the other side.

Provisions comparable to Art II, Sec. 4, Ohio Constitution from 13 selected states are set forth below. The states were chosen on the basis of their having adopted new constitutions or legislative revisions in recent years. Annotations pertaining to military service are included.

Although the Committee in its deliberations did not consider the term "public office" as including commissioned reserve officers, it may, in the light of cases reported herein and the action taken by other states, choose to include some form of exception to the broad prohibition of dual office holding proposed for Section 4.

Pennsylvania in 1967 revised the Constitutional exception on prohibited dual office holding to apply to persons "in the National Guard or in a reserve component of the armed forces of the United States." The California Constitution also excepts members "of a reserve component of the armed forces of the United States" except where on active duty for more than 30 days in any year. Members of "the reserve corps" are excepted from the bar on officeholding or employment under the U. S. or state in Missouri, and"members of the armed forces reserve" are excepted from a similar ban in Michigan.

Pennsylvania
Art. 2, Sec. 6 - No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under this Constitution to which a salary, fee or perquisite is attached. No member of Congress or other person holding any office (except of attorney-at-law or in the national guard or in a reserve component of the armed forces of the United States) under the United States or this Constitution to which a salary, fee or perquisite is attached shall be a member of either house during his continuance in office.

2 132 A.L.R. 254 ( ); 147 A. L. R. 1419 ( ); 148 A.L.R. 1399 ( ); 150 A. L. R. 1444 ( )

A 1967 amendment of this section substituted the words "national guard or in a reserve component of the armed forces of the United States" for "militia."

California

Art. IV, Sec. 13 - A member of the legislature may not, during the term for which he is elected, hold any office or employment under the State other than an elective office.

Art IV, Sec. 28 - A person holding a lucrative office under the United States or other power may not hold a civil office of profit. A local officer or postmaster whose compensation does not exceed $500 per year or an officer in the militia or a member of a reserve component of the armed forces of the United States except where on active federal duty for more than 30 days in any year is not a holder of a lucrative office, nor is his holding of a civil office of profit affected by this military service.

The provision that no person holding lucrative office under the United States shall be eligible to any civil office of profit under the state, is inapplicable to a state officer whose duties, compensation, rights and opportunity to exert influence as such are suspended and inchoate while he is rendering temporary patriotic service to his country under military or naval commission. McCoy v. Bd. of Sup'rs of Los Angeles County 114 P. 2d 569 (Calif. 1941)

Alaska

Art 2, Sec. 5 - No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment or by election to a constitutional convention.

Minnesota

Art. 4, Sec. 9 - No senator or representative shall hold any other office under the authority of the United States or the State of Minnesota, except that of postmaster or of notary public. If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor. (As amended Nov. 5, 1968. Prior section excepted postmaster only and had no provisions for resigning.)

Hawaii

Art. III, Sec. 9 - No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have been created or the emoluments whereof shall have been increased by legislative act during such term. The term "public office" for purposes of this section shall not include notaries public, reserve police officers or officers of emergency organizations for civilian defense or disaster relief. The legislature may prescribe further disqualifications.

Connecticut

Art. 3, Sec. 11 - No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the government of any county. No member of congress, no person holding any office under the authority of the United States, and no person holding any office in the judicial or executive department of the state government or in the government of any county shall be a member of the general assembly during his continuance in such office.

Georgia

Sec. 2-1606 - No person holding a military commission, or other appointment, or office, having any emolyment, or compensation annexed thereto, under this State, or the United States, or either of them, except justices of the peace and officers of the militia . . . shall have a seat in either house . . .

New Jersey

Art. 4, Sec. 5, Par. 3 - If any member of the Legislature shall become a member of Congress or shall accept any Federal or State office or position, of profit, his seat shall thereupon become vacant.

Art. 4, Sec. 5, Par. 4 - No member of Congress, no person holding any Federal or State office or position, of profit, and no judge of any court shall be entitled to a seat in the Legislature.

Michigan

Art. 4, Sec. 8 - No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be member of either house of the legislature.

Virginia (1971 Const.)

Art. IV, Sec. 4 . . . No person holding a salaried office under the government of the commonwealth and no judge of any court, attorney for the commonwealth, sheriff, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes or clerk of any court shall be a member of either house of the General Assembly during his continuance in office; and his qualifications as a member shall vacate any such office held by him. No person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, shall be eligible to either house of the legislature.

A 1921 case held that a retired naval officer is not ineligible under this section to a seat in general assembly as he is not holding a federal office. Galt v. Hobbs, 7 Va. L. Reg. (N.S.) 255 (1921)

New York

Art. 3, Sec. 7 . . . No member of the legislature shall, during the time for which he or she was elected, receive any civil appointments from the governor, the governor and the senate, the legislature or from any city government, to an office

which shall have been created or the emoluments whereof shall have been increased during such time. If a member of the Legislature be elected to congress, appointed to any office, civil or military, under the government of the United States, or under any city government except as a member of the national guard or naval militia of the state, or of the reserve forces of the United States, his or her acceptance thereof shall vacate his or her seat in the Legislature, providing, however, that a member of the legislature may be appointed commissioner of deeds or to any office in which he or she shall receive no compensation.

A 1922 case held that an officer of the Federal Reserve Corps not in active service is not a military office, within the meaning of former Art. III, Sec. 8 (now this section). Matter of Flynn, 196 N.Y.S. 926 (1922)

In 1919 the New York attorney general ruled that a New York national guard officer, federalized under the Act of Congress of June 3, 1916 c. 134 is eligible to the legislature within the meaning of former Art. III, Sec. 8 (now this section) since he is an officer appointed by the state and cannot be regarded as a military officer under the United States for the purpose of questioning his eligibility. 1919 Op. Atty. Gen. 21 St. Dept. Rep. 276

Missouri

Art. 3, Sec. 12 - No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of Senator or Representative. When any Senator or Representative accepts any office or employment under the United States, this state, or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as Senator or Representative. During the term for which he was elected no Senator or Representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps, and of school boards, and notaries public.

Illinois (prior to 1971 revision)

Art. 4, Sec. 3 - . . . No judge or clerk of any court, secretary of state, attorney general, state's attorney, recorder, sheriff or collector of public revenue, member of either house of congress, or person holding any lucrative office under the United States or this state, or any foreign government, shall have a seat in the general assembly: Provided, that appointments in the militia, and the offices of notary public and justice of the peace shall not be considered lucrative. Nor shall any person, holding any office of honor or profit under any foreign government, or under the government of the United States (except postmasters whose annual compensation does not exceed the sum of $300) hold any office of honor or profit under the authority of this state.

A captain in the United States army cannot hold an office of honor or profit under authority of this state, and induction into military service by one commissioned as captain automatically vacates the office to which the person has been previously elected. Cromer v. Village of Maywood, 1943, 381 Ill. 337; cert. den. 318 U.S. 783, rehearing denied 319 U.S. 780.

Captain in U. S. Army cannot hold office of city attorney, although he was inducted in the service for the emergency of the war while he was in the state

militia and after he had been elected city attorney. Fekete v. City of E. St. Louis, 315 Ill 58 (1925).

Illinois (present)

Art. LV, Sec. 2 (e) - No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity for time during which he is in attendance as a member of the General Assembly.

Legislative Compensation

Sections 20 and 31 of Article II both deal with salaries and the responsibility of the General Assembly to establish compensation for "all officers" under the former section and "members and officers of the General Assembly" under the latter. Section 31 provides:

> 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.

The salary of Ohio legislators, as set by Revised Code section 101.27, 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 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 are, in descending order of compensation, California, New York, Michigan, Florida, Hawaii, and Massachusetts. All of these states provide for expenses allowances in addition to salary.

Under Revised Code section 101.27 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.

An Ohio Court of Appeals has upheld statutory travel expenses for members of the General Assembly in spite of the prohibition of Section 31 against "allowance or perquisites," 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) is part of constitutional compensation. The opinion contains dictum to the effect that reimbursement for "hotel and living expenses" would be unconstitutional.

Several years earlier State ex rel. Boyd v. Tracy, 128 Ohio St. 242 (1934) 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 there 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.

Legislative compensation has received widespread attention of commentators upon American state legislatures and proponents of constitutional revision have called

for removal of outdated compensation restrictions contained in legislative articles. Acknowledging that traditionally American state legislatures have been composed of "citizen legislators," the Committee on Legislative Processes and Procedures of the National Legislative Conference nevertheless called for increases in legislative compensation and expenses, observing in its final report of 1961, Recommendation No. 4:

> "From the viewpoint of good public service, and in light of the increasing amounts of time that legislators must devote to their duties both during and between sessions, their compensation in most states is now much too low. Likewise the pay of legislative leaders, faced with even greater demands on their time in most jurisdictions is notably out of line Flat salaries rather than a per diem allowance should be paid. Salary and reimbursement of necessary expenses should be provided in amounts sufficient to permit and encourage competent persons to undertake growingly important and time-consuming legislative duties. Actual amounts of salary and expense money should be provided by statute rather than specified in the constitution."

Comments to the latest edition of the Model State Constitution deplore freezing salary and compensation details in constitutional provisions and reflect virtual unanimity on this point in the literature of constitutional revision. Such an obstacle is fortunately absent from the Ohio Constitution. Section 4.07 of the Model State Constitution, like the Constitutions of Hawaii (Art. III, Sec. 10), Illinois (Art. IV, Sec. 11), Maine (Art. IV, Part Third, sec. 7), New York (Art. III, Sec. 6), California (Art. 4, Sec. 4) and Virginia (Art. IV, Sec. 5) would provide that legislators receive salary and allowances as designated by law.

However, a number of states, explored in an earlier memorandum, have chosen to incorporate constitutional provisions for salary commissions, to meet public criticism of legislative increases in salary. Others have proposed constitutional amendments for this purpose. Some of the constitutional provisions adopted and proposed are replete with detail concerning commission appointment and procedures and the implementation of its recommendations. Such a commission has been <u>established</u> in some amendments and proposals and <u>authorized</u> in others.

At its June 17, 1971 meeting the Committee discussed the provisions and proposals for salary commissions and expressed preference for the approach that incorporates the least detail in the Constitution. Alternative compensation provisions were specifically requested for further Committee consideration. The following drafts, with comment, are submitted in response to this directive.

> 1. THE MEMBERS OF THE GENERAL ASSEMBLY SHALL RECEIVE AN ANNUAL SALARY AND SUCH ALLOWANCES AS ARE PROVIDED BY LAW, BUT CHANGES IN THE SALARY OF ANY MEMBER SHALL NOT TAKE EFFECT DURING THE TERM FOR WHICH HE WAS ELECTED.

Comment:

Draft No. 1 is almost the same as the provision in the new Illinois Constitution (Art. IV, Sec. 11) and the new Virginia Constitution (Art IV, Sec. 5). It is like Section 4.07 of the Model State Constitution except for the final clause which there reads "but any increase or decrease in the amount thereof shall not apply to the legislature which enacted the same." Comments point out that this language requires an intervening election before salaries become effective. Because of the differing

terms in the two houses in Ohio, the language proposed appears more appropriate.

Draft No. 1, like all drafts proposed, removes the obsolete prohibition against "allowance" and the archaic and ambiguous restriction on "perquisites." The removal of a restriction on "payment of postage" conforms the law to the practice.

The Committee requested, in addition, that it be furnished additional alternatives to consider, embodying the Constitutional creation of a salary commission for the establishment of legislative salaries. At least one state (Arizona) by recent constitutional amendment authorizes creation of such a commission, with power to make salary recommendations for elective state officers. Most states with salary commission plans establish the commission by Constitution, with varying degrees of detail concerning its operation. Maryland (1970) and Michigan (1968) Constitutions establish a salary commission whose recommendations stand unless rejected by the legislature. It was agreed that if commission recommendations are to become operative upon failure of the General Assembly to reject them, the subject of a legislative salary commission is appropriate for the Ohio Constitution. Two alternatives are presented.

> 2. THE MEMBERS OF THE GENERAL ASSEMBLY SHALL RECEIVE AN ANNUAL SALARY AND SUCH EXPENSE ALLOWANCES AS ARE PROVIDED BY THIS CONSTITUTION AND BY LAW, BUT CHANGES IN THE SALARY OF ANY MEMBER SHALL NOT TAKE EFFECT DURING THE TERM FOR WHICH HE WAS ELECTED.
>
> THERE SHALL BE A COMMISSION, KNOWN AS THE GENERAL ASSEMBLY COMPENSATION COMMISSION, CONSISTING OF SEVEN MEMBERS, THREE OF WHOM SHALL BE APPOINTED BY THE GOVERNOR, TWO OF WHOM SHALL BE APPOINTED BY THE PRESIDENT OF THE SENATE, AND TWO OF WHOM SHALL BE APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES. THE COMMISSION SHALL MAKE DETERMINATIONS OF THE SALARIES AND EXPENSE ALLOWANCES OF THE MEMBERS OF THE GENERAL ASSEMBLY, WHICH DETERMINATIONS SHALL BE THE SALARIES AND EXPENSE ALLOWANCES ESTABLISHED, UNLESS THE GENERAL ASSEMBLY BY A VOTE OF TWO-THIRDS OF THE MEMBERS SERVING IN EACH HOUSE REJECT THEM. THE GENERAL ASSEMBLY SHALL IMPLEMENT THIS SECTION BY LAW.

Comment:

Draft No. 2 provides for rht establishment of a Commission which would determine both salaries and expense allowances for the General Assembly. Commission determination would become effective unless rejected by a two-thirds vote of each house. Draft No. 2 requires implementation by law. It is silent as to terms of commissioners, timing of the submission of recommendations, and when salary determinations go into effect. Like the present Section 31 and Draft No. 1, Draft No. 2 prohibits changes in salary during term.

This very simple form is similar to the provision for a State Officers Compensation Commission in the Michigan Constitution (Art. IV, Sec. 12). Similarly, the provision in the Hawaii Constitution for establishment of a Commission on Legislative Salary is without elaboration as to submission of recommendations, although it does fix four year terms for the Commissioners and an annual date for submission of recommendations (Art. III, Sec. 13)

Note that the appointing authority includes "president of the Senate," which under Committee recommendations would be an elected member of the Ohio Senate.

3. THE MEMBERS OF THE GENERAL ASSEMBLY SHALL RECEIVE SUCH EXPENSE ALLOWANCES AS ARE PROVIDED BY LAW AND A SALARY AS PROVIDED BY THIS CONSTITUTION AND BY LAW.

THERE SHALL BE A GENERAL ASSEMBLY COMPENSATION COMMISSION, CONSISTING OF SEVEN MEMBERS, THREE OF WHOM SHALL BE APPOINTED BY THE GOVERNOR, TWO OF WHOM SHALL BE APPOINTED BY THE PRESIDENT OF THE SENATE, AND TWO OF WHOM SHALL BE APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES. APPOINTMENTS TO THE COMMISSION SHALL BE MADE FOR FOUR YEAR TERMS, AS PROVIDED BY LAW. THE COMMISSION, BY FORMAL RESOLUTION, SHALL SUBMIT ITS DETERMINATIONS FOR LEGISLATIVE SALARIES TO THE GENERAL ASSEMBLY ON THE SECOND TUESDAY IN FEBRUARY OF EACH ODD-NUMBERED YEAR. THE GENERAL ASSEMBLY MAY REDUCE OR REJECT, BUT SHALL NOT INCREASE ANY ITEM IN THE RESOLUTION. THE RESOLUTION, WITH ANY REDUCTIONS THAT HAVE BEEN CONCURRED IN BY JOINT RESOLUTION OF THE GENERAL ASSEMBLY, SHALL TAKE EFFECT AND HAVE THE FORCE OF LAW AS OF THE BEGINNING OF THE NEXT ANNUAL SESSION OF THE GENERAL ASSEMBLY /BUT CHANGES IN THE SALARY OF ANY MEMBER SHALL NOT TAKE EFFECT DURING THE TERM FOR WHICH HE WAS ELECTED./
Note: Material in brackets is optional.

Comment:

Draft No. 3 is somewhat more detailed, and in this sense it is more comparable to provisions in the Constitutions of Arizona and Maryland. The same structure of appointment is adopted as in Draft No. 2, the alternative of having a commission appointed by the Governor, as in Hawaii, having been rejected. The timing for submission of recommendations (second Tuesday in February of odd-numbered years) is intended to coincide with budget procedures, and is the date adopted by Am. S. B. No. 112 of the 109th General Assembly, which would establish an Ohio Public Officials Compensation Commission. (The Commission proposed under this legislation would have recommending authority only.) The Draft avoids detail concerning Commission appointments--i. e. relative to staggered terms, reappointment, removal from office, and compensation.

Draft No. 3 also provides for the setting of expenses by law and the fixing of salaries by a commission. Alternative No. 2 puts both matters within the province of the Commission. Proposals and adopted provisions from other states have taken both forms. Some logic exists for separating salary and expense allowances. The latter could apply to the operation of a particular committee or commission, in which case legislative initiation could be more appropriate.

Another feature of Draft No. 3 is the optional character of the ban on changes in the salary of any member during term. With salaries initiated by an outside body, the question arises as to whether a purpose for the ban still exists. Draft No. 3 would effectuate recommendations of the Commission at the beginning of the next annual session of the General Assembly after recommendation made in an odd-numbered year.

Constitutional Revision Commission
Committee to Study the Legislature
October 15, 1971

RIGHT OF MEMBERS TO PROTEST

The committee proposes repeal of section 10 of Article II, reading as follows:

Section 10. Any member of either House shall have the right to protest against any act,or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the jounral.

ADDITIONAL COMMENT:

Testimony presented at the commission's Public Hearing on October 6, 1971 questioned the repeal of section 10 because of the protection that it affords to a minority party or minority group within the legislature to make public in the Journal its objections to legislation under consideration by either house. The provision was reportedly most recently used early this summer when Democrats in the House had proposed budget amendments recorded in the Journal. Proponents of repeal acknowledge that right to record protest is protected by legislative rule, but point out that such rules are subject to change. Lieutenant Governor Brown noted that this right to journalize a protest has been clarified by the Court of Appeals in the Carney case in(1967), which restricted its scope to legislation or resolutions. Its attempted use before that case was reportedly much more frequent.

There appear to be some 13 other states which guarantee the privilege of entering protest or dissent in legislative journals. The provisions, like section 10, which originated in 1802, are of very long standing. Minnesota and Illinois require two members to exercise the right. Neither the United States Constitution nor the Model State Constitution extends the privilege of entering a dissent in the journal. All dissents in Congress are preserved, of course, because the debates are published in the Congressional Record.

The right to record protest originated in a day when dissenters had no other opportunity for publicizing their objections to legislation. Such a situation does not prevail today, and, indeed, the readership of the legislative journals is

extremely limited. Today a minority position is readily publicized and widely circulated through the news media. The constitutional provision in that sense is an anachronism and appropriate for removal if the constitution is to be modernized and cleared of provisions designed to meet the needs of a time long past.

WHO SHALL NOT HOLD OFFICE
Section 5, Article II

The committee proposes the repeal of section 5 of Article II which reads as follows:

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

ADDITIONAL COMMENT:

Some questions were put to the committee and the commission Public Hearing on October 6, 1971, concerning the proposed repeal of section 5 as statutory. Specific inquiry concerned whether removal of the provision disqualifying convicted embezzlers from membership in the General Assembly would affect legislative authority to restrict eligibility.

The committee is of the view that repeal of section 5 would neither restrict nor remove limitations upon the General Assembly in this regard. Section 5 can be viewed as a redundancy in view of Article V, Section 4, 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, Article XV, Section 4 provides:

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

The legislature's authority to enact more restrictive qualifications had been recognized in statutes declaring an ineligible for elector status person convicted of a felony in this state (Revised Code section 2961.01) 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 (Revised Code section 2961.02)

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
November 12, 1971

The following proposals (attached) are presented to the Commission for consideration and action at its meeting November 18, 1971, at which time public testimony is also invited.

Article II, section 25 - annual session; special sessions called by presiding officers.

Article II, sections 6 and 7 (repeal 8); Article III, sections 1, 3, and 16; Article V, section 2a - presiding officer of the Senate to be a Senator; joint election of Governor and Lt. Governor; rearrangement of material.

Article II, sections 15, 16, 17, and 18 - consolidated into two sections (requirements for enactment of legislation and gubernatorial veto with some changes)

Article II, section 9 - journals; included for pusposes of rearrangement.

Also to be considered, not changed from previous distribution:
Article II, section 31 - legislator compensation
Article II, section 3 - residence of members of the General Assembly

ANNUAL AND SPECIAL SESSIONS
Section 25, Article II

The following is proposed as a combination of the annual and special session proposals, if the Commission recommends both.

Section 25. 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 IN 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.

COMMENT: This draft of section 25 represents an attempt to combine amendments recommended for annual sessions and special sessions. It also specifies that one General Assembly convenes in two regular sessions. The practice of numbering General Assemblies would not be changed.

In considering the question of authorizing the legislature to convene itself in special sessions, the committee noted a trend in recent years to provide for legislative initiation by petition of a specified majority of the members of each house. 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 amendment passed in 1970.

The committee considered and rejected the proposal that a percentage of the members rather than the leaders be entitled to call a special session. 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 effect 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 favors permitting legislative leaders to act unrestricted by petition requirements, as they can under the Illinois Constitution of 1970.

Some concern was expressed at the Commission meeting of October 19, 1971 that authorizing presiding officers to call a session would not be favored by all members unless they were assured that the presiding officer of the Senate for this purpose would be chosen from its membership. A package amendment for the purpose of having the Lieutenant Governor elected in tandem with the Governor and designating his duties as executive, not legislative, is submitted today for this purpose.

Subject: Lt. Gov.: Election; substitution of executive for legislative duties

Article II

Section 6. Each house shall be judge of the election, returns, and qualifications of its own members;-a . A majority of all 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 ITS MEMBERSHIP, 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 ACTIONS UNDER CONSIDERATION OR IN CONTEMPLATION, OR WITH REFERENCE TO ANY ALLEGED BREACH OF ITS PRIVILEGES OR ITS CONDUCT OF ITS MEMBERS, AND TO THAT END TO ENFORCE THE ATTENDANCE AND TESTIMONY OF WITNESSES, AND THE PRODUCTION OF BOOKS AND PAPERS.

COMMENT: Section 6 is included in this package for the sole purpose of organization and rearrangement of material in Article II, and the substance of the section has not been reviewed as of this time. In considering the amendment to section 8 of Article II, whereby the right of each house to choose its own officers would be expanded to specify that a presiding officer be selected from the membership of each house, the committee decided that section 8 is composed of two widely different subjects, and that the disparity would be compounded by the proposed amendment relating to presiding officers. That portion of section 8 dealing with choice of officers (including the proposed new provision for elected presiding officers) is logically related to the subject matter of section 7--organization of each house--and has been

transferred in the amendment below. The remainder 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 in the amendment above.

The amendment to section 6 and the repeal of section 8 are intended to be non-substantive in that they involve a transfer of language only. One possible change in meaning could result from rewording provision for expulsion of a member. 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 committee has interpreted the intent of this section to require concurrence of two-thirds of the membership.

Article II

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..

COMMENT: The amendment of the first paragraph of section 7 has already been considered and agreed to by the Commission at its meeting of October 19, 1971.

The remainder of the amendment to this section is for the purpose of organization and rearrangement only. See comment to section 6 above.

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" is eliminated because it is viewed as applying to the designation of the Lieutenant Governor as president of the senate, eliminated below.

Section 8 of Article II to be repealed.

Article III

Section 1. The executive department shall consist of a governor, lieutenant 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.

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.

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.

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.

Article V

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.

COMMENT: This amendment package incorporates the proposal submitted to the commission on September 16, 1971 and considered by it on October 6 and October 19, 1971, to give to each house the authority to choose its own presiding officers, including the choice of president of the senate from among the membership of that body. Article II, Section 8 is amended for this purpose.

The comment to this section as proposed on the above date noted that Section 16 of Article III, making the Lieutenant Governor president of the senate, will require amendment or repeal if revised Section 8 is adopted.

The amendment of Section 8 was discussed by the Commission at its meeting on October 6 and October 19, 1971. At the former meeting, at which Lieutenant Governor Brown testified, the Lieutenant Governor was asked whether he favored a proposal for Governor and Lieutenant Governor running as a team. Such tandem election assures that the two officers have the same party affiliation, recognizes the Lieutenant Governor as a member of the executive branch of government, and serves the purpose for which the office of Lieutenant Governor was created--to provide an automatic successor, elected state-wide, to fill any vacancy which may occur in the office of the Governor. TheLieutenant Governor stated that he strongly favors team election and would extend it to pre-primary selection. Commission members present at the October 19 meeting unanimously favored the idea of having the two officers run for election together. Upon re-referral, the Committee has broadened its original proposals to include provision for team election, including pre-primary selection, and has replaced the legislative role of the Lieutenant Governor with explicit provision for his exercise of duties and powers in the executive department of government.

In the committee's view election of a Lieutenant Governor with the Governor recognizes his position as an executive official of state government and supports its position that to retain administrative leadership by an executive official over one body of the legislative branch of government is inappropriate.

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 10 states of Connecticut, Hawaii, Michigan, New Mexico, New York, Illinois, Massachusetts, Wisconsin, Colorado and Florida 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 draft proposed gives the General Assembly responsibility for providing by law for the joint nomination of candidates. (Article 5, section 4)

The 1968 Florida Constitution creates the office of Lieutenant Governor in that state and provides: "In the general election and in party primaries, if held, all candidates for the office of governor and lieutenant governor shall form joint candidacies in a manner prescribed by law, so that each voter shall cast a single vote for a candidate for governor and a candidate for lieutenant governor running together." (Article 4, section 5) Most states have followed the New York model which is "they shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices, and the legislature by law shall provide for making such choice in such manner." (Article 4, section 1)

The draft proposed by the committee includes provision for joint candidacy in the primary election or by petition but does not attempt to set out the details by which pre-primary selection takes place. Article V, Section 7 of the Ohio Constitution 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 provide, as does this draft, 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.

Forty states have a lieutenant governor and in 39 states the office is established by constitution. Without exception, the creation of the office appears in the executive article of the state constitution, as it does in the Ohio Constitution. The classification of the position as legislative or executive has not been clear cut, and one commentator has termed it "hybrid."[1]

Byron Abernathy, in his 1960 report on the state executive branch, examines the office of lieutenant governor in terms of the following question: "Can the office be justified in a capacity more useful than that of presiding over the senate?" His analysis deplores the dearth of political literature concerning the office and points out 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."

Most writers appear to speak of the lieutenant governor as primarily an executive official. Yet evaluating executive aspects of the position Abernathy finds room for considerable improvement.

> "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

1 Abernathy, Byron, Some Persisting Questions Concerning the Constitutional State Executive, University of Kansas publications, Governmental Research Series No. 23 (1960)

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."

In a keynote address delivered at the fifth annual meeting of the National Conference of Lieutenant Governors in Cleveland in June 1966,[2] 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 of the lieutenant governor 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 him to assume the reins of state government in an emergency. That both branches of government would benefit is his thesis, as he argues:

"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

2 Reprinted as "Office of the Lieutenant Governor: Authority and Responsibility," 42 Social Science 142 (June, 1967)

president should be chosen by that body from among its own members by a majority vote."

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 provision, he is a member of the equivalent (Governor's Council) in Massachusetts. In Louisiana, he is chairman of the state Pardon Board and of the Voting Machine 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 the 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.

Another point of view is 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, there is little support for proposals to abolish the office in those states where it exists, and thus the literature of state government routinely calls for the development of duties to make the holder of the office a kind of assistant to the governor. Opposition to such suggestions is based on the fear that a Lieutenant Governor might become 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 officers. Another is to make it constitutionally possible for the Governor to use the Lieutenant Governor as an assistant but leave to the discretion of the Governor the extent to which he does so. The Alaska plan for Secretary of State leaves it to the Governor and to the legislature to define the duties of the office, and the draft proposed adopts this solution. The Florida Constitution provides that the Lieutenant Governor "shall perform some duties pertaining to the office of Governor as shall be assigned to him by the Governor, except when otherwise provided by law, and such other duties as may be prescribed by law." The Hawaii Constitution provides that the Lieutenant Governor shall perform such duties as may be prescribed by law, a provision that leaves open the possibility of making the Lieutenant Governor an assistant to the Governor. Any of these solutions is preferable to spelling out duties in the constitution because of the flexibility they permit. Duties in the draft proposed are specifically designated as "executive," consistent with the Committee's view of the office and to eliminate some of the uncertainty that has surrounded it.

Constitutional Procedural Requirements for Passage
of Legislation - A Consolidation
Sections 15, 16, 17, 18 of Article II

Article II

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 AND EACH AMENDMENT THERETO HAS BEEN REPRODUCED AND DISTRIBUTED TO MEMBERS OF THE HOUSE IN WHICH IT IS PENDING.

(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 TO THE GOVERNOR FOR HIS APPROVAL.

Sections 15, 17, and 18 of Article II to be repealed and Sections 16 and 9 of Article II to be amended, as shown below.

COMMENT: This section is a composite of the procedural requirements for bill passage contained in present sections 15, 16, 17, and 18 of Article II and a portion of section 9 of Article II. The format follows modern constitutions in combining all elements pertaining to passage of legislation.

Paragraph (A) adds the requirement not found in the Ohio Constitution but commonly part of legislative articles that no law shall be enacted except by bill, and adds to it the provisions of section 15 that bills may originate in either house. The provision that no bill be passed without the concurrence of a majority comes from section 9.

Paragraph (B) embodies the style clause for bills presently found in sec. 18.

Paragraph (C) rejects the traditional "three reading" law because, like the drafters of the Model State Constitution, the Committee 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, the 1970 report by the Council of State Governments (American State Legislatures: Their Structures and Procedures) reveals that the practice of reading bills in full is extremely rare.

To conform fundamental law with practice, a number of state have revised the requirement by specifying that the reading shall be "by title only." 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 Model State Constitution provision notes that undue haste is checked by the requirement that the printed bill be on members' desks for 3 days before final legislative action. It might be appealing to substitute such a rule for one that had its origins in a day when illiteracy was a problem and reproduction of printed material was difficult. 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 rules of code revision, as well as for substantive purposes, are common in Ohio. To retain them would require special leave to dispense with the requirements of such a provision as is incorporated in thw M.S.C., and it is for this reason that the New York and Model approach have been rejected by this committee. Instead, the draft proposed suggests a requirement that a copy of each bill and every amendment thereto be reproduced and distributed to members, with no time limitation before third reading or "consideration." By rule, floor amendments can be required to be filed prior to session time.

Paragraph (C) also represents a radical departure from the "reading" rule. If undue haste is to be checked, three considerations of the bill would meet such an objective. Clearly, the procedure by which bills are to be considered should be a flexible one, to be determined by the legislature in accordance with changing time. Therefore, the draft mandates the General Assembly to pass laws governing such procedures.

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 Paragraph (D). This requirement can be found in most constitutions. The New England states are an exception to the general ruel. Purposes of the rule, according to one commentator,[1] are threefold: (1) to prevent logrolling, a practice in which unrelated matters

1 Rudd, Millard H. "No law shall embrace more than one subject," 42 Minn. L. Rev. 250, January, 1958.

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" nor the "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" provision "directory" and not "mandatory" and have, in this manner, repudiated challenges to legislation based upon the requirements of section 16. Pim v. Nicholson, 5 Ohio St. 176 (1856); State ex rel. Attorney General v. Covington, 29 Ohio St. 102 (1876).

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

Paragraph (E) combines the provisions of sections 16 and 17 for the signing and approval of bills. In the committee's view, the purpose of requiring bills to be signed by the presiding officers is to certify that the bill so signed was the one passed by the General Assembly in accord with constitutional requirements.

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 with respect to other procedural limitations in the constitution. 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. Camel, 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, and reiterated, from earlier holdings, the rule that courts will consult as appropriate evidence the legislative journals 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 are 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 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 (now found in section 16) would vary the rule and rationale of the two cited cases.

The committee deliberated upon the provisions of Section 15 (D), transferred virtually without change from present section 16. The proscription against revival of laws has been interpreted to apply to lapsed appropriations and laws that have become inoperative or been declared unconstitutional. They may not be enacted by reference under this provision, and the committee favors this prohibition and its application.

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 members voting for and against the bill shall be entered upon the journal.

If a bill ~~shall~~ IS not 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 EVERY BILL THAT BECOMES LAW WITHOUT HIS SIGNATURE WITH 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, shall be void, uless repassed in the manner ~~herein~~- prescribed BY THIS SECTION for the repassage of a bill.

COMMENT; The amendment of present section 16 of Article II is essentially non-substantive. The portion of the section governing procedural requ. irements for bill passage have been transferred to new section 15, as explained in the comment thereto. The remainder of present section 16 has to do with veto and passage over veto, and has been retained in section 16 as amended, with minor style changes. The "shall" construction, no used in a mandatory sense, has been replaced with the present tense.

In it s 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. Present section 16 (proposed new section 15) declares that a bill becomes law when signed by the governor. Section 1(c) of Article II, the subject of which is initiative and referendum, provides: "No law passed by the General

Assembly shall go into effect until 90 days after it shall have been filed by the Governor in the office of the Secretary of State, except as herein provided." Section 1(d) is silent as to the effective date of a measure enacted over veto. New section 16 as proposed would fill the gap by requiring that the presiding officer of the second house file it with the secretary of state. Suction 1(c) should be approxpriately amended to eliminate any question about the effective date ofa law passed over veto.

Another gap is filled relative to the filing with the secretary of state of an enactmant that becomes law without gubernatorial signature by the specific re quirement that the governor file it with the secretary of state Jefferson B. Fordham[1]. had pointed out another question not answered by the language of present section 16. 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 difficutl 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 Clerk's 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 probhems 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. The committee will at a later date be considering the whole question of the effective or operative date of legislation, as contained in the sections on the initiative and referendum, but has deferred further consideration of conflict until that time.

On the matter of gubernatorial veto of appropriations, the committee considered whether the Governor should have the power to reduce items in addition to the power to make item vetoes. Such power exists in Pennsylvania, by judicial decision, and in a number of other states by constitutional provision. Additional veto or executive amendment is recognized in other states as an alternative or supplement to item vetoes.

The committee discussed and rejected including gubernatorial powers to reduce appropriation items, preferring to consider and expand, if necessary, the governor's budgetary controls.

The committee also considered the question of legislative consideration of vetoes made after adjournment and concluded that by use of the adjournment procedures to take care of this, no problem need arise. The authority to convene special sessions (now in proposed new section 25) should eliminate any question which might arise.

Subject: Art. II, Sec. 9 - Journals

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 ans 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.~~

COMMENT: The only amendment proposed for Section 9 is the removal of the last clause, requiring at least a majority vote for the passage of laws. The amendment is one of form, not substance, because the language removed is inserted in full in a new section dealing with legislative procedures. That new section, representing a composite of Sections 15, 16, 17, and 18, contains various requirements pertaining to the enactment of legislation by bills. The majority requirement in Section 9 is more related to the new section than it is to the keeping of journals by each house, as required by the remainder of presen' section 9.

No substantive revision of the section has been proposed. A similar journal keeping provision 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. Speaker of the House Charles Kurfess, in remarks to the Committee to Study the Legislature at its meeting of May 20, 1971, pointed out the need for indicia of legislative intent. Debate transcripts meet such a need and allow the news media to report legislative activities more accurately. In the propcsed New York 1967 Constitution (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 1970 adopted this very plan. 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." 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."

As for the use of the journal in litigation attacking legislation for not having been adopted in conformance with constitutionally required legislative procedures, courts have adopted two views, commonly referred to as the "enrolled bill" and the "journal entry" doctrines. In roughly half of the states, applying the journal entry rule, the use of the journal is permitted to show whether constitutional requirements for passage of a bill were met. For many purposes Ohio Courts have refused to look beyond the enrolled bill to the journal to ascertain if it was enacted in strict accord with such requirements. In Ritzman v. Campbell 93 Ohio St. 246 (1915) the Ohio Supreme Court refused to go beyond the enrolled bill to an inspection of the journal for the purpose of establishing discrepancy in content between the enrolled bill and the bill as it might appear by journal entries, although the opinion acknowledged that journal evidence might be appropriate to establish method of passage. Fordyce v. Godman, 20 Ohio St. 1 ( ) is still authority for the Ohio version of the enrolled bill doctrine--that the enrolled bill may be impeached on the ground of fatal irregularity in enactment--I.E. failure to receive a constitutional majority. Recourse to the journals has also been permitted to determine which of two irreconciliably inconsistent acts was last passed where they were passed on the same day.

For an indication of what kinds of evidence may be used to impeach the journal where its inspection is permitted by Ohio Courts, Wrede v. Richardson, 77 Ohio St. 182 (1907) may be examined. The requirement in question was presentation of an act to the Governor, and argument made was that oral evidence would support the allegation that presentation as required was not made. Entry in the Governor's Minute Book was held competent and when considered with legislative journals and records of the secretary of state was held sufficient to preclude oral testimony that the governor, because of extreme illness, was unable to consider the legislation.

Ohio courts have applied the enrolled bill doctrine where requirements have been construed as "directory" only and have allowed journal evidence if "mandatory" requirements were questioned. Furthermore, the rule in Ohio is that the journal may not be contradicted by the parol evidence of one member. However, the journal was successfully impeached in Harbage v. Tracy under an exception termed "manifest fraud." Members were held not entitled to mileage during time the legislature was not in session, in spite of the fact that the journal of each house made it appear that they held 40 legislative sessions. Harbage v. Tracy, 24 Ohio L. Abs. 553 (1937); aff'd 64 Ohio App. 151 (1939); app. dis'd 136 Ohio St. 534 (1939).

Constitutional Revision Commission
November 18, 1971

LEGISLATIVE COMPENSATION
Section 31, Article II

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.

COMMENT: The salary of Ohio legislators, as set by Revised Code section 101.27, 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 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 are, in descending order of compensation, California, New York, Michigan, Florida, Hawaii, and Massachusetts. All of these states provide for expenses allowances in addition to salary.

Under Revised Code section 101.27, 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.

An Ohio Court of Appeals has upheld statutory travel expenses for members of the General Assembly in spite of the prohibition of Section 31 against "allowance or perquisites," under the apparent holding that they constitute part of a legislator's"compensation." State ex rel. Harbage v. Ferguson, 68 Ohio App. 189 (1941), dismissed 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) is part of constitutional compensation. The opinion contains dictum to the effect that reimbursement for "hotel and living expenses" would be unconstitutional.

Several years earlier, State ex rel. Boyd v. Tracy, 128 Ohio St. 242 (1934) 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 there 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.

Legislative compensation has received widespread attention of commentators upon American state legislatures and proponents of constitutional revision have called for removal of outdated compensation restrictions contained in legislative articles. Acknowledging that traditionally American state legislature have been composed of "citizen legislators," the Committee on Legislative Processes and Procedures of the National Legislative Conference nevertheless called for increases in legislative compensation and expenses, observing in its final report of 1961, Recommendation No. 4:

> "From the viewpoint of good public service, and in light of the increasing amounts of time that legislators must devote to their duties both during and between sessions, their compensation in most states is now much too low. Likewise the pay of legislative leaders, faced with even greater demands on their time in most jurisdictions is notably out of line. Flat salaries rather than a per diem allowance should be paid. Salary and reimbursement of necessary expenses should be provided in amounts sufficient to permit and encourage competent persons to undertake growingly important and time-consuming legislative duties. Actual amounts of salary and expense money should be provided by statute rather than specified in the constitution."

Comments to the latest edition of the Model State Constitution deplore freezing salary and compensatio details in constitutional provisions and reflect virtual unanimity on this point in the literature of constitutional revision. Such an obstacle is fortunately absent from the Ohio Constitution. Section 4.07 of the Model State Constitution, like the Constitutions of Hawaii (Art. III, sec. 10), Illinois (Art. IV, sec. 11), Maine (Art. IV, Part Third, sec. 7), New York (Art. III, sec. 6), California (Art. 4, sec. 4) and Virginia (Art. IV, sec. 5) would provide that legislators receive salary and allowances as designated by law.

The proposed amendment of section 31 removes the obsolete prohibition against "allowance" and the archaic and ambiguous restriction on "perquisites". The removal of restrictions on "payment of postage" conforms the law to practice.

The revised section would permit allowances but prohibit their unrestricted use by requiring such allowances to meet a "reasonable and necessary" test. The term "salary" replaces "compensation" because ofthe Supreme Court's characterization of mileage as compensation under the uncertain rationale of Harbage v. Ferguson and its holding that "room and board" constitutes compensation in Boyd v. Tracy. "Salary" is a less ambiguous term. Additional payments in the form of allowances for travel or other outlays would be related to expenses incurred.

Constitutional Revision Commission
Committee to Study the Legislature
October 15, 1971

Qualifications - Residence and Age
Section 3, Article II

Section 3. Senators and Representatives shall ~~have resided~~ RESIDE in their respective districts ~~one year next preceeding their election~~ ON THE DAY THAT THEY BECOME CANDIDATES FOR THE GENERAL ASSEMBLY, AS PROVIDED BY LAW, AND SHALL REMAIN RESIDENTS DURING THEIR RESPECTIVE TERMS, UNLESS THE BOUNDARIES OF THEIR DISTRICTS ARE CHANGED BY A PLAN OF APPORTIONMENT, OR unless they ~~shall have been~~ ARE absent on the public business of the United States or of this State.

COMMENT: The committee regards the requirement that a member of the General Assembly be one of his own constituents a reasonable one, but favors removing the requirement of one year's prior residence for this purpose. Residence is a matter of intent, and if it is established when a person becomes a candidate, no reason exists in the committee's view to impose the additional waiting period. Residence within the district is related to proper representation, and therefore maintenance of residence during term is more appropriate than residence prior to election.

At the public hearing on October 6, 1971, a question was raised regarding the effect of apportionment on the committee's proposal for requiring members of the General Assembly to remain residents of their districts during term. The committee's proposed revision of Section 3 on that date recognized the hardship caused by apportionment under the present constitutional requirement that a member must have been a resident of his district for one year prior to election. The requirement that members must retain residency was intended to balance the removal of a prior residence requirement and also to prevent "carpetbagging" whereby a person comes into a district for the purpose of running for election and, after election, moves out of the district he represents. In response to criticism that to require a member to remain a resident could create problems if his district is subsequently altered by apportionment, the committee proposes to provide an exception for

retaining residency. Under the section as revised, members would be required to remain residents of their districts during term "unless the boundaries of their districts are changed by a plan of apportionment." The term "plan of apportionment" was selected to accord with Article XI. Any change in district lines as the result of an apportionment would remove the requirement that the member retain residency during term.

Residence requirements vary among the states, with one year's state residence a common one. Several newer constitutions do not specify a period of time for district residence, and leave this question to legislative discretion. Some state constitutions set a district residence requirement but make special provision for reapportionment by allowing residence in a district containing part of a new district for a specific period or setting district residences of a specific period, provided the district has been so long established.

Under Article XV, section 4, legislators (as persons elected to any office in this state) must possess the qualifications of an elector - i.e., reside in the state six months and be 21 years of age. The committee does not wish to place specific minimum age limits on eligibility for election to the General Assembly. Lowering of the age of an elector from 21 to 18 does not affect its position that no age restriction be inserted and that 18 year olds be permitted to seek office if they are permitted to vote, if that interpretation is given to the federal constitutional amendment as applied in Ohio.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
December 9, 1971

Article II, Section 3 - Residency

Section 3. TO BE ELIGIBLE TO SERVE AS A MEMBER OF THE GENERAL ASSEMBLY, A PERSON SHALL BE A RESIDENT OF THE DISTRICT HE SEEKS TO REPRESENT ON THE DAY THAT HE BECOMES A CANDIDATE FOR THE GENERAL ASSEMBLY. Senators and Representatives shall ~~have resided in~~ REMAIN RESIDENTS OF their respective districts ~~one year next preceding their election unless they shall have been absent on the public business of the United States or of this State~~ DURING THEIR RESPECTIVE TERMS, EXCEPT THAT SUCH RESIDENCY NEED NOT BE MAINTAINED DURING A TERM IN WHICH A PLAN OF APPORTIONMENT IS MADE, PURSUANT TO ARTICLE XI OF THIS CONSTITUTION.

Additional Comment: The exception for absence from the public business of the United States or of this State attaches to prior residence under the present section. Prior residency having been dropped, the exception could go with it. This is preferable to applying it to the requirement that persons become residents on the day they become candidates. The exception does not attach to prior residency requirements for voting. Temporary absence would not appear to affect residency or domicile. The question could be reserved for study in conjunction with Art. V, Sec. 5 which provides that: "No person in the Military, Naval, or Marine service of the United States shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State."

This version of the section proposes that the provision that a member remain a resident of his district during his term be inapplicable during a term in which a plan of apportionment is made.

November 18, 1971

TO: Ohio Constitutional Revision Commission

FROM: Robert K. Schmitz, Assistant Clerk, and Sam J. McAdow, Legal Administrator

RE: A Written Testimony for Consideration at November 18, 1971, Meeting.

Section 6. In the second line of the second paragraph, we would recommend the deletion of "its membership" and the insertion of "the members elected". This recommendation is merely for consistency. In other areas of the Constitution where reference is made to the required number of votes, the Constitution uses the words "of the members elected". This is illustrated in the first paragraph of Section 6.

Section 15. In the third line of the first paragraph after the first "house," we would insert "except as otherwise provided in this Constitution." Section 1d of Article II provides in part that emergency laws require "the vote of two thirds of all members elected." Without this reference it appears that all laws only require a majority.

In paragraph C of Section 15 we would recommend the deletion of the word "considered" and the insertion of "read by title only." The word "considered" has very little meaning in the legislative process. Is a bill "considered" when committee meetings are held? Is a bill "considered" when it is recommitted to a committee? Is a bill "considered" when it is referred to a committee? What we feel the Constitutional Revision Commission means is that the bill should be read by title only and therefore should so state. If the committee follows this recommendation, then the word "consideration" in the third line of Paragraph C would also have to be deleted. "Reading by title only" would have to be inserted in its place.

Also we would recommend the elimination of the last sentence in Paragraph C from Section 15 for several reasons. First, we do not feel that this is a proper constitutional requirement, but rather should be a rule of both houses; second, this requirement could create severe logistics problems, especially with respect to "jitney" calendars and during the closing hours of a session; and third, there is no way to establish compliance with this requirement. Is the journal to show that all amendments have been reproduced and distributed to members prior to passage? This requirement would severely slow down the legislative session. Right now, during the pending budget and taxation proposals, several large floor amendments have been submitted with regard to the conference committee reports. To require that these amendments be reproduced and distributed prior to voting would have mandated a recess for several hours.

We would recommend the deletion of the first sentence of Paragraph D, Section 15. As you have noted, this requirement is "directory" only in Ohio. Since "directory" only, it does not belong in the Constitution any longer.

We would recommend that in the second line of Paragraph E of Section 15 that "to certify that the procedural requirements for passage have been met" be deleted. This is a self-serving statement and one that the presiding officer probably will not have first hand knowledge. The mere signing of the bill without any certification should be all that is required. The courts in reviewing procedural requirements would, in our opinion, not respect the presiding officer's certification.

In your proposals regarding Section 15, the committee indicated that you considered the question of legislative consideration of vetoes made after adjournment. You indicated that the authority to convene special sessions would eliminate any question. If the adjournment is not a sine die adjournment, we concur. However, if the legislature adjourns sine die, their authority to convene a special session would not permit them to consider a governor's veto. See Mason's Manual of Legislative Procedure, Section 445, Paragraph 3, which states:

> "A motion to adjourn sine die has the effect of closing the session and terminating all unfinished business before the house, and all legislation pending upon adjournment sine die expires with the session, while a motion to adjourn from day to day does not destroy the continuity of a session and unfinished business simply takes its place on the calendar of the succeeding day."

ihg

TO: Robert K. Schmitz, Assistant Clerk
Sam J. McAdow, Legal Administrator

FROM: Legislative-Executive Study Committee, Ohio Constitutional Revision Commission

RE: Written Testimony regarding revisions considered by the Ohio Constitutional Revision Commission on November 18, 1971

DATE: December 10, 1971

The Legislative-Executive Study Committee thanks you for your written testimony submitted to the Ohio Constitutional Revision Commission regarding constitutional revisions considered by the Commission at its meeting of November 18, 1971. We appreciate your interest and would like to comment upon your suggestions.

Section 6. Your point is well taken that proposed Sec. 6 of Art. II needs amendment for consistent terminology. At the November 18 meeting an amendment was adopted affecting the phrase calling for a two-thirds vote, making the change you propose by providing that the two-thirds percentage applies to "the members elected to that house," in lieu of "its membership." This change is in accord with the language of most sections calling for various majorities, and the Committee agreed to review all such sections for the purpose of maintaining consistent phraseology.

Section 15. Paragraph (A) of proposed Section 15 begins with the following sentence: "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." You suggest adding an exception to read "except as otherwise provided in this Constitution," noting the provision of Section 1 (d) of Article II that calls for a two-thirds vote of all members elected. However, in proposing the incorporation of language from present Section 9 to proposed Section 15 the Committee intended no substantive change. Section 9 presently provides in part: "and no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto." It contains no exception for special majorities provided in other parts of the Constitution. It is the Committee's position that Section 9 sets a <u>minimum</u> vote for the passage of bills and is not inconsistent with section 1 (d) and other special sections calling for other majorities in specific situations. The Committee is 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 uncertainty.

Your third suggestion concerns the substitution for three readings at large with provision for the bill to be "considered" on three different days. You raise the question as to the meaning of the term, "considered," specifically whether a bill is "considered" when the committee meetings are held, or when a bill is recommitted or referred to a committee.

Paragraph (C) respresents a deliberate departure from the "reading" rule. The original reasons for this rule appear to have been the absence of printing and the inability of some members 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 U. S. Constitution nor the Model State Constitution mentions "reading."

However, because of the desirability of safeguards against hasty consideration, the Committee hesitated to remove entirely the requirement relative to action upon three separate legislative days. Members felt that a minimum requirement calling for action on three separate days is appropriate for this purpose. The terms "considered" and "consideration" are necessarily ones for which the legislature must provide a definition. Some similar interpretation applies to the term "reading." Moreover, the present Constitutional requirement that bills be fully and distinctly read on three different days does not require that the bill be read before the full house as opposed to before a committee. Detailing the procedure to describe every legislative action taken would be not only difficult but would unduly restrict the legislature in its application of the requirement.

Your fourth suggestion is to delete the requirement in paragraph (C) of Section 15 that requires the reproduction and distribution of bills and amendments. This provision was incorporated by the Committee upon the belief that it constitutes an added restriction upon undue haste and is an element of assuring that legislators are familiar with measures that they are voting upon. It was deliberately framed as broadly as possible so that it would not restrict floor amendments.

An amendment to paragraph (C) was adopted by the Commission at its meeting on November 18, 1971, so that the provision would now read as follows:

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

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 involved would be afforded by changing the provision in this manner. The provision as revised may meet your objections that the requirement as to amendments would severely slow down the legislative session.

The Committee in its deliberations acknowledged some of the effects of such a revision on present practices as you suggest, but felt that a minimum guarantee should be inserted in the Constitution to protect the right of a memberupon demand to have before him the text of a measure being voted upon. The relative ease with which material can be presently reproduced and distributed keeps such a requirement from being an unduly burdensome one, the frequency of large floor amendments is not great, and the possibility of delay is a small price to pay for constitutional recognition of the right. Moreover, the Committee is reluctant to relegate this matter to legislative rule that can be suspended. If the protection is in the Constitution, it may not be suspended, and a minority of one can invoke the rule by raising the point of order.

Your fifth suggestion--to delete the one subject rule because it is directory--has also been considered by this Committee. In considering various constitutional limitations on legislative procedure in the Ohio Constitution the Committee did not reject all provisions which the courts have termed "directory only." 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 and oath to support the Constitution of the state. The Committee's response to suggested removal of the requirement that no bill shall contain more than one subject is that such a requirement provides a minimum guarantee for an orderly and fair legislative process. Its inclusion in the Constitution instead of legislative rule is in part, at least, for the protection of a temporary minority whose right may not be suspended by a majority willing to disregard traditional procedures.

The Committee in its deliberations favored reform proposals calling for strict enforcement of rules limiting bills to one subject matter. It was pointed out in discussion that if such a rule were elminiated, the door might be opened to the practice of allowing unrestricted riders to bills, as is done in the U. S. Congress.

A sixth recommendation was directed to Paragraph (E) of Section 15, in which the Committee inserted a provision specifying the purpose of bill signing by presiding officers of each house. Originally the Committee proposed an amendment to Section 17, Art. II to delete the requirement that bills be signed publicly, in the presence of each house while the same is in session and capable of transacting business. The requirement was regarded by the Committee as an obsolete one and one that is not observed according to the letter of the Constitution in that the signing of bills takes place before "skeleton" sessions which are not capable of transacting business.

In Committee and Commission deliberations on the proposed revision of Section 17 the question was raised as to whether signing at all is necessary to the validity of legislation. The Committee viewed the act of signing by presiding officers not as an authentication of legislation but rather as a formal declaration (certification) that the act being signed is the one passed by the legislature. Viewing signing as the last step in the legislative process before an act goes to the governor for his signature, the Committee felt provision for it appropriately included in proposed procedural Section 15, and re-wrote the provision to make clear its desire to insulate bill passing from invalidation for procedural defects in signing by presiding officers. In the Committee's view unless signatures of the presiding officers serve the purpose of certifying procedural conformance, they are unnecessary.

Finally, your testimony responds to Commentary following Section 16, pointing out that if the legislature adjourns sine die, it would be without authority to convene a special session to consider a governor's veto. At page 17 of its report to the Commission the Committee wrote that no change had been proposed concerning legislative consideration of vetoes made after adjournment becuase "by use of the adjournment procedures to take care of this, no problem need arise." Your response was to the second sentence on this point to the effect that the authority to convene special sessions should eliminate any question which might arise.

The Commentary statement could have been better phrased and will be rewritten to clarify that what was meant to be said is (1) that the legislature can reserve opportunity to reconsider vetoed bills through its adjournment resolution and (2) that the legislature could under its authority to convene a special session obviate the necessity to reconsider bills under procedures calling for a three-fifths vote by convening in special session to pass new legislation, requiring in most instances a simple majority.

Ohio Constitutional Revision Commission
December 16, 1971

Compatibility and Eligibility - General Assembly

Sections 4 and 19 of Article II

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.

Section 19 of Article II to be repealed.

COMMENT: Section 4 of Article II, governing the compatibility of other public positions with membership in the General Assembly, was recommitted to the Committee with instructions to combine it with section 19 of Article II. The latter section, prohibiting appointment of a member of the legislature to an office either created or better compensated during his term, is patterned after section VI of Article I of the U. S. Constitution. Combining it with section 4 is logical because both sections deal with public conflicts of interest. Such provisions are commonly the subject of one section in modern constitutions. The Committee has not considered abandoning the one-year rule in

Section 19, prohibiting appointment to any such office for a year after term.

The section as proposed would substitute for the ambiguous phrase pertaining to office "under the authority of the United States, or any lucrative office under the authority of this State" the term "public office" and thus significantly reduce the need for interpretation of the section to determine its application to specific cases. Public employment would not be a constitutional disqualification for membership in the General Assembly. Compensation attaching to office would not be a criterion. Public office would replace "civil office" in Section 19 because military office having been excluded, definitions of the two terms have been interchangeable.

In recommending this change the Committee recognizes that it cannot eliminate the necessity of interpretation of the term "public office." The General Assembly has, by statute, defined certain types of positions prohibited to members of the legislature. Section 101.26 of the Revised Code as last amended in 1965 reads as follows:

> "No member of either house of the General Assembly except in compliance with this section, shall:
>
> (A) Be appointed as trustee, officer, or manager of a benevolent, educational, penal, or reformatory institution of the state, supported in whole or in part by funds from the state's treasury;

(B) Serve on any committee or commission authorized or created by the General Assembly, which provides other compensation than actual and necessary expenses;

(C) Accept any appointment, employment, or office from any committee or commission authorized or created by the General Assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

Any such appointee, officer, or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer, or employee and in case he fails or refuses to do so, his seat in the General Assembly shall be deemed vacant. Any member of the General Assembly who accepts any such appointment, office, or employment shall forthwith resign from the General Assembly and in case he fails or refuses to do so, his seat in the General Assembly shall be deemed vacant. This section does not apply to members of either house of the General Assembly serving an educational institution of the state, supported in whole or in part by funds from the state treasury, in a capacity other than one named in Division (A) of this section, school teachers, township officers, notaries public, or officers of the militia."

The Committee recognizes that the General Assembly will have the authority to define public office for purposes of the Constitutional provision.

In choosing "public office" the Committee is cognizant of judicial interpretations of the term and intends that the tests enunciated in several important Ohio cases apply to its usage of the term in the proposed section. For this purpose, 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 sovereignty of the state."

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

> "It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say 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.

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 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.

In order to constitute a position, a public office, the duties of the position must be independent, and the one performing them cannot, if he is a public officer, be subject to the direction and control of a superior officer. 44 Ohio Jur. 2d. Public Officer 487, 488.

In general recommendations for the states[1] the Citizens Conference on State Legislatures states: "There should be a prohibition against a legislator accepting appointment to other state office during the term for which he is elected or within two years of the termination of his service as a member of the legislature."

The provisions of 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 ambiguous and archaic term, "emoluments" has been replaced by the term "compensation."

1. Burns, John, The Sometime Governments, August, 1971

An additional change has been made in section 4 by the retention of an exception not incorporated in the earlier drafts. The ban on dual office-holding would not include notaries public or officers of the militia, as under the present constitutional provision, with the additional provision that it would also not extend to reserve officers in the United States armed forces. The term militia has been defined by statute to include Ohio national guard but does not extend to the U.S. reserves. The Committee's position is that if one class of officers is to be excluded, there is no logic in not excluding the other.

Notaries are defined by case law as public officers for several other purposes, and therefore the exception on this point is appropriate to retain.

The Committee considered adding to this section 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 recommends that the topic of conflict of interest and ethics be referred to the committee studying public officers.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
February 24, 1972

Research Study No. 10

GUBERNATORIAL SUCCESSION AND DISABILITY

Because state programs may suffer as a consequence of controversies arising out of inadequate or ambiguous provisions concerning the gubernatorial office, the problem of executive succession and disability is an important one in state constitutional revision. A vacancy in the office of Governor for an indefinite period of time, for whatever reason, is a potential threat to the normal functioning of modern state administration. Although this problem is dealt with in many state constitutions, in most, the provisions are ambiguous and unclarified. This is not surprising in view of the complexity of the problem. Among the many facets to the issues of vacancy and succession are:

1. the determination of a successor in the event of the death, inability to serve or disqualification of the governor-elect.

2. the determination of a successor in the event of the death of the chief executive, or his resignation, removal, absence or inability.

3. the determination of concrete procedures for establishing the existence of a vacancy in the gubernatorial office. Determining when a state of disability exists and when that state no longer exists is a highly sensitive issue.

4. clear provisions for the term, salary, and status of the successor in any of the above cases.

The Constitution of the State of Ohio deals with these matters in Article III, Sections 15 and 17:

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.

17. If the Lieutenant Governor, while executing the office of Governor, shall be impeached, displaced, resign or die, or otherwise become incapable of performing the duties of the office, the President of the Senate shall act as Governor, until the vacancy is filled, or the disability removed; and if the President of the Senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of Governor, the same shall devolve upon the Speaker of the House of Representatives.

Thus, at present in Ohio, the line of succession is to the Lieutenant Governor, and then to the presiding officer of the Senate, and the presiding officer of the House.

ANALYSIS OF THE OHIO PROVISIONS ** PROBLEMS

In theory, it would seem that the purpose of adequate provisions on succession and disability is to avoid the confusion resulting from disputes over succession and to assure continuity of the policies which the voters approved. The provisions on succession in the Ohio Constitution leave gaps concerning several important issues. Much is left open to interpretation. Given certain situations, the Constitution is entirely inadequate. It is not clear whether the lieutenant governor when succeeding to the gubernatorial office becomes the actual governor, or if he remains merely acting governor. The Constitution further does not indicate to what extent he is to be compensated for his added service to the State. The Constitution does not indicate what would happen if a governor-elect could not assume office. In view of the limitation of two terms in the gubernatorial office, under a strict legal interpretation of the Constitution, Ohio could conceivably be without a legal executive should the governor-elect die prior to assuming office while the governor in office was constitutionally prevented from further service. A 1947 opinion by the Ohio Attorney General said 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-elect. OPS. Atty. Gen. (Nos. 1562, 1947)

It may be questioned whether or not the present line of succession in the Ohio Constitution is the most adequate for the best continuation of state responsibilities. The present line of succession runs to the Lieutenant Governor, and then to the presiding officers in the Senate and the House, respectively. The situation in Ohio at present is such that the Lieutenant Governor is elected separately from the Governor and need not evidence political agreement with him. It has been recommended by this Commission that the Governor and Lieutenant Governor be elected on a joint ticket in Ohio. The possibility presently exists that a Lieutenant Governor could succeed to the office of Governor only to institute different policy from that of the Governor the people had elected to serve them. Furthermore, the objection to moving legislators (any presiding officer of the legislature) into the Governor's office is that the legislator has not been elected from a statewide constituency.

A major question may be raised as to the problem of gubernatorial disability 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 his office is needed. The Massachusetts Legislative Research Council has indicated that the States of Illinois, Louisiana, Nebraska, New Hampshire, and North Dakota have had "disconcerting" experiences with disabled Governors.[1] The lack of any procedure for determining inability in Louisiana resulted in a series of events in the summer of 1959 which were a source of embarrassment to the people of the state and further evidence the problems involved when constitutions do not make adequate disability provisions. In May, Governor Earl K. Long was taken, forcibly he asserted, to a mental clinic in Galveston, Texas. Subsequently released, he returned to Louisiana where he was committed to the

[1]Massachusetts Legislative Research Council, Reports Relative to Determination of Gubernatorial Disability, February 1, 1967, p. 7-8, as in Council of State Governments, Issues of Gubernatorial Succession, p. 2.

Southeast Louisiana State Hospital upon the basis of a court order obtained by his wife. Released from the hospital after a court hearing, Long dismissed the chief of the state police, the head of the state department of hospitals, and the director of the hospital in which he had been confined. During the period of a month in which these events took place, the lieutenant governor refused to assume any of the powers of the governorship, notwithstanding an opinion of the attorney general that the executive power rested with the lieutenant governor.

Despite both a state and Federal history of the troublesome aspects of gubernatorial disability, few states have seen fit to take remedial constitutional or statutory action. Only twelve states have a procedure for determininggubernatorial disability. The Massachusetts Legislative Research Council has suggested the following reasons for the disinclination of the majority of the states to establish procedures for determining gubernatorial disability:

> First, a constitutional amendment is undoubtedly the safest method of approaching the problem, and there is a natural reluctance to tamper with constitutions. Furthermore, many of those constitutions are couched in language which is ambiguous, unclear, and sometimes simply void of expression or meaning...
>
> But perhaps the strongest reason for state apathy is the belief that if the occasion demands, state supreme courts will assume jurisdiction and resolve the issue.[2]

When a Governor dies, resigns, or is removed by impeachment, the gubernatorial office is vacant. What happens to the office in the event of disability, and what disability exactly means in the Ohio Constitution, is far from clear. There is no machinery in the Ohio Constitution for determining what disability means, who is to determine it, or what should happen when a physical or mental disability is only temporary. Even with provisions for gubernatorial succession and disability written into the Constitution, the matter of removing the Governor in a state of disability can be a difficult situation. The possibility exists that a disabled Governor may resist displacement, or that a constitutionally designated successor may be reluctant to exercise the powers of the provision.

ORIGIN OF THE OHIO EXECUTIVE SUCCESSION PROVISION

The development of the state executive structure in American politics came at a time when it was felt that state executives should be relatively powerless. During the colonial period when the original state constitutions were developed, the office of governor was deliberately made weak because the people regarded the governor with the same distrust as the British Monarch and British tyranny. The prevailing tendency in American state government was such that most power was granted to the legislative branch of government, and the state executive was viewed mainly in terms of a figure-

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[2] Ibid., p. 3.

head. The governor had no power of appointment or removal, and he had no power of veto.

It is not surprising, then, in view of the lack of strength and importance of the gubernatorial office, that stronger provisions for succession to it were not written into the original state constitutions. The real responsibility and power was felt to be within the state legislatures, and often, the succession patterns that were set up were such that the position of Governor, in the event of a required succession, fell to the officers of the state legislatures.

The situation in Ohio would seem to fit in well here. In 1802, according to the Constitution (which designated a weak and figurehead governorship), the office of Governor was to be filled in case of vacancy by the Speaker of the Senate, and the Speaker of the House of Representatives, successively.

The present sections in the Ohio Constitution concerning succession and vacancy date back to the Constitutional Convention of 1850-1851 and the Constitution which was adopted in 1851. Important debate at the convention centered on the creation of the executive position of Lieutenant Governor, who would serve as presiding officer of the Senate (the Senate had been having tremendous organizational problems) and who would succeed to a vacancy in the Governorship. The resolution concerning the provision for a Lieutenant Governor read:

> "Resolved, that it is expedient so to amend the Constitution as to create the office of Lieutenant Governor, as to provide for his election and compensation, and to prescribe his qualifications, powers and duties."

The Lieutenant Governor was to be provided for in the Executive article, and debate as to the creation of the position was lengthy throughout the convention, and sheds some light on the establishment of the succession provision as it has existed in the Ohio Constitution to the present.

Points raised favoring the adoption of a Lieutenant Governor leaned toward the idea that he would be useful in the organization of the Senate and that there would be a well-qualified person to fulfill the office of Governor if necessary Debate opposed to the establishment of the position was based on the feeling that government should be simple, that the addition of an executive position was an economically unsound move, and that any officer would be capable of assisting in the organizational problems in the Senate. It was maintained that vacancy had rarely occurred in the office of Governor, and that when it did, the President of the Senate was well capable of assuming the position. However, an impressive point made by Mr. Hitchcock, one of the delegates, clarifies one of the important reasons why the establishment of the position of Lieutenant Governor was accepted by the Convention. Maintaining that under Ohio's Constitution at the time, the person succeeding to the Governorship would not have been elected by the entire State, Mr. Hitchcock debated,

> "How is it under the present Constitution? In the case of a vacancy of the office of Governor, the Speaker of the Senate acts as Governor. Well, the Speaker of the Senate is elected by the Senate, and in that event, the Senate will elect the Governor of the State. By provisions of the Report, it is provided, if there is a vacancy of the office of Governor, the

> Lieutenant Governor fills his place, who it is proposed, shall be elected by the whole body of the people. The question is, then in providing for such a case, shall the Governor be elected by the people of the State or by the Senate? That seems to be the idea."
>
> (1851 Convention Debates, Vol. I, p. 301.)

Sections 15 and 17 of Article III as they exist today were accordingly adopted by the Convention, and the new Constitution was ratified by the voters. Succession to the Governorship was thus to proceed from Governor to Lieutenant Governor, and then to the President of the Senate and the Speaker of the House of Representatives.

SUMMARY

The diversity of possibilities for constitutional provisions on succession and disability is reflected in the wide range of opinions found among organizers of state government and political scientists on the subject. It may be said that two basic considerations are involved in providing for succession to the governorship. The first is concerned with providing for a successor, or line of succession, to the governorship in case of a vacancy; the second is concerned with providing adequate procedures for a successor to assume the role of chief executive without undue delay when the governor's inability to discharge the powers and duties of his office obstructs or hinders the necessary conduct of state affairs. Inherent in the latter is the consideration of when and under what conditions should a governor's temporary absence or disability be subject to inquiry and determination for the purpose of establishing gubernatorial "inability". From this is derived the need to provide for the establishment of procedures for defining and determining "absence" and "disability".

Several possibilities for succession order exist. A fixed line of succession could run to the Lieutenant Governor and other designated officials, as now occurs in Ohio. Arguments for succession by the Lieutenant Governor point to the common popularity of this arrangement among the states; the fact that the Lieutenant Governor is selected by popular election on the same statewide basis as the Governor; and that the Lieutenant Governor is the next highest official of the executive branch of government. On the other hand, it has been pointed out that the main weakness of such an arrangement lies in the fact that the Lieutenant Governor's role may not necessarily be an active one. Also, the possibility exists that the Lieutenant Governor may be of a different political party than the Governor, thus creating political and policy upheaval as the Lieutenant Governor succeeds to the position, perhaps necessitating a total change in administration. If the Lieutenant Governor is to be elected on the same party ticket as the Governor--as the Commission has recommended here in Ohio, and as fifteen states now do--the successor would presumably have a political philosophy harmonious to that of the Governor.

Whether or not the presiding officers of the state legislature should occupy prominent, or any, positions in the line of succession to the governorship is a highly debated issue. An alternative to succession by the Lieutenant Governor would be to provide for succession by the president of the Senate or the speaker of the House of Representatives, or often the Lieutenant Governor is followed in line of succession by

these officers. Those who support such an arrangement hold that it is more likely to provide a top caliber successor than does the lieutenant governorship and that it also may reflect more recent electoral sentiment since the legislature is elected every two years. (Senators have four-year terms in Ohio.) They further state that a legislative leader is apt to be more involved, more aware, and more knowledgeable about the affairs of the state, and hence, well equipped for succession.

Those who oppose such legislative succession question the desirability of having a change in the party affiliation of the governor which is possible if the senatorial majority is from a different party. They also question the advisability of having as a successor a legislator elected from a single district which represents only a small segment of the state's population rather than an official elected on a statewide basis. (These people support other statewide elected officials as following in the line of succession.) A related argument states that the selection of statewide and local officials by voters is often based on different requirements and that a voter electing a person to the senate would not necessarily elect that same person to the governorship. Finally, there is cited the danger of placing a higher value on factional legislative loyalties.

Consideration might be given to a constitutional provision authorizing or requiring the calling of a special election when the executive office is vacant and a substantial portion of the governor's unexpired term remains, especially if succession has become remote from the governor. A further possibility here would be to provide for further succession in much the same manner as the Federal Constitution and the new Virginia constitution, which in theory would always provide a replacement for the executive, because the House of Representatives (Delegates) may fill a vacancy after the normal line of succession. Yet, because there is no way to insure indefinite succession, and because ideally a person not elected by all the people should not serve for too long, special election might be the most desirable means of always insuring a replacement for the executive in an uncommon situation.

Clarification as to how long a successor is to serve in an acting capacity (unless the successor is to assume the full title to the governorship immediately upon succession) might also be useful in the constitutional provision for succession order, and whether or not the acting executive or succeeding governor is to receive special compensation for his service is also an area which demands further specification. It would also seem that it should be constitutionally provided if special succession is to occur in the event of the death (or otherwise, etc.) of the governor-elect. It seems well evident that the establishment of an ordered line of succession and the accompanying problems are important areas for consideration.

Gubernatorial absence is a further area of concern. The Ohio Constitution does not specifically mention absence, but other state constitutional provisions dealing with gubernatorial absence and succession continue to be embroiled in conflict because of the lack of any constitutional definition of absence, or because of antiquity or ambiguity in language defining absence. Consequently, interpretations of what constitutes "absence" in specific instances have frequently been left to the courts.

There are two opposed views which define absence. One view considers a governor to be absent when he physically leaves the state for any purpose or for any period of time. The other view declares a governor to be absent when such absence will injuriously

affect the public interest. Supporters of the first view contend that the strict interpretation of gubernatorial "absence from the state" is required because the framers of such constitutional provisions and the people of the state who adopted the constitutions believed that in times of absence of the governor from the state, regardless of the period of time, the successor to the governor should assume the constitutional functions of the governor. Supporters of the latter view, however, contend that in the case of a governor's absence from the state, a doctrine of effective absence, one which bases temporary succession upon the state's immediate need for action on a particular function, should apply. They attack the "strict absence" provisions on the basis that some kind of objective, as well as consistent criteria for determining when a governor is absent is needed. Furthermore, they feel that the duties of the governor's successor should be defined more clearly and be less inclusive for periods of temporary succession. The trend in the newer state constitutions seems to be towards this view. With modern transportation and communications, the desirability of a "strict absence" provision has been increasingly subject to question.

At any rate, it is obviously required that a distinction be made between a successor's assumption of the gubernatorial office and a temporary assumption of the gubernatorial office. This is the same question which arises in cases of gubernatorial disability.

Experiences in other states and at the federal level clearly suggest that procedures are needed to determine executive disabilities fairly confidently and without delay. The differences between temporary and permanent disability may require different methods for dealing with them. One distinction between temporary and permanent disability which has been suggested is that in cases of permanent disability, the alternate succeeds to the office of chief executive, while in cases of temporary disability, the alternate only serves as a substitute or deputy until the disability is removed.

Possibilities for dealing with the disability problem include, of course, both statutory and constitutional mechanisms, but the arguments for a specified constitutional procedure would seem to be well taken in light of the research presented in this paper and the obvious problems which can arise in disability situations. The ways in which the states which presently do make provision for disability determinations deal with the problem evidence that many solutions can be evolved. Alaska leaves this up to statutory mechanism, as prescribed in the Constitution. A number of states authorize the legislature to rule on whether or not a disability exists; among these is Virginia. However, the possibility might be raised that such legislative consideration might conceivably result in the introduction of irrelevant political concerns. A number of states authorize the supreme court to rule on questions of disability. Among these are Alabama (but the Alabama Constitution deals only with mental disability), Illinois, Mississippi, and New Jersey. The Model State Constitution recommends that the state supreme court be given original and final jurisdiction to determine whether or not the governor is disabled. Using a slightly different means of constitutional mechanism, California adopted a constitutional amendment in 1966 authorizing the supreme court to determine questions of disability. The proposed Kentucky constitution of 1966 devised a unique solution wherein the auditor, attorney general, and a physician designated by law would constitute a board, any two of whom could request the supreme court to determine the degree of disability of the governor.

Generally, a comprehensive provision on gubernatorial disability would appear to cover at least three areas: (1) specification of the grounds or causes indicating that a disability exists; (2) designation of the person or persons authorized to initiate a disability challenge; and (3) designation of the person or agent responsible for rendering a determination on the disability question.

THE FEDERAL CONSTITUTION ON EXECUTIVE SUCCESSION AND DISABILITY

Executive succession and disability are presently dealt with in the Federal Constitution in the executive article and in Amendments XX and XXV, as follows:

Article II, Section I.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve upon the Vice-President, and the Congress may by law provide for the case of the removal, death, resignation or inability, both of the President and the Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

Amendment XX, Sections III and IV

If, at any time fixed for the beginning of the term of the president, the president-elect shall have died, the vice president-elect shall become president. If a president shall not have been chosen by the time fixed for the beginning of his term, or if the president-elect shall have failed to qualify, then the vice president-elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president-elect not a vice president-elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate shall choose a vice-president whenever the right of choice shall have devolved upon them.

Amendment XXV, Sections I, II, III, IV

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as the Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Federal Constitution originally evidenced similar inadequacy to that of the states, maintaining that a Vice President would succeed to "the powers and duties" of the office of President, without establishing whether or not he should succeed also to the title. Until the 25th Amendment, no procedure was concretely established for determining the question of inability, with the result that in the two instances of inability that have occurred, those of Presidents Garfield and Wilson, the former continued in office until his death, and the other, after his partial recovery, until the end of his term.

The passage of the 25th Amendment to the U.S. Constitution further evidences the desirability of similar arrangements for maintaining continuous occupancy of the office of chief executive in the various states. The 25th Amendment provides 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 that he is unable to discharge the duties of his 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.

On the state level, a rational premise in devising succession rules is that the first choice of the voters was the Governor's program and policies, and they have a right to their continuance in his successor. At the federal level, this objective is likely to be met. The president and vice-president are in practice elected on a joint ballot, and by tradition the president selects his vice-president. The power granted by the 25th Amendment to the president to fill a vacancy in the office of vice-president by appointment with the approval of a majority of both Houses of Congress virtually assures continuity of executive policy.

MODEL STATE CONSTITUTION, Sixth Edition, Revised, 1963

The 1963 edition of the National Municipal League's "Model State Constitution" discusses succession to the governorship as follows:

Section 5.08. Succession to Governorship

(a) If the governor-elect fails to assume office for any reason, the presiding officer of the legislature shall serve as acting governor until the governor-elect qualifies and assumes office, or, if the governor-elect does not assume office within six months, until the unexpired term has been filled by special election and the newly elected governor has qualified. If, at the time the presiding officer of the legislature is to assume the acting governorship, the legislature has not yet organized and elected a presiding officer, the outgoing governor shall hold over until the presiding officer of the legislature is elected.

(b) When the governor is unable to discharge the duties of his office by reason of impeachment or other disability, including but not limited to physical or mental disability, or when the duties of the office are not being discharged by reason of his continuous absence, the presiding officer of the legislature shall serve as acting governor until the governor's disability or absence terminates. If the governor's disability or absence does not terminate within six months, the office of governor shall be vacant.

(c) When, for any reason, a vacancy occurs in the office of governor, the unexpired term shall be filled by special election except when such unexpired term is less than one year, in which event the presiding officer of the legislature shall succeed to the office for the remainder of the term. When a vacancy in the office of governor is filled by special election, the presiding officer of the legislature shall serve as acting governor from the occurrence of the vacancy until the newly elected governor has qualified. When the presiding officer of the legislature succeeds to the office of governor, he shall have the title, powers, duties, and emoluments of that office, and, when he serves as acting governor, he shall have the powers and dutings thereof and shall receive such compensation as the legislature shall provide by law.

(d) The legislature shall provide by law for special elections to fill vacancies in the office of governor.

(e) The supreme court shall have original, exclusive, and final jurisdiction to determine absence and disability of the governor or governor-elect and to determine the existence of a vacancy in the office of governor and all questions concerning succession to the office or to its powers and duties.

BICAMERAL ALTERNATIVE: Section 5.08. Succession to Governorship. For "presiding officer of the legislature" substitute "presiding officer of the Senate".

Commentary on the Model State Constitution notes that a virtually unlimited line of succession is assured when succession falls to the presiding officer of the legislature, because the legislature in the Model is a continuous two-year body and there will always be a presiding officer. This is criticized in other sources, however, as passing the governorship to an individual not elected by the mass of voters. It should be added, too, that the presiding officer of the legislature under the Model can never serve in the governor's place for a period of more than one year under the conditions of subsection (c) and for a period of more than six months under the conditions of subsections (a) and (b). Because no limit is set on the number of successive terms a governor may serve in the Model, the problem of term is taken care of, and a successor may later seek election to the office in his own behalf. It is important to note that the Model does provide for succession in the event of the death or incapacity of the governor-elect before he has assumed the office.

The Model has left the limits of the term "disability" undefined. Although specifically including impeachment and physical or mental disability, the intention of the Model is to treat as disability any condition or circumstance that renders the governor "unable to discharge the duties of his office". The Model makes an interesting distinction between temporary and "continuous" absence of the governor from the state. Calling only for succession "when the duties of the office are not being discharged by reason of his (the governor's) continuous absence," this differs from many state provisions which provide for temporary succession every time the governor is absent from the state. The assumption here is that modern day communication allows that temporary absence will not place a governor out of touch with state affairs.

When a vacancy occurs more than one year before the expiration of the governor's term, the Model calls for a special election to be held, as provided by the legislature. The Model evidences the distinction existing in law between succession to the office of governor, in which case the presiding officer of the legislature actually becomes governor with full compensation to the office; and succession to the powers and duties of the office, in which case the successor merely becomes acting governor for a limited period until a new governor has been elected by special election. Finally, the Model gives "original, exclusive, and final" jurisdiction to determine absence and disability of the governor or governor-elect and to determine the existence of a vacancy in the office of governor and all questions relating to succession to the office. Commentary in the Model expresses the feeling that all issues relation to succession will eventually wind up in that court anyway, and avoids any limitations on the court's power to proceed.

STATE CONSTITUTIONAL PROVISIONS

The various states meet the potentially disruptive problem of a vacancy in the office of Governor in assorted ways. Thirty-nine states provide for the Lieutenant Governor to succeed to the gubernatorial office. Seven states designate the President of the Senate and four the Secretary of State as first successor to the governorship. Whether there will be continuity of leadership, however, is uncertain. Except in a few states, it is not impossible for the second in command to be of the opposite party or a member of an opposite faction. 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 fifteen 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 originally provided that the Secretary of State be elected on a joint ticket with the Governor, and he was the successor to the gubernatorial office, but Alaska has now changed the position of Secretary of State to one of Lieutenant Governor. In a few states, a special election is provided for in certain circumstances, but the more common practice is to permit the Lieutenant Governor or other first successor to serve out the unexpired term.

In a study of 42 of the states, the Council of State Governments found that the average number of officials provided for in the succession order is five. The same study established that only twelve of the states had developed procedures for determining gubernatorial disability. Thirty of the 42 states either directly or indirectly provide for temporary devolution of the Governor's authority upon his successor when the Governor is absent from the state. Twenty-six states reported that a successor to the office of Governor receives a salary of the Governor. It would seem useful to look more closely at the constitutional provisions of several states in order to become more aware of the alternatives which exist for constitutional revision.

ALABAMA

The Constitution of the State of Alabama of 1901, amended as of December 16, 1969, includes the following provisions on succession and disability, dating to 1901:

Article 5, Section 127

> In case of the governor's removal from office, death or resignation, the lieutenant governor shall become governor. If both the governor and lieutenant governor be removed from office, die, or resign more than sixty days prior to the next general election, at which any state officers are to be elected, a governor and lieutenant governor shall be elected at such election for the unexpired term, and in the event of a vacancy in the office, caused by the removal from office, death or resignation of the governor and lieutenant governor, pending such vacancy and until their successors shall be elected and qualified, the office of governor shall be administered by either the president pro tem of the senate, speaker of the house of representatives, attorney general, state auditor, secretary of

state, or state treasurer in the order herein named. In case of the impeachment of the governor, his absence from the state for more than twenty days, unsoundness of mind, or other disability, the power and authority of the office shall, until the governor is acquitted, returns to the state, or is restored to his mind, or relieved from other disability, devolve in the order herein named, upon the lieutenant governor, president pro tem of the senate, speaker of the house of representatives, attorney general, state auditor, secretary of state and state treasurer. If any of these officers be under any of the disabilities herein specified, the office of the governor shall be administered in the order named by such of these officers as may be free from such disability. If the governor shall be absent from the state over twenty days, the secretary of state shall notify the lieutenant governor; if both the governor and the lieutenant governor shall be absent from the state over twenty days, the secretary of state shall notify the president pro tem of the Senate, who shall enter upon the duties of governor, and so on, in case of such absence, he shall notify each of the other officers named in their order, who shall discharge the duties of the office until the governor or other officer entitled to administer the office in succession to the governor returns. If the governor-elect fail or refuse from any cause to qualify, the lieutenant governor-elect shall qualify and exercise the duties of governor until the governor-elect qualifies; and in the event both the governor-elect and the lieutenant governor-elect from any cause fail to qualify, the president pro tem of the senate, the speaker of the house of representatives, the attorney general, state auditor, secretary of state, and state treasurer, shall, in like manner, in the order named, administer the office until the governor-elect or the lieutenant governor-elect qualifies.

Article 5, Section 128

If the governor or other officer administering the office shall appear to be of unsound mind, it shall be the duty of the supreme court of Alabama, at any regular term, or at any special term, which it is hereby authorized to call for that purpose, upon request in writing, verified by their affidavits, of any two of the officers named in section 127 of this Constitution, not next in succession to the office of governor, to ascertain the mental condition of the governor or other officer administering the office, and if he is adjudged to be of unsound mind, to so decree, a copy of which decree, duly certified, shall be filed in the office of the secretary of state; and in the event of such adjudication, it shall be the duty of the officer next in line of succession to perform the duties of the office until the governor or or other officer administering the office is restored to his mind. If the incumbent denies that the governor or other person entitled to administer the office has been restored to his mind, the supreme court, at the instance of any officer named in section 127 of this Constitution, shall ascertain the truth concerning the same, and if the officer has been restored to his mind, shall so adjudge and file a duly certified copy of its decree with the secretary of state; and in the event of such adjudication, the office shall be restored to him. The supreme court shall prescribe the method of taking testimony and the

rules of practice in such proceedings, which rules shall include a provision for the service of notice of such proceedings on the governor or person acting as governor.

When the office of Governor becomes vacant in Alabama, the Lieutenant Governor becomes Governor. However, should both the Governor and the Lieutenant Governor "be removed from office, die or resign more than sixty days prior to the next general election, at which any state officers are to be elected," both offices are filled at that election for the unexpired term. In the case of a temporary vacancy until such an election, the further line of succession in Alabama is such that the office would be held and administered by the president pro tem of the senate, speaker of the house of representatives, attorney-general, state auditor, secretary of state, or state treasurer in that order. The salary of the acting governor is not constitutionally specified. The Alabama Constitution does specify twenty days as the period after which the succession rule becomes operative. It is further specified that in such circumstance, the Secretary of State shall notify the appropriate succeeding officer that he should discharge the duties of the office until the return of the Governor.

If the Governor-elect, for any reason, does not assume office, the lieutenant governor-elect is to exercise the duties of the governor until the governor-elect does qualify. Further succession order in this case would be the same as that mentioned previously.

The Alabama Constitution outlines a procedure for the determination of gubernatorial disability only when that disability concerns the governor's mental state. The Constitution places the burden on the Supreme Court of Alabama to determine whether the governor is "of unsound mind". However, the matter must first be referred by the written request and affidavits of any two officers named in the succession order, but not next in line of succession to the office of Governor. There is, however, no mention of physical disability.

ALASKA

The Constitution of the State of Alaska, adopted in 1956, deals with gubernatorial succession and disability in Article III, Sections 9, 10, 11, 12, 13, and 14, as follows:

9. Acting Governor

In case of the temporary absence of the governor from office, the lieutenant governor shall serve as acting governor.

10. Succession; Failure to Qualify

If the governor-elect dies, resigns, or is disqualified, the lieutenant governor elected with him shall succeed to the office of governor for the full term. If the governor-elect fails to assume office for any other reason, the lieutenant governor elected with him shall serve as acting governor, and shall succeed to the office if the governor-elect does not assume his office within six months of the beginning of the term.

11. Vacancy

In case of a vacancy in the office of governor for any reason, the lieutenant governor shall succeed to the office for the remainder of the term.

12. Absence

Whenever for a period of six months, a governor has been continuously absent from office or has been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. The procedure for determining absence and disability shall be prescribed by law.

13. Further Succession

Provision shall be made by law for succession to the office of governor and for an acting governor in the event that the lieutenant governor is unable to succeed to the office or act as governor. No election of a lieutenant governor shall be held except at the time of electing a governor.

14. Title and Authority of Successor

When the lieutenant governor succeeds to the office of governor, he shall have the title, powers, duties and emoluments of that office.

Alaska's constitutional provisions on succession and disability are reasonably complete. The immediate successor to the governorship is the lieutenant governor, who is elected jointly with the governor. Provisions outline both temporary absence and vacancy in the gubernatorial office, and indicate status of the successor and his term for each case. When the lieutenant governor succeeds to the office of governor, he receives full title and authority of the position. In the event that the lieutenant governor would be unable to succeed to the office of governor, provision for further succession is to be made by law. The lieutenant governor is only elected at the same time at which there is an election for governor.

It is specified in Section 12 of the Constitution that the procedure for determining absence and physical or mental disability of the governor shall be provided for by law. Thus, rather than defining disability constitutionally, it is left for statutory description. The provisions of the Constitution of the State of Alaska are, however, more clearly defined than those in most of the other state constitutions.

HAWAII

The Hawaii Constitution, adopted in 1959, deals with succession in Article IV, Section 4, in the following way:

4. Succession to Governorship; Absence or Disability of Governor

When the office of Governor is vacant, the Lieutenant Governor shall become Governor. In the event of the absence of the Governor from the State, or his inability to exercise and discharge the powers and duties of his office, such powers and duties shall devolve upon the Lieutenant Governor during such absence or disability.

When the office of Lieutenant Governor is vacant, or in the event of the absence of the Lieutenant Governor from the State, or his inability to exercise and discharge the powers and duties of his office, such powers and duties shall devolve upon such officers in such order of succession as may be provided by law. In the event of the impeachment of the governor or of the lieutenant governor, he shall not exercise the powers of his office until acquitted.

In Hawaii, succession occurs whenever the office of governor is "vacant". In such a situation, the lieutenant governor "becomes" governor. In cases of the absence or the inability of the governor, however, the "powers and duties" of the office are to devolve upon the lieutenant governor for the duration of such absence of inability. Other succession, such as that to the office of lieutenant governor, when it is vacanted, when the lieutenant governor is absent from the State, or when the lieutenant governor is unable to "exercise and discharge the powers and duties of his office," is to be provided for by law.

The last sentence of Section 3 of the same article in the Hawaii Constitution reads, "When the lieutenant governor succeeds to the office of governor, he shall receive the compensation for that office." Thus, the question of salary in the case of succession to the governorship is made clear in the Hawaii Constitution.

The Constitution of the State of Hawaii was revised in 1968, but no changes were made in the sections dealing with succession to the governorship and absence or disability of the governor.

ILLINOIS

The new Illinois Constitution of 1970 makes the following provision for succession and disability:

Article V. Section 6. Gubernatorial Succession

(a) In the event of a vacancy, the order of succession to the office of Governor or to the position of Acting Governor shall be the Lieutenant Governor, the elected Attorney General, the elected Secretary of State, and then as provided by law.

(b) If the Governor is unable to serve because of death, conviction on impeachment, failure to qualify, resignation or other disability, the office of Governor shall be filled by the officer next in line of succession for the remainder of the term or until the disability is removed.

(c) Whenever the Governor determines that he may be seriously impeded in the exercise of his powers, he shall so notify the Secretary of State and the officer next in line of succession. The latter shall thereafter become Acting Governor with the duties and powers of Governor. When the Governor is prepared to resume office, he shall do so by notifying the Secretary of State and the Acting Governor.

(d) The General Assembly by law shall specify by whom and by what procedures the ability of the Governor to serve or to resume office may be questioned and determined. The Supreme Court shall have original and exclusive jurisdiction to review such a law and any such determination and, in the absence of such a law, shall make the determination under such rules as it may adopt.

Illinois is very sensitive to the problems of succession and gubernatorial disability, not wishing to repeat the experience of 1938-40 when Governor Henry Horner was largely incapacitated from a heart attack for almost two years before his secretary relinquished the office to Lieutenant Governor Stelle--only a day before Governor Horner's death.

This section in the Illinois Constitution replaces Article V, Sections 17 and 19 of the 1870 Constitution, removing the presiding officers of the General Assembly from the immediate line of succession. It changes the order of succession so that if the Governor and Lieutenant Governor cannot serve, the office falls upon the elected Attorney General, the elected Secretary of State, and then according to law. No special elections need be provided for, because in the immediate line of succession, the Governorship falls only to statewide elected officials. A short absence by the Governor from the state is eliminated as a cause of gubernatorial "disability", and the provision leaves final decisions on disability up to the Legislature, with "original and exclusive" jurisdiction for review in the Supreme Court.

MISSISSIPPI

The Constitution of the State of Mississippi deals with succession to the office of Governor and gubernatorial disability in Article 5, Section 131, of the 1890 Constitution as follows:

Section 131. When the office of governor shall become vacant, by death, or otherwise, the lieutenant governor shall possess the powers and discharge the duties of said office. When the governor shall be absent from the state, or unable, from protracted illness, to perform the duties of the office, the lieutenant governor shall discharge the duties of said office until the governor be able to resume his duties; but if, from disability or otherwise, the lieutenant governor shall be incapable of performing said duties, or if he be absent from the state, the president of the senate pro tempore shall act in his stead; but if there be no such president, or if he be qualified by like disability, or be absent from the state, then the speaker of the house of representatives shall assume the office of governor and perform said duties; and in the case of the inability of the foregoing officers to discharge

the duties of governor, the secretary of state shall convene the senate to elect a president pro tempore. The office discharging the duties of governor shall receive compensation as such. Should a doubt arise as to whether any one of the disabilities mentioned in this section exists or shall have ended, then the secretary of state shall submit the question in doubt to the judges of the Supreme Court, who, or a majority of whom, shall investigate and determine said question, and shall furnish to said secretary of state an opinion, in writing, determining the question submitted to them, which opinion, when rendered as aforesaid, shall be final and conclusive.

The line of succession in Mississippi runs to the Lieutenant Governor, and then to the President of the Senate pro tempore and the Speaker of the House of Representatives. In cases of vacancy, the successor "shall possess the powers and discharge the duties " of the governorship, and in other cases, where the vacancy is only to be temporary, "shall discharge the duties of said office until the governor be able to resume his duties." No specific time limit is given in this case, and it is specified that any officer discharging the duties of the governorship is to receive compensation as such.

Mississippi is one of the few states to outline specifically in the state constitution how cases of disability are to be determined. The Mississippi Constitution provides that if there is a doubt whether a disability exists, then the Secretary of State submits the question to the judges of the Supreme Court of Mississippi, who investigate and determine the question. The opinion of the Supreme Court is "final and conclusive."

NEW JERSEY

Sections in the New Jersey State Constitution of 1947 on gubernatorial succession and disability date to the New Jersey Constitution of 1844, as amended December 19, 1897. These matters are dealt with in Article V, Sections 6, 7, 8, and 9 as follows:

6. Vacancy in the office of Governor from death, resignation, removal or other cause; devolution of powers and duties

In the event of a vacancy in the office of Governor resulting from the death, resignation or removal of a Governor in office, or the death of a Governor-elect, or from any other cause, the functions, powers, duties, and emoluments of the office shall devolve upon the President of the Senate, for the time being, and in the event of his death, resignation or removal, then upon the Speaker of the General Assembly, for the time being; and in the event of his death, resignation or removal, then upon such officers and in such order of succession as may be provided by law; until a new Governor shall be elected and qualify.

7. Failure of Governor-elect to qualify; absence from state; inability to discharge duties; impeachment; devolution of powers and duties.

In the event of the failure of the Governor-elect to qualify, or of the absence from the State of a Governor in office, or his inability to discharge the duties of his office, or his impeachment, the functions, powers, duties, and emoluments of the office shall devolve upon the President of the Senate, for the time being; and in the event of his death, resignation, removal, absence, inability, or impeachment, then upon the Speaker of the General Assembly, for the time being; and in the event of his death, resignation, removal, absence, inability, or impeachment, then upon such officers and in such order of succession as may be provided by law; until the Governor-elect shall qualify, or the Governor in office shall return to the State, or shall no longer be unable to discharge the duties of the office, or shall be acquitted, as the case may be, or until a new Governor shall be elected and qualify.

8. Vacancy in office of Governor upon failure of Governor-elect to qualify; absence from state; inability to discharge duties; determination of vacancy

Whenever a Governor-elect shall have failed to qualify within six months after the beginning of his term of office, or whenever for a period of six months a Governor in office, or person administering the office, shall have remained continuously absent from the State, or shall have been continuously unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. Such vacancy shall be determined by the Supreme Court upon presentment to it of a concurrent resolution declaring the ground of the vacancy, adopted by a vote of two-thirds of all the members of each house of the Legislature, and upon notice, hearing before the Court and proof of the existence of the vacancy.

9. Election of Governor to fill unexpired term in event of vacancy

In the event of a vacancy in the office of Governor, a Governor shall be elected to fill the unexpired term at the general election next succeeding the vacancy, unless the vacancy shall occur within sixty days immediately preceding a general election, in which case he shall be elected at the second succeeding general election; but no election to fill an unexpired term shall be held in any year in which a Governor is to be elected for a full term. A Governor elected for an unexpired term shall assume his office immediately upon his election.

It is provided in the New Jersey Constitution that in the event of a vacancy in the office of Governor or in the event of the failure of a Governor-elect to assume office, the succession order to the Governorship shall be such that the "functions, powers, duties, and emoluments of the office" shall devolve first upon the President of the Senate, and then upon the Speaker of the General Assembly "for the time being." Further succession, if needed, may be provided for by law.

The New Jersey Constitution provides that if the Governor is unable to discharge

his duties for a period of six months by reason of mental or physical disability, the office shall be deemed vacant. The vacancy is determined by the New Jersey Supreme Court, upon the presentment to it of a resolution declaring the vacancy and the grounds for it, which must be adopted by a two-thirds vote of each house of the Legislature. The article also provides for a hearing before the court, for which notice shall be given and during which proof of the existence of the vacancy shall be heard.

If a vacancy occurs more than sixty days prior to the next general election, a new Governor is elected at that election. If not, a new Governor is elected at the second succeeding general election. No election to fill a vacancy is to be held in a year in which a Governor is to be elected for a full term. A Governor so elected takes office immediately.

The case of In re An Act concerning Alcoholic Beverages, 130 N.J.L. 123, 31 A. (2d) 837 (1943), defined absence as used in the Constitution, as "such as will injuriously affect the public interest and not merely a temporary absence." Thus, temporary absence from the state is not to be included as a cause for succession according to the New Jersey Constitution.

NEW YORK

The sections of the Constitution of the State of New York on gubernatorial succession and disability date to January 1, 1964. These provisions are outlined in Article IV, Sections 5 and 6.

5. When lieutenant governor to act as governor.

> In case of the removal of the governor from office or of his death or resignation, the lieutenant governor shall become governor for the remainder of the term. In case the governor-elect shall decline to serve or shall die, the lieutenant governor-elect shall become governor for the full term.
> In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office, the lieutenant governor shall act as governor until the inability shall cease of until the term of governor shall expire.
> In case of the failure of the governor-elect to take the oath of office at the commencement of his term, the lieutenant governor shall act as governor until the governor shall take the oath.

6. Qualifications, duties and compensation of lieutenant governor; succession to the governorship.

> The lieutenant governor shall possess the same qualifications of eligibility for office as the governor. He shall be the president of the senate but shall have only a casting vote therein. The lieutenant governor shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly.
> In case of vacancy in the offices of both governor and lieutenant

governor, a governor and lieutenant governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant governor shall be had in any event except at the time of electing a governor.
In case of vacancy in the offices of both governor and lieutenant governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.
In case of vacancy in the office of lieutenant governor alone, or if the lieutenant governor shall be impeached, absent from the state, or otherwise unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant governor during such vacancy or inability.
If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.
The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

These sections of the New York Constitution date to 1963. The Constitution which was defeated in New York in 1967 would have amended these provisions such that the general structure of succession would have remained the same, but would have provided for a special election three months after anytime at which both the offices of Governor and Lieutenant Governor might be vacant, excepting when such unexpired term was less than one year. In this case, the temporary president of the Senate would serve as Governor.

As the provision in New York presently stands, however, succession goes to Lieutenant Governor, and then to the temporary President of the Senate and the Speaker of the Assembly, respectively. The legislature may provide for any case not constitutionally stated.

In the case of permanent vacancy in the governorship, the Lieutenant Governor becomes Governor. If the office is temporarily vacant, the Lieutenant Governor merely acts as Governor. In cases where there was vacancy in both the offices of Governor and Lieutenant Governor, the temporary President of the Senate or the Speaker of the Assembly, respectively, only assumes the position of acting Governor until the next general election happening at least three months after the offices became vacant, when a new election for Governor and Lieutenant Governor is held.

It should be noted that the Governor and Lieutenant Governor are chosen on a joint ticket in New York. Thus, they would share the same political views, and in most cases where the Lieutenant Governor succeeds to the governorship, the voters

could expect a continuance of the policy preferences which they had voted into office at the previous election.

PENNSYLVANIA

The Constitution of the State of Pennsylvania was amended on May 16, 1967, rewriting Article IV, Sections 13 and 14 which deal with succession and disability as follows:

13. When Lieutenant Governor to act as Governor

> In the case of the death, conviction on impeachment, failure to qualify or resignation of the Governor, the Lieutenant Governor shall become Governor for the remainder of the term, and in the case of the disability of the Governor, the powers, duties, and emoluments of the office shall devolve upon the Lieutenant Governor until the disability is removed.

14. Vacancy in the Office of Lieutenant Governor

> In case of the death, conviction on impeachment, failure to qualify or resignation of the Lieutenant Governor, or in case he should become Governor under the preceding section, the President pro tempore of the Senate shall become Lieutenant Governor for the remainder of the term. In case of the disability of the Lieutenant Governor, the powers, duties, and emoluments of the office shall devolve upon the President pro tempore of the Senate until the disability is removed. Should there be no Lieutenant Governor, the President pro tempore of the Senate shall become Governor if a vacancy shall occur in the office of Governor and in case of the disability of the Governor, the powers duties and emoluments of the office shall devolve upon the President pro tempore of the Senate until the disability is removed. His seat as Senator shall become vacant whenever he shall become Governor and shall be filled by election as any other vacancy in the Senate.

The change affected by these amendments clarifies the status of the Lieutenant Governor when he succeeds to the governorship. Previous wording of Section 13 was such that the "powers, duties and emoluments of the office" would fall upon the Lieutenant Governor, but did not clarify his official status. Further, a similar clarification is evidenced in the change in wording of Section 14, where instead of the "powers, duties and emoluments" of the office devolving on the President pro tempore of the Senate, he is to become Lieutenant Governor if the Lieutenant Governor is succeeding to the governorship, or Governor is the case where there is no Lieutenant Governor.

It is necessary to note that in Pennsylvania, the Lieutenant Governor is elected separately from the Governor, rather than on a joint ticket, so the possibility exists that a Lieutenant Governor succeeding to the governorship might have different political and policy viewpoints from that of the Governor. However, the Lieutenant Governor succeeding to the position would have been the man the people elected statewide to succeed to the governorship in such a case.

VIRGINIA

The new 1970 Constitution of the State of Virginia replaced the old Section 78 of Article V, dealing with gubernatorial succession, with Article V, Section 15, which deals with the topic in the following manner:

Section 15. Succession to the office of Governor.

When the Governor-elect is disqualified, resigns, or dies following his election but prior to taking office, the Lieutenant Governor-elect shall succeed to the office of Governor for the full term. When the Governor-elect fails to assume office for any other reason, the Lieutenant Governor-elect shall serve as Acting Governor.

Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Delegates his written declaration that he is unable to discharge the powers and duties of his office and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor.

Thereafter, when the Governor transmits to the Clerk of the Senate and the Clerk of the House of Delegates his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Attorney General, the President pro tempore of the Senate and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly, transmit within four days to the Clerk of the Senate and the Clerk of the House of Delegates their written declaration that the Governor is unable to discharge the powers and duties of his office. Thereupon the General Assembly shall decide the issue, convening within forty-eight hours for that purpose if not already in session. If within twenty-one days after receipt of the latter declaration, or, if the General Assembly is not in session, within twenty-one days after the General Assembly is required to convene, the General Assembly determines by three-fourths vote of the elected membership of each house that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall continue to discharge the same as Acting Governor; otherwise, the Governor shall resume the powers and duties of his office.

In the case of the removal of the Governor from office or in the case of his disqualification, death, or resignation, the Lieutenant Governor shall become Governor.

If a vacancy exists in the office of Lieutenant Governor when the Lieutenant Governor is to succeed to the office of Governor or to serve as Acting Governor, the Attorney General, if he is eligible to serve as Governor, shall succeed to the office of Governor for the unexpired term or serve as Acting Governor. If the Attorney General is ineligible to serve as Governor, the Speaker of the House of Delegates, if he is eligible to serve as Governor, shall succeed to the office of

Governor for the unexpired term or serve as Acting Governor. If a vacancy exists in the office of the Speaker of the House of Delegates or if the Speaker of the House of Delegates is ineligible to serve as Governor, the House of Delegates shall convene and fill the vacancy.

These sections of the Virginia Constitution, revised in 1970, represent a substantial change from Section 78 of the same article which previously dealt with disability problems. The provisions as they now stand provide for orderly succession and further provide a clear method for resolving the question of disability. This section of the Virginia Constitution generally parallels the Twenty-Fifth Amendment to the United States Constitution, making it a unique way for a state to deal with succession and disability problems.

The first paragraph of the section provides for succession by the Lieutenant Governor-elect in the event that the Governor-elect fails to assume office. If the Governor-elect fails to assume office for any reason other than disqualification, resignation or death, the Lieutenant Governor-elect serves as Acting Governor.

The second, third, and fourth paragraphs follow the Twenty-Fifth Amendment rather closely. In the event that the Governor is disabled and voluntarily transmits his written declaration to that effect to the President pro tempore of the Senate and the Speaker of the House of Delegates, the Lieutenant Governor takes over as Acting Governor.

In the event that the Governor is disabled but is unable or unwilling to certify his disability, paragraph three provides that either a group composed of the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the General Assembly can inform the Clerks of both houses of the General Assembly of the Governor's disability. In that event, the Lieutenant Governor immediately assumes the powers and duties of the office of Governor.

The Governor can immediately reclaim his office by filing with the clerks of both houses a declaration that no disability exists. If, however, either of the two groups referred to in paragraph three of the section disputes the Governor's claim, the Lieutenant Governor continues to serve as Acting Governor until the General Assembly can decide the issue. To deprive the Governor of his office requires a three-fourths vote of the elected membership of each house of the General Assembly.

Finally, the provisions prescribe the line of succession to the office of Governor or service as Acting Governor. First in line of succession is the Lieutenant Governor, Next comes the Attorney General, the only other official with a true statewide constituency. Following the Attorney General in the line of succession is the Speaker of the House of Delegates. The Virginia Constitution avoids the necessity for ever having to hold a special election by completing its succession order with the provision that the House of Delegates may always provide for a vacancy if there is no Speaker of the House of Delegates or if the Speaker of the House of Delegates is ineligible to serve as Governor.

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Research Study #11

EXECUTIVE CLEMENCY

The Ohio Constitution of 1802 gave to the governor power "to grant reprieves and pardons, after conviction, except in cases of impeachmeht." Art. II, Sec. 5.

The Constitutional Convention of 1851 added the term "commutation" to the pardon provision in present section 11 of Article III. However, the term "commutation," although not used in early constitutions, has long been interpreted as being included within pardon, and texts have often not disassociated the power to commute from the power to pardon. The differentiation is explained below.

The 1851 Convention also limited the pardoning power by excepting from it the crime of treason and making the manner of applying for pardons subject to legislative regulation. The new provision also imposed a requirement that the governor report exercises of his powers, along with reasons therefor, to the General Assembly. As adopted in 1851 and still in effect Section 11 reads as follows:

> Section 11. He (the governor) shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offences[1] 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.

The background of the communication requirement, according to Convention debates, was concern over abuse of the power. It was argued that the provision would tend to prevent people from indiscriminately putting their signatures on petitions for pardon. However, a specific amendment to require the reporting of names of all persons who had signed such petitions was defeated. One delegate argued that he supposed that the latter part of the section was intended for the purpose of making the governor accountable to the people for the exercise of the pardoning power and to inform them whom he had pardoned. He considered that the reasons which influenced the governor were all that could reasonably be required.[2]

Another delegate questioned the reason for excluding treason. However, the ensuing discussion had to do with retaining the power of punishing treason notwithstanding the fact that the U. S. Constitution provides a remedy for the crime of treason. Several delegates expressed the view that the Ohio Constitution should

[1] So in the original on file in the office of the Secretary of State
[2] 1 Debates 307 (June 5, 1850)

define the term, but none discussed the rationale for excluding the offense from the governor's power.

In Ohio, the terms "pardon," "commutation," and "reprieve," have been defined by statute. The common law meanings of these terms are not materially different from the meanings adopted in Section 2967.01 of the Revised Code, which provides in part:

> ...(B) "Pardon means the remission of penalty by the governor in accordance with the power vested in him by the constitution. Pardons may be granted after conviction and may be absolute and entire, or partial, and may be granted upon conditions precedent or subsequent.
>
> (C) "Commutation" or "commutation of sentence" means the substitution by the governor of a lesser for a greater punishment. A sentence may be commuted without the consent of the convict, except when granted upon the acceptance and performance by the convict of conditions precedent. After commutation the commuted sentence shall be the only one in existence. The commutation may be stated in terms of commuting from a named crime to a lesser included crime or in terms of commuting from a minimum and maximum sentence in months and years to a minimum and maximum sentence in months and years.
>
> (D) "Reprieve" means the temporary suspension by the governor of the execution of a sentence. A reprieve may be granted without the consent of and against the will of the convict . . .

The popular understanding of the term "commutation" is a shortening or lessening of a sentence. The most frequent use of commutation is to make the prisoner eligible for parole. A second important use of commutation is to reduce a death sentence to life imprisonment. A reprieve or temporary suspension of execution is used mainly in capital cases, to stay execution of death pending action on application for pardon or commutation or where necessary to allow time to appeal a conviction. A pardon is considered a complete exoneration. A conditional pardon is frequently regarded as the equivalent of a release on parole. Conditions commonly imposed are similar to those imposed on parolees--e.g. that the person commit no crime, that he conduct himself as a law-abiding citizen, that he support his family, and that he abstain from the use of liquor or drugs, etc.

It is a popular misconception that the clemency power has always inhered in the executive branch of government. The purpose of this memorandum is to provide historical and contemporary information about pardoning practices in this country and to explore the alternatives to executive clemency.

In the United States the concept of executive clemency derives from our English heritage. In an article, entitled "Some Historical Aspects of Pardon in England,"[1] Stanley Grupp observes

> Antecedents of the pardon are of course rooted deep in antiquity. There is no doubt but that the Crown's prerogative of mercy has existed since the very earliest time.

[1] 7 American J. Legal Hist. 51 (January, 1963)

William the Conqueror is credited with bringing from Normandy the notion that clemency was an exclusive privilege of the king. During the period from 1066 to 1535, however, history reveals power struggles between the king and would be contenders for concurrent possession of the pardon power, including the feudal courts and the Church. Grupp writes:

> Gradually and in juxtaposition with the growing nationalism of England, it appears that the Crown's pardon prerogative became increasingly solidified.[1]

He cites an act of Parliament in 1535 as recognition of the king's absolute and exclusive power to pardon. Yet by the first quarter of the 18th century the ascendancy of Parliament carried with it recognition of Parliament's concurrent power over exercise of the pardon power.

Christen Jensen in his book, The Pardoning Power in the American States[2] writes:

> When the American colonies were founded, the English legal conceptions of the 17th and 18th centuries were transplanted to the new world. Included in these was the principle of clemency for criminal offenders. And in most of the colonial charters the king delegated the pardon power and made provisions for its exercise.

While the official or governmental organ to which this power was delegated varied somewhat among the different colonies, Jensen reveals that the general pattern was fairly uniform. Except in the royal colonies, the chief executive, with occasional assistance from other colonial authorities, exercised clemency powers.[3] In royal colonies the general pattern was to permit the governor to pardon in all cases except treason and wilful murder. In the latter instances the governor could under exceptional conditions grant reprieves until such time as the king's desire could be ascertained.

When early constitutions replaced colonial charters, however, the executive department was looked upon with distrust, largely because royal governors had not been sympathetic to the colonists. "It is not surprising, therefore," writes Jensen, "to discover that in New Hampshire, Massachusetts, New Jersey, Pennsylvania and Virginia the pardoning power could be exercised only by the governor with the consent of the executive council."[4] In only five states was the pardon power unconditionally conferred upon the governor at the time of the American Revolution. Georgia deprived the governor of the pardoning power entirely, giving him only power to reprieve until the meeting of the assembly. Connecticut and Rhode Island continued to function under colonial charters by which the pardoning power was exercised by the General Assembly.

1 Id at 53
2 University of Chicago Press (1922)
3 Id at 8
4 Id. at 10

By the time the federal constitution was written, however, a countermovement had begun in the direction of placing greater powers in the hands of the executive, including the unrestricted power of clemency. The U. S. Constitution gives the President power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Art. II, Sec. 2. In support of this provision in the new constitution, Alexander Hamilton said in The Federalist:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.[1]

Executive councils were abolished in a number of states which then provided for the exercise of executive clemency by the governor. Jensen reports that of the 35 nonoriginal states, the constitutions of 26 at the time of their admission into the union vested the pardoning power in the hands of the governor.

The historical development of present pardoning practices is further explored in an exhaustive work on the subject, published by the U. S. Department of Justice in 1940 as part of the Attorney General's Survey of Release Procedures (herein referred to as Survey). The probable explanation of why the pardoning power is identified with the chief executive, according to the Survey, is that he stands in the place of the monarch or sovereign. However, the rationale that because all offenses in England were against the king's peace, it was reasonable that he alone have the power of forgiving never did fit the United States. Rather, the true rule, as stated in Survey discussion, is that the pardoning power is neither inherently nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official, board or department of government that they choose. If the constitution is silent, it vests no more power in one branch of the government than in another. In the United States the pardoning power is entrusted in most instances to the executive branch of government, and yet it appears that pardons and especially amnesty (group pardons) have been granted by state legislatures.[2]

A question examined in the Survey is whether constitutional provisions giving the governor the power to grant pardons is intended to confer an exclusive power. A disagreement is reported, but the theory most generally said to be correct is that the grant is exclusive and may not be exercised, delegated or interfered with by the legislature, except as specifically provided in the constitution. American constitutional provisions conferring gubernatorial clemency commonly except treason or impeachment or both, and require the governor to report clemency action to the legislature. Of states excluding treason from the governor's power (some 25 states) the great majority, like Ohio, provide that the governor may reprieve persons convicted of treason until the next session of the legislature and the legislature may then grant clemency as it sees fit.

1 The Federalist (Lodge ed.) No. LXXIV, p. 463
2 Pardoning Power, 115

Support can be found for three other views concerning the authority of the legislature when the constitution gives the governor or a special board the pardon power--that the power is not exclusive but concurrent, that the power is partially concurrent (the legislature retaining the right to enact general laws of pardon, or amnesty), and that the legislature retains a supplementary power to grant pardons in such cases as the executive power does not cover.

The Survey points out that although often repeated, the rule that the power of executive clemency is exclusive has rarely been directly applied. The Survey's position is that the concurrent power theory is preferable for several reasons: (1) Legislatures historically have exercised the power to grant amnesties, not only in England, but in this country also; (2) Although courts have distinguished individual pardon from group pardon, or amnesty, the distinction is meaningless; (3) The exclusive theory has been mistakenly used to invalidate legislation not expressly dealing with pardons--e.g. parole and probation laws. In keeping with the rule of more modern cases the Ohio Supreme Court has upheld laws authorizing judicial probation after conviction as not being in contravention of Section 11 of Article III. Gordon v. Zangerle, 136 Ohio St. 371 (1940).

Another rule to which Ohio courts have subscribed is that the constitutional pardoning power of the governor is not subject to restriction or interference by the legislature, except under Section 11 of Article II "as to the manner of applying for pardons." Such a limitation appears in about one-third of the state constitutions. Its significance is not entirely clear, and the Survey cites authority to the effect that probably every state would hold that the legislature may prescribe such rules and regulations without constitutional authority, so long as the power of the executive to disregard the rules is not denied. So long as statutes are addressed to the applicant and not to the governor they have usually been upheld. In one of the few reported cases construing this provision, an Ohio Court of Appeals said in 1935 that the power of the legislature to regulate the matter of applying for pardons is limited to such regulations as will assist the governor in the discharge of his duties. Such regulations could not limit the exercise of the pardoning power at any time. Licavoli v. State, 20 Ohio Ops. 562 (App. 1935).

According to further authority, even the broader power in a constitution, making the exercise of clemency "subject to such rules and regulations as the legislature may prescribe" does not give the legislature unlimited control. Courts have said of such provisions that the authority to regulate and restrict does not confer the power to abrogate the executive power to pardon. The Survey points out: "Such a constitutional provision does not subject the pardoning power to legislative control, either to limit the effect of a pardon or to exclude from its operation any class of offenders."[1]

Although limitations upon executive clemency lost favor and both new states and older states provided for the exercise of the pardoning power by the governor alone for a period, a new development in the form of advisory pardon authorities came into vogue toward the end of the 19th century. The Survey reports: "The climax of this movement occurred during the years 1897-1918, during which time advisory boards were set up in 23 states and advisory pardon officers in seven."[2]

[1] 3 Survey 119
[2] 3 Survey 90

Some of such authorities, as in Ohio, were statutory and not constitutional. As such they could not displace the governor as final arbiter in clemency matters.

In the past 50 years the pardon board has become a widespread institution, in some cases acting in an advisory capacity to the governor and in others reducing the governor's powers substantially by providing that he cannot exercise clemency without board recommendation. The development of the pardon board was in part a response to concern over abuse of executive clemency. A popular topic at constitutional conventions of the middle to latter part of the 19th century was the laxness with which some executives administered clemency power. Illustrative of this mood was the debate that led to the adoption of present section 11 of Article III. Jensen cites like discussion on this question in the Constitutional Conventions of California (1878), Illinois (1870), Iowa (1857), Kentucky (1890) and Pennsylvania (1890).[1]

Few court challenges to abuse of pardoning discretion have been upheld. One notorious exception was the impeachment of a former governor of Oklahoma for wrongful and corrupt use of pardon where the power was found to have been exercised as an accommodation and for personal financial rewards, unrelated to the merits of the pardon applications. Indiscriminate granting of pardons by Texas governors (1774 between 1915 and 1917, 1319 by the succeeding governor between 1917 and 1921, and 384 by the governor between 1925 and 1926) led to the creation in 1936 of a Board of Pardons in that state by constitutional amendment.[2] For all the widespread condemnation of pardon abuses, however, Jensen reports that attempts to determine the extent of political pressure and manipulation in the pardon process throughout the United States had been "met with indifferent success."[3] Sporadic rather than constant instances of unwise and undiscriminating exercises of the pardon power are the most that he can record.

Although Ohio law journals of the 1890's decried "wild and reckless" use of the pardon power[4] and called for reforms, no documentation of such charges has been noted in the research for this memorandum.

The creation of pardon boards has served other purposes, too. They represent "a concession to the expanding sphere of the governor's activities and to the ever-increasing prison population and consequent step-up in clemency applications.[5]

A statutory Board of Clemency was created in Ohio in 1917 to provide advisory assistance to the governor. Its role is presently exercised by the Adult Parole Authority, in the Division of Correction of the Department of Mental Hygiene and Correction. The authority, under Chapter 2967 of the Revised Code, may recommend pardon, commutation or reprieve of sentence to the governor, or it may grant parole upon reasonable ground to believe that either action would "further the interests of justice and be consistent with the welfare and security of society."

1 Pardoning Power, 23 et seq.
2 Tex. Const. Art. 4, Sec. 11, Interpretive Commentary
3 Pardoning Power 59
4 XXVI Weedly Law Bulletin and Ohio Law Journal 265 (Nov., 1891)
5 Note, "Executive Clemency," 39 N.Y.U.L. Rev. 126, 182 (1964)
6 Section 2966.03 of the Revised Code

All applications for pardon, commutation of sentence or reprieve must be made to the Adult Parole Authority. Upon the filing of such application or when directed by the governor in any case, a thorough investigation must be made and fact and recommendations must be reported to the governor.[1]

The Adult Parole Authority is a regular administrative unit of the Department of Mental Hygiene and Correction. Its chief, appointed by the Chief of the Division of Corrections with the approval of the Director must be qualified by education or experience in correctional work, law, social work or a combination of the three. Staff positions are in the classified civil service of the state.[2]

There is also a parole board in Ohio, consisting of 7 members. Membership on the board requires the same qualifications as chief of the Authority. The chairman of the Parole Board submits recommendations for or against clemency directly to the governor, and determinations for or against parole to the Chief of the Adult Parole Authority. Parole determinations are final.[3]

The personnel of the boards in states where boards have constitutional authority in the clemency decision process varies considerably. Eight of the boards are staffed by elected officials, including in various capacities the governor, the lieutenant governor, secretary of state, the attorney general, auditor, treasurer, judges and others.

Other boards have been categorized as follows:

(1) entire board appointed by governor, no personnel restrictions;
(2) entire board appointed by governor, with restrictions as to political party;
(3) board partially appointed by governor, no restrictions as to personnel;
(4) board partially appointed by governor, restrictions as to political party or otherwise;
(5) board not chosen by governor, no restrictions as to personnel.

The Survey, arguing for retention of the pardoning power in the hands of the governor with a pardon board to act in an advisory capacity only, calls for exclusion of prison and parole officials, even related department heads, from such a board. The reason for this position is to keep separate considerations relevant in parole procedures from considerations in clemency hearings.

A recent report on the Ohio Constitution to the Wilder Foundation[5] favors a board that includes experts. Noted with approval is the Pennsylvania practice of including a lawyer, penologist, physician and psychiatrist or psychologist on the Board of Pardons.

At the present time state pardoning practices vary. Some state constitutions leave the governor's power relatively unrestricted; other constitutions recognize various forms of legislative regulation; some specifically provide that the governor share his power with a constitutionally recognized board; and in a few states the pardoning power has been taken from the governor and placed in the hands of a board or commission upon which the governor has no voice. In the 1968 edition of his Sourcebook on Probation, Parole and Pardon Charles L. Newman reports that the

[1] Section 2967.04 of the Revised Code
[2] Sections 5149.02 and 5149.09 of the Revised Code
[3] Section 5149.10 of the Revised Code
[4] Note "Executive Clemency in Capital Cases, " 39 N.Y.U.L. Rev. 136, 143 (1964) footnotes eliminated
[5] State Government for Our Times--New Look at Ohio's Constitution (1970)

constitutions of approximately one quarter of the states continue to vest the pardon power in the governor alone, although by statute he is generally furnished with assistance, in the form of a pardon attorney, as is the President of the United States or a board or authority. In approximately half the states, Newman writes, advisory boards hold hearings in pardon applications and make recommendations to the governor. Finally, he says, in about one-fourth of the states pardon boards (or councils) are more than advisory and make final decisions upon applications for clemency. The states of Maine, Massachusetts, New Hampshire and Rhode Island have retained the original requirement for concurrence by executive council (in the case of Rhode Island by the Senate). A board having pardon jurisdiction, sometimes accompanied by probation or parole, or both, is constitutionally created in some 13 states.

Pennsylvania is an example of the latter category. By constitutional amendment in 1967 a Board of Pardons was created in Pennsylvania. Prior to that time the governor could grant no pardon or commutation except upon recommendations of other named public officials. They were replaced by the Board of Pardons, consisting of the lieutenant governor, attorney general, and three members appointed by the governor with the consent of the Senate. Pa. Const. Art. 4, Sec. 9.

In South Carolina the governor may grant reprieves and commute death sentences but otherwise clemency is the responsibility of the Probation, Parole and Pardon Board. S. C. Const. Art. 4, Sec. 11.

In Texas the governor may grant reprieves and commutations "on the written signed recommendation and advice of the Board of Pardons and Paroles or a majority thereof . . ." Appointments to the Texas board are made by the governor, chief justice, and presiding judge of the court of appeals. Tex. Const. Art. 4, Sec. 10.

In Minnesota the governor's power is exercised in conjunction with the board of pardons. Minn. Const. Art. 5, Sec. 4. Other states with constitutional boards include Delaware, Idaho, Iowa, Montana, Nebraska, Nevada, North Dakota, Oklahoma and Utah.

Among the states with recently amended or revised constitutions or in which constitutional revision has been studied in the past decade, there has been no discernible trend toward standardization of pardoning practices. The 1945 revision of the Missouri Constitution retained the governor's power to grant the traditional forms of clemency for all offenses except treason and impeachment, added a provision that the power to pardon shall not include the power to parole, and dropped the provision requiring communication to the legislature of every case of clemency and reasons. Mo. Const. Art. IV, Sec. 7.

The Michigan Constitution of 1963 eliminated treason as an offense for which the governor does not have authority for reprieve, commutation and pardon. His power excludes impeachment and is subject to procedures and regulations prescribed by law. As in Ohio, he is required to inform the legislature of every exercise of the clemency power and his reasons therefor. Mich. Const. Art. 5, Section 14.

In the New Jersey Constitution the Governor has traditional powers, and, in addition, a "commission or other body may be established by law to aid and advise the governor in the exercise of executive clemency." N. J. Const. Art. 5, Sec. 2, par. 1.

The 1968 Revised Constitution of Florida recognizes two forms of executive clemency--one within the governor's discretion and the other subject to approval of an outside body. The governor may suspend fines and grant 60 day reprieves on his own; he may grant pardons and commutations, restore civil rights and remit fines with approval of three members of his cabinet. Fla. Const. Art. 4, Sec. 8. Prior to 1968 a constitutional Pardon Board acted upon the second form of clemency; The governor was a member, but the board made decisions as a unit, with or without the governor's concurrence.

The constitutions of the two newest states give to the governor a broad pardon power. Under the Alaska constitution he may grant pardons, commutations and reprieves and may suspend and remit fines and forfeitures. The power is subject to procedures prescribed by law and does not extend to impeachment. Alas. Const. Art. 3, Sec. 21. In Hawaii the governor may grant all of these forms of clemency for all offenses, subject to regulation by law as to the manner of applying for clemency. In Hawaii, also, the legislature may, by general law, authorize the governor to grant pardons before conviction, to grant pardons for impeachment, and to restore civil rights. Haw. Const. Art. IV, Sec. 5.

The Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, in June, 1969 made a strong recommendation that the governor's power to grant reprieves and commute sentences be continued and that constitutional details relative to pardon, probation and parole be relegated to statute. (Recommendation as yet not implemented.)

In Montana a board of pardons is constitutionally recognized but the legislature is required by law to provide for its appointment, composition, powers, duties, and proceedings. Mont. Const. Art. VII, Sec. 9. The Montana Legislative Council in its Report No. 25 (October, 1968) questioned whether the board should be constitutional but did not recommend change.

A 1968 report of the North Carolina State Constitution Study Committee to the North Carolina State Bar favored removal from the constitution of details about the governor's clemency reports to the general assembly, as more appropriate to statute.

The Constitutional Convention of Maryland in 1967-68 called for broadening of executive clemency, accompanied by an annual public reporting requirement of the instances of its exercise. (Constitution not adopted.)

Similarly, the Proposed Revision of the Idaho Constitution (which failed to pass in 1970) simplified and broadened the governor's pardon power and authorized the creation of an advisory agency.

The Model State Constitution retains executive clemency but permits delegation of the power. Section 5.01 provides: "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law." The same provision is found in Section 8 of the Model Executive Article as set forth in a Report to the National Governor's Conference by the Study Committee on Constitutional Revision and General Government Organization (July, 1968).

The M. S. C. Commentary explains the proposal as follows:

> It is the view of responsible legal and penological authorities that, in addition to legal and political considerations, the granting of pardons involves complex judgments of a correctional and behavioral nature and that chief executives are neither trained to exercise such judgment nor can they be expected to have any special interest in doing so. Hence, this Model expresses the view that a state constitution should leave the matter to legislative development. While recognizing clemency powers to be executive in nature, the section permits the governor to delegate them "subject to such procedures as may be prescribed by law." This will leave room for the creation of such expert or professional boards or agencies to deal with matters of clemency as may be appropriate.

The model provision is not without ambiguity, as noted by George D. Braden and Rubin G. Cohn in their Annotated and Comparative Analysis of the Illinois Constitution. The question they pose about such a provision is this: "Does the legislature have power to prescribe procedures only in the case of delegation or can the legislature also prescribe procedures for the exercise of the power to grant reprieves, commutations and pardons?" The Model Commentary, they admit, leads one to believe that the clause refers only to delegation, but they suggest clarification by making the delegation provision the subject of a separate sentence or moving the phrase that begins with "subject" to a position that more clearly shows the relationship.

Among alternatives available to the recent revisers of the Illinois Constitution was a return to language considered in the Illinois Convention of 1870 that permitted the legislature to regulate the entire pardoning process. It read: "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided in law." A compromise adopted that year added the qualifying language "relative to the manner of applying therefor." Braden and Cohn acknowledge cogent arguments on both sides of the issue and call the choice a relatively balanced one. The 1970 Constitution chose to expand, not limit, the governor's powers by authorizing the governor to grant the named forms of clemency on such terms as he thinks proper. The Executive Article Committee stated that the intent of this provision was to allow conditional pardons.

A decision as to whether the governor should continue to be vested with relatively unlimited authority to exercise clemency after conviction is facilitated by an examination of studied views as to the proper scope of clemency.

Historically, detractors of the concept have argued that pardon is unnecessary and undesirable because it (1) deprives the criminal law of deterrent value, (2) may be based upon arbitrary whim, (3) leads to injustice, because of unequal exercise and (4) weakens confidence in impartiality.

In response the Survey asserts:

> Obviously the criminal law cannot be a suitable and efficacious working instruction for all possible situations. Conditions of social and political life change. Sometimes they change suddenly and radically, and legal rules cease to fit the situations. Since every law is strengthened by length of time and since the time-honored validity of a rule is an important factor in its enforcement, the practice of all nations is averse to frequent alterations. Hence criminal law is often behind the demands of the time, is "unjust." After a while the discrepancy is felt, and while the law itself may remain unchanged, compensatory contrivancies are introduced.[1]

[1] 3 Survey 59

Some Survey examples of instances when pardon may be indispensable include: (1) technical violations of law--e.g. aiders, abettors and accessories, and the attachment of equal punishment to acts with differing degrees of culpability; (2) pardon and transition of power--where penal sanctions were used as weapons in internal struggles for political power; (3) conflict between customary rules of conduct and the criminal law--where support of a friend involves infringement of law; (4) to correct miscarriages of justice--pardons on the ground of innocence; (5) cases of a reformed perpetrator--instances where pardon is a more just act than parole; (6) changed exterior conditions--i.e. when political and social tensions are eased; (7) reasons of state--e.g. to pacify a revolution-torn country or bring about inner cohesion when unity is important.

Although clemency should not be abolished, its exercise should be circumscribed, according to Survey analysis, which calls for restrictions from two sides:[1]

> 1. Criminal procedure should be liberalized so as to permit reversal of a conviction where new evidence is found indicating that the defendant was innocent.
>
> 2. All releases on condition of good behavior and under supervision should be under the parole law, and not by conditional pardon.

Reluctance to liberalize criminal procedure in the direction of the first restriction has been based upon English and American aversion to interfere in miscarriages of justice by new judicial proceedings. The objection to later reversal is that the law is uncertain if there is not a time after which a case is closed and the judgment final. Conceding the need for limits, Survey authors call for a less restrictive right of appellate review.

As to the second restriction the Survey concludes that it would mean the almost total elimination of conditional pardon and certainly its use as a regular procedure, in lieu of parole. The recommendation is accompanied by a call for liberalization of parole laws so as to give a parole board full discretion for paroling any prisoner it deems worthy. The authors explain:[2]

> This means repealing all restrictions in the parole statutes making certain classes of prisoners ineligible for parole. The primary reason why conditional pardon, commutation, reprieve and other forms of executive clemency have been so extensively used to effect conditional release has been to cover cases not eligible for parole . . . The result is that restrictions written into the parole laws by those who do not think that certain kinds of criminals should be turned loose on parole . . . too often defeat their own objective. The convicts we refuse to release on parole are released on indefinite furloughs, on conditional pardons, or other types of releases under which there are much less actual supervision and control than under parole.

Nevertheless, a valid field for the pardoning power exists, according to Survey rationale, and the enumeration of situations in which pardon may be proper includes the following:[2]

[1] 3 Survey 296
[2] 3 Survey 397
[3] 3 Survey 398

1. Political upheavals and emergencies . . .
2. Calm second judgment after a period of war hysteria . . .
3. Similarly, changed public opinion after a period of severe penalties against certain conduct which is later looked upon as much less criminal, or as no crime at all . . .
4. Cases "where punishment would do more harm than good,". . .
5. Technical violations leading to hard results . . .
6. Cases where pardon is necessary to uphold the good faith of the state, as . . . immunity for turning state's evidence . . .
7. Cases of later proved innocence or of mitigating circumstances. . .
8. Applications for reprieve or commutation, especially in death sentence cases . . .

Many states, like Ohio, combine the administration of pardon and parole. This practice, too, is condemned by the Survey analysis as having resulted from a confusing of the different functions to be served by pardon and parole. The view taken is that pardon should not be in any degree a regular release procedure. All conditional releases should be under the parole law. The authors explain:

> Parole would depend upon the prisoner's personality, upon his prison record, the degree of his reformation, the environment into which he will return and his chances of getting a job. The investigator to determine these factors should have social service training and the parole board itself should have on its membership competent penologists, psychiatrists, criminologists and social workers. (emphasis added)

On the other hand the pardoning power, as they view it, is dependent upon political or judicial considerations and should be restricted to special cases involving such considerations.

One of the arguments in favor of a board, commission or other agency vested with pardon powers is that such an arrangement encourages the development of rules and precedents dealing with clemency. However, according to Jensen, by 1922 little had been done in the way of standardization in the states having pardon authorities. He writes:

> It is true that a few pardon authorities stated that they tried to be consistent, but they followed no precedents or standards except in a general way," . . . and that they aimed to follow an intelligent method as far as practicable but none of these practices were made a matter of record. The general conclusion that one must draw from these inquiries is that no permanent stability of policy exists, and furthermore, that most of these authorities do not even realize the nature of the problem involved, nor the need for a consistent policy."[1]

On the other hand, some authorities cited in Jensen reject the need for clemency standardization, arguing that the pardoning function does not fit the concept, "for the attempt to apply information or standards which might be practicable in some lines is wholly impracticable and impossible of application to pardon cases."[1]

[1] Pardoning Power at 102

Authors of a recent note on executive clemency in capital cases confirm the nonexistence of constitutional standards for granting commutation.[1] Noting discernible differences among the states in clemency practices and rates of commutation in death sentences, they conclude:

> Whether these results are attributable to the various types of clemency structures in these states, is, however, doubtful. The differences seem rather to be differences in attitude and approach among the individual clemency officials.

They do report a rough sketch of standards, however, based upon interviews and questionnaires submitted to the pardoning authorities in states that have capital punishment. The following are matters that reportedly to a greater or less degree are taken into account by clemency authorities:

(1) nature of the crime--with changes of clemency being less in heinous crimes
(2) doubt as to guilt--rare
(3) fairness of trial
(4) relative guilt and disparity of sentences
(5) geographical equalization of sentences
(6) mitigating circumstances--duress, provocation, intoxication
(7) rehabilitation
(8) mental and physical condition of the defendant--with some attention to conflict between legal definition of insanity and the medical and psychiatric definition
(9) dissents and inferences drawn from judicial opinions
(10) recommendations of the prosecution and trial judge
(11) political pressure and publicity--can work for or against a clemency applicant
(12) the clemency authority's views on capital punishment
(13) role of precedent--for the most part disavowed on the basis that each case is unique

The note points out some striking differences in the way opponents of capital punishment have handled applications for commutation of the death sentence. Every governor of Massachusetts has commuted every case since 1947 and a statement attributed to Governor Endicott Peabody, a vigorous opponent, justifies such a use of clemency as within his constitutional authority, which carries no criteria for the exercise of clemency.[2]

The Oregon Supreme Court in 1958 upheld the power of the Governor to exercise a power to commute the death sentence based solely on his conviction that the death penalty is wrong. Eacrat v. Holmes, 215 Ore. 121 (1958). The commutation of every death sentence by Governor Cruce of Oklahoma was challenged almost 50 years earlier, and although the court then excoriated the practice, it could find no basis for invalidating commutation. Henry v. State, 10 Okla. Crim. 369 (1913)

[1] Note, "Executive Clemency," 39 N.Y.U.L. Rev. 136 (1964)
[2] Id. at 177

Governor Brown of California, on the other hand, attempted to balance his right to grant clemency against his duty to uphold California law. As a result, he spent an active role in the investigatory state of clemency applications but did not commute every case presented to him. Former Governor DiSalle, another opponent of the death penalty, reported a similar posture in making life and death decisions, pointing out that obvious mitigating circumstances and inequities weighed heavily in his decisions.[1]

As the movement against capital punishment grows, abolition groups devote more and more of their attention to executive clemency. It is the contention of some observers that in the same way that clemency has historically led to revisions in the criminal law, so widespread commutation of the death sentence reflects dissatisfaction with the criminal law and could lead to responsive legislative action abrogating capital punishment.

If a current direction can be detected, it is towards putting clemency decisions in professionally trained hands. "The study of penology," reasons the 1970 report to the Wilder Foundation, "while still not a science, has advanced to a point that experts can make a valuable contribution to the decision-making process. While nothing now prevents the Governor from using whatever expertise is available, there is no mandate to use it . . . While a constitutional provision is no guarantee of the competence of . . . a board, it does provide a framework for effective use of accumulated knowledge of a difficult subject."

Fifty years ago Jensen argued that governors are not specially fitted for their clemency task. "They are elected on other issues, Many of them, prior to their election, have given no serious thought to the problems of clemency. At best they can but hope to use good average judgment when they are called upon to deal with this question. They bring no expert knowledge or training to aid in its solution.[2]

A second argument in favor of replacing the governor as chief clemency arbiter is that the governor does not have the time to give to clemency matters. Jensen said, "The social, industrial, and economic development within each state has become so intricate that governors are confronted with more numerous and complex administrative problems than ever before . . . the task of administering clemency is growing, and the time which a governor has to devote to this duty is becoming less."[3]

Contemporary critics of gubernatorial clemency have agreed with Jensen that the absence of special qualifications and the press of other executive duties are cogent reasons for a restructuring of the pardon powers. They have noted other objections. The governor is "first and foremost a political figure with political debts and allegiances which may result in an abuse of the power in a given case."[4]

1
2 Pardoning Power 107
3 Id. at 103
4 Id. at 183

The desirability of greater consistency is stressed as another factor involved in the choice. "It is no secret that governors have differed radically in their attitudes toward the exercise of the clemency power, and there have been cases where one governor has denied commutation only to have his successor overrule that judgment."[1]

Counterbalancing the points that governors are without special training to exercise clemency judgments, that the demands of office are already too great, that the power in the hands of one person is subject to abuse, and that inequities from an individualized and inconsistent application of clemency principles is the position that the vesting of the clemency power in the hands of the governor alone conforms to the belief that mercy is an individual act. Speaking of capital cases only, the same contemporary writers on the subject assert:

> When a board makes a clemency determination, it takes on the appearance of a court. That he is responsible to the electorate is a good thing insofar as the governor's actions would in some measure reflect the concerns, and protect the interests, of the public. And individual responsibility is to be preferred to collective responsibility. There is less of a problem with rigidity in adherence to precedent with a governor than with an appointed board whose members are called upon to serve more than one term. A governor, within a given term of office, is likely to handle relatively few capital cases and consequently is better able to consider cases in their individual settings and to resolve them without recourse to anachronistic precedents.[2]

On the merits of restricting the governor to action upon recommendation of a board, they allege that the practice has been for the governor in such a situation to "rubber stamp" the actions of the board.

> Thus, in effect, such a structure is really the same one as where a board alone decides. The only difference would be that this structure affords the governor the opportunity to take credit for the granting of a commutation, while attributing a denial to the board.[3]

The Survey's conclusions in 1940 represent a middle ground. Endorsing executive clemency from which parole would be clearly differentiated, the authors call for retention of pardoning powers in the office of governor, together with adequate advisory assistance.

> The most obvious political implications and considerations involved in most of the valid grounds for pardon indicate the propriety of retaining this power in the hands of the chief executive. The objection that this takes too much of the governor's time from more important matters of state is true today--when executive clemency is used in so many states as a regular and normal release procedure, handling cases which

[1] Id. at 183
[2] Id. at 183
[3] Id. at 183

> should be left to a competent parole board--but it should not be true if pardon were restricted to the exceptional cases as we have recommended . . .
>
> This does not mean that it would not be helpful to have a pardon official or board to assist the governor in this function. A board would seem preferable to one official, for the determination of whether clemency should be granted would usually involve considerations of policy upon which it would be well for the governor to have the views of other executive officials of his administration, rather than pardon attorney or other official who too often may be merely a kind of secretary.[1]

Nor would the requirement to report to the legislature be abolished under the Survey recommendation. "This publicity, together with the requirement that he first submit all cases to the board, would seem to place sufficient checks upon the governor to make abuse unlikely."[2]

With the exception of necessary legislative changes to divorce pardon and parole the Survey conclusions are already implemented in the constitutional and statutory law of Ohio. On the basis of arrangements in other states, trends, and principles discussed in this memorandum, the committee could consider various alternatives. They range from reducing or removing the present limitations upon executive clemency to placing the power to pardon, commute and reprieve in other hands. Other possibilities include greater constitutional restriction on the power or the recognition of greater statutory regulation. The following options are stated broadly for committee consideration.

(1) Retain the present provision which recognizes a degree of statutory regulation and which has not barred the creation of advisory agencies, established by law;

(2) Remove treason as an exception to the pardoning power as did the proposed New York Constitution of 1967 on the basis that treason convictions might be inconsistent with the Federal Constitution (a point not yet researched);

(3) Remove reporting requirements as statutory;

(4) Authorize the statutory creation of a board or commission to aid and advise the governor in the exercise of executive clemency, as other states have done in recent years, in order to give such an agency constitutional permanency and spell out the framework of its structure and powers:

(5) Exclude parole from the pardon power, following a principle endorsed by the Survey and a measure adopted by the Missouri Constitution;

[1] 3 Survey 302
[2] Id. at 303

(6) Provide for the creation of a pardoning agency with the governor as a participating member and spell out such limitations on individual action by the governor as are deemed best suited to meet the needs of retaining the pardoning power;

(7) Provide for the creation of a pardoning agency without the governor as a member and establish such criteria for membership and tenure as seem desirable;

(8) Divide clemency as Florida has done, basing such an arrangement upon the extent and nature of various kinds of clemency action applied for in recent years and the views of personnel involved in the administration of clemency.

(9) Allow the delegation of pardoning power, as does the Model State Constitution, with the provision that delegation procedure be prescribed by law.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
April 7, 1972

LENGTH OF GUBERNATORIAL SERVICE (Article III, Section 2)

The Ohio Constitution on Term of Office and Reeligibility of Executive Officials

The Constitution of the State of Ohio deals with term of office and reeligibility of executive officials in Article III, Section 2, of the Constitution as follows:

> Section 2. Term of Office. 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.

These provisions of the Ohio Constitution were adopted November 2, 1954, and provide for a four year term of office for the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Attorney General, and Auditor of State. It is further specified that the Governor of the State may hold his office for not more than two consecutive terms of four years. There is no stipulation as to the number of terms which any of the other state officers may serve in the Ohio Constitution.

In the State of Ohio, prior to 1954, the length of the term of the Governor was two years. The first Governor to serve a four year term when the provision of that constitutional amendment went into effect was Michael DiSalle, who served from 1959-1963. Previous to that same amendment, there was no constitutional limitation on the number of terms that a Governor could serve. The 1954 amendment provided "No person shall hold the office of Governor for a period longer than two successive terms of four years."

In the history of the State, 25 of Ohio's Governors have served for more than one term in office. Nineteen Governors have served for two terms. Eighteen of these served two 2-year terms and one (James A. Rhodes) served two 4-year terms. Governors Trimble, Hayes, Cox, Donahey (Vic), and Bricker were each elected to the gubernatorial office for three terms, and Governor Frank Lausche is the only Governor to have served the state for more than three terms, having been elected five times as chief executive of the state.

In all of these cases of multiple terms in office, however, the terms of service have not necessarily been consecutive. (All except Rhodes were prior to the 1954 amendment.) There have been five cases where Governors have served for periods which were interrupted by the service of another Governor. Governor Allen Trimble served as Acting Governor from January 4, 1822 to December 28, 1822, and then after two terms out

of office, served as Governor from 1826 to 1830 for two terms. Governor Wilson Shannon served from 1838 to 1840, and after one term out of office, returned to serve for a second term from 1842-1844. Governor Rutherford B. Hayes served for two terms from 1868-1872, and after one term out of office, returned to serve a third term from 1876 to 1877, when he resigned to become President of the United States. Governor James M. Cox served for one term from 1913-1915, and after one term out of office, returned to serve for two more terms from 1917 to 1921. Governor Frank Lausche, the Governor with the longest amount of gubernatorial service to the state, served his first term in office from 1945-1947, and after one term out of office, returned to serve four more terms in the period from 1949-1957.

Limitations on Gubernatorial Service

Twenty-four states do not limit the number of terms a governor may serve. Seventeen of the 42 states which provide for four-year terms and 7 of the 8 states which provide for two-year terms place no limits on the number of terms a governor may serve.

Seventeen states limit the number of consecutive terms a governor may serve to two, and nine of the state constitutions presently provide that the governor of the state may not succeed himself after one term in office.

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. This would remove from the election the candidate who would be most familiar to the voters and deny them an opportunity to pass judgment at the polls on the immediate governor's past administration.

Conversely, political experience indicates that it is often difficult to defeat an incumbent governor who is seeking reelection even though he may not be the most qualified candidate. It has been argued that a two-term restriction upon a governor's tenure offers the best protection against "bossism."

Research in a publication on the executive by the Legislative Reference Bureau of the University of Hawaii made the following points for both arguments:

Those who advocate unlimited terms for governors state that:

1. The people should be able to retain a governor if they feel he is the most qualified and that he is the one they know the most about. To deprive the people of such a right denies them the service and experience of able public servants and more important, denies them the right to elect a person of their own choice.

2. Knowledge of the administrative machinery is so complex that a governor should have at least a four year term and unlimited succession so that he may have a sufficient time to develop and implement programs to which he is committed.

3. The powerful political machines built by bosses and special interests are not weakened by constitutional limitations on reeligibility whereas the political power of the people is more easily fragmentized. If the governor has a sufficiently

long term and can be reelected, there is more opportunity for him to organize his own public support so that he may win succession to office by his own right.

4. Limiting the number of terms results in periodically heavy turnovers of administrative executives appointed by the governor so that continuity in administration is prevented; being the executive of an administrative department is less attractive; the incentive for doing a good administrative job is lessened.

5. Numerous other checks upon the governor exist in the form of legislative and judicial controls, the two-party system, the constitution, public opinion, and desire for re-election.

6. Limited terms diminish a governor's political leadership, and he tends to become ineffective as he nears the end of his alloted time because party leaders, legislators, and the public are already considering who the next governor will be.

Unlimited gubernatorial elections are opposed because:

1. There is a fear that unlimited re-election provides the governor with the opportunity to build a political machine which he may use to perpetuate his re-election. His continuance in office would thus allow him to amass so much political power that he might create a dictatorship.

2. Providing a constitutional limitation on gubernatorial re-election makes the office available to new men with new ideas more often and it is more likely to keep the governor responsive to the wishes of his people.

3. The governor in fostering self-perpetuation will usually do what is popular rather than what is right because he has to think of the next election.

4. 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 person.

The applicability of the arguments presented by either side would appear to depend to a large extent upon the political environment existing within a given state.

The following table shows the gubernatorial term and re-election provision in all states:

Gubernatorial Term of Office and Re-election

I. Four Year Gubernatorial Term

No Limit on Succession	Cannot Succeed Himself	Limited to Two Consecutive Terms
Arizona	Georgia	Alabama
California	Indiana	Alaska
Colorado	Kentucky	Delaware
Connecticut	Mississippi	Florida
Hawaii	New Mexico	Louisiana
Idaho	North Carolina	Maine
Illinois	South Carolina	Maryland
Massachusetts	Tennessee	Missouri
Michigan	Virginia	Nebraska
Minnesota		Nevada
Montana		New Jersey
New York		Ohio
North Dakota		Oklahoma
Utah		Oregon
Washington		Pennsylvania
Wisconsin		West Virginia
Wyoming		

II. Two Year Gubernatorial Term

No Limit on Succession	Limited to Two Consecutive Terms
Arkansas	South Dakota (Nomination for third successive term in South Dakota is prohibited by law.)
Iowa	
Kansas	
New Hampshire	
Rhode Island	
Texas	
Vermont	

SOURCE: The Book of the States, 1970-1971

The language in the Ohio Constitution regarding the limit on a Governor's right to more than two successive terms is 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. The constitutions of the states listed in the preceding table under "Limited to Two Consecutive Terms" have been examined in order to determine the wording of the limitation and are set forth below. No effort has been made to determine how these various constitutional provisions have been interpreted or applied.

ALABAMA

The Constitution of the State of Alabama deals with the term of the governorship in Article 5, Section 116, which reads as follows:

Section 116. The governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, and commissioner of agriculture and industries, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday in January next succeeding their election and until their successors shall be elected and qualified. Each of the said officers shall be eligible to succeed himself in office, but no person shall be eligible to succeed himself for more than one additional term.

The Alabama Constitution thus provides a four year term for its elected officials, specifying all of them in the Constitution, and provides that no elected official is eligible to succeed himself more than once.

ALASKA

The Constitution of the State of Alaska makes the following provisions for term and limit on tenure in office in Article III, Sections 4 and 5:

Section 4. Term of office. The term of office of the governor is four years beginning at noon on the first Monday in December following his election and ending at noon on the first Monday in December four years later.

Section 5. Limit on Tenure. No person who has been elected governor for two full successive terms shall again be eligible to hold that office until one full term has intervened.

The Constitution of Alaska also provides that the Lieutenant Governor shall serve for the same term as the Governor, but does not specify if the limitation on tenure applies equally to that office.

DELAWARE

The Constitution of the State of Delaware deals with the term of office of the Governor of the State in Section 5 of Article III, as follows:

Section 5. Term of office. The governor shall hold his office during four years from the third Tuesday in January next ensuing his election; and shall not be elected a third time to said office.

This is the only provision concerning the defined term of office of an elected state official in the Delaware Constitution. It is provided that the secretary of state shall be appointed by the governor, to serve at his pleasure, but although it is provided that there shall be an elected lieutenant governor, attorney general,

treasurer, auditor, and insurance commissioner, their terms of office or limitations on them are not constitutionally specified.

FLORIDA

The Constitution of the State of Florida, revised in 1968, deals with the subject of the term of elected state officials and limitations on such terms in Article IV, Section 5, in the following wording:

5. Election of governor, lieutenant governor, and cabinet members--qualifications--terms.
(a) At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the first Monday of the succeeding year...

(b)...No person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term.

There is no constitutional limitation on the tenure of any other of the state officers in Florida except for the above provision concerning the limitation on the term of the governor.

LOUISIANA

The Constitution of the State of Louisiana deals with the same subjects in Article V, Sections 2 and 3, as follows:

Section 2. The supreme executive power of the State shall be vested in a chief magistrate, styled the Governor of Louisiana. He shall hold office during four years, and, together with the Lieutenant Governor, chosen for the same term, shall...

Section 3....Any person shall be eligible as a candidate for nomination, election or re-election to the office of governor for two consecutive terms, but no person including the Governor in office at the time of the adoption of this amended section, shall be eligible as a candidate for nomination, election, or re-election to the office of Governor for the term immediately following the second consecutive term to which he was elected as Governor.

This section of the Louisiana Constitution was written in 1960. It provides a four year term for both the Governor and the Lieutenant Governor, and further provides that the Governor may no succeed to the office for more than two consecutive terms. There appears to be no limitation on the number of times the Lieutenant Governor may succeed to his office, and there are no provisions concerning the term length or limitation on number of consecutively served terms of any of the other state elected officials.

MAINE

The Constitution of the State of Maine deals with term of office and re-election eligibility in Section 2 of Article V as follows:

2. Term of office; re-election eligibility. The Governor shall be elected by the qualified electors, and shall hold his office for four years from the first Wednesday of January next following the election. The person who has served two consecutive popular elective four year terms of office as Governor shall be ineligible to succeed himself.

This provision in the Maine Constitution specifies that the Governor shall hold a term of four years and that he shall not serve for more than two consecutive elected terms of office. This provision does not include any of the other elected officials in Maine, however, it should be noted that in Maine, the Secretary of State, Attorney General, Treasurer, and Auditor are not elected by the public but by the State Legislature, and this may explain the lack of constitutional provisions concerning these officials in this area.

MARYLAND

The Maryland Constitution deals with term in office and limits on eligibility for re-election in Article II, Section 1, as follows:

Section 1. Executive power vested in Governor; term of office; when ineligible to succeed himself. The executive power of the State shall be vested in a Governor, whose term of office shall commence on the second Wednesday of January next ensuing his election, and shall continue for four years, and until his successor shall have qualified; and a person who has served two consecutive popular elective terms of office as Governor shall be ineligible to succeed himself as Governor for the term immediately following the second of said two consecutive popular elective terms.

As specified, this provision is only concerned with the term and provision for possible re-election of the Governor of the State of Maryland. The Maryland Constitution contains no provisions for the term or reeligibility of other elected officials.

MISSOURI

The Constitution of the State of Missouri deals with the terms of state elected officials in Section 17 of Article IV, which was adopted on August 17, 1965, reading as follows:

Section 17. The governor, lieutenant governor, secretary of state, state treasurer, and attorney general shall be elected at the presidential elections for terms of four

years each. The state auditor shall be elected for a term of two years at the general election in the year 1948, and his successors shall be elected for terms of four years. No person shall be elected governor more than twice, and no person who has held the office of governor, or acted as governor for more than two years of a term to which some other person was elected to the office of governor shall be elected to the office of governor more than once. The state treasurer shall not be eligible for election as his own successor.

The Missouri Constitutions thus provides for four year terms for state elected officials, and includes the stipulation that the governor may not serve for more than the bulk of two consecutive terms in office. The provision that the state treasurer may not succeed himself in office is also part of the Missouri provisions.

NEBRASKA

The Constitution of the State of Nebraska deals with the term and eligibility of elected state officials in Section 1 of Article IV, as follows:

1...The Governor, Lieutenant Governor, Attorney General, Secretary of State, Auditor of Public Accounts and the Treasurer shall be chosen at the general election held in November, 1974, and in each alternate even-numbered year thereafter, for a term of four years and until their successors shall be elected and qualified...The Governor shall be ineligible to the office of Governor for four years next after the expiration of two consecutive terms for which he was elected...

The Constitution of Nebraska thus provides that the listed state officials shall all be elected for four year terms, and until their successors shall be elected and qualified. The Governor of the State may not serve for more than two consecutive terms to which he was elected.

It is provided in Section 3 of the same article that "the treasurer shall be ineligible to the office of treasurer for two years next after the expiration of two consecutive terms for which he was elected," however, no limitations for service are placed on any of the other officers in the Constitution.

NEVADA

The Constitution of the State of Nevada makes provision for the term and eligibility of the Governor and other elected state officials in Sections 2, 3, 17, and 19 of Article V, as follows:

2. The Governor shall be elected by the qualified electors at the time and places of voting for members of the Legislature, and shall hold his office for four years from the time of his installation, and until his successor shall be qualified.

3. No person shall be eligible to the office of Governor, who is not a qualified elector, and who, at the time of such election, has not attained the age of twenty-five years; and who shall not have been a citizen resident of this State for two years next preceding the election; nor shall any person be elected to the office of Governor more than twice; and no person who has held the office of Governor, or acted as Governor for more than two years of a term to which some other person was elected Governor shall be elected to the office of Governor more than once.

17. A Lieutenant Governor shall be elected at the same time and places and in the same manner as the Governor, and his term of office, and his eligibility shall also be the same.

19. A Secretary of State, a Treasurer, a Controller, and an Attorney General shall be elected at the same time and in the same manner as the Governor. The term of office for each shall be the same as is prescribed for the Governor.

The Constitution of Nevada thus provides four year terms for the elected officials, with the stipulations that the Governor and Lieutenant Governor may not hold their offices more than twice.

NEW JERSEY

The Constitution of the State of New Jersey deals with the term of office and eligibility of elected officials in Article V, Section 1, Paragraph 5, as follows:

5. Term of office of governor; ineligibility after term. The term of office of the Governor shall be four years beginning at noon of the third Tuesday in January next following his election, and ending at noon of the third Tuesday in January four years hereafter. No person who has been elected Governor for two successive terms, including an unexpired term, shall again be eligible for that office until the third Tuesday in January of the fourth year following the expiration of his second successive term.

It is provided in Section 4 of the New Jersey Constitution that a Secretary of State and Attorney General be appointed to serve "during the term of the Governor", by the Governor and with the consent of the Senate.

OKLAHOMA

The Oklahoma Constitution deals with term of office in Article 6, Section 4, as follows:

4. The term of office of the Governor, Lieutenant Governor, Secretary of State, State Auditor, Attornye General, State Treasurer, State Examiner and Inspector, and Superintendent of Public Instruction shall be four years from the second Monday in January next after their election. The said officers shall be eligible to immediately succeed

themselves. No person shall be elected Governor more than two times in succession.

This section of the Oklahoma Constitution was adopted May 3, 1966, and provides four year terms for the listed state elected officers. It provides that holders of those offices may succeed themselves, but provides that the Governor of the State may not succeed to the office for more than two consecutive terms.

OREGON

The Constitution of the State of Oregon makes the following provision concerning the term and eligibility of state officers in Article V, Section 1, and Article VI, Section 1:

V. 1. The chief executive power of the state shall be vested in a governor, who shall hold his office for a term of four years; and no person shall be eligible to such office more than eight in any period of twelve years.

VI. 1. There shall be elected by the qualified electors of the state, at the time and places of choosing the members of the legislative assembly, a secretary and treasurer of state, who shall severally hold their offices for the term of four years; but no person shall be eligible to either of said offices more than eight in twelve years.

The provisions in the Constitution of the State of Oregon provide four year terms for the Governor, Secretary of State and Treasurer of the State, and provides that none of these officers may serve for more than two consecutive terms (eight years in any period of twelve years).

PENNSYLVANIA

The Constitution of the State of Pennsylvania provides the following in Section 3 of Article IV, concerning the term of office of the Governor of the State:

3. The Governor shall hold his office during four years from the third Tuesday in January next ensuing his election. Except for the Governor who may be in office when this amendment is adopted, he shall be eligible to succeed himself for one additional term.

The Constitution of the State of Pennsylvania thus provides the four year term for the governor, which may be served not more than twice consecutively. The Constitution also provides that the Lieutenant Governor shall hold office for the same term and subject to the same provisions as the Governor.

WEST VIRGINIA

The Constitution of the State of West Virginia deals with the term and eligibi-

lity of elected state officials in Article VII, Sections 1 and 4:

1. ...a governor, secretary of state, auditor, treasurer, commissioner of agriculture, and attorney general...Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next following their election.

4. None of the elective officers mentioned in this article shall hold any other office during the term of his service. A person who has been elected or who has served as governor during all or any part of two consecutive terms shall be ineligible for the office of governor suring any part of the term immediately following the second of the two consecutive terms. The person holding the office of governor when this section is ratified shall not be prevented from holding the office of governor during the term immediately following the term he is then serving.

The Constitution of West Virginia thus provides for four year terms for the listed officers, and provides that the Governor of the State may not serve for more than two consecutive terms to which he was elected or for part of which he served as governor. There are no constitutional limitations, however, placed on the eligibility of any other state officers.

THE MODEL STATE CONSTITUTION

The Model State Constitution of the National Municipal League provides that the Governor of the State is the only elected official. It provides for his term of office as follows:

Section 5.02. Election and Qualifications of Governor. The governor shall be elected, at the regular election every other odd-numbered year, by the direct vote of the people, for a term of four years beginning on the first day of (December) (January) next following his election. Any qualified voter of the state who is at least ____ years of age shall be eligible to the office of governor.

The Model State Constitution thus provides for a four year term for the Governor of the State, and sets no limitation on the number of times that the governor of the state may serve. Commentary in the Model maintains that the main argument favoring restriction in the term of the governor is the fear of bossism or perpetuation through use of the powers of the office. It continues that this is always a possibility but that the better argument seems against any form of restriction. Limitations of this kind restrict the right of the people to pass judgment upon the quality of gubernatorial service performed for them and thus eliminates from the field the one candidate about whom the voters usually know the most. It is the Model's theory that from a program-policy point of view, a restriction on service in office affects the governor's ability to develop and implement a long range plan.

As stated previously, the Model's provision is concerned only with the Governor, because there are no other provisions for elected officials. The Model is presented here in an attempt to evidence one viewpoint concerning the duration of gubernatorial service.

TERM OF LIEUTENANT GOVERNOR

In the States which have Lieutenant Governors, all hold four year terms except for the following who hold terms of two years:

Arkansas, Iowa, Kansas, Rhode Island, South Dakota, Texas, Vermont

This corresponds with the term of the Governor in these states, which is also two years.

TERM OF ATTORNEY GENERAL

In the States with Attorney Generals, the usual pattern is for a four year term, except in the following states:

Arkansas	2 year term
Iowa	2 year term
Kansas	2 year term
Maine	2 year term (Legislature elects the Attorney General.)
New Hampshire	5 year term (Governor and Council appoint the Attorney General.)
Rhode Island	2 year term
South Dakota	2 year term
Tennessee	8 year term (Supreme Court appoints the Attorney General.)
Texas	2 year term
Vermont	2 year term

TERM OF SECRETARY OF STATE

In the states with a Secretary of State, the usual pattern is for a four year term with the following exceptions:

Arkansas	2 year term
Delaware	appointed by the Governor, to serve at the pleasure of the Governor
Indiana	2 year term
Iowa	2 year term
Kansas	2 year term
Maine	2 year term (elected by the Legislature)
Maryland	appointed by the Governor, to serve at the pleasure of the Governor
New Hampshire	2 year term (elected by the Legislature)
New York	appointed by the Governor, to serve at the pleasure of the Governor
Pennsylvania	appointed by the Governor, to serve at the pleasure of the Governor
South Dakota	2 year term
Texas	2 year term (appointed by the Governor)
Vermont	2 year term

SOURCE: The Council of State Governments, State Administrative Officials, Classified by Functions, 1971.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
April 19, 1972

Summary of GAO Statutes and Practices

The General Accounting Office, under the control and direction of the Comptroller General, was established by the Budget and Accounting Act of 1921. This federal legislation abolished the offices of the Comptroller and Assistant Comptroller of the Treasury and provided for the transfer of Treasury personnel and records to the General Accounting Office, generally referred to as the GAO.

The Comptroller General is appointed by the President for a term of 15 years, cannot succeed himself, and cannot be removed except for cause by joint resolution of Congress. 31 U. S. C. Sec. 41-43. This extended term was intended to isolate the Comptroller General from political pressures.

The Comptroller General and the GAO were declared to be part of the legislative branch by the Reorganization Act of 1945 (59 Stat. 616) and the Reorganization Act of 1949 (as amended, 5 U. S. C. Sec. 902 (1)). The Comptroller General was designated agent of Congress by the Accounting and Auditing Act of 1950. The Congressional declaration of policy contained in the 1950 legislation includes a provision that:

> (d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers. (Emphasis added) 31 U. S. C. Sec. 65.

Auditing duties of the GAO are spelled out in Section 67 of Title 31, reading in part as follows:

> (a) Except as otherwise specifically provided by law, the financial transactions of each executive, legislative, and judicial agency, including but not limited to the accounts of accountable officers, shall be audited by the General Accounting Office in accordance with such principles and procedures and under such rules and regulations as may be prescribed by the Comptroller General of the United States. In the determination of auditing procedures to be followed and the extent of examination of vouchers and other documents, the Comptroller General shall give due regard to generally accepted principles of auditing, including consideration of the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of the respective agencies.

As arm of the legislative branch one of the GAO functions is to respond to congressional requests for investigative and evaluative audits of government agencies and programs. For this purpose the Budget and Accounting Act provides:

> (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing

recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures. (Emphasis added - significance of this phrase discussed below)

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time. 31 U. S. C. Sec. 53.

Departments and establishments are required to furnish to the Comptroller General "such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them . . ." and GAO personnel have the statutory right to examine any books, documents, papers, or records of any such department or establishment. 31 U. S. C. Sec. 54.

The GAO's audit function entails not only examinations into the manner in which government agencies discharge their financial responsibilities but also examination into certain contract activities.

Although the 1921 and 1950 statutes support audits of government contracts they do not give the Comptroller General the right to examine books and records of government contractors. Later statutes require all negotiated contracts to contain clauses providing that "the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers or records of the contractor, or any of his subcontractors, that directly pertain to and involve transactions relating to the contract or subcontracts. Armed Services Procurement Act, 10 U. S. C. Sec. 2313 (b); Federal Property and Administrative Services Act, 41 U. S. C. Sec. 254 (c); Atomic Energy Act, 42 U. S. C. Sec. 2206.

The GAO has also been given authority to audit the records of government operations by the Government Corporation Control Act. 31 U. S. C. Secs. 850, 857.

In a paper entitled "The Role of the General Accounting Office,"[1] Robert F. Keller, general Counsel for the GAO discussed the substance of these statutory provisions and stated:

> We view the primary purpose of the statutes as to require the General Accounting Office to make for the Congress independent examinations into the manner in which Government agencies discharge their financial responsibilities. Financial responsibilities include the administration of funds and the utilization of property and personnel only for authorized programs, activities, or purposes; and the conduct of programs and activities in an effective, efficient and economical manner. Our audits include critical examinations of the administration of Government contracts from the contracting agencies' standpoint in all cases and from the contractors' standpoint where negotiated contracts are involved. (Emphasis added)

On the question of whether the GAO has authority to go beyond strictly financial matters and include in its reports recommendations on matters in the management area, Mr. Keller referred to the provision of Title 31 of the United States Code in section 53 (set forth above), giving the Comptroller General the duty and responsibility to "investigate . . . all matters relating to the receipt, disbursement, and application of public funds" and cited legislative history to support the GAO view that its duties are not limited to fiscal or financial concerns:[2]

> In explaining the purpose of section 312 (31 U. S. C. Sec. 53) and in particular the word "application," which was placed in the section as a result of a floor amendment, the framers of the act made it clear that the Comptroller General should make it his duty to search for methods of economy, and that he should concern himself with the question of whether public funds were economically and efficiently applied. (Emphasis added)

Congressman Luce, who offered the amendment to include the word "application" stated:

> "The purpose, Mr. Chairman, is to make it sure that the Comptroller General shall concern himself not simply with taking in and paying out money from an accountant's point of view, but that he shall also concern himself with the question as to whether it is economically and efficiently applied."

Congressman Good, Chairman of the Committee concerned with the bill, had the following to say about the amendment offered:

> "It was the intention of the Committee that the Comptroller General should be something more than a bookkeeper or accountant; that he should be a real critic, and at all times should come to Congress, no matter what the political complexion of Congress or the executive might be, and point out inefficiency, if he found money was being misapplied - which is another term for inefficiency - that he would bring such facts to the notice of the committees having jurisdiction of appropriations.

1 1965 Business Lawyer 259

2 Id. at 260-261

Therefore I have no objection at all to the gentlemen's amendment. I think it will subserve a useful purpose.

Mr. Keller concluded: "If we are to carry out our duties, as we understand them to have been intended by the Congress, it is impossible not to enter the management area."

In a recently published analysis of the GAO's influence upon contracting policies and procedures[3] commentators John Cibinic, Jr. and Jesse E. Lasken point out that of all its activities the GAO's audits and reports on government contracts have created the greatest amount of controversy and criticism. The statutes set forth above, they agree, make it clear that the GAO audit is expected to be a "management audit," going into the transactions underlying accounting records, Moreover, they point out:

> Although the audit of contract activity is not specifically mentioned, the breadth of the terms of these statutes clearly support such audits. The efficiency and propriety of Government agencies' operations cannot be evaluated if the more than $50 billion spent annually for goods and services is ignored.[4]

Contracts subject to audit are negotiated contracts; not contracts awarded as a result of formal advertising. In the exercise of other statutory powers, discussed below, the GAO plays a role in the advertising process. This activity, coupled with statutory regulation of the advertising process, according to the authors, have greatly reduced the discretion of contracting agencies in this area. "As a result, or so the theory goes," they state, "there would be relatively little to gain in auditing advertised contracts. Hence, they are not."[5]

On the subject of audited contracts Cibinic and Lasken further explain:[6]

> Many negotiated contracts are awarded on a cost reimbursement, incentive or redeterminable basis where the final price to the Government is either wholly or partically determined by the contractor's cost of performance (used where the risks are too great to enter into a fixed price contract). In addition, many of the firm fixed price contracts awarded as a result of negotiation are based solely upon estimated costs of performance negotiated between the contractor and the Government (often used when the contractor is a sole source of the goods or services).

In describing the audit process in Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before a Subcommittee of the House Committee on Government Operations, 89th Congress, 1st Session (1965) at page 42, then Comptroller General Campbell stated:

3 Cibinic and Lasken, "The Comptroller General and Government Contracts," 38 Geo. Wash. L. Rev. 349 (March, 1970)
4 Id. at 387
5 Id. at 388
6 Ibid.

> Audits of negotiated contracts may involve a review of the contractor's cost representations and pricing proposals, a comparison of the contractor's cost estimates with his previous cost experience, a comparison of his cost estimates with costs actually incurred in the performance of the contract, and an audit of costs incurred in those cases in which reimbursement of the prices paid by the Government are based on or are affected by actual costs.

Critical of GAO's emphasis on audit comparisons of the contractor's anticipated costs with his actual costs and cost factors that were reasonably available when the contract was made, Cibinic and Lasken argue:[7]

> The practice has both good and bad points. Such reports can be very useful. They can and have sharpened the Government's negotiation practices . . . Probably the most legitimate criticism of the system, however, is that it gives a distorted view of the operations of the Government's negotiating practices and of the responsibility of its contractors by focusing only on the poor jobs of negotiation.

Some GAO contract audit reports initially recommended that the contracting agency attempt to obtain voluntary refunds from contractors as a remedy for overpricing. Such reports played an acknowledged role in the passage of the "Truth in Negotiations" act, 10 U. S. C. Sec. 2306 (F), requiring contractors in noncompetitive negotiated contracts to submit cost and pricing data and to certify that it is accurate, current and complete. Cibinic and Lasken conclude:[8]

> As a result of criticism contained in GAO audit reports both before and after passage of the Truth in Negotiations law, a rising tide of resentment began to build up in industry and Government circles. Continued complaints about GAO audit activities culminated in a series of hearings before a subcommittee of the House Committee on Government Operations. . . . The investigations concluded with a report which mildly rebuked the General Accounting Office and suggested some areas for improvement in its auditing and reporting activities with respect to Government contracts (e. g. that reports "be couched in constructive terms").

Furthermore, they argue:[9]

> One thing stands out in review of the GAO audit activity in the Government contract area and that is its near obsession with pricing . . . This is not to say that the Government's contract pricing is beyond repute. There is considerable room for improvement. However, many other important areas of Government contracting are practically ignored.

[7] Id. at 389

[8] Id. at 391

[9] Id. at 392

Besides its audit and reporting powers the GAO exercises other powers relating to government contracting as the result of statutory authority in the Budget and Accounting Act of 1921. The GAO's "settlement powers" derive from a provision granting it the authority to settle and adjust all "claims and demands whatever by the Government of the United States or against it and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor . . ." 31 U. S. C. Sec. 71. In addition, Title 31, Section 74 states that:

> Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government.

GAO's activities under these two provisions, according to Cibinic and Lasken, require a knowledge of the historical development of the Government's financial system and its method of effectuating payments to contractors.

The Treasury Act of 1789 contemplated Treasury approval and certification prior to payment of claims, but the system that developed involved the issuance of advances from the Treasury to Government disbursing officers. They point out: "The Treasury officers would examine accounts of the disbursing officer, which reflected his disposition of the funds advanced to him. The disbursing officer system soon developed into and continues to be the dominant method by which the Government effectuates payment of its obligations."[10]

Accompanying this development was a shift in the primary responsibility for procurement of the Government's needs from the Treasury Department to the operating agencies. Collection processes became complicated because departmental accountants would make initial settlements. Legislation in 1817 gave Treasury officers authority to settle and adjust all claims and demands (in language virtually identical to the present authority conferred upon the GAO). The 1921 act transferred to the GAO all powers and duties which had been conferred upon Treasury officials. Cibinic and Lasken further explain:[11]

> Even though post-transactional audits were the rule from at least as early as 1817, there still remained many situations in which a claim might reach the Treasury before any payment had been made. An agency might refuse to pay an alleged claim and after such a refusal claimants often submitted their claims to the Treasury for "adjudication" and settlement. Generally, the agencies abided by these"adjudications.:

[10] Id. at 354

[11] Id. at 355

The voluntariness of agency acquiescence, the further point out, was secured by an Act of March 30, 1868, which provided that 'balances . . . certified by the Comptroller . . . shall be taken and considered as final and conclusive upon the executive branch of the government . . ." 15 Stat. 54 (1868).

The purpose of this Act was to protect war claimants whose claims were not being recognized by the War Department. The language was broad and appeared to apply to accounts of disbursing officers as well as private claimants and to authorize downward as well as upward revisions. Subsequent legislative developments concerning the accountability of disbursing officers and certifying officers "coupled with the finalty given in 1868 to balances certified by the Comptroller (then a Treasury official but now the Comptroller General in the office of the GAO) have provided the Comptroller General(i.e. the GAO) the power to subject the accountable officers to potential litigation and liability."[12]

Thereafter disbursing officers requested advisory opinions from the Treasury officers (and now do from GAO) as to their view of the legality of proposed payments.

Although contracting officers make and administer contracts, certifying officers attest to the legality of the contract, performance thereunder, and correctness of the voucher presented for payment, and disbursing officers make the actual payment to the contractor, the thrust of the Cibinic and Lasken article is that the Comptroller General (GAO) has successfully used his settlement powers over certifying and disbursing officers to make a significant impact upon the contracting process. Proposed agreements have been submitted to the GAO by contracting officers and certifying or disbursing officers have requested opinions as to the legality of payments on agreements previously made. The GAO has played some role in contract disputes and has also provided a forum for unsuccessful bidders, resting its power to do so on the fact that if an agency disregards its decision on bidder acceptance, the agency might have to reckon with a future disallowance of payment.

GAO activity in the procurement field through the use of "settlement powers" is the subject of much criticism in the Cibinic and Lasken article. According to it, the GAO, operating on a hazy borderline between legislative and executive powers and under vague and antiquated statutes containing its "settlement powers" has intervened in the active formulation of procurement policy and agency operations without clear Congressional mandate to do so. The writers conclude:[13] "If our recommendations concerning withdrawal of the GAO from the bid protest, disputes, and settlement of claims areas were adopted, the GAO would be able to use its procurement experts now engaged in these activities to perform a strengthened and broadened auditing and reporting function."

About one year ago the GAO received considerable publicity because of a controversy involving cost increases under a "total package procurement" contract between the Defense Department and Lackheed Aircraft Corp. for C-5A jet transports. The contract was originally entered into in 1965. Five aircraft were to be built during the $1 billion research and development phase of the contract, and 115 planes were to be mass produced for an additional $2.3 billion. The C-5A program remained in relative obscurity until the fall of 1968 when according to Congressional Quarterly the Joint Economic Committee heard testimony to the effect that the C-5A program was running $2 billion above initial cost estimates. The Committee heard charges

12 Id. at 359

13 Id. at 395

that one reason for cost overruns involved corporate strategy in contract negotiation.

Pressure from the Joint Economic Committee and widespread publicity about cost overruns led to renegotiation efforts to determine who would absorb the losses. Although they culminated on February 1, 1971 in a renegotiated contract in which Lockheed bore a portion of the loss, subject to renegotiation, Lockheed suffered financial setbacks in its commercial operations that were bound to affect its Defense Department contract.

The Joint Economic Committee in 1970 requested an investigation by GAO of Lockheed and asked for a detailed audit of the contractor's "cash-flow" statement--an account of expenditures and receipts for both defense and commercial programs.

The GAO did not conduct the thorough audit requested but conducted a "review" of the cash flow statement. Under an agreement with the Defense Department GAO staff could look at Lockheed's books but not write down or report figures concerning commercial problems. Commercial ventures were seen as interrelated by the Committee. Senator William Proxmire, a prominent member, charged that without such figures Congress would not have sufficient knowledge about Lockheed's financial position to make an evaluation on appropriating additional money for the project.

The Comptroller General defended the GAO from Committee criticism that it had authority under Section 54 of Title 31 to obtain the information requested by arguing that GAO has "no legal authority to demand from the contractors their records relating to commercial- that is, nongovernment - transactions. The fact that Lockheed's ability to make delivery is dependent upon its over-all financial situation has, therefore, complicated our ability to develop the data needed to reach such an opinion."

The February 19, 1971 issue of Congressional Quarterly reported factors involved in the stand-off.[14]

> A detailed Congressional Quarterly study of a series of letters exchanged between the Defense Department, GAO, and the Joint Economic Committee, plus a review of various statutes, showed several factors which contributed to the GAO's inability to conduct a full audit.
>
> *** Congress initially failed to demand a thorough GAO study - one which would have disclosed the full scope of Lockheed's dilemma. Long after it was known that the C-5A had incurred cost overruns in excess of $1 billion, the Senate rejected a Proxmire-Schweiker amendment to the defense procurement authorization bill . . . which, among other things, would have required a thorough GAO study. The amendment was rejected . . .
>
> *** The GAO failed to offer, over the years, an interpretation of the law which had allowed the Pentagon to renegotiate the Lockheed contract without regard to normal contract procedures. The responsibility of interpreting contract laws affecting any government agency rests with the GAO.

[14] at page 431

*** With regard to conducting an audit of Lockheed's cash-flow statement, the GAO failed initially to exert its statutory authority until pressed by the Joint Economic Committee (Proxmire and Schweiker still question whether the GAO has flexed its statutory muscles to the fullest.)

*** The Defense Department refused to accommodate requests of the Joint Economic Committee and did not allow the GAO to gather detailed information for presentation to Congress.

Legislation has been introduced calling for stricter GAO supervision of government contracts mainly as a result of this controversy.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
June 7, 1972

Length of Gubernatorial Service-
incumbency for more than stated number of consecutive terms

The Legislative-Executive Committee on May 12, 1972, discussed the research report on length of gubernatorial service and particularly the provision in Section 2 of Article III of the Ohio Constitution, which provides that no person "shall hold the office of governor for a period longer than two successive terms of four years."

Because of the interest in how the Ohio limitation would be interpreted--i.e. whether the term "period" would be construed as the total time an individual could serve as governor or merely as a sequential limitation--judicial interpretations of similar language from other states have been examined.

There are no cases that are precisely analogous to the Ohio question. Cases in which questions were raised about related provisions are compiled in a 1956 American Law Reports Annotation, dealing with the construction and effect of constitutional and statutory provisions disqualifying a person for public office because of previous tenure of office. 59 A.L.R. 2d 716 (1956).

The annotation follows the Florida case of Ervin v. Collins, 85 So. 2d 852, (1956), often cited as authority for the principle of construction that provisions in statutes and constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers. The Florida court held that a section of the constitution providing that the governor shall hold his office for four years "but shall not be eligible for re-election to said office the next succeeding term" does not impose ineligibility for re-election to a full term upon one elected governor for the unexpired term of his deceased predecessor. The Collins case represents the majority view that where the article creating a constitutional office prescribes that the officer shall hold it for a certain term and then imposes a disability to succeed himself or to hold another office, the courts will construe the disability as attaching only to an officer who has served a full term.

A concurring opinion in the Collins case relied upon "two factors . . . in favor of eligibility . . . One is the rule that even if uncertainty and ambiguity are present . . . construction should favor eligibility if that can be reasonably done in carrying out the intention of the framers, and the other is the result of that rule, namely that if his eligibility is sanctioned, the electorate will have a broader field from which to choose an executive."

Sometimes cited with Collins as authority for liberal construction is a Georgia case, dealing with statutory eligibility to be a member of the state board of pardons and paroles and not with consecutive tenure. The court syllabus in McLendon v. Everett, 205 Ga. 713, 55 S. E. 2d 119 (1949) stated: "A citizen may not be deprived of the right to hold office without proof of some disqualification specifically declared by the constitution or statutory law." The reason, said the court, is that: "The right of a citizen to hold office is the general rule and ineligibility the exception."

The 1956 annotation points out that few general principles can be extracted from the cases discussed because of differences in the particular language of

limitation and wide variance in other significant factors. Cases construing the prohibition against holding office for more than a stated number of consecutive terms are separately discussed. The general rule recognized at this point in the annotation is that such a prohibition "does not result in permanent disability to hold such office when the permissible number of consecutive terms have been served, but only in a disability to be elected for the next successive term, which will disappear as soon as an intervening term has been served by another." Only one cited case discussed the rationale for such a rule.

Horton v. Watson, 23 Kans. 160 (1880) involved the provision that no person shall hold the office of county treasurer for more than two consecutive terms. It was held to have been satisfied by the inclusion of a "vacancy" between terms of office resulting from an act of the legislature adjusting and changing the dates of elections. The act of the legislature effecting the change in election dates has recognized the vacancy in office that would result from its passage, and had provided that the vacancy should be filled by appointment. Where one had held office for a part of one term and the whole of a second term, and then had vacated the office when the interregnum or vacancy occurred, the office being filled by another appointed as provided in the act, he was held not ineligible to run again for election as county treasurer for the term established by the new act and commencing at the end of the vacancy. The interposition of the vacancy, filled by the appointment of another, prevented the second and third regular terms from being consecutive, said the court, the object of the constitutional limitation upon consecutive terms being not to make a person ever afterward ineligible to hold the office after he had held it for two consecutive terms, but to require him to go out of the office for a time, and to deliver to another all the funds, books, papers, etc. belonging to the office so that a full and complete settlement could be made with him. Three months, the length of the vacancy, was held ample for this purpose, and the candidate was eligible to run for election to a third term after its passage.

Other cases discussed in the annotation are of little value in predicting how the limitation in Section 2 of Article III would be construed. In some instances a prohibition against serving more than two consecutive terms was held to mean two full terms, and in others it was not. That consecutive terms has reference to elective terms only and not appointive terms was the holding in other cases. A few of the cases involved the relationship between statutory provisions for holdover until a successor was qualified and the constitutional prohibition against consecutive terms.

In an early West Virginia case the constitutional prohibition that the same person shall not be elected sheriff for two consecutive terms did not prevent a candidate from seeking election who had served one full term, following which another person had been elected sheriff but had vacated office during term, whereupon his predecessor was elected to fill the vacancy thereby created for the last half of the term. The candidate had not been elected to two consecutive terms, reasoned the court in Gorrell v. Bier, 15 W. Va. 311 (1879) because a period of two years elapsed between the termination of his full term and his second election to fill the vacancy existing during the last half of the next term. Had the framers of the constitution intended to render one who had been sheriff ineligible to re-election during the period of four years next succeeding the termination of a full term of office, they would have used language definitely indicating that intention, said the court, as they did elsewhere in the same constitution in providing that the governor shall be ineligible for said office for the four years next succeeding the term for which he was elected. "The apparent object of the provision," said the

court, "was to prevent the sheriff from holding the office continuously, by compelling him to go out of office at the end of a full term, the probable object of which was to prevent him from prostituting the office for the purposes of a re-election."

Prior to November 7, 1933, Section 3 of Article X of the Ohio Constitution provided that no person was eligible to the office of sheriff for more than four years in any period of six years. In several cases the Ohio Supreme Court ruled upon application of the provision, but in none of the three leading cases on the subject is there discussed the principle of liberal construction or of resolving ambiguities in favor of eligibility. In Haff v. Pask, 126 Ohio St. 33 (1933) a candidate who received the most votes for sheriff at the November, 1932 election had already served as sheriff for two years, four months and seven days, having been appointed to fill a four months vacancy in the term that preceded his first full term. The court held that he was ineligible to be a candidate because the law does not contemplate election to part of a term, and his eligibility would run out during the term of office for which he sought election.

Sartain v. Harris, 77 Ohio St. 481 (1908) and Wilson v. Pontius, 78 Ohio St. 353 (1908) involved the 1905 constitutional amendment providing a new scheme of elections and statutes passed under the authority of that amendment that extended the term of office of incumbents to comply with the scheme. In the first case the Court held that the amendment and statutes took precedence over the ineligibility provision, because a special provision is given effect as an exception to a general provision, and thus Harris held that Section 3 of Article X would not prohibit a one year extension of an incumbent's second two-year term.

In the Wilson case the extended term was a first, not second term, and it was argued that the candidate for a second term would lose his eligibility in the middle of his second term. The court rejected the argument, holding that the statutes changing election dates and extending term had authorized an extension of eligibility as well as of term.

The annotation discussed situations where a disability to succeed to office is imposed upon an officer for a certain number of years in a given period of time, as under former Section 3 of Article X. Such limitations have been held to disqualify absolutely the officer when the period of eligibility has expired because the disqualification depends upon passage of time rather than terms of office. But here again other factors may affect the result.

The recent case of Maddox v. Fortson, 172 S. E. 2d 595 (1970), from Georgia, was a challenge as to the federal constitutionality of the provision in the state constitution that "governors shall not be eligible to succeed themselves and shall not be eligible to hold office until after the expiration of four years . . ." Plaintiffs Maddox and seven electors claimed, without success, that this prohibition of succession was violative of their rights under the First Amendment and the equal protection clause of the Fourteenth Amendment. The court rejected both contentions and, as to the equal protection argument, recognized the office of governor as one in a class by itself. The Georgia supreme court relied on several cases, all from the latter half of the 19th century, as authority for its position that it is within the power of the state to set tenure and succession of its elected officials as it may wish. The United States Supreme Court denied certiorari on March 2, 1970.

A law review note, critical of the decision and its acceptance of the justification that "compelling state interests" were apparent argues:[1] "Reason actually points to the underlying motivation of this prohibition. It now seems to be and always has been, the desire on the part of the legislature to assert its dominance over the executive."

The note points out in support that the 1943 commission to revise the constitution, though weighted heavily toward the legislative branch of government, had voted twice to remove the prohibition. The proposed Constitution of 1945, when taken to the General Assembly, did not contain the provision but it was there inserted, and the revision commission was reversed. "The legislative jealousy of executive power was manifested by the preclusion of succession," concludes the note. Its author notes further that case law is not lacking in holding that statutes and constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of eligibility, However, only the Collins and McLendon cases are cited as authority for this proposition.

[1] Note, "Constitutional Law - Incumbency Prohibition - Is Georgia in Step with the Times?" 22 Mercer L. Rev. 473 (1971).

Ohio Constitutional Revision Commission
June 16, 1972
The State Seal--Article III, Section 12

The Constitution of the State of Ohio provides in the Executive Article in Section 12 for the keeping of a state seal as follows:

> 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 of the same article also deals with the seal of the State, as follows:

> 13. All grants and commissions shall be 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.

Neither of these sections of the Ohio Constitution has been changed since 1851, and both were agreed to by the 1850-51 Convention as reported by the Committee on the Executive Article of the Constitution without any amendment. There is no mention of either section in the Report of the Convention of 1802; however, both sections concerning the state seal date to 1802 when they were included in Article II, the executive article. The language at that time was the same as that which was reported out by the Committee to the Convention of 1851, and the same which is found in the Ohio Constitution at present.

All but 11 of the states have some constitutional reference to a great seal. Over half of the references give custody of the seal to the Secretary of State, and around a dozen give custody of the seal to the Governor of the State, as does the Ohio Constitution. Miscellaneous references are found in approximately half a dozen states. Neither the Model State Constitution of the National Municipal League, nor the United States Constitution has a reference to a great seal.

These two sections are obviously not essential to modern state government, but neither are they obtrusive or capable of creating problems. A description of the form and use of the Great Seal is found in Section 5.10 of the Revised Code. The seal of the State is basically a tradition, an example of state authority, and in 1802, its use was probably felt to give grants and commissions of the state official authority for their activities. It might be noted that the new Constitution of Illinois has done away with the provision in the Constitution for a state seal.

Constitutional Revision Commission
Legislative-Executive Study Committee
July 10, 1972

Research Study No. 16

The Attorney General: Advisory Opinions

Although the Ohio attorney general is a member of the Executive branch of government, by reason of constitutional enumeration of the executive department in Section 1 of Article III of the Ohio Constitution, the relationship of the state attorney general to state government has been recognized by many commentators as a unique one. The office, considered executive in the vast majority of states, has also been described as having a "quasi-judicial"[1] status because of its function involving the issuance of advisory opinions on questions of law. Furthermore, in Ohio, as in most other states, the attorney general is required by statute to give written opinions to either house of the general assembly, and this duty has been seen as establishing a special relationship of the attorney general to the legislative branch of state government.

In February, 1971, a comprehensive report on the office of attorney general was released by the National Association of Attorneys General through its Committee on the Office of Attorney General. This lengthy publication is hereinafter referred to as "Report" unless additional identification is essential in the context of discussion. The Report culminated a two year study conducted under grants from the National Institute of Law Enforcement and Criminal Justice of the United States Department of Justice and deals with all aspects of the office. Included in it are results of surveys of incumbent and past state attorneys general on a variety of subjects, and citations to cases concerning common law powers inherent in the office of attorney general.

Attorneys general derive their powers not only from constitutional and statutory law, but also from common law because the English office of attorney general was assuming its modern form as the American colonies were being settled, and by the 17th century his common law powers were numerous. The Report contains no citations to Ohio case law concerning the common law powers of the Ohio attorney general. Although many courts in the United States have agreed that the attorney general of contemporary American states is endowed with common law powers of his forebearer, it has also been acknowledged that "the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter."[2] The relevance of such a proposition to Ohio will be explored in a subsequent memorandum.

Of particular interest to the Committee at its last meeting was the question of the binding status and effect of opinions given by the attorney general. A chapter of the Report is devoted to this subject, as is a Committee Recommendation[3] to the following effect.

> "Formal opinions of the Attorney General should be binding as law on all public officials unless and until overturned or clearly inconsistent with subsequent law, official opinion, or decision of a court of record."

According to the Report, the question of the legal standing of opinions has been before the courts of most states with inconsistent results. Furthermore:

"The legal status of opinions involves two questions: whether opinions are binding upon recipients and whether they confer immunity from legal liability on the part of recipients."[4]

Five states reportedly have statutes on the subject. Alabama, Mississippi and Pennsylvania confer statutory immunity upon public officials who follow an attorney general's opinion. A Mississippi law protects an officer from civil or criminal liability where the officer in good faith acts in accordance with a legal opinion from the attorney general "unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support."[5]

The Pennsylvania statute[6] makes opinions binding and confers immunity upon recipients:

"Whenever any department, board, commission or officer of the state government shall require legal advice concerning its conduct or operation . . . it shall be the duty of such department . . . to refer the same to the Department of Justice. It shall be the duty of any department . . . having requested and received legal advice from the Department of Justice . . . to follow the same, and, when any officer shall follow the advice given him by the Department of Justice, he shall not be in any way liable for so doing upon his official bond or otherwise."

Minnesota law makes opinions given the Commissioner of Education "decisive until the question involved shall be decided otherwise by a court . . ."[7] (Emphasis added.)

The duties of the attorney general in Ohio are not spelled out in the Ohio Constitution. His duty to give advisory opinions is the subject of statute. Revised Code Section 109.12 requires that he furnish legal advice to state officers and boards, and Section 109.13 that when required by resolution he give his written opinion on questions of law to either house of the general assembly.

Special statute apparently gives certain opinions special status. Revised Code section 5715.28 requires the department of taxation to decide all questions that arise as to the construction of any statute affecting the assessment, levy or collection of taxes "in accordance with the advice and opinion of the attorney general," and provides that such opinion shall be binding upon all officers until overthrown by a court of competent jurisdiction. The only reported instance in which this provision has been questioned was in an action to compel that sales tax assessments be made contrary to the opinion that had been given by the attorney general. The action was unsuccessful, but with respect to Section 5715.28 the Ohio Supreme Court said that such an action, to compel a board or officer to perform an alleged duty, is a proper proceeding in which to secure annulment or modification of the attorney general's advice or opinion. No such annulment or modification resulted in Foster v. Evatt, 144 Ohio St. 65 (1944), nor does the opinion undertake to discuss the binding quality to be accorded attorney general opinions.

Conflict in case law on the two questions may be illustrated by comparing rules set forth in two legal encyclopedias. One[8] states:

"An officer who has sought an opinion from the attorney general should, it would seem, even though not compelled to do so by statute, follow the advice which is given to him, and when he does so in good faith, he is not, according to some authorities, personally liable to the state . . . . However, it has been held to the contrary that the officer . . . (is) not protected by the fact that the officer's act was in accordance with an official opinion of the attorney general."

However, the summary of Ohio holdings in Ohio Jurisprudence carries different emphasis. It[9] states:

"It is a general rule of law that while the opinions of the Attorney General may be persuasive, they are not conclusive or binding, and the recipient of them is free to follow them or not as he chooses. Consequently, a public officer is neither justified in a particular act, now shielded from its legal consequences, by a written opinion of the Attorney General upholding the legality thereof."

"Nor are the opinions of the Attorney General in any sense controlling upon the court," continues Ohio Jurisprudence, which adds, however, a proviso that in at least one situation, where an attorney general's opinion sets out a rule of construction controlling for a long period of time, "it should receive consideration by the court." Such a statement comes from a 1934 holding of the Ohio Court of Appeals in Anderson v. Wolf, 17 Ohio L. Abs. 161, involving the construction of a statute that prohibited employment of a person as teacher without the person's having obtained a teaching certificate. The board of education was seeking recovery of amounts paid to such person, and the Court allowed recovery on the basis that the statute's meaning was clear, adding that it thereby upheld a long-standing construction of the statute by the attorney general. Said the Court:[10]

"The opinions of the Attorney General are not in any sense controlling upon this court, yet where the opinion, as it has, sets out the rule of construction controlling every school board in the state for a long period of time, it should receive consideration by this court."

A more recent ruling in which an Ohio court had occasion to make pronouncements upon the status and effect of attorney general opinions was in a court of common pleas in 1960. The question before the court in Schlueter v. Cleveland Board of Education, 40 Ohio Ops. 427 (1960) was whether a teacher is entitled to credit and financial increment for the period he served in the armed forces, and required construction of a statute on the subject. Here the Court found that the code section involved had been construed and interpreted in an opinion of the attorney general soon after its effective date in 1951. Citing the general rule of the Anderson case and pointing out that opinions "are entitled to only such consideration as the reasons given for the opinion warrant," the court here found:[11]

"The opinion of the attorney general is a very thorough, well-reasoned and sound analysis of the problem; the conclusion reached by the attorney general in the opinion of this Court is correct, and this Court adopts the conclusions reached in said opinion for the cogent reasons therein stated."

The court quoted extensively from the attorney general's opinion and noted that the attorney general had affirmed and followed his own 1951 opinion in a subsequent ruling. By doing so, the court apparently accorded some weight to the period of time

over which the rule adopted by the attorney general had been consistently controlling.

In his 1950 analysis of some legal aspects of the attorney general's duty to advise,[12] Robert Toepfer submitted that opinions stand as controlling precedent and, at least until attacked, they are expressions of law. He wrote: "It has been held that while the opinions are not to be given the same weight as judicial utterance, yet if the court's opinion coincides with the opinion of the attorney general, the court may properly adopt it."[13] Conceding that the "exact weight" to be given attorney general opinions is not clearly settled, Toepfer finds the most accurate statement to be one made by the Federal Circuit Court of Appeals, that they are entitled to such "deference as is given the opinions of other able persons learned in the law."[14] Toepfer also points out that federal courts are bound by state rules of substantive law, whether it be framed by state legislature or judicial decision and shows that state attorneys general opinions must be considered by federal courts in the determination of state law. It is his thesis that they may be controlling in the absence of any intermediate or appellate decisions.

The 1971 Report on the Office of Attorney General reveals that, according to a survey taken by the Committee on the Attorney General, opinions are advisory only in most states but have "great weight" and are considered "persuasive." States the Report:[15] "Most jurisdictions believe that the courts would consider that an opinion immunizes the recipient on questions of good faith, negligence or intent."

An argument in support of the view that opinions are not binding on a recipient is that "if the law were otherwise any executive officer of the state could be controlled by the opinion of the Attorney General specifying what the law requires to be done in that office." Follmer v. State, 94 Neb. 217, 142 N. W. 908 (1913)

Furthermore, the Report points out,[16] the fact that an official was acting on the Attorney General's advice does not put him in any more favorable position. If . . . he must act at his peril, that he proceeded upon the advice of others did not relieve him from responsibility."

On behalf of the view that an official is protected by following an opinion even if it proves to be erroneous is the rationale that otherwise few responsible administrative officers would care to assume the hazards of rendering close decisions in public affairs. "Officers acting in good faith have a right to rely on the opinion of the Attorney General, as he is the officer designated by law to render such service for their guidance and protection."[17] According to the Report, the same reasoning holds that it is the duty of public officers to follow the opinion of the attorney general until relieved of such duty by a court of competent jurisdiction

However, Toepfer noted a variation of this rule in cases in which courts held that an officer must follow the attorney general's advice only when there is "well founded doubt or ambiguity." Otherwise the officer must follow the wording of the statute and is liable if he does not.[18]

1 Of official liability Toepfer also points out:[19]

> "It would seem that a state officer should always seek the opinion of the attorney general in doubtful legal matters, that he should follow such advice, and should not be held personally liable under such circumstances. However, such officer is an agent of the state and if his

> conduct results in illegal harm to innocent third parties, justice requires that such persons be compensated. It is suggested therefore that statutes of the type found in Pennsylvania should be enacted by state legislatures. Such statutes, which take away the personal liability of state officers for official acts when done under proper legal advices, will promote efficient state government. But in the interests of justice the legislature should provide a means whereby the state pay for the failure of an officer to perform his functions under doubtful law. It is fair that the entire political body bear this as a cost of government rather than that the individual suffer."

Another study of the importance and value of attorney general opinions has pointed out that "although state officers cannot be forced to follow a requested attorney general's opinion, formal opinions do seem to carry a sizable amount of legal force. Their power derives from custom and practical considerations rather than from legal compulsion. The state official who defies the advice of the attorney general does so at considerable peril, for it is the attorney general who will represent the official in court if his actions precipitate a suit. . ."[20] (Emphasis added.)

Urging that courts will continue to be likely to adopt opinions when judicial precedent is lacking, Toepfer argues:[21]

> "This general attitude of the courts toward the opinion of the attorney general, in many cases giving them the status of judicial utterances and in most cases following them were cited, is not only a potent argument for state officers seeking legal advice and following it, but also for the proposition that lawyers in private litigation make as wide a use as possible of this valuable precedent."

Ohio has no general statute concerning the binding effect of attorney general opinions nor, other than the dicta in the three cases cited above, has case law been located on the question of status and effect of opinion. Ohio Jurisprudence suggests that the recipient of opinions may be "free to follow them or not as he chooses." However, Ohio case law clearly supportive of this proposition has not been located. In the absence of particular circumstances one could argue for application of the general rule that formal opinions carry the force of law in the absence of contrary judicial decision. Officials from various states reported to the Committee on the Attorney General that despite the absence of both statute and case law, officials in some states regard opinions as binding by custom and believe that an officer who follows the attorney general's opinion receives some protection.

The recommendation made by the National Association of Attorneys General that formal opinions should be binding as law until overturned or clearly inconsistent reflects surveys taken by its Committee showing 29 of 37 incumbent attorneys general and 82 of 111 former attorneys general subscribe to this position. According to the report, an "even larger percentage of both groups believe that officials who follow opinions should be immunized from criminal liability."

In a recent law review article entitled "The State Attorney General: A Friend of the Court?"[21] commentators Henry J. Abraham and Robert R. Benedetti examine the activity of the state attorneys general following the United States Supreme Court rulings in 1963 on school prayer. The article discusses the content of formal opinions issued by the attorneys general, especially in states where bible reading or prayer were required or tolerated and suggests factors to explain regional and

other differences in the scope and substance of attorney general activity. The authors point out:[23]

> "Thus the attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice. It appears, then that there is a need for state government officials to know the duties imposed on them by the law and a need for the people as a whole to understand the law if it is to be followed. The attorney general explicates the state of the law, positive and customary. Where law has been struck down, he predicts the consequences. Where it has been obscured, he clarifies its prescriptions.

Although the article lists Ohio as a state in which uncertainty on this matter was tolerated (because of the tradition of leaving school matters to local officials), the Committee is expected to have an interest in the following hypotheses[24] generated by the study concerning the role of the attorney general in the enforcement of Supreme Court decisions:

> (1) Attorneys general are active interpreters of Court decisions when a state statute requiring a uniform practice is unequivocally struck down, and, in the absence of such a statute, when the issue has not been dealt with by the state legislature or judiciary . . .
>
> (2) The opinions of the attorney general usually attempt to create a balance between popular opinion and the law . . .
>
> (3) The attorney general is at least as useful as the lower courts in the enforcement of Court opinions. In fact, the attorneys general are often the route by which such cases reach the courts . . .

The authors conclude by suggesting the need for further study of the office of attorney general in the context of his national as well as state responsibilities because the "utility of much that the Supreme Court hands down may be measured by the abilities of such officials. Their functions deserve further scrutiny."[25]

Footnotes

1. Robert Toepfer, "Some Legal Aspects of the Duty of the Attorney General to Advise," 19 Univ. of Cin. L. Rev. 201 (1950)

2. Earl Delong, "Powers and Duties of the State Attorney General in Criminal Prosecutions," 25 J. Crim. O. 392 (1934)

3. Recommendation No. 32, Report at 7

4. Id. at 267

5. Miss. Code Ann. sec. 3834

6. Pa. Stat. Tit. 71, sec. 192

7. Minn. Stat. Ann. sec. 807

8. 7 C.J.S. Attorney General, sec. 6 at 1225

9. 6 Ohio Jur. 2d Attorney General, sec. 7 at 8

10. 17 Ohio L. Abs. 161, 164 (1934)

11. 40 Ohio Ops. 2d 427, 434 (1960)

12. Toepfer, Op. Cit. Supra note 1, at 218

13. Id.

14. Id.

15. Report, at 268

16. Id.

17. Id.

18. Toepfer, op. cit. supra note 1 at 223

19. Id. at 225

20. Larson, "The Importance and Value of Attorney General Opinions," 41 Iowa L. Rev. 351, 360 (1956)

21. Toepfer, Op Cit. Supra note 1, at 220

22. 117 U. Pa. L. Rev. 795 (1969)

23. Id. at 805

24. Id. at 820

25. Id. at 821

Ohio Constitutional Revision Commission
Legislative-Executive Committee
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Research Study No. 17

The State Budget

Preparation of the Budget in Ohio

The Ohio Constitution places the entire responsibility for the raising of revenues and making of appropriations on the General Assembly. Article II, Section 22, provides that "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years." There is no provision for an executive budget in the Ohio Constitution. Under Article III, Section 7, the Governor is required 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," and this may be taken to imply executive preparation of the budget, although it does not do so specifically. The Governor is given the power of veto of appropriations of the General Assembly in Article II, Section 16, providing "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 for the repassage of a bill."

The executive budget is a statutory development in Ohio. The Governor's duties for preparing and submitting the biennial executive budget are specified in Sec. 107.03 of the Ohio Revised Code. It is required in general language that the Governor make appropriate recommendations for all the state's activities and revenue estimates under existing and proposed legislation. This has been required by statute in Ohio since 1933.

The Budget as an Executive Responsibility

The trend in the states has been towards the development of the executive budget--where the governor has the primary responsibility for recommending the fiscal and program policies to the legislature. The legislature usually has final responsibility for accepting or modifying executive recommendations. Other possibilities in the realm of budget preparation besides the executive budget include either statutory or constitutional provisions that the budget is to be prepared by a state budget commission or board. However, at present, only three states do not have an executive budget--although it is not necessarily provided for in the constitution in other states, just as it is not in Ohio.

Budgeting is increasingly felt to play a significant role in the leadership function of the state executive. W. Brooke Graves maintains in his book, State Constitutional Revision:

> "Because budgeting plays a significant role in the leadership function of the governor, the budget function should be provided for in the constitution. The remaining staff functions--personnel, planning, accounting, and preauditing--should be established for law rather than by constitutional provision. In addition to providing for the usual powers of the governor over an executive budget, it is recommended that the legislature not be permitted

to increase the amount of an appropriation item (though it may decrease or eliminate the item) and that its power to add new items be restricted. The bills embodying the budget should be passed before any other appropriations are considered. The right of designated representatives of legislative committees to attend departmental budget hearings and to make inquiries should also be provided for in the constitution. A quarterly allotment system for budget execution should also be provided, as well as an authorization to the governor to reduce appropriated funds to departments when revenues fall below estimates. The chief model for these recommendations is the constitutional budget authority of the Governor of New York. The effectiveness of this system is attested to by Professor Lynton K. Caldwell in The Government and Administration of New York, pp. 229-236."

Graves, p. 197.

Thus, Graves believes that the governor should be strengthened by giving him the powers necessary to provide leadership in state government, with constitutional authority for an executive budget being one of the constitutionally-granted powers the governor should have. Further, he would spell out the fiscal relationship between the governor and the legislature in the Constitution.

The Advisory Council on Intergovernmental Relations proposes a constitutional amendment providing for a strong executive budget, granting the governor full authority for preparing a budget which reveals the full scope of administrative operations. It is significant in the proposal that the budget presented by the governor must be balanced, and that the governor has the constitutional mandate to recommend raising additional revenues. The proposal of the ACIR, in full, reads as follows:

STRONG EXECUTIVE BUDGET

The principal tool for controlling the activities of state government is the budget. All but three states have adopted, to some extent, an executive budget system, but in many cases its effectiveness is vitiated by gaps in the overall picture of fiscal resources and needs, or by agency practices that contravene the authority of the governor.

The executive budget system contemplates that the governor be given full authority and responsibility for preparing a budget that reveals the full scope of administrative operations, and that the legislature review and render judgement on the budget that the governor presents. The governor should be cognizant of all funds from every source coming into State agencies, even the independent ones. Earmarked funds should be reflected in the analysis accompanying the budget presentation, even though their expenditure is not subject to ordinary executive or legislative controls. Similar treatment is warranted for the large and growing portion of State income that arrives in the form of grants or other aid(loans) from the Federal Govt. This draft amendment, by requiring a plan of expenditures for all agencies, assumes that the state's higher education system is not constitutionally independent, although in some states the university system has separate constitutional status.

All budget requests should be channelled exclusively through the governor. In some states, the legislature receives the agency estimates at the same time the governor does. In many states, agencies are free to argue for their original requests in hearings before legislative committees. Either situation is undesirable to the extent that it permits the administrative agencies to play off the legislature against the governor.

The proposed amendment designates the governor as the state-budget officer. It clearly establishes the authority and responsibility of the governor for budget preparation and execution, and anticipates that the budget staff would be an integral part of the executive office of the governor. This kind of flexibility takes on increasing significance with the growing emphasis on the development of the so-called "Planning, Programming and Budgeting System."

The following is the constitutional amendment which the ACIR suggests:

(Title, format, and procedural practice for constitutional amendment should conform to state practice and requirement.)

Section 1. Governor's Budget and Recommendations as to Revenue. The governor shall be the state budget officer and shall submit to the (legislature), at a time fixed by law, but not later than (10) days after it convenes in each regular (or budget) session, a budget for the ensuing fiscal period, setting forth a complete plan of proposed expenditures (by program) of the state and all its agencies, together with the governor's estimate of available revenues and his recommendations for raising any additional revenues that may be needed.

Section 2. Power of Partial Veto of Appropriation Bills; Procedure; Limitations. The governor may disapprove or reduce one or more items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing the bill he shall append to it a statement of the items which he has disapproved or reduced, and these items or portions of items shall not take effect. If the (legislature) is in session he shall transmit to the house in which the bill originated a copy of the statement, and the items he has disapproved or reduced shall be considered separately. If the (legislature) is not in session he shall transmit the bill within (fourty-five) days to the office of the secretary of state with his

approval or reasons for disapproval. The governor shall not reduce any appropriation below the amount necessary for the payment of principal and interest on the public debt.

Section 3. Power of Governor to Control and Reduce Expenditures. The governor, at his discretion, may control the rate at which any appropriation to a department or agency of the executive branch is expended during the period of the appropriation, by allotment, or other means, and may reduce the expenditures of any department or agency of the executive branch below the amounts appropriated.

Section 4. (All parts of the Constitution in conflict with this amendment are hereby repealed.) (Sections (identify those section of the Constitution to be repealed) and hereby repealed.)

Section 5. (Insert appropriate language, consistent with the referendum requirements for amending the Constitution and with state election laws, for submission of the proposed amendment to electorate.)

Advisory Council on Intergovernmental Relations, Suggested Legislation, p. E-43.

The 1970 Report of the Wilder Foundation on the Ohio Constitution recommends that the duty to submit a balanced budget should be clearly constitutionally imposed on the Governor. "If sufficient revenues are available, this presents no problem; the governor is quite happy to spell out the state's needs, and to show that his administration can meet them with existing revenues. However, in times of revenue shortages, buckpassing can take place. The governor can, and has, submitted a budget showing the state's needs, and then said, in effect, that raising taxes to meet these needs was the legislature's problem. A fight between the two branches at such a critical time is not in the interests of the state." The Wilder Report mentions the provisions of the Model State Constitution and the Constitution of the State of Michigan as exemplary. (See provisions attached to this paper.)

The Model Executive Article of the National Governor's Conference would provide also for an executive budget, specifically written into the executive article of the state constitution, providing:

> "The Governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state."

It is felt that this sort of constitutional provision gives the budget message a greater significance for the general public, and increases the seriousness with which the Governor should approach such a message.

If the governor prepares the budget, he will include many of the policy changes which he wishes to see enacted, and will undoubtedly emphasize programs he views as necessary. The governor's budget message, therefore, is a policy document of considerable importance in most instances. In the states where the governor shares the power for preparation of the budget with a board or commission, this power may be considerably weakened, because it may be possible that such a board or commission is appointed by a previous governor or by the legislature.

It should be pointed out that in many of the states with an executive budget, the budget document seldom reaches the high goals set for it as a policy device. One of its primary limitations is the fact that the budget actually covers only a part, sometimes as little as one-quarter, of the state's income and expenditures, since the majority of the state's income is from earmarked revenues which are dedicated to predetermined purposes. In Ohio, 47% of taxes collected are earmarked, according to a study by the Tax Foundation. This figure is slightly higher than the average amount of taxes earmarked in the various states, which according to the Tax Foundation study, amounted to 41%.

Another limiting factor in some states, which should be mentioned, is the poor timing of the budget. In many states it must be submitted shortly after the governor takes office and before he has time to make a thorough analysis of the major policy problems involved. This limitation can again reduce the effectiveness of the budget as the central focus in the process of policy formation. However, in Ohio, the statute concerning the executive presentation of the budget to the legislature does provide that in a circumstance where a newly elected governor is assuming office, he has until March 15th to produce his budget, rather than the usual four weeks after the general assembly has convened.

Thus, in order for the executive budget to be an effective policy device of the governor, there must be a high degree of gubernatorial control concerning its preparation. Whether or not this is present cannot necessarily be viewed through the statutes or constitutional provisions providing for budget preparation among the various states.

The Fiscal Period of the Budget

The period of the budget in Ohio is not controlled by the finance and taxation article of the Constitution, except to provide that appropriations by the general assembly cannot be made for more than a two year period. The General Assembly has provided by law that the governor shall submit the budget message--a state budget containing a complete financial plan for the ensuing biennium--at a specified time after the convening of the general assembly and that that message shall be concerned with the fiscal biennium. (As previously mentioned, the Governor is given a slightly longer period in which to prepare and present the budget to the General Assembly after he has been newly elected.) However, it is possible, under the present constitutional provision, that the General Assembly could provide for an annual budget, which has been

adopted in many states which have moved to annual sessions of the general assembly--and this could be done by law, or through constitutional provision. It would thus seem useful to understand the pros and cons of the biennial and annual budgetary systems.

Among the states, the trend has been towards annual budgets. In 1949, there were only five states with annual budgets (Hawaii Constitutional Convention Studies, Taxation and Finance, p. 27). According to the 1972 Book of the States, 33 states now have annual budgets. The relationship between how often the legislature in a state meets and the period covered by the budget is almost a perfect one. In Ohio, the Constitution presently provides for biennial sessions of the General Assembly. The budget is adopted biennially, but appropriations are made for each year of the biennium separately.

The following arguments are those made for the adoption of a biennial budgetary system, and an annual budgetary system, respectively:

Arguments for a Biennial Budget:

1. Budget preparation by a state administration on an annual basis is too time consuming. No sooner is one budget adopted by the legislature than the cycle begins for the preparation and review of another budget. Adoption of a budget for a two-year period frees administration officials and personnel for other important tasks.

2. Appropriations for a biennial period afford a fairer test and evaluation to be made of government programs. Under an annual system, there is little time to assess the progress and accomplishments of the programs before the question of continued or additional expenditures must again be decided by administrators and legislators. This time limitation results in the executive branch requesting and the legislature approving or denying proposed expenditures without sufficient information as to whether a particular program is justified in terms of its actual implementation expense.

3. Planning for government operations under a biennial budget is improved. Because administrators and legislators are forced to take a longer range view of government programs, the result is likely to be sounder planning for operational as well as fiscal policies.

Arguments for an Annual Budget

1. The expenditure of time and effort in budget preparation should not be a controlling consideration. The budget is probably the most important recurring document prepared by the executive branch and reviewed by the legislature. That considerable time should be expended on budget preparation and review is justifiable. Moreover, there is no certainty that less time and effort would be required for a biennial budget. Further, preparation of the budget on an annual basis means that the effects of inflation over a two-year period, which may be difficult to determine, need not be accounted for.

2. Appropriations for a biennial period, rather than an annual one, would curtail the powers of the legislature. Adoption of such a procedure would reduce the frequency of

overall review of state operations, which is the essence of the legislative review of the budget. Budget-making for a two year period might further financial independence of the executive branch, but this would be at the expense of the exercise of legislative power over appropriations.

3. Program planning could still take place under an annual budgetary system for longer periods. Annual budgeting allows such plans to be revised and amended in light of new analysis and changing circumstances. The financing of programs on an annual basis with program planning proceeding on a multi-year basis keeps the appropriations process responsive to new conditions and requirements without denying a longer range view into the future.

4. Emergencies and changing conditions are more easily met on an annual basis.

Not withstanding the possible merits of the arguments on both sides, the frame of reference of the biennial vs. annual budget issue is just as likely to be political as it is administrative. In a period of executive initiative in financial policy-making, state legislatures are generally reluctant to see further erosion of their control of the purse. The exercise of legislative power to approve, modify, or deny budget proposals of the governor is viewed as virtually the only effective check against complete executive supremacy. If this is so, the exercise of this power every year instead of every two years would weigh on the side of legislative control. Conversely, appropriations for a biennial period would lessen the frequency of the executive-legislative confrontation. Reducing the frequency of confrontations would free the executive branch from financial dependence on the legislature for longer periods, and the effect would be to advance executive power. (Hawaii Constitutional Convention Studies, Taxation and Finance, p. 29)

It does seem that the point, previously made, that annual budget systems are often used to correspond wiht annual legislative sessions, has validity. The trend toward annual sessions of the state legislatures has been inspired in part by the view that annual budgeting in state appropriations is better than biennial budgeting. W. Brooke Graves maintains in his book, State Constitutional Revision, that "annual sessions, or brief budget-appropriation sessions in the even years where biennial sessions are held, will allow the budget period to be kept to one year and thus permit greater precision in estimating revenues and expenditures." (Graves, p. 197) This is the kind of theory which originally moved states towards annual sessions--California being one of the first states to adopt a "budget session" in the off year. In 1946, an amendment was adopted to the California constitution which added this budget session of 30 days duration to be held during the even-numbered years. This provision placed the meeting of the legislature upon an annual rather than a biennial basis, but with a sharply restricted jurisdiction during the budget sessions--limited basically to the consideration of expenditures and the necessary revenue acts to support the budget. Maryland, Colorado, and Nebraska were also among the early states following this trend. In more recent years, it has become obvious that more frequent legislative sessions are needed to dispose of matters in general which demand legislative attention; thus has come the move to the annual session without restriction. This move has included California. (Blair and Flournoy, Legislative Bodies in California, p. 14; and Illinois Legislative

Council, Annual vs. Biennial Legislative Sessions, p. ii)

The Outlook for Budgeting in Ohio

At present, it is found that the constitutional provisions governing budgeting in Ohio are general and left basically to statute. This matter has attracted attention from varying viewpoints. The League of Women Voters has maintained that "budgeting is of such fundamental importance" that a constitutional provision on the subject should be considered. The League recommendations continue:

> "Planning a budget either by the year or the biennium is sound fiscal policy. It requires not only an evaluation of existing state programs but also plans for future programs. In the process the General Assembly is able to evaluate the executive department policies and increase or decrease items as they deem necessary."
>
> (League of Women Voters, Recommendations regarding the Finance and Taxation Provisions in the Ohio Constitution, July, 1971.

The League feels that the Governor should thus submit an executive budget on a regular basis to the General Assembly, but does not specify whether that budget should be submitted on an annual or biennial basis.

Bernard Jump, in an Ohio State University Ph.D. Thesis on State Capital Spending in Ohio, has taken a view similar to that of the League, maintaining that there must be a number of general rules of action (my emphasis) which are followed with few changes from time to time--independent of administrative changes, in the area of state budgetary practices. Mr. Jump does add, however, that there is much to be said for a legal structure which facilitates adaptation to changing circumstances. This view might agree with those who believe that flexibility is necessary in budget processes, and that such problems should be left for legislative, rather than constitutional, determination, with neither an annual nor a biennial budgetary provision written into the constitution. It is pointed out that the legislature in Ohio can always make supplemental appropriations or amend the Appropriations Act to change appropriations if it wants to.

The trend in the states would seem otherwise, however, and analysis of the attached state provisions would seem pertinent.

Alaska IX. 12.

Section 12. Budget

The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the state. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

The Constitution of the State of Alaska provides for an annual executive budget, and also a general appropriation bill to authorize proposed expenditures, which is submitted at the same time to the legislature by the Governor of the State. The time for this submission is to be fixed by law.

Georgia VII. Sec. IX Paragraph 1a

The Governor shall submit to the General Assembly within fifteen days after its organization, a budget message accompanied by a draft of a General Appropriation Bill, which shall provide for the appropriation of the funds necessary to operate all the various departments and agencies, and to meet the current expenses of the state for the ensuing fiscal year.

The Georgia Constitution thus provides for an executive budget, submitted annually to the General Assembly and accompanied by a General Appropriation Bill, and it is also provided that this budget message shall be submitted by the Governor to the General Assembly within fifteen days after the organization of the General Assembly for that session.

Hawaii VI. 4.

Within such time prior to the opening of each regular session as may be prescribed by law, the governor shall submit to the legislature a budget setting forth a complete plan of proposed general fund expenditures and anticipated receipts of the state for the ensuing fiscal period, together with such other information as the legislature may require...

The Hawaii Constitution provides for an executive budget to be submitted to the legislature by the governor at a time prescribed by law prior to the opening of each regular session. It is stipulated that the budget set forth a complete plan of proposed general fund expenditures and anticipated revenues of the state for the ensuing fiscal period. (The 1972 Book of the States provides us with the information that in Hawaii, the fiscal period for which a budget is submitted is biennial--the budget is adopted biennially, but appropriations are made for each year of the biennium separately. Increases or decreases in budget items may be made in even-year sessions. The biennial budget is provided for in Hawaii by statute.)

Illinois Article VIII-Finance, Section 2. State Finance

(a) The Governor shall prepare and submit to the General Assembly, at a time prescribed by law, a State budget for the ensuing fiscal year. The budget shall set forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year of every department, authority, public corporation and quasi-public corporation of the State, every State college and university, and every other public agency created by the State, but not of units of local government or school districts. The budget shall also set forth the indebtedness and contingent liabilities of the State and such other information as may be required by law. Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.

(b) The General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year.

Section 2 of the Illinois Constitution provides that every year the Governor must prepare and send to the General Assembly a budget covering all state agencies. This budget must show the revenue the State expects to receive from all sources and the money the State intends to spend for all purposes in the coming fiscal year. The budget must be balanced. Only the General Assembly has the power to decide how state funds are to be spent. The General Assembly cannot authorize spending more money in any fiscal year than it expects to receive from all sources.

This section was new to the Illinois Constitution in 1970. Previously, the only reference to a budget which can be assumed was that in providing for the Governor's State of the State message in Article V, Section 7. Until 1970, in that the Governor's message was biennial, Illinois had an executive biennial budget, but until 1970, this was not provided for in the Constitution.

Michigan Article V. Section 18

Following the trend in the new and recently revised state constitutions, the 1962 Michigan document includes a new section providing for an executive budget. (Section 18) At a time fixed by law, the governor is required to submit a "balanced" budget to the legislature for the next fiscal period that details all proposed expenditures and estimated revenues. Proposed expenditures may not exceed estimated revenues, whether from present or proposed new revenue sources. At the same time, the governor is directed to submit general appropriations bills and "any necessary bil or bills" to procure "new or additional revenues to meet proposed expenditures" and "any bills to meet deficiencies in current appropriations." Section 18 also requires that the amount of any surplus or deficit be included as an item in the budget and in one of the appropriation bills. The governor may submit amendments to appropriation bills to either house.

Model State Constitution

The Model State Constitution commands the governor to give information and recommendations to the legislature at the beginning of each session and permits him to give information at other times. The Model State Constitution also provides for a budget message as follows:

"The governor shall submit to the legislature, at a time fixed by law, a budget estimate for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments and agencies of the state, as well as a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues."

(Article 7.02)

The Commentary in the Model State Constitution on the provision reads as follows:

"No single act in the fiscal process is of greater importance than the preparation of the budget, which enables the governor to develop a comprehensive fiscal program for each fiscal year.

Recognizing this executive responsibility, the Model requires that the chief executive develop not only proposals for an expenditure program but also a plan for the raising of the necessary revenues. Any new or additional revenues the governor feels are necessary must be spelled out in his budget presentation.

With such requirements, the legislature is in a position to evaluate the executive's comprehensive fiscal plan, to increase or decrease items and to strike out or add items. These broad powers are balanced by the governor's power to veto appropriation bills."

(Model State Constitution, p. 92-93)

New York Article 7, Sections 2 and 3

2. Executive budget

Annually, on or before the first day of February in each year following the year fixed by the constitution for the election of governor and lieutenant governor, and on or before the second Tuesday following the first day of the annual meeting of the legislature, in all other years, the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as he may deem proper and such additional information as may be required by law.

Section 2 was adopted Nov. 8, 1938; and amended Nov. 2, 1965. The 1965 amendment added the provisions designating the time when the governor is to submit the budget to the legislature.

3. Budget bills; appearances before legislature

At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein. The governor may at any time within thirty days thereafter and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or submit supplemental bills.
The governor and the heads of departments shall have the right, and it shall be the duty of the heads of departments when requested by either house of the legislature or an appropriate committee thereof, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearances and inquiries shall be provided by law.

The New York Constitution calls in the two above sections for the presentation of an executive budget by the governor to the legislature of the state--this is to be an annual budget as stipulated in Section 2. The budget is to be a complete plan of expenditures accompanied with an explanation of the basis of such estimates and recommendations as to proposed legislation, which the governor may suggest as a means of implementing his executive budget. New York is one of the states granting the governor general authority in the Constitution for the preparation of a budget and its submission to the legislature.

Massachusetts Article LXIII, Section 2. The Budget

Within three weeks after the convening of the general court the governor shall recommend to the general court a budget which shall contain a statement of all proposed expenditures of the commonwealth for the fiscal year, including those already authorized by law, and of all taxes, revenues, loans, and other means by which such expenditures shall be defrayed. This shall be arranged in such form as the general court may by law prescribe, or, in default thereof, as the governor shall determine. For the purpose of preparing his budget, the governor shall have power to require any board, commission, officer or department to furnish him with any information which he may deem necessary.

Article LXIII. Section 3. The general appropriation bill

All appropriations based upon the budget to be paid from taxes or revenues shall be incorporated in a single bill which shall be called the general appropriation bill. The general court may increase, decrease, add or omit items in the budget. The general court may provide for its salaries, mileage, and expenses and for necessary expenditures in anticipation of appropriations, but before final action on the general appropriation bill it shall not enact any other appropriation bill except on recommendation of the governor. The governor may at any time recommend to the general court supplementary budgets which shall be subject to the same procedures as the original budget.

Constitutional authority is thus granted in the Massachusetts Constitution for an executive budget. The budget is annual, as annual sessions of the general court (state legislature) are held in Massachusetts, and it is stipulated that the budget be designed for the fiscal year.

Missouri Article IV. Section 24 and Section 25

24. The governor shall, within thirty days after it convenes in each regular session, submit to the general assembly a budget for the ensuing appropriation period, containing the estimated available revenues of the state and a complete and itemized plan of proposed expenditures of the state and all its agencies, together with his recommendations of any laws necessary to provide revenues sufficient to meet the expenditures.

25. Until it acts on all the appropriations recommended in the budget, neither house of the general assembly shall pass any appropriation other than emergency appropriations recommended by the governor.

Missouri also provides for an executive budget, for which the governor of the state is given constitutional authority. The constitutional provision provides that the budget shall be submitted to the general assembly by the governor "for the ensuing fiscal period," which, in Missouri, is annual by statute.

Connecticut

The State of Connecticut also has an executive annual budget, but the provision for such is not constitutional, specifically, which makes Connecticut a further interesting example for analysis.

Article IV, Section 11, of the Connecticut Constitution provides:

He (the governor) shall, from time to time, give the general assembly, information of the state of the government, and recommend to their consideration such measures as he shall deem expedient.

This provision has been taken as basis for an executive budget message to the legislature. Thus, Connecticut has an executive budget.

Up until 1971, the executive budget was biennial, corresponding to the biennial sessions of the Connecticut legislature. However, in November, 1970, Section 2 of Article III of the Constitution was amended, providing for the time and place of sessions of the general assembly, and providing for regular yearly sessions of the legislature.

Changes in the system of budgeting had been requested by the governor and were supported by legislative leaders of both parties. The need for annual budgets in the face of the state's large population growth was cited by supporters of annual legislative sessions as the principal justification for adoption of the constitutional amendment. The amendment was adopted, and the first bill passed by the 1971 General Assembly was one placing the state on annual budgets. Thus, Connecticut has an executive budget, according to a general provision of the Constitution, and an annual budget by statute.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
September 28, 1972

DETERMINING GUBERNATORIAL DISABILITY

From among the questions related to guberntorial succession and disability which the Committee discussed at its meeting of September 22, 1972, the one upon which the Committee reached a consensus was that the Constitution should provide a mechanism for determining whether a disability exists. It was also agreed that such a mechanism must deal with two questions: (1) Who should have final jurisdiction to make the determination? and (2) Who should initiate the proceeding?

On the matter of jurisdiction, Research Study No. 10 presents three alternatives. The states of Alabama, Illinois, Mississippi and New Jersey and the Model State Constitution confer final jurisdiction upon the Supreme Court to make the determination. Under the 25th Amendment to the United States Constitution and the new constitution of the state of Virginia, the legislature makes the determination, by a two-thirds vote under the former and a three-fourths vote under the latter. Other state constitutions are silent on the matter or simply provide as does Alaska that the "procedure for determining absence or disability shall be prescribed by law."

Considerably greater variation among the various jurisdictions is to be found in the ways in which they provide for initiating disability questions and establishing applicable procedures. The Model State Constitution is silent as to how the matter is to be triggered. The New Jersey Constitution and the Maryland draft allow the legislature to initiate the proceedings, in the former case by concurrent resolution (2/3 vote) and in the latter by resolution in joint session (3/5 vote). The legislature in Illinois specifies by whom and by what procedures the ability of the governor to serve may be questioned, by general law. Similarly, the California provision reads: "Standing to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute." (Article V, part of Section 10, added November 8, 1966). Other constitutions make designations as follows:

Virginia--Attorney General, President pro tempore of Senate, and Speaker of the House, or a majority of the total membership of the General Assembly

Alabama--Any two officers in the line of succession, but not next in succession

Mississippi--Secretary of State

United States--Vice President and majority of either the principal officers of executive departments or of such other body as Congress may by law provide

A Kentucky proposal in 1966 called for initiation of proceedings by a board composed of the auditor, attorney general, and a physician.

The Committee decided that it would like to consider two alternative drafts--one in which disability questions would be raised by joint resolution (as in the Maryland

draft) and the other in which they would be raised in the manner and by the officer or agency prescribed by the legislature in general law. The former approach has the advantage of guaranteeing that the triggering agency be an elected body.

The draft or variant thereof on this subject that is favored by the Committee may ultimately be proposed as an addition to Section 15 or as an independent section. Matters of style will be reserved until after substantive decisions are made.

Furthermore, the drafts contain bracketed references to "absence" as a ground for succession. Absence is not a ground for succession in Ohio, and some reluctance to add it was expressed at the Committee meeting. However, Research Study No. 10 points out that there are two views as to absence of the governor. Under the strict interpretation, when the governor is physically absent from the state for any purpose and for any period of time, the lieutenant governor becomes acting governor. This strict approach seems obsolete.

The Committee may wish to consider providing for such absence as will injuriously affect the public interest. One Committee member raised the specific question as to whether the Constitution should recognize a vacancy where the governor simply leaves the state and remains away from his duties for a long period of time.

The Model State Constitution calls for an acting governor "when the duties of the office are not being discharged by reason of continuous absence..." Absence from the state for more than 20 days calls for temporary succession in Alabama. A vacancy results in the office of governor in Alaska when for a period of six months he has been continuously absent or unable to discharge the duties of office by reason of disability. The Illinois Constitution does not use the term "absence" but provides for temporary succession of the lieutenant governor when the governor determines that "he may be seriously impeded in the exercise of his powers."

Absence may be considered both in terms of providing for an "acting governor" for some period of time, or, where continuous for a substantial period of time, in terms of automatic vacancy. Acting governor status is the subject of the accompanying discussion and drafts, so the absence question may be reserved until determinations are made on the questions thereposed as to duration and designation of the gubernatorial successor.

Draft No. 2 is a variant of Draft No 1. It supposes that a vacancy would be declared to exist (temporary or permanent, depending on other language that could fix a period of time after which the vacancy ceases to be temporary) when the governor is unable to discharge the duties of office. That provision could specify that the duties of office could not be discharged by reason of enumerated grounds, such as, for example, continuous absence, physical or mental disability, etc.

The words, "or governor-elect", are also bracketed in these drafts. The specific questions involved in omitting the governor-elect from the succession provisions are discussed in accompanying materials. It is assumed at this point that the Committee will recommend some specific provisions to cover vacancies in the office of governor-elect. The decision as to inclusion of governor-elect in these drafts governing determination of disability should be reserved until the subject of governor-elect has been considered.

DRAFT NO. 1

The supreme court has original, exclusive, and final jurisdiction to determine the (absence or) disability of the governor (or governor-elect) and to determine the existence of a vacancy in the office of governor and all questions concerning succession to the office of governor or to its powers and duties.

The general assembly by law shall specify by whom and by what procedures questions concerning the (absence or) disability of the governor (or governor-elect) may be submitted to the supreme court.

In the absence of such a law the supreme court shall make the determination of the (absence or) disability under such rules as it may adopt.

Notes: (1) Should the contigency of non-action by the legislature be recognized, as in the Illinois Constitution? Is the contingency provision satisfactory? Compare Draft No. 2 and Notes.

DRAFT NO. 2

The supreme court has original, exclusive, and final jurisdiction to make determinations about whether the governor (or governor-elect) is able to discharge the duties of his office, and to determine the existence of a vacancy in the office of governor, and to resolve all questions concerning succession to the office of governor or its powers and duties.

The general assembly shall by law specify by whom and by what procedures the ability of the governor (or governor-elect) to discharge the duties of office may be questioned.

In the absence of such a law, the matter of status to raise questions concerning the ability to discharge the duties of the office of governor (or governor-elect) and the means by which such questions must be raised shall be determined by the rules of the supreme court.

Notes: (1) Here as in Draft No. 1 the purpose of the third paragraph is to provide for the situation where the general assembly has not passed an applicable law. The phraseology here used suggests that questions of whether a party has status (or standing) to question the ability and as to how he should proceed to do so would be governed

by general rules that had been adopted prior to a particular proceeding. Draft No. 1 appears to authorize the adoption of rules to cover the particular proceeding.

DRAFT NO. 3

The supreme court has original, exclusive, and final jurisdiction to determine (absence or) disability of the gove nor (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 (absence or) disability. Such joint resolution shall be adopted by a vote of (two-thirds) (three-fifths) vote of the members elected to each house.

The supreme court has original, exclusive, and final jurisdiction to determine all questions concerning succession to the office of the governor or to its powers and duties.

Notes: (1) These drafts omit provision for the convening of the General Assembly. The Maryland draft provides that it may be convened by the presiding officers upon the written request of a majority of the members of each house. If the Ohio General Assembly were not in session, under Commission recommendations the presiding officers could cause a special session to be convened. Is there a reason here for requiring a request by a percentage of the members?

(2) In its determination of what vote should be required to pass a resolution on this matter, the Committee is reminded of other special majority requirements in the present Constitution and of some Commission recommendations affecting them, set forth below. The Committee to Study the Legislature decided that there is no particular merit to having all special majorities be the same.

(a) 2/3 of all members elected to each branch to pass emergency bills Sec. 1d, Art. II	(a) Not included in Commission's recommendations to date
(b) 2/3 of members of each house to expel a member -Sec. 6, Art. II	(b) Same in Commission's recommendations to transfer subject matter to II,8.
(c) 2/3 of th se present to dispense with secret proceedings of the G.A. --Sec. 13, Art. II	(c) Not included in Comm. recommendations to date
(d) 3/4 of house concurrence to dispense with 3 reading rule for legislation-- Section 16, Art. II	(d) Changed to 2/3 of members elected in Commission's proposed Sec. 15, Art.II

(e) 3/5 of members elected to each house to override veto Sec. 16, Art II.	(e) No change in Commission's recommended Sec. 16, Art. II
(f) 2/3 of senators for impeachment conviction--Sec. 23, Art. II	(f) Not included in Commission's recommendations to date
(g) 2/3 of members elected to each branch for allowance of compensation or claim not provided for by pre-existing law Sec. 29, Art II	(g) " "
(h) 2/3 of members elected to each house to increase certain judges and establish courts--Sec. 15, Art. IV	(h) Commission recommended repeal as outmoded.
(i) 2/3 of each house for appointment of supreme court commission --Sec.22, Art. IV	(i) Commission recommended repeal as obsolete provision.

Determining Guberntorial Disability (continued)

The Virginia disability provision, like the 25ht amendment to the United States Constitution, established that a time limit within which the body charged with making a determination must act upon a declaration of disability. That body is Congress under the federal provision and the General Assembly under the Virginia provision. If not in session Congress must assemble and the Virginia legislature must convene within 48 hours. Both provisions call for a determination to be made within 21 days.

There is merit to setting a constitutional limit upon the time that may be taken to act on a matter of such importance. The following sections incorporate such a limitation.

> The supreme court has original, exclusive and final jurisdiction to determine the disability of the governor upon presentment to it of a joint resolution by the general assembly, declaring that the governor 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. Within 48 hours after presentment of such resolution the supreme court shall convene to consider it. The supreme court shall make a determination of whether the governor is unable to discharge the powers and duties of office by reason of disability within 21 days after it is required to convene.
>
> The supreme court has original, exclusive, and final jurisdiction to determine all questions concerning succession to the office of the governor or to its powers and duties.

An alternative form for the underlined portion above is as follows:

> The supreme court shall determine the question of disability within 21 days after presentment of such resolution.

In addition to adopting a provision to establish the procedure for questioning the ability of the governor to perform gubernatorial powers and duties by reason of a disability, the Committee may wish to consider a provision whereby a governor who has been determined to be disabled may initiate a proceeding to have the court declare that he is no longer disabled. If the Committee decides that a vacancy results after six (or more) months have elapsed, the provision would be available to the governor for that period only. If no limitation is established, the successor to the governorship would serve in the capacity of "acting governor" for the remainder of the term, and the governor would be empowered to initiate a proceeding to have the court redetermine the disability question at any time.

In addition, the federal and Virginia constitutions include specific provisions whereby the chief executive may declare that he is unable to discharge the powers and duties of office by reason of a disability. In both instances he transmits his declaration to this effect to the presiding officers of the legislature "and until he transmits

to them a written declaration to the contrary," the powe s and duties of the office are to be discharged by the first officer in the line of succession (vice-president or lt. governor), each designated as serving in an "acting" capacity. In both instances the executive's declaration that the disability no longer exists may be challenged, and the legislature must determine the question of disability. In neither instance does a vacancy occur after a period of time has elapsed.

The Committee should decide whether it wishes to include (1) a provision for the governor to make a declaration of his own disability; (2) a provision for him to make a subsequent declaration to the contrary (within 6 or 12 months or with no limitation) and whereby it may be challenged and determined; or (3) a provision for the governor who has been found to be disabled under procedures initiated by the legislature to initiate a subsequent proceeding in which the supreme court would determine whether the disability no longer exists.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
November 6, 1972

Research Study No. 20

THE ATTORNEY GENERAL: HIS CONSTITUTIONAL STATUS AND COMMON LAW POWERS

An attorney general is provided for by the constitution in all states except Connecticut, Indiana, Oregon and Vermont. He is an elective official in all states except Alaska, Hawaii, Maine, New Hampshire, New Jersey, Pennsylvania, Tennessee, and Wyoming. The appended copy of Table 1.41 from the 1971 Report on the Office of the Attorney General of the National Association of Attorneys General gives information regarding selection and term of the attorney general in every state.

Historically, the Attorney General was an appointed, not elected, official in England and colonial America. Early state constitutions commonly provided that the office be filled by the legislature. The Jacksonian period in American history led to widespread substitution of popularly electing state officials, including the attorney general. Contemporary trends are reported in the 1971 Report as follows(1):

> Wyoming, in 1899, became the first "new" state to provide for appointment of the Attorney, General, thereby ending the trend toward popular election. Alaska's 1959 Constitution and Hawaii's of 1960 provided for Gubernatorial appointment, as did their territorial conventions in 1956 and 1950.
>
> Recommendations for an appointive Attorney General were submitted to New York Constitutional Conventions in 1867, 1894, 1914, 1938, and 1967, but were not adopted. The New Jersey Constitutional Convention of 1947 continued the practice of Gubernatorial appointment, as did the Pennsylvania Constitution of 1968. The 1961-62 Michigan Constitutional Convention extensively debated the issue of election versus appointment. An alliance between two of three convention factors led to the acceptance of elective status for the Attorney General and Secretary of State and appointive status for the State Treasurer, Auditor, and Highway Commission. The Maryland Constitutional Convention of 1967 also retained elective status for the Attorney General.

As it considers each executive official independently of the others, the Legislative-Executive Committee has expressed interest in having before it the rationale for election versus appointment. As respects the attorney general, both are set forth in the 1971 Report, frequently cited throughout this memorandum and Research Study No. 16, dealing with advisory opinions of the Attorney General.

For Appointment

In summary form, the Report states the case for appointment by noting the following points:

(1) The need to strengthen the executive branch, developed in commentary to the National Municipal League's Model State Constitution. The League's Honorary Chairman, Mr. Richard S. Childs, is quoted as follows: "Our objection to election of attorneys general applies to all the jobs on the tail of state tickets and rests on the conviction

that the attempt to have the people scrutinize the candidates for these secondary and undramatic jobs has failed completely for 100 years. The failure is called apathy...it is a reasonable result of the attempt to impose on busy voters the duty of investigating and scrutinizing candidates for a technical non-representative office."

(2) The importance of integrating administrative activities and concentrating control over them in the hands of a responsible chief executive, an argument advanced in numerous studies on administrative reorganization;

(3) The position that the function of the attorney general is to advise the governor and that the governor should be permitted to choose his advisors for the close and harmonious relationship that is necessary for effective liason. Proponents say that the office of attorney general "is one through which the Governor is expected to discharge his responsibilities, and the Governor should therefore exercise some control over it."

(4) That the electoral process does not assure professional competence and that the rigors of campaigning dissuade people from running.

(5) That the skills involved are technical and should not be subject to the electoral process.

For Election

Most reasons urged for retaining the elected attorney general proceed from the premise that the attorney general is not exclusively the governor's attorney but holds a unique position in state government because of his relationship to all three branches of government and his role as attorney for the people. In his letter to the Committee dated August 23, 1972, Ohio Attorney General William J. Brown reasoned:

> The Attorney General is the legal advisor to the Governor. He is also legal advisor to the other elected state officials, the legislature and the various county prosecutors. The Attorney General represents all state officers, judicial and legislative as well as executive, in litigation. The Attorney General may also appear and defend the validity of any state statute or city ordinance which is alleged to be unconstitutional.
>
> In addition to his duties as advisor and advocate, the Attorney General exercises a judicial function. He is empowered to issue advisory opinions on questions of statewide interest which have the force of law. In deciding these questions, the Attorney General must be free of outside influence. He should enjoy the same independence in this function as a member of the judiciary. He must, therefore, be free of fear of dismissal by a superior officer.
>
> The Office of the Attorney General has assumed increasing responsibility as the attorney for the people. The Attorney General now represents the interests of the public in areas such as consumer protection and the protection of our environment. In these areas particularly, the Attorney General must be responsive to public needs. This is an additional reason for making the office directly responsible to the electorate.

The case made for election in the 1971 N.A.A.G. Report is parallel in rationale. The points made, in summary, are:[3]

(1) That the attorney general is an attorney for all of the people and should therefore be chosen by them--i.e. that although he is the Governor's advisor, he is not so exclusively, the Governor being merely one among many clients. "By making the Attorney General directly responsible to the electorate, he remains subject to the ultimate source of power and will be more responsive to the public needs."

(2) That the attorney general does not act as agent for the executive branch in exercising important administrative and legal functions, such as programs in consumer protection and environmental control, and that many responsibilities fall outside the scope of the Governor's duties and interests.

(3) That the legislature also relies upon his advice. "Thus he should not be responsible to any single branch of government, but can serve to strengthen checks and balances within the system."

(4) That fear of loss of office should not deter the attorney general from issuing an opinion, which should be rendered solely on the basis of law, and not as advocate for a particular administration.

(5) That appointment does not necessarily remove the office from politics.

(6) That the governor can appoint men with legal training to his staff if he feels that he needs lawyers of his own choosing.

The N.A.A.G. Report concludes [4]:

"No recent or current arguments deferd the proposition that either the legislature or the courts should appoint the Attorney General; appointment is viewed as an executive function. It is assumed that the Attorney General is logically a member of the administrative branch of government, not the legislative or judicial. Furthermore, his impartiality in rendering opinions on legislation could be impaired if he remained responsible to the legislative body. The Attorney General represents many facets of the state before the court of the state; such being the case, there are obvious arguments against permitting the judges to select one of the advocates in a case."

Powers and Duties of the Attorney General

The Ohio Constitution, like most constitutions, names the attorney general and other officers as members of the executive department, fixes their terms of office and provides for the filling of vacancies, allows the governor to require information in writing from such executive officers, requires such officers to make specific reports to the Governor, and provides that they shall receive compensation to be established by law. As to the powers and duties pertaining to the offices enumerated in the executive article, the Ohio Constitution is silent.

Few state constitutions specify the duties of executive officers. Where any reference is made to the powers and duties of the attorney general, it is common to

provide that they shall be prescribed by law. A few state constitutions include a specific designation of the attorney general as "conservator of the peace" as in Delaware of "legal office of the state" as in the 1970 Illinois Constitution. The Model State Constitution does not mention the office. It provides simply that there shall be such administrative departments, not to exceed 20 in number, as may be established by law, with powers and duties as may be prescribed by law.

Powers and duties of the attorney general in Ohio, as in most states, are prescribed by statute. By judicial decision in a number of states, attorneys general have been said to derive powers not only from constitutional and statutory law, but from the common law--a somewhat nebulous term that court have also had to define for a variety of purposes, including the extent and nature of powers established by custom or ancient usage. As was pointed out in Research Study No. 16, the origins of the office are found centuries ago in the development of English jurisprudence. Consequently, according to most authorities, the evolution of the office in both England and America over a period of 600 years has helped shape its contemporary character. The 1971 Report describes the historic development of the office in England, in which the attorney general emerged as the legal advisor for the government, not just as the single servant of the king. By the end of the 17th century, the attorney general "appeared on behalf of the Crown in the courts, gave legal advice to all the departments of government and appeared for them in courts whenever they wished to act. He became advisor to the government as a whole; the Attorney General for the Crown."[5]

History further reveals that the office of attorney general was common to colonial governments and that the powers exercised by the early American attorney general was akin to his English counterpart's common law powers, by then fairly well established. Again according to the 1971 Report, "he was engaged in activities ranging from preparing indictments on charges of murder, theft, mutiny, destitution and piracy, to appearing before the grand jury, and to acting against individuals for disturbing a minister in a divine service. He worked closely with the courts and even made recommendations to the Council, even suggesting the creation of new courts and appointing attorneys for the county courts."[6]

Ohio was among the eight states which did not have an attorney general at the time it became a state. During the days of the Northwest Territory and the Indiana Territory, both of which Ohio was then a part, officers prosecuted the laws of the United States and were concerned practically entirely with federal matters. Before 1846, when the office of attorney general was created by statute, the prosecuting attorney of each of the counties, elected for a two year term by the people of the county, had the duty to prosecute for and on behalf of the state all complaints, suits, and controversies in which the state was a party, in both the Supreme Court and Court of Common Pleas. (See Swan's Statutes of Ohio, 1841, pp. 737,738.)

The office of attorney general in Ohio was created by statute in 1846. He became a constitutional officer in the Constitution of 1851. The debates of the Convention which proposed this Constitution record no discussion of the delegates' views concerning the powers and duties of the office.

Common law Powers

Although legal scholars acknowledge that state attorneys general are possessed of some "common law" powers, the nature and extent of these powers in any particular jurisdiction depends in part upon statute and constitution and in part upon judicial interpretation. The Report explains: "Common law powers are the most difficult to establish; even if their existence is recognized by statute, their definition rests with the court. No court has ever attempted a complete listing of the Attorney General's powers at common law."[7]

Even the term "common law" has been variously defined by American courts. In the present context it has been called "the common jurisprudence of the people of the United States...brought with them as colonists from England and established here so far as it was adapted to our institutions and circumstances." Common law has also been defined as the unwritten law of a particular jurisdiction, as distinguished from its written or statutory law. Ohio Jurisprudence says: "By the common law is meant those maxims, principles, and forms of judicial proceedings, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws..."[8]

The 1971 Report gives considerable attention to the history of the office of attorney general and to the subject of common law powers that American courts have attributed to it. At the outset is a discussion of the difficulties involved in delineating such powers. According to one authority:

> "Although many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed with the common law powers of his English forebearer...the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on this matter."[9]

The Report also points out: "Two subjects are involved in considering Attorneys General's common law powers: the content of these powers and the extent to which they are retained by the Attorney General. Neither is susceptible to a clear answer."[10]

An 1850 Massachusetts court attempted to make a listing of the attorney general's common law powers but denied that it was complete. Some of the terminology is archaic but because the case is frequently cited, the powers aresummarized as follows:

1. to prosecute all actions necessary for the protection and defence of the property and revenues of the crown;

2. the bring certain classes of persons accused of crimes and misdemeanors to trial;

3. to revoke and annul grants made...improperly or forfeited...

4. to recover money...or damages for wrongs committed on the land, or other possessions of the crown;

5. to determine the right of him who claimes or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations,...

6. to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted

7. to enforce trusts, and to prevent public nuisance, and the abuse of trust powers

8. to recover property to which the crown may be entitled...and property for which there is no other legal owner, such as wrecks, treasure trove, etc...

9. And in certain cases...protection of the rights of lunatics and others who are under the protection of the crown...

A statement of the Minnesota Supreme Court in a contemporary case illustrates recognition of powers derived from the common law:

> "The Attorney General is the chief law officer of the state. His powers are not limited to those granted by statute, but include extensive common law powers inherent in the office. He may institute, conduct and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." Slezak v. Ousdigian, 260 Minn. 303 (1960)

Some states specifically acknowledge by statute the attorney general's common law powers, and in others the existence of a statute adopting the common law may affect the attorney general's power. Illustrations of both appear in Chapter 1.3 of the 1971 Report. Courts have had to resolve controversies that involved the applicable date of the adoption of the common law of England, as well as the effect of statutory enumeration of powers.

Table 1.331, reproduced from the Report and appended to this memorandum, shows which jurisdictions recognize the attorney general's common law powers, which do not, and which have not settled the question. It is based on responses by state attorneys general to the Committee on the Attorney General of the National Association of Attorneys General, hereinafter abbreviated as C.O.A.G. Much of the Report was compiled on the basis of C.O.A.G. survey in addition to research on specific questions affecting the office. Although in most jurisdictions courts have ruled on the attorney General's common law powers, the C.O.A.G.'s research revealed no relevant cases in Alaska, Connecticut, Guam, Maryland, Ohio, Puerto Rico, Samoa, Tennessee, or the Virgin Islands.

Another extensive report on the office of attorney general affirms that judicial interpretations of common law powers have not been uniform.[11] Kentucky's highest court has noted three prevailing constructions of the constitutional provision that the attorney general's duties shall be prescribed by law. They are:

1. the legislature may not only add duties but may lessen or limit common law duties.

2. the term "as prescribed by law" has been held...in effect, to negate the existence of any common law duties, so that the Attorney General has none, and the legislature may deal with the office at will...

3. the term has been construed in Illinois and Nebraska to mean that the legislatures may add to the common law duties of the office, but they are inviolable and cannot be diminished...

The Kentucky court in the case in question[12] adopted the first view that the Constitution authorizes the legislature to prescribe the Attorney General's duties at will.

Former Attorney General Arthur Sills of New Jersey explained the rationale for applying the common law of England to the current role of the American Attorney General when he stated:[13]

> "As guardian of royal prerogative, the Attorney General of England possessed a broad range of powers...Unlike after the Colonial Period when state govts. were organized and recognized in this country, there was no monarch in whom the governmental prerogatives were vested. Since the essential power of government resided and emanated from the people, the prerogatives had to be exercised in their behalf. Just as the Attorney General safeguarded royal prerogatives at common law, similarly, the official authority, an obligation to protect public rights and enforce public duties on behalf of the general public, became vested in the states in the Attorney General. And it is this obligation inherited from the common law to represent the public interest which has shaped and colored the role which the Attorney General fills today."

Ohio reported on its C.O.A.G. questionnaire that it is "strictly a code state" and therefore the attorney general has no common law powers. The Report acknowledges no relevant case law but points out that courts might still recognize some such powers. North Dakota statutes, for example, say that there is no common law in any case where the law is declared by the code. The court, however, upheld the Attorney General's authority to go before a grand jury, even without statutory authorization in the case of State ex rel. Miller v. District Court. 19 N.D. 818, 124 N.W. 417 (1910).

Only a few jurisdictions have denied the Attorney General any common law powers. The Report points out, of course, that in some jurisdictions the common law is not recognized. Furthermore, courts have fluctuated on the question in some jurisdictions.

In summary of a variety of holdings from many different states the Report notes:[14]

> "The vast majority of jurisdictions recognize the Attorney General's common law powers, but consider them subject to constitutional or statutory modification. The existence of common law power is thus recognized, but it must be considered in the context of the jurisdiction's statute law. Where statute law and common law conflict, the legislative act will prevail in most cases. Where the statutes are silent, the Attorney General's power at common law will be acknowledged."

It seems probably that such statements regarding common law powers would apply in Ohio. The common law is recognized. Revised Code Section 311.08 says, for example, that the sherriff shall "exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law." Section 1.11 provides in part: "The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws..." Section 2317.44 requires courts to take judicial notice of the common law of every state, and 2317.45 allows partied to present evidence of it. Numerous other references to the common law are scattered throughout the Revised Code.

State ex rel. Doerfler v. Price, 101 Ohio St. 50 (1920) challenged the constitutionality of a statute authorizing the attorney general to make written request of the court of common pleas to order a special grand jury in connection with certain investigations and prosecutions. One objection raised was that the statute conferred judicial power upon the attorney general, in contravention of his status as an executive officer. The court found no judicial function involved and held that in the exercise of the police power the general assembly could delegate to the attorney general any such legal, administrative, or executive duties as it deems best. An oblique reference is made to nonstatutory powers in that part of the opinion which quotes Section 1 of Article III and concludes:

> "So that the attorney general of Ohio is a constitutional officer of the state, in the executive department thereof, chargeable with such duties as usually pertain to an attorney general, and especially with those delegated to him by the general assembly of Ohio, exactly as duties are delegated to the other executive officers of the state, the lieutenant governor, secretary of state, auditor of state, treasurer of state, and any others created."[15]

The court also pointed out that the only reference in the Constitution to grand juries is in Section 10 of Article I of the Bill of Rights. Said the Court, "This constitutional provision, at the time of its adoption, assumed the grand jury to be an existing institution in Ohio, or, in short, recognized the grand jury as it existed at common law."

The general statement of duties prescribed by statute in Ohio in Revised Code Section 109.02, which provides as follows:

> The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime.

Many additional special powers are spelled out in Chapter 109 of the Revised Code. These include, among others, duties concerning the enforcement of charitable trusts, the bureau of criminal identification and investigation, the Ohio peace officer training council, and the antitrust section in the office of Attorney General. Other powers are found throughout the Revised Code.

The N.A.A.G.'s Report discusses some 100 cases involving common law powers. Some of the powers discussed are powers that appear to be within the statutory competence of the Ohio attorney general and cannot at this point be assumed to be of value in predicting the judicial response to any particular challenge in Ohio. Cases summarized deal with such topics as the institution of civil suits to protect the public interest, the attorney general's standing to challenge the constitutionality of legislative or administrative actions, authority to intervene in public utility rate cases, proceedings against public officers (e.g. to recover public offices from wrongful occupants thereof , revocation of corporate charters, and enforcement of antitrust laws. With respect to the latter, a Missouri statute placing responsibility for enforcing antitrust laws with the attorney general was challenged on the ground that it was not part of his authority at common law and upheld as "within the same general character" as powers and duties possessed at common law.

Some cases upholding the power of the attorney general to act to abate pollution are said to follow from the common law power to prevent public nuisances, a power mentioned in the oft cited 1850 Massachusetts case, discussed above. The Attorney General in Ohio has statutory authority to abate nuisances (see chapter 3767. of the Revised Code.).

The enforcement of charitable trusts, as noted above, is a statutory power in Ohio, but it has been recognized as being embraced within common law powers in the absence of specific statute. Cases involving the attorney general as the sole representative of state agencies are cited in the Report, discussion noting that this is an area in which common law duties have been substantially changed in many states over the years.

The relationship of the attorney general to local prosecutors is a topic included as a subject involving common law powers, but a subsequent chapter explores this subject in greater depth, describing the office of local prosecutor in the different jurisdictions, the different bases for this office, and the differences in its relationship to the office of attorney general.

Conclusion

There is no unanimity of thought as to what provisions relating to the office of attorney general should be incorporated into the Constitution. Appended Table 1.212 provides a rough comparison of what other state constitutions include.

The office of attorney general is affected by the current trend toward shorter constitutions, containing little more than concise statements of fundamental law. In his letter to the Committee on August 23, 1972, State Attorney General William J. Brown has indicated that he agrees with this Committee's thesis that the Constitution should outline the responsibility of state officials without including unnecessary details. The absence of litigation on the point supports the position that the Attorney General's powers and duties should not be constitutionally elaborated.

Footnotes

1. National Association of Attorneys General, Report on the Office of Attorney General, 64 (1971)

2. Id. at 65

3. Id. at 67

4. Id. at 68

5. Id. at 14

6. Id. at 15

7. Id. at 32

8. 9 Ohio Jur. 2d. Common Law Sec. 2

9. Earl Delong, Powers and Duties of the State Attorney General in Criminal Prosecutions, 25 J. Crim. L. 392 (1934)

10. N.A.A.G. op.cit.supra.note 1, at 33

11. "The Office of Attorney General in Kentucky," Report of the Department of Law to the Committee on the Administration of Justice in the Commonwealth of Kentucky, February, 1963, 51 Ky. L.J. Supp. 7 (1963)

12. Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W. 820 (1942)

13. Arthur Sills, Proceedings of the Conference of the National Association of Attorneys General 102 (1967)

14. N.A.A.G., op.cit. supra note 1, at 55

15. State ex rel. Doerfler v. Price, 101 Ohio State 50, 57 (1920)

Ohio Constitutional Revision Commission
Legislative-Executive Committee
November 16, 1972

ARTICLE XV
Section 3

Present Section

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.

Recommendation

Repeal or Revise

History of Section

Section 3 of Article XV originated in the Convention of 1850-51, as a provision to be inserted in the legislative article. As the original section 22 of that article, it read:

> An accurate and detailed statement of the receipts and expenditures of the public money, and of the names of the persons who shall have received the same, and the amount they have received, shall annually be published.

Objections raised upon its introduction went to the requirement that names of all persons and individual amounts be included in the annual publications. Some felt such a program would result in a document "of such magnitude as not to justify the expense" that it would incur. Some predicted the annual publication of books that could contain as many as 1000 pages if every recipient of public money were to be included. Others questioned the value of publishing a complete list of the names of individuals comprising the holders of state bonds then outstanding in the amount of some 16 million dollars. Some questioned the ambiguity of the term "public money." And one delegate observed that the requirement for listing any person receiving a dollar of public money was unique and would have restricted the application to "public officers."

But it was not the salaries of public officers that worried proponents of the measure. The concern, said one, was to control expenditures of "public agents, especially the Resident Engineers and Superintendents." And another: "As it now is, the Resident Engineer may get his unrestricted check and draw out his money for the alleged purpose of settling off with those in his employ. When he finally comes to settle, we cannot really tell whether the money has been really paid, which in his account is made to appear that he has paid; for we do not know whether the amount paid to each individual is correct--some of the vouchers which he produces, it may be, are signed by men who cannot read or write." The provision, he thought, would have the great tendency to expose any and all corruption."

To another the importance of the provision had to do with restoring the money power to the General Assembly.

> The appropriations made by the General Assembly are small and trifling, compared with the appropriations made by other authorities. The Assembly appropriates a small sum annually for the benevolent asylum, the school fund, and the expenses of government. The State Auditor appropriates to those who come to him in the guise of public creditors."

The section as he saw it, was "the only mode of throwing the slightest responsibility on the State Auditor and his board."

To another delegate the entire matter was better left to the legislature. If it was thought proper to make such a publication, to let them do it. And he urged that it "seems to me that it would be wrong to establish this principle in the Constitution, which would admit of no change except by the people." A motion to strike out the entire section was not agreed to.

The section was slightly amended but continued to be debated in the following form:

> An accurate and detailed statement, of the receipts and expenditures of the public money, and of the names of the persons who shall have received the same, together with the amount and the object for which they have received it, respectively, shall, from time to time be published, as shall be directed by law.

An attempt was made to substitute a comparable provision from the Constitution of 1802 reading as follows:

> An accurate statement of the receipts and expenditures of the public money, shall be attached to and published with the laws annually--amended by substituting "biennially" to accord with legislative sessions.

Proponents of the Convention draft pointed out that statements were to be published as directed by law. "The section left the whole thing in the hands of the General Assembly." If so, countered an opponent, "why not leave the matter as in the old constitution . . ." He argued that the Legislature should appoint an officer to oversee these accounts, as at present they were apparently only made upon faith of superintendents.

In support, said another, there had been a great deal of rascality in connection with the disbursement of the public revenue . . . connected with the construction of the public works. "But this body . . . put an effectual extinguisher upon that business, and they had guarded most carefully all the avenues by which the public treasury could be approached by the Legislature--therefore, it was not a legitimate argument to refer to what had heretofore transpired in connection with the construction . . . and apply it to our future operations."

A final version was considered and rejected. It read:

> An accurate statement of the receipts and expenditures of the public money, by the State, shall be published annually, in such manner as may be prescribed by law."

More discussion followed on the original requirement of publishing names of all public payees and the concluding spokesman on behalf of the proposition said he

had made a little calculation upon the subject and found that one hundred pages of ordinary size would contain ten thousand names, and there would not probably be more than that number of persons "who would have their hands to their elbows in the public crib." He supposed that a mere statement of the names of the payees and the sums paid would be sufficient; "and if the Board of Public Works see fit to go on and make a big book of it, we are not to blame."

Rational for Repeal or Revision

In his 1951 Report to the Wilder Foundation Dr. Harvey Walker said of this section that it seems "reasonable" but is a provision that belongs in the article on state finance.

Extensive portions of the debates regarding its inclusion in the Constitution of 1851 have been repeated in this memorandum because they demonstrate that the intent of including the provision was to meet particular problems of that day. For example, the purpose of requiring that no money be drawn from the treasury except in pursuance of an appropriation made by law was stated to be to "get clear of the power by which the Legislature in 1825 authorized the Auditor of State to levy a tax. . . to take away from the General Assembly all control over the people's money."

The section, like others, confers powers upon the General Assembly which it inherently possesses. If a provision of this sort is to be retained in the Constitution under the valid justification that minimum guarantees must often be retained for various purposes, its terminology ought to be reconsidered in the light of modern state operations and its placement in the article dealing with state finance should be recommended.

ARTICLE XV
Section 5

Present Constitution

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.

Recommendation

Repeal

History of Section

Section 5 of Article XV was originally proposed as Section 33 of the legislative report as follows:

> No person who shall fight a duel or assist in the same as second, or otherwise, shall be eligible to, or capable of holding any office of trust, honor, or profit.

The first objection to inclusion of this section noted that the General Assembly had power under another section (now section 4 of Article V) "to exclude from the privileges of an elector or being elected, any person convicted of perjury, bribery, or any other infamous crime . . ."

Another delegate argued that under the laws as they existed the subject was handled, but thought the section should stand in relation to dueling because he considered it a special crime, for which fixing a special stigma was appropriate. Another opponent of removal based his reason upon experiences in Kentucky. "In the history of that state," he said, "it has become necessary for the legislature, at almost stated intervals, to remove the disqualifications from duelists by passing new laws." He desired such a prohibition in the Constitution and not left to the control of the Legislature.

Opponents of retaining the provision argued that (1) dueling was not prevalent in Ohio; (2) the addition of such provisions to certain southern constitutions had not stopped the practice of dueling, as had been hoped; (3) criminal statutes already in existence were sufficient and the section was unnecessary; and (4) it was unfair to disenfranchise and disqualify a man who fought a duel at some distant time in his past. The latter objection led to the insertion of the word "hereafter." By another amendment acts of sending, accepting or carrying of a challenge were added--"the root of the veil" according to one spokesman.

One opponent put the case for rejection in terms with which this Committee has become very familiar when he said:

> The great danger in that Convention called to make a Constitution was that it would make a book of statutes instead of arranging those principles which should constitute the organic law of the State.

Dueling was, he said, for the legislature to provide against.

Rationale for Repeal

The section on dueling is wholly obsolete. The section is unnecessary in view of other qualifications that have been established by 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 prescribe qualifications for voting and for holding office. Furthermore, Section 4 of Article XV 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 legislature has inherent power to regulate eligibility to office by statute. The singling out of dueling was considered both outdated and violative of good constitutional draftsmanship when it was debated in the Convention of 1850-51

Statutory material should be deleted from the Constitution unless there exists some compelling reason for making an exception to such a rule. Little can be anticipated in the way of opposition to removal of a dueling provision of this sort.

OHIO CONSTITUTIONAL REVISION COMMISSION
LEGISLATIVE/EXECUTIVE COMMITTEE
NOVEMBER 16, 1972

ARTICLE XV

Section 2

Present Constitution

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.

Recommendation

Repeal

Section 2 of Article XV was first proposed to be incorporated into the legislative article by the appropriate committee of the Constitutional Convention of 1850-51 in the following form:

> The printing of the laws, journals, bills and other legislative documents for each branch of the Legislature, together with the printing required for the executive department, and officers of State, shall be let on contract to the lowest responsible bidder by the Secretary, Treasurer, and Auditor of State; the contract to continue for two legislative terms: and the mode and manner to be prescribed by law.

As subsequently adopted by the Convention and incorporated in the Constitution of 1851 it read:

> 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 by such executive officers and in such manner as shall be prescribed by law.

Convention Debates record extensive discussion on the need for having such a provision. Dr. Walker's point in the 1951 Report to the Wilder Commission that to single out public printing in this manner is inconsistent was made by delegates to the 1851 Convention, one of whom offered an amendment to strike the section as unnecessary. A substitute proposal was offered early in the proceedings to provide instead for an elected state printer. A proponent for the substitute offered the following explanation as to why the matter was before the convention:

> A large amount of time and money . . . has been spent at nearly every session of the General Assembly, in debating and wrangling and quarreling on the subject of State Printing. And in these fierce contests, what has been the question at issue? The <u>real</u> question generally has been, who shall do the printing, and not what prices shall be paid? Let us then . . . apply the proper remedy to this evil. Let us provide in the Constitution for the election of a State Printer by the people, and this disgusting and expensive strife must cease.[1]

The matter of state printing was referred to a select committee of three for further consideration and recommendation, but strong disagreement among its members is disclosed by several pages of recorded debate. Opponents of a report in favor of creating the office of elected state printer argued that contract printing had already proved to be more economical. One contrasted printing cost figures for the period of 1837 to 1845, inclusive, in which a state

printer was elected by the legislature with lower printing costs for the ensuing four years when the printing was let to the lowest bidder.

Proponents of having a state printer, elected by the people, argued that having the Legislature select the printer and fix the prices that the printer was to receive was far different from having the printer elected, with compensation to be fixed by general law. Moreover, they said, the past price comparisions were misleading because of recent improvements in printing that made it significantly cheaper. They favored total removal of printing questions from the legislative domain because of the enormous costs that had been incurred by delay and influence. Other delegates opposed any constitutional provision governing printing, urging that it be regulated by law.

Despite vehement opposition, however, the section on printing was sustained, much in its original form, and was incorporated by the Convention's Committee on Revision in Article XV, captioned "Miscellaneous."

Public printing was a subject under consideration by the Convention of 1912, also. Section 2 was amended to read as it does at present by adding the alternative provision allowing printing to "be done directly by the state in such manner as shall be prescribed by law." The final sentence was added at that time: "All stationery and supplies shall be purchased as may be provided by law."

According to the 1912 debates the legislature had established a department of public printing, headed by the supervisor of public printing, but because the Constitution required that printing contracts be let by executive officers, that supervisor had to present bids to the printing commission, composed of executive officers. The intention in amending Section 2 was said to be to eliminate red tape, facillitate printing awards, and let the legislature provide that the department of printing shall attend to this or adopt some other means. The concern in 1912 was that the General Assembly not be required to enact laws requiring executive officers to award printing contracts.

Furthermore, according to the record of the 1912 proceedings: "The idea is, when the volume of printing reaches such proportions that the state thinks it should be in the business itself, it should be able to do so. . .The idea is not to establish a printing department by the state now, but only to make it possible that when the time comes and the state wants to, it may be permitted to do so."

Finally, according to the 1912 record, the sentence pertaining to the purchase of stationery and supplies was added because of prior investigations that involved graft in the furnishing of such supplies. However, it is difficult to see how such a problem was solved by the added language.

The section was put into its present form by the Standing Committee on Arrangement and Phraseology of the 1912 Convention.

The statement was later made of the proposal that it "reads plainly that the state may do its own printing in a manner as may be provided by law. It may do it in any manner or form it sees fit."

Rationale for Repeal

As altered by the amendments of 1912 Section 2 is no longer a limitation upon the legislature and as an authorization is unnecessary. A state legislative body would have ample power to secure the same result without such a provision. Its presence in the Constitution is a clear illustration of the affixing of rigidity to the problems and policies of another age.

The language of Section 2 is clearly obsolete, having been first proposed to meet specific problems that disturbed critics of the legislature some 120 years ago, and subsequently amended 50 years ago to remove the original restrictions on legislative action that it imposed in this area. History reveals that even some delegates of the 1851 Convention regarded Section 2 as an unnecessary singling out of a subject matter that was within the province of the legislature to control. The original incorporation of Section 2 in the Ohio Constitution of 1851 is an example of what Albert L. Strum has called the addition of too much detailed matter to constitutions of the nineteenth century, reflecting popular distrust of state lawmaking bodies resulting from legislative excesses and abuses.[2]

Footnotes

1 2 Debates 582 (Feb. 12, 1951)

2 Albert L. Sturm, "Modern Constitution-Making and the 1851 Ohio Constitution," An Address delivered at an Open Public Meeting of the Ohio Constitutional Revision Commission, September 16, 1971

OHIO CONSTITUTIONAL REVISION COMMISSION
LEGISLATIVE/EXECUTIVE COMMITTEE
November 16, 1972

ARTICLE XV

Section 8

Present Section

There may be established in the Secretary of States* office, a bureau of statistics, under such regulations as may be prescribed by law.

* So in the original on file in the office of the Secretary of State

Recommendation

Repeal

History of Section

Section 8 of Article XV originated in the Constitution of 1851. In the Constitutional Convention drafting the new constitution it was originally proposed as an amandment to the legislative article for reasons stated as follows:

> "I believe. . . that the establishment of such a department would be productive of the most beneficial results. We have nothing of the kind now in the State except some fragmentary information collected by the Secretary of State, with regard to common schools. I believe that this bureau would develop one of the most useful institutions in Ohio -- would become a department more visited and referred to by citizens of all classes, than any other. The vast amount of valuable and accurate information, would be of the greatest service to the Legislature at each session, as a basis for all political, religious, educational, agricultural, financial and scientific calculations. Such a bureau would indicate the progress of the people -- the progress of art and science in Ohio."

Although the amendment was disagreed to at this point in the proceedings (with no objections to it recorded in the Debates) it was offered again as an addition to the report on the executive. Proponents viewed it as means of acquainting people of one section of the state with the wealth, health, and resources of other sections. Said one:

> "It would add little or nothing to the cost of government. At most it would be merely the salary of a clerk, and perhaps not even that. The mode of collecting the information would be through the assessors, and by a correspondence with citizens of different parts of the State."

It was said in behalf of this resolution that the State Board of Agriculture had failed to collect and disseminate agricultural intelligence power and that power should be given to the General Assembly to establish a bureau to superintend these matters and see that annual reports were made on time by persons competent to do so.

The section was later reported by the Committee on Revision as part of Article XV instead of Article II. No opposing views or questions as to its necessity are recorded in the published Debates of the Convention.

Rationale for Deleting

This provision 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 would have 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 statitics of any sort is not a matter of a fundamental nature. The provision is dated and obsolete, as is well illustrated by Convention debate concerning its inclusion.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
December 7, 1972

Ohio Constitutional Powers and Duties of Elected Executive Officials

The following is a compilation of the powers and duties of the elected executive officials in Ohio, as scattered throughout the Ohio Constitution.

Secretary of State

Art. II, Sec. 1a--duties re. amendments to Constitution proposed by initiative petition
Sec 1b--duties re. laws proposed by initiative petition
Sec. 1c--duties re. referendum on laws
Sec. 1g--duties re. initiative and referendum petitions, printing of proposed laws and amendments, together with arguments and explanations, their distribution, and placement of upon ballots
Sec. 11--duties re. filling of legislative vacancies
Sec. 16--filing of laws with secretary of State

Art. III, Sec. 4--returns of elections to be made to secretary of state if no g.a. in session
Sec. 13--countersigns Great Seal of Ohio
Sec. 20--report to governor 5 days preceding each regular session

Art. VIII, Sec. 8--member of commissioners of the sinking fund
Sec. 9--duties of commissioners of same
Sec. 10--duties of commissioners of same
Sec. 11--duties of commissioners of same
(Note: these sections would be repealed if the Debt recommendations are adopted.)

Art. XI, Sec. 1--member of apportionment board
Sec. 13--apportionment duties
Sec. 14--apportionment duties

Art. XV, Sec. 8--authorizes establishment of bureau of statistics in office under such regulations as may be prescribed by law

Art. XVII--Elections Article; nothing therein except as to term and vacancy

Art. XVIII, Sec. 9--certification of municipal charter or amendments thereto to sec. of state

Treasurer of State

Art. III, Sec. 20--report to governor 5 days preceding each regular session

Art. VIII, Sec. 8--member of commissioners of the sinking fund
Secs. 9, 10, 11--duties of commissioners of same
(Note: These sections would be repealed if the Debt recommendations are adopted.)

Auditor of State

Art. III, Sec. 20--report to governor 5 days preceding each regular session

Art. VIII, Sec. 8--member of commissioners of the sinking fund
Secs. 9, 10, 11--duties of commissioners of same
(Note: These sections would be repealed if recommendations on Debt are adopted.)

Art. XI, Sec. 1--member of apportionment board
Sec. 13--duties of same
Sec. 14--duties of same

Attorney General

Art. III, Sec. 20--report to governor 5 days preceding each regular session

Art. VIII, Sec. 8--member of commissioners of the sinking fund
Secs. 9, 10, 11--duties of commissioners of same
(Note: These sections would be repealed if recommendations on Debt are adopted.)

Ohio Constitutional Revision Commission
Legislative-Executive Committee
January 18, 1973

Research Study No. 21

THE ATTORNEY GENERAL: HIS PROSECUTION FUNCTION AND CONSTITUTIONAL SPECIFICATION OF DUTIES

According to the most recent compilation of the Council of State Governments in its second supplement to the 1970-71 Book of the States, the attorney general is an elective office in 42 jurisdictions. He is appointed by the governor, with approval of the legislature in Alaska, with senate approval in Hawaii, New Jersey, Pennsylvania, and Wyoming, and with Council concurrence in New Hampshire. The legislature elects the attorney general of Maine, and the Supreme Court appoints the attorney general of Tennessee.

Byron Abernathy, in his 1960 examination of questions concerning the constitutional state executive, notes that "it appears that as far as the states are concerned, the office of attorney general tends very definitely to remain an office which is largely independent of the governor." Revision activities prior to 1960 had not changed his status, and the New Jersey revised constitution of 1947, although it retained the plan for gubernatorial appointment, established additional independence for the attorney general by providing that appointment be for the governor's term of office, and not at the pleasure of the governor.

On the other hand, Abernathy acknowledges that the thesis of most students of state administration, including drafters of the Model State Constitution, is that "the attorney general should be at the head of a state legal department which should embrace the apprehension and prosecution of all criminals, as well as the providing of legal advice to public officials, and representing the state in legal matters to which it is a party; that as such he should supervise local prosecuting attorneys; and that he should be appointed by, responsible to, and removable by the governor, in the same manner as the heads of other administrative departments." The Constitutions of the two newest states--Hawaii and Alaska--provide only for the governor and lieutenant governor in the executive branch with other executive and administrative offices, departments and their jurisdictions.

Yet a significant percentage of governors and attorneys general polled by Abernathy favored retention of the post as an elective one. This result, plus the fact that states that had revised their constitutions had retained elective attorneys general, led the writer to call for "a deeper look at the nature of this office in state governments, at all its functions, its political significance, and so on, before the conclusion is lightly reached that it should be made subordinate to the governor."

When he attempts to set forth the duties of the attorney general in American states, Abernathy points out that adherents of appointment stress administrative responsibilities--giving legal advice to the governor and other state officers, representing the state in litigation and sometimes supervising local prosecutors--while proponents of an elective attorney general emphasize that the office is more than ministerial, "that its responsibilities go beyond and embrace something of the judicial and perhaps even of the representative; that the attorney general is not solely the governor's attorney, or even solely his administration's attorney, but is, rather, the peoples' and the state's attorney, responsible to maintain and protect the interests and rights of the people and of the state as against the governor and his administration as well as to serve state officials in their execution of the state's laws."

However, notes Abernathy, "one looks in vain for any truly comprehensive empirical study and analysis of the duties and responsibilities of this office in American states." And he concludes with the advice that "states concerned with revision of their constitutions need to take a careful look at the duties and responsibilities assigned to the attorney general, and be careful to see that the office is not provided for in a manner inconsistent with the nature of the duties and responsibilities assigned to it."

Research Study No. 20 contains frequent references to and quotations from a report of the National Association of Attorneys General, published in 1971, and containing the findings of a two year study by that body of the powers, duties and operations of the office of the attorney general in the 50 states. Each attorney general was asked to name a staff member to serve as liaison with the Association's Committee on the Office of the Attorney General (referred to in the Report and hereafter as C.O.A.G.), and the foreword to the lengthy document that was produced reports that all did so or undertook to perform this function themselves. Committee Chairman John B. Breckinridge notes that in addition to the usual scholarly and legal sources, his Committee and its staff made extensive use of questionnaires in an attempt to put together a comprehensive body of definitive literature on the organization, powers, and duties of the office of state attorney general.

In Ohio the attorney general was first created by statute in 1846. His duties, as set forth in 44 Ohio Laws at page 45, were as follows:

> "Sec. 3. He shall appear for the state in the trial and argument of all causes, criminal or civil, and in chancery, in the supreme court in bank, in which the state is a party for itself or for any county, or wherein the state shall be interested.
>
> Sec. 4. He shall, also, when required by the governor, or either branch of the legislature, appear for the state in any court or tribunal, in any causes, criminal, civil, or in chancery, in which the state may be a party, or interested.
>
> Sec. 5. He shall, at the request of the governor, secretary, auditor, or treasurer of state, prosecute every person who shall be charged, by either of those officers, with the commission of an indictable offense, in violation of the laws which such officer is specially required to execute, or in relation to matters connected with his department.
>
> Sec. 6. He shall cause to be prosecuted the official bonds of all delinquent officeholders in which the state may be interested.
>
> Sec. 7. He shall give legal opinions to the governor, to the heads of the several departments of the state government, the board of public works, the canal fund commissioners, and to the legislature, or either branch thereof, when required thereto.
>
> Sec. 8. Upon complaint made to him that any incorporated company, by any act of nonuse, has offended against the act relating to information in the nature of quo warranto, or any other law which hereafter may be enacted therefor, it shall be the duty of the attorney general to inquire into the cause for it, he shall cause proceedings in quo warranto to be instituted and prosecuted against such incorporation.

Sec. 9. If he shall have knowledge that any incorporated company has so offended against such law, or whenever he shall be instructed by the supreme court, or by either branch of the legislature, to institute proceedings in quo warranto against any incorporated company, it shall be his duty to cause such proceedings to be instituted and prosecuted against such incorporated company.

Sec. 10. It shall be his duty to prosecute all assessors, and other officers connected with the revenue laws of the state, for all delinquencies and offences against such laws that come to his knowledge.

Sec. 11. It shall be his duty, whenever requested by the governor, secretary treasurer, or auditor of state, to prepare proper drafts for contracts, obligations, and other instruments which may be wanted for the use of the state.

Sec. 12. It shall be the duty of the prosecuting attorney of the proper county, on the requirement of the attorney general, to institute suits and prosecutions directed by this act, and to assist the attorney general in preparing the same for trial, and in the prosecution thereof.

Sec. 13. It shall be the duty of the attorney general to consult with, and advise the prosecuting attorneys of the several counties, when requested by them, in all matters appertaining to the duties of their offices."

The legislation further required prosecuting attorneys to make annual crime statistics reports to the attorney general, "specifying the number of persons prosecuted, the crimes for which they were prosecuted, the results thereof, the punishment awarded therefor, and the costs thereof, specifying what portion, if any, of such costs have been, or probably will be collected of the offenders or their sureties, and also what proportion of the offences prosecuted were occasioned by, or committed under the influence of intemperance."

It also required the attorney general to make annual reports to the general assembly of all official business done by him in the preceding year and of the statistical information that he received from the counties.

The attorney general became a constitutional officer in the Ohio Constitution of 1851. However, the published proceedings and debates of the 1850-51 Convention record no discussion of delegates' views concerning the powers and duties of the office. One reference appears to the statutory creation of the office but without mention of the duties which the legislation had created. Neither the proceedings of the Convention of 1873-74 nor the Convention of 1912 reveal concern with the attorney general's powers and duties, which have, as indicated in Research Study No. 20, evolved by statute.

Case law defining the attorney general's powers and duties is sparse in Ohio. The encyclopedia description of the duties of the office in Ohio Jurisprudence adds little to what may be found by going to the Ohio Revised Code for an enumeration of the responsibilities of the office. Ohio Jurisprudence, in section 2 of its article on the attorney general in volume 6 states: "It is provided by statute that the Attorney General is the chief law officer for the state and all its departments."

Footnoted cases are said to establish the rule that "in the exercise of the police power of the state the General Assembly may delegate to the Attorney General such legal, administrative, or executive duties as it deems best, and which are not otherwise delegated by the Constitution.

State ex rel. Doerfler v. Price, 101 Ohio St. 50 (1920) is the source of this rule. It was an action challenging the constitutionality of statutes vesting the attorney general with rights and powers of a prosecuting attorney in matters which the attorney general is required by the governor or general assembly to investigate or prosecute. The court said in Syllabus 5: "The prosecution of crimes and offenses for the violation of the criminal laws of the state of Ohio is a state function and not a county or municipal function. It calls for the exercise of the state police power, in which county officers have only such powers as may be delegated to them." The statutory delegation of powers to the attorney general was held not to contravene the constitution because the attorney general is a constitutional officer, chargeable with duties prescribed by law, and the prosecuting attorney is not.

Another common pleas decision is said to establish the rule that the attorney general is without power to impanel a grand jury to investigate alleged violations of the law making it an offense for two or more persons to conspire to defraud a political subdivision of Ohio. See State v. Lucas, 39 Ohio Ops. 519 (C.P. 1949). However, the question depended upon the interpretation of statute and the extent of authority which it conferred, the court holding that it seemed to confer sole jurisdiction upon county law enforcement officers to prosecute conspiracies pertaining to county funds.

No study or analysis of the duties and responsibilities of the Ohio attorney general has been found to exist.

It is to the N.A.A.G. Report, then, that one logically turns first to find out about the functions of the office of attorney general in the various states. This report is both recent and thorough and involved the input of many state officials.

An earlier memorandum used the Report as a starting point to discuss the advisory function of the state attorney general, specifically the status and effect of the attorney general's opinions. This one will examine the prosecution function of the state attorney general, and will use as its reference point an extensive chapter of the 1971 Report that deals with that topic.

Chapter 2.2 discusses the relationship of state attorneys general to local prosecutors. It begins:

> "The Attorney General's relationship to local prosecutors ranges from complete control in those states where they are under his jurisdiction to a complete absence of formal contact in some states. His role in local prosecutions ranges from complete responsibility for such actions in some states to an absence of authority to intervene in or initiate prosecution in others."

Tables reproduced from the Report and appended to this memorandum show the attorney general's relationship to local prosecutors in the various states. The point stressed in Chapter 2.2 is:

"There is a commonality of interest between the Attorney General and local prosecutors, whatever the legal relationships may be in a particular jurisdiction. Both are public prosecutors, subject to legislative definition of powers and duties and to judicial definition of the law and procedure."

Cited are the recommendations of a variety of other studies for strengthening the attorney general's relationship to local prosecutors. The President's Commission on Law Enforcement and Administration of Justice in The Challenge of Crime in a Free Society (February, 1967) said, at page 149:

"States should strengthen the coordination of local prosecution by enhancing the authority of the state attorney general or some other appropriate statewide officer and by establishing a State council of prosecutors comprising all local prosecutors under the leadership of the attorney general."

The American Bar Association's Advisory Committee on the Prosecution and Defense Functions in 1970 reportedly concurred that local prosecutors should consult with the Attorney General "in cases where questions of law of statewide interest or concern arise which may create important precedents . . ."

Observes the Report: "Both the A.B.A. and the President's Commission favor retaining local prosecutors, but making the Attorney General responsible for improving coordination. This is a different position than that taken by earlier reports, which tended to favor centralization."

Another recent recommendation for centralization was that of the Advisory Commission on Intergovernmental Relations, as part of its study of state-local relations in the criminal justice system. Under its recommendation of September 11, 1970, the local prosecution function would be centralized in a single office, responsible for all criminal prosecutors.

In his consultant's report attached to the N.A.A.G. Report, Samuel Dash, Professor Law and Director, Institute of Criminal Law and Procedure, Georgetown University Law Center, stresses the need for statewide services to buttress and strengthen local law enforcement efforts in the area of "street crime" - usually handled at the local level in most states. As to "organized and white collar crime," he urges:

"It is obvious from the information included in the regular staff report that the launching of a successful campaign against organized crime or white collar crime is too large a responsibility for a local prosecutor. Organized crime, especially, involves statewide conduct, as well as conduct of an interstate nature. Only a marshaling of the forces of the entire state can effectively begin to combat this form of crime."

For this purpose, Dash urges conferences conducted by the state attorney general, his participation in any federal task force on organized criminal activities that are taking place in the state, and the implementation of centralized data record systems.

Since 1846, when the office of Ohio attorney general was created, the attorney general's duties have been prescribed by statute. Present Revised Code section 109.02 has clear origins in this early legislation. Sections 3, 4, and 5 of the original act are retained in that section in its present form in the following terms: "The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

Similarly, the provision of Revised Code section 109.09 that the attorney general shall "prosecute any officer for an offense against the revenue laws of the state that come to his knowledge" is a restatement of section 10 of the 1846 law. The duty to consult with and advise prosecuting attorneys from section 13 of the original legislation can now be found in Revised Code section 109.14.

In Ohio, as in most states, the prosecutorial function of the attorney general and his relationship to local prosecutors has long been prescribed by statute and has not been governed by constitutional provision. The same is true of his advisory and representative capacities. The only case law concerning the duties and responsibilities of the Ohio attorney general has been, as indicated above, interpretative of the pertinent statute.

Table 2.3 of the Report, appended to this memorandum, shows that most state attorneys general may initiate local prosecutions in at least some circumstances. In Ohio by statute the attorney general may do so on request of the governor. According to the C.O.A.G. survey of local prosecutors and state attorneys general, a large percentage of both groups polled believe the state attorney general should be able to initiate local prosecutions, especially of an "inter-jurisdictional nature."

While a great deal of material concerning the duties and responsibilities of the state attorney general appears in the N.A.A.G. report, in the form of state-by-state tables and text concerning his role as state prosecutor and the special functions and duties that have been conferred upon the state attorney general in the areas of environmental control, consumer protection, and antitrust, little distinction is made in the Report between powers and duties that are constitutionally prescribed and those which have been added to the office by statute. Text and tables recognize the nearly universal existence of functions that are of a prosecuting nature and report that in some states the attorney general has assumed certain powers in the absence of statute. In Ohio, however, the attorney general's powers clearly derive from statute. Chapter 3767. of the Revised Code, for example, relative to the abatement of nuisances, gives the attorney general specific authority to abate a nuisance and provides further that as used in all sections of the Revised Code relating to nuisances the term nuisance means that which is defined and declared by statutes to be such. There are a great many provisions in other parts of the code which specifically charge the Attorney General with the enforcement of particular statutes. They are cited, along with the little case law involving their interpretation in section 15 of the Ohio Jurisprudence article concerning the Ohio attorney general. 6 Ohio Jur. Attorney General 15.

In most state constitutions, as in Ohio, the attorney general is classified as an executive official. In the states where the office is constitutionally recognized the most common provision relative to general duties and responsibilities

(other than specific provisions for membership on given state boards or to make reports to the Governor, as found in the Ohio and other state constitutions) is some form of the statement retained in the Virginia Constitution of 1970 that the attorney general "shall perform such duties . . . as may be prescribed by law." Va. Const. Art. VI, Sec. 15. States with similar constitutional provisions include the following:

Alabama	Art. V, Sec. 137
Arizona	Art. V, Sec. 1
Arkansas	Art. VI, Sec. 22
Georgia	Art. V, Sec. 2-3102
Idaho	Art. IV, Sec. 1
Kentucky	Sec. 91
Minnesota	Art. V, Sec. 5
Montana	Art. VII, Sec. 1
Nevada	Art 5, Sec. 22
North Carolina	Art. III, Sec. 7
North Dakota	Art. III, Sec. 83
Oklahoma	Art. VI, Sec. 1
Rhode Island	Art. VII, Sec. 12
South Carolina	Art V, Sec. 28
South Dakota	Art. IV, Sec. 13
West Virginia	Art. VII, Sec. 18
Wisconsin	Art. VI, Sec. 3

The new Illinois Constitution contains a slight variant of such a provision. Section 15 of Article 5 reads: "The Attorney General shall be the legal officer of the State and shall have the duties and powers that may be prescribed by law."

The Utah and Washington provisions are similar: "The Attorney General shall be the legal advisor of the State officers, and shall perform such other duties as may be provided by law." Utah Const. Art. 7, Sec. 18; Wash. Const. Art. III, Sec. 21.

The Florida Constitution of 1968 merely provides: "The attorney general shall be the chief state legal officer." Art. 4, Sec. 4(c)

In Delaware the attorney general is an elected officer in the executive article of the Delaware Constitution but is described, along with the chancellor and judges as "conservators of the peace throughout the state" (Art. XV, Sec. 1) and required to bring prosecutions for election offenses. Del. Const. Art. 5, Sec. 8.

The following state constitutions establish the office of attorney general but neither describe nor provide for general duties: Kansas, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, New York, Pennsylvania, and Tennessee.

Other, more detailed constitutional provisions are as follows:

California - Art. 5, Sec. 13 - Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the State are uniformly and adequately enforced. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such reports concerning the investigation, detection, prosecution and punishment

of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties.

Louisiana - Art. VII, Sec. 55 creates a Department of Justice, headed by the Attorney General and manned by assistants. Section 56 provides: ". . . They, or one of them, shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. They shall exercise supervision over the several district attorneys throughout the State, and perform all other duties imposed by law."

Maryland - Art. V,Sec. 3 - It shall be the duty of the Attorney General to prosecute and defend on the part of the State all cases, which at the time of his appointment and qualification and which thereafter may be pending in the Court of Appeals and the intermediate courts of appeal, or in the Supreme Court of the United States, by or against the State, or wherein the State may be interested; and he shall give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney, on any legal matter or subject pending before them, or either of them; and when required by the Governor or General Assembly, he shall aid any State's Attorney in prosecuting any suit or action brought by the State in any Court of this State, and he shall commence and prosecute or defend any suit or action in any of said Courts, on the part of the State, which the General Assembly, or the Governor, acting according to law, shall direct to be commenced, prosecuted or defended, and he shall have and perform such other duties and shall appoint such number of deputies or assistants as the General Assembly may from time to time by law prescribe . . ."

The Texas electorate had before it in November, 1972 a fairly specific statement of duties for the attorney general in proposed section 22 of Article IV, that included the provision for such other duties as may be required by law.

This group of constitutional provisions appears to contain much undesirable, statutory material.

Both Michigan and New Jersey adopt the MSC departmental approach. The Michigan Constitution reads in part: ". . . The single executives heading principal departments shall include a secretary of state, a state treasurer, and an attorney general . . ." Art. V, Sec. 3.

In New Jersey where the attorney general is appointive, the provision reads: "All executive and administrative offices, departments and instrumentalities of the State Government, including the offices of Secretary of State and Attorney General, and their respective functions, powers, and duties, shall be allocated by law among and within nor more than 20 principal departments, in such manner as to group the same according to major purposes so far as practicable . . ." Art. 5, Sec. 4, par. 1.

Similarly, the Nebraska Constitution provides: "The executive officers of the State shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of

Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish . . ."

May the Attorney General Initiate Local Prosecutions?

Alabama	Yes-Ala. Code tit. 55 sec. 235, on own initiative
Alaska	Yes-(No local prosecutors)
Arizona	Yes-Only on request of Governor
Arkansas	Yes-Only under certain statutes, on own initiative
California	Yes-On own initiative
Colorado	Yes-Only on request of Governor
Connecticut	No-Attorney General has no jurisdiction in criminal matters
Delaware	Yes-(No local prosecutors)
Florida	No, but Attorney General may initiate quo warranto proceedings
Georgia	Yes-On own initiative
Guam	Yes-(No local prosecutors)
Hawaii	Yes-On own initiative or at direction or request of Governor
Idaho	No
Illinois	No
Indiana	Yes-When interests of public require it
Iowa	Yes-On own initiative
Kansas	Yes-Only under certain statutes
Kentucky	Yes-Under some statutes for specific crimes
Louisiana	Yes-In criminal cases, when the interests of the state require
Maine	Yes-On own initiative
Maryland	Yes-On request of Governor or Legislature
Massachusetts	Yes
Michigan	Yes-May initiate and conduct criminal proceedings
Minnesota	Yes-At request of Governor; assists county attorney on request
Mississippi	Yes-When required by public service or directed by Governor
Missouri	No
Montana	Yes
Nebraska	Yes-Has concurrent power with county attorney
Nevada	Very infrequent-Only in extreme cases
New Hampshire	Yes-On own initiative; direction of Governor, Legislature, or local prosecutors
New Jersey	Yes-When interest of state requires it
New Mexico	Yes-Only under certain statutes
New York	Yes-Only under certain statutes, on own initiative, at request of Governor or Legislature
North Carolina	Yes-Only for violations of Monopolies and Trust Laws
North Dakota	Yes-On own initiative, or request of County Board, 25 citizens, doctor, judge
Ohio	Yes-On request of Governor
Oklahoma	Yes-On request of Governor or either branch of Legislature
Oregon	Yes-Only on request of Governor
Pennsylvania	Yes-under certain circumstances
Puerto Rico	Yes

Rhode Island	Yes-(no local prosecutor)
Samoa	Yes-(no local prosecutor)
South Carolina	Yes-on own initiative
South Dakota	Yes-On own initiative
Tennessee	No-(but Governor may appoint extra counsel at District Attorney's request)
Texas	Yes-for election fraud, labor union crimes, misuse of state funds
Utah	Yes-On default of local prosecutor
Vermont	Yes-Undecided if dispute exists over who will prosecute
Virgin Islands	Yes-(no local prosecutors)
Virginia	No
Washington	Yes-On lobbying law, or when prosecuting attorney fails to take proper action; also for certain acts of city or state officers in connection with public funds
West Virginia	No-But Attorney General may replace Prosecuting Attorney if he refuses to prosecute
Wisconsin	Yes-On request of Governor or local prosecutor
Wyoming	Yes-Only for removal of county officer at Governor's request

Attorney General's Powers in Proceedings Initiated by the Local Prosecutor

Alabama	May intervene or assist in criminal cases at any time he considers proper
Alaska	(No local prosecutors)
Arizona	May assist on request of local prosecutor
Arkansas	May act jointly with local prosecutor under certain statutes
California	May intervene, supersede or assist on own initiative
Colorado	May intervene on request of Governor or legislature. May assist on request of local prosecutor with direction of Governor
Connecticut	No jurisdiction in criminal matters
Delaware	(No local prosecutors)
Florida	May intervene upon request of local prosecutor, at direction of Governor or legislature
Georgia	May not intervene or supersede
Guam	(No local prosecutors)
Hawaii	May intervene or assist on own initiative or at direction or request of Governor
Idaho	May assist upon request of local prosecutor; may not intervene or supersede. May be appointed as special prosecutor when local prosecutor cannot act
Illinois	May intervene in any prosecution if state's interest requires it
Indiana	May assist in criminal cases upon request of local prosecutor
Iowa	May intervene on own initiative; may supersede on direction of Governor, legislature, or either house thereof. May assist on request of local prosecutor
Kansas	May intervene on direction of Governor or either branch of the legislature. May institute action or intervene on own initiative on behald of any political subdivision in action for conspiracy, combination or agreement in restraint of trade.
Kentucky	May intervene on request of Governor, courts or grand juries, sheriff, mayor or majority of a city legislative body
Louisiana	May intervene only when the local prosecutor is unable or unwilling to perform his duties; may not supersede; may assist
Maine	May intervene, supersede or assist on his own initiative
Maryland	May assist on request of local prosecutor or at the direction of of the Governor
Massachusetts	May intervene, supersede or assist on his own initiative. May initiate proceedings independent of local prosecutor.
Michigan	May intervene or initiate on own initiative or at direction of Governor or legislature; will assume jurisdiction when requested by prosecuting attorney.
Minnesota	May intervene or assist at direction of Governor or local prosecutor
Mississippi	May intervene or assist at direction of Governor or when required by the public service
Missouri	May intervene or supersede at the direction of the Governor; may assist local prosecutor

Montana	May intervene or supersede on own initiative or at the direction or request of the local prosecutor
Nebraska	May intervene, assist or supersede
Nevada	May intervene when necessary to determine the state's or peoples' rights in water or public lands. May supersede on own initiative
New Hampshire	May intervene, supersede or assist on own initiative, or on direction of Governor/legislature. Has full responsibility for criminal cases punishable with death or imprisonment for twenty-five years or more.
New Jersey	When, in his opinion, the interests of the state will be furthered by so doing (1970 Statute).
New Mexico	May intervene or assist on direction of Governor
New York	May intervene or supersede at direction of Governor
North Carolina	No statutes or case law in point
North Dakota	May intervene, supersede or assist on own initiative; on request of majority of board of county commissioners; on petition of twenty-five taxpaying citizens; on written demand of district judge.
Ohio	May appear for state in all cases in which the state is directly or indirectly interested. May appear in any court on direction of Governor or legislature.
Oklahoma	May appear in any case at direction of Governor or legislature and may, at his discretion, supersede. May assist at request of local prosecutor.
Oregon	May intervene. Attorney General is charged with responsibility of supervising all District Attorneys; however, may only intervene in particular prosecution when directed by Governor or requested by district attorney.
Pennsylvania	May assist. May supersede on own initiative or at request of local judge.
Puerto Rico	May intervene on own initiative
Rhode Island	(No local prosecutors)
Samoa	(No local prosecutors)
South Carolina	May intervene or supersede in any case where state is a party
South Dakota	May intervene or assist in any case where the state has an interest on own initiative or on request of Governor or legislature. May not supersede.
Tennessee	May not intervene, supersede or assist, except that additional counsel may be appointed by the Governor upon request of the District Attorney.
Texas	May assist in or initiate some cases. May not intervene or supersede.
Utah	May intervene when required by the public interest or directed by the Governor.
Vermont	May assist, intervene or supersede on own initiative; appears by invitation.
Virgin Islands	Full power, except for felonies, which are handled by U. S. Attorney.

Virginia	May intervene at request of Governor, or on own initiative in cases involving ABC laws, Motor Vehicle Laws and the handling of state funds.
Washington	May intervene on own initiative when the interests of the state require it.
West Virginia	May intervene or supersede on request of Governor. Apparently, assistance is limited to instances where local prosecutor is disqualified.
Wisconsin	May not intervene on own initiative. May assist at request of District Attorney and intervene otherwise at the direction of the Governor.
Wyoming	May not intervene or supersede.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
February 8, 1973

The Secretary of State: Duties and Relationship to State Government

From 1802 until 1851 the Ohio Secretary of State was elected by joint ballot of the General Assembly for a three year term. His duties under the Ohio Constitution of 1802, as prescribed by Section 16 of Article II were "to keep a fair register of all the official acts and proceedings of the governor..." and "when required, lay the same, and all papers, minutes, and vouchers relative thereto, before either branch of the Legislature." Finally, he was also required to "perform such other duties as shall be assigned him by law."

The Constitution of 1851 made the Secretary of State and elective office and eliminated the general language as to duties. Other provisions scattered throughout the Ohio Constitution contain references to the Secretary of State and establish some of the elements of his relationship to the executive branch and to state government. Initiative and referendum petitions are required to be filed in the office of the Secretary, and he is required to take specific action with them by virtue of Sections 1a, 1b, and 1c of Article II. Duties with respect to laws submitted by referendum petition and proposed laws and constitutional amendments are specified in Section 1g:

> The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail, or otherwise distribute, a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution...The foregoing provisions of this section shall be self-executive, 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.

Under Section 11 of Article II the Secretary of State has the further specific duty to issue a certificate to the person selected to fill a legislative vacancy. Sec. 16 of Article II provides that it is in the Secretary's office that laws are filed after passage and signature.

Section 4 of Article III, the executive article, says that the returns of an election for state officers shall be made to the Secretary of State if the General

Assembly is not in session "and opened, and the result declared by the Governor, in such manner as may be provided by law." In other executive article provisions, (Sections 13 and 20), the Secretary countersigns the Great Seal of the State and, along with other executive officers, makes reports to the Governor.

Under Article VIII the Secretary, along with other executive officers, is a member of the commissioners of the sinking fund (sections would be repealed if debt recommendations are adopted) and under Article XI, with some other executive officers and some legislative leaders, he is a member of the apportionment board.

Section 9 of Article XVIII provides for certification of municipal charters or amendments thereto to the Secretary of State.

By virtue of statute, the Secretary of State has numerous responsibilities. Ohio corporation laws require that proceedings for the organization and operation of all corporations involve filings in the office of the Secretary of State. The Secretary is also chief filing officer under the Uniform Commercial Code. As constitutional custodian of all laws and resolutions passed by the General Assembly, the Secretary compiles and prints the session laws of the Ohio General Assembly.

Functions attached to the office of Ohio Secretary of State include powers and duties relating to the registration of voters and the conduct of election, in the Secretary's role of "chief election officer of the state," as he is designated by Section 3501.04 of the Ohio Revised Code.

At its meeting on December 7, 1972, the Legislative-Executive Committee voted to retain the present elected officials in the executive article, but inasmuch as the Committee did not reach the question of the duties that attach to each office, some members would consider the vote upon the office of Secretary of State, at least, as a tentative one in that the question of whether the Secretary has an elections function is intertwined with the question of whether the office ought to be filled by election or appointment. In the view of at least one member, the Secretary should continue to be elected if the duties of office include being the chief elections officer of the state. If they do not, the office ought to be an appointive one.

Because of this special question relating to the Secretary of State, additional research has been conducted as to the constitutional and statutory duties attached to the office in other states. In addition, this memorandum examines some of the problems that have elsewhere been considered as related to the choice between an elective and appointive Secretary of State and some proposals for reform that have been weighed in other constitutional revision studies.

In addition, this memorandum examines some of the problems related to the choice between an elective and appointive secretariat and some points that have been advanced in other studies of this subject.

In a 1968 governmental research publication from the University of Kansas, Govt. Research Center,[1] James T. Havel contrasts two views about the functions of the state secretary of state. Some students of government have subscribed to the traditional view of the secretary's duties as clerical and basically ministerial in nature. Of this position he writes:

"Those scholars, public officials, and politicians who describe the duties of secretaries of state as ministerial, administrative, and routine generally maintain that the office of secretary is essentially a depository for public documents. As an office of record, its duties are important, but largely of a housekeeping nature. The secretary's responsibilities, they suggest, are so closely defined by law, that he is allowed almost no leeway to formulate public policy. To them, he is basically a filing officer, performing relatively simple clerical functions, executing directives issued by others--particularly the Governor and state legislature..."

Such a view of the office of secretary of state as a depository of records has, according to Havel, logically questioned popular election as a means of selection.

On the other hand, according to this commentator, the opposing view, which sees the secretary as an important policy maker, has contemporary support among both political scientists and politicians. Its spokesmen reject the traditional distinction between administration and policy making as unreal, he says. They see, besides a covert policy influence in the interpretation, enforcement, and implementation of statutory obligations, a more direct role for state secretaries of state in areas assigned to that office.

Says Havel, "According to those who emphasize the secretary's policy-making role, his intimate involvement with the administration of elections permits him the necessary latitude to make decisions of considerable political and policy import."

Furthermore, "nowhere, they suggest, is his influence over public policy more far-reaching or less visible to the casual observer than in the area of his appointive and ex officio board responsibilities...Unfortunately, say the scholars and governmental officials accentuating this point, these board memberships are frequently so far removed from other secretarial duties that their policy implications are commonly overlooked by students concerned with the office..."

Havel sums up the dichotomy:

"As is usually the case in most controversies, there appears to be an element of truth in both of the positions...Certainly, the secretary of state as a policy maker cannot be classified as an equal of the Governor or even, in most statesm as the equal of the attorney general. Many of his duties seem purely ministerial. The maintenance of public records, for example, is hardly a function demanding the exercise of significant discretionary authority. In some states, the secretary makes almost no policy of consequence, although it seems likely that he can, at times, influence policy decisions in every state. Thus, the proponents of the prevailing opinion of the secretary of state's limited policy role rightly assert that his most common duties are basically administrative.

On the other hand, they may be justifiably criticized for unduly demeaning the policy-making potential of the office in the vast area of miscellaneous, and often highly important, duties assigned to secretaries in individual states. The secretary of state, in many states, is a policy-maker of considerable import, just as the minority position avers. Those persons

> who argue that the secretary does exercise noteworthy influence in the affairs of state also seem to be correct in claiming that the secretaryship has not received sufficient attention from scholars to validate the conclusions about its character which find expression in most state government and public administration texts.

What then is the appropriate role of a Secretary of State? Asks Havel: "Should secretaries perform a wide variety of miscellaneous duties or should they be restricted to essentially clerical and record-keeping tasks? Should their responsibilities include service on ex officio and statutory boards whose duties are basically unrelated to their main functions? Should they be policy-makers or policy executors, or both?"

Acknowledging variations on a theme, Havel characterizes the positions on the proper role as falling within two camps which he designates as legitimists on the one hand and pragmatists on the other. In the legitimist camp, he generalizes, are primarily students of state government; in the pragmatist camp are government officials, legislators, and politicians, "who are less concerned with the theory of administrative integration than with the solution to immediate, and often pressing, governmental problems."

In the legitimist view, the secretary should be chief clerk of government, a secretary in the dictionary definition sense, the maintainer of official records. Says Havel:

> Legitimists would curtail the various non-clerical and non-custodial activities of secretaries of state and confine them to relatively simple and routine tasks. The secretary would be reduced, in essence, to an amanuensis for the state executive. His office would cease to be functionally eclectic--the recipient of duties haphazardly, irrationally, or sometimes even whimsically assigned by state legislatures. Instead, they would restructure the department of state so that its functions would be more closely interrelated. Such a department, exorcised of the spirit of amalgam, would, they content, follow the classical textbook description of a well-integrated, co-ordinated, and efficient service agency for state administrators.

Pragmatists, on the other hand, view the secretary of state as much more than a chief clerk. To them the office is a logical place to assign diverse duties, often on a temporary basis, and the tests they rely upon for secretarial performance are effectiveness and usefulness.

Again, in summary, Havel points out:

> "Despite their disagreement over the merits or shortcomings of the present structure and operation of state departments of state, most legitimists and pragmatists agree that the secretarial office doew perform a wealth of unrelated tasks. Adherents of both positions recognize that secretaries of state must commonly divide their time between their duties as secretaries and their responsibilities as members of ex officio and statutory boards. They acknowledge the policy-making aspects of the secretarial position in some states,--although they may not concur on the significance of the decision-making authority the secretary possesses, But where the two

positions differ most markedly is in their assessment of the appropriate role a secretary of state should play in state governmental affairs. The legitimists would like to diminish the secretarial role and relegate this official to the classification of chief scribe and archivist for the state. Conversely, the pragmatists defend the status quo. In fact, some would even increase his stature by granting him additional duties and accentuating the tendency to make his office a holding company for inchoate public programs. It is hardly surprising, then, to find that suggestions for improving the structure and operation of state secretariats commonly reflect the conflicting perspectives of the legitimists and the pragmatists."

Constitutional revision commissions, governmental reorganization committees, and others have considered a variety of proposals for altering the relationship of the secretar of state to the governor and to state government. Studies early in the century called for abolition of the office. More recent proposals acknowledge the impracticality and undesirability of such an approach, but call for administrative reform. The method of selecting the secretary "has been the subject of one of the most persisting debates relating to the secretarial office," writes Havel. He notes,"One of the major arguments advanced in favor of the popular selection of the secretary of state is that his office has more policy making authority than commonly recognized, particularly in the important areas of elections, corporation regulation, securities, and professional licensing."

There is apparent greater continuity in office for elective secretaries than for appointive secretaries, and the proponents of an elective secretariat use this premise to argue that the elective office staff is hence a more stable one. The fact is also cited by proponents of popular election "as an important asset to a viable two-party system on the state level." Finally, direct popular election, say its supporters, serves an educational function in that election provides an opportunity to inform the electorate of the functions and powers of the office.

Proponents of an appointive secretary have argued that: (1) an elective official may decrease executive efficienty and harmony; (2) apathy towards the nature of the job complicates an intelligent and rational choice between contenders; (3) the relatively low remuneration does not compensate for the high costs of campaigning; and (4) the duties of the office are essentially routine, clerical, and not of a policy-making nature. The points made by the reppective sides in the debate over election or appointment are typical of the points made in discussions of whether any executive officer other than the Governor should be appointed or elected. The basic difference in the debate as it affects the secretary of state is the view of the office as ministerial or policy making, and the nature of functions with which the office has been traditionally endowed in any particular jurisdiction.

Status of the Secretary of State in Other States

Of specific interest to members of this Committee is the status of the secretary of state in other states. What are the powers and duties that attach to the office elsewhere? How specific are the constitutional provisions on this point?

In 38 states the secretary of state is an elective office. In the six states of Delaware, Maryland, New Jersey, New York, Pennsylvania and Texas, the office is filled by gubernatorial appointment. The legislature chooses the secretary of state in Maine,

New Hampshire and Tennessee. Alaska has no such office. In that state by statute, the Lt. Governor has elections functions, including administrative supervision and appointment of local officials.

Most state constitutions have very little to say about the functions of the secretary of state. The Illinois constitution of 1870 was typical in this regard. The only specific responsibility which it conferred upon the secretary was to preside over the house of representatives until a temporary presiding officer was chosen.

Section 16 of Article 5 of the Illinois Constitution of 1971 sounds much like the comparable provision of the Ohio Constitution of 1802 and is commonly worded to the provisions in other states. It reads:

> The Secretary of State shall maintain the official records of the acts of the General Assembly and such official records of the Executive branch as provided by law. Such official records shall be available for inspection by the public. He shall keep the Great Seal of the State of Illinois and perform other duties that may be prescribed by law."

The Illinois provision regarding the Secretary of State is general and allows the legislature to prescribe the powers and duties of office. Presumably, these exclude an extensive elections function because of Article III, Section 5 of the Illinois Constitution, which reads:

> "A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State. The General Assembly by law shall determine the size, manner of selection, and compensation of the Board. No political party shall have a majority of members on the board."

Virginia is another state that constitutionally recognizes a state board of elections. Section 2 of Article 5 of the Virginia Constitution of 1971 provides in part as follows: "The Governor shall be elected...Returns of the election shall be transmitted, under seal, by the proper officers, to the State Board of Elections , or such other officer or agency as may be designated by law..." Section 8 of Article II of the same Constitution provides for three-member electoral boards in each county and city.

In an election law guidebook, published by the United States Superintendent of Documents, January 1, 1970, appears a Summary of Federal and State Laws Regulating the Nomination and Election of United States Senators. Although limited to the election of federal officers, the summary does reveal to some extent the large role played by state secretaries of state in the elections area. I nearly all instances nominating papers and petitions are filed with andfees where required are payable to the Secretary of State. Exceptions are: Hawaii, where the Lieutenant Governor is the recipient; Indiana, where nominating petitions are reportedly filed with the Governor, although expense reports go to the Secretary of State; North Carolina, where the State Board of Elections is named (a body recently transferred by statutory reorganization to the Department of the Secretary of State); Oklahoma, where the State Board of Elections is

named; and Tennessee, which designates the State Board of Elections Commissioners as the office in which filings are to be made.

In Oklahoma, the State Elections Board is a creature of statute and is not named in the Constitution. The Oklahoma Constitution of 1907 provides for a Secretary of State and provides for his duties in the following familiar terms:

> Sec. 16, Art. 6. The Secretary of State shall keep a register of the official acts of the Governor, and when necessary, shall attest them and shall lay copies of the same, together with copies of all papers relative thereto, before either house of the legislature when required to do so. He shall also perform such other suties as shall be prescribed by law.

The Arizona Constitution of 1910 states:

> Sec. 9, Art. 5. The powers and duties of the secretary of state, state treasurer, attorney general, and superintendent of public instruction shall be as prescribed by law.
> Sec. 11, Art. 5. The returns of the election of all State officers shall be canvassed, and certificates of election issued by the Secretary of State, in such manner as may be provided by law.

In Tennessee the Secretary of State has, from the inception of constitutional government in that state, been chosen by the legislature, and the State Board of Election Commissioners, referred to in the summary above, is established by statute. The Secretary's duties under the Constitution are the subject of Section 17 of Article 3, which provides in part that "he shall keep a fair register of all official acts and proceedings of the Governor...and shall perform such other duties as shall be enjoined by law."

The functions of an appointive Secretary of State in Maryland are governed by Section 22 of Article II, reading:

> The Secretary of State shall carefully keep and preserve a record of all official acts and proceedings, which may at all times be inspected by a committee of either Branch of the Legislature; and he shall perform such other duties as may be prescribed by law, or as may properly belong to his office, together with all clerical duty belonging to the Executive Dept.

The Michigan Constitution of 1963 removed the auditor general and state treasurer as elective officers and provided for their appointment. It also added a Model State Constitution kind of provision in Section 3 in Article 5 that:

> The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executive heading principal departments shall include a secretary of state, a state treasurer, and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this Constitution, he shall be appointed by the Governor by and with the advice and consent of the senate, and he shall serve at the pleasure of the governor.

By statute in Michigan, "The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election of officials in the performance of their duties under the provisions of this article." Mich. Comp. Laws Ann. Sec. 168.21

Prior to 1966 the California Constitution provided in Section 18 of Article 5 that the Secretary of State "shall keep a correct record of the official acts of the legislative and executive departments of the government and shall, when required, lay the same and all matters relative therero, before either branch of the legislature, and shall perform such other duties as may be assigned him by law." The constitutional provision was repealed on November 8, 1966 and incorporated verbatim into the statutes of California as part of its Governmental Code.

In the fairly recent constitutions of Connecticut (1965) and Florida (1968) provision is made for the secretary's functions in the following terms:

Conn. Const. Art. 4, Sec. 23. The secretary of state shall have the safe keeping and custody of the public records and documents and particularly of the acts, resolutions and orders of the general assembly, and record the same; and perform all duties as shall be prescribed by law. He shall be the keeper of the seal of the state, which shall not be altered.

Fla. Const. Art. 4, Sec. 4(b). The secretary of state shall keep the records of the official acts of the legislative and executive departments.

A review of state constitutions reveals that where duties are constitutionally prescribed, the provisions are extremely general, with further duties to be such as are prescribed by law in many instances. In none discovered is he specifically designated as chief elections officer, yet in most states he fulfills statutorily imposed duties in this area.

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[1] James T. Havel, The Office of State Secretary of State in the United States, Govt. Research Series No. 36.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
March 12, 1973

The Auditor of State

Three proposals are attached dealing with the Auditor of State as a constitutional, elective office. They are: (1) retain the office as a constitutional, elective office with no change except to change the title to Auditor General; (2) retain as in (1) and add a general description of duties (post-audit); (3) abolish the office as constitutional, elective office.

Auditor of State: DRAFT no. 1

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor GENERAL, 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.

This draftwould retain the office as a constitutional, elective office and change the name to "Auditor General."

Comment: The office of auditor was created in 1797 when the first legislature of the Northwest Territory established "Auditor of Public Accounts" for the purpose of assuring "legality and propriety" of territorial accounts. It was preserved by the Constitution of 1802, which provided in Section 2 of Article VI that the state treasurer and auditor should both be triennially appointed by joint ballot of both houses of the legislature. Under the Constitution of 1851, the auditor of state became an elective official, and of the six officers comprising the executive department, the office of auditor was the only one given a four as opposed to a two year term.

Extensive discussion on this point is recorded in the Debates of the Constitutional Convention of 1850-51. The duties attached to that office were called "complex," "complicated," and "intricate," and "capable of being performed only after study and experience." The argument for a long term was said not to apply to the treasurer, and several speakers argued for a distinction between the term for auditor and those of the "other ministerial officers" named in the section.

The present state auditor has argued that the most compelling reason for keeping the auditor's office as a constitutionally elected one is based upon the theory of separation of powers within the executive branch--i.e. having an independent auditor servesto check on the fiscal operations of the executive branch.

Removal of the auditor as an elective official would be difficult to sell to the public. Having been designated by state as "chief accounting officer of the state" the auditor is regarded as the "watchdog of the treasury." It is a popular view that the presence of an independently elected auditor provides a valuable means of checking on the legality of public expenditures and the honesty of public officials.

Besides acting as a type of check and balance within the executive department, the continuation of elected officers provides stepping stones of experience for prospective candidates to higher offices.

The Committee favors changing the name of Auditor of state to Auditor General to imply that the duties of office are not limited to pre-audit activities--i.e. the approval and verification of vouchers and statements and the issuance of warrants or orders upon the treasurer to issue funds--but embrace post-audit activities--ascertaining that money has been spent for the purposes intended. It recognizes a growing emphasis upon expansion of public auditing programs to include not only the fiscal review process but the additional elements of compliance conformation and performance auditing. These terms are used and explained byaa representative of the United States office of the GAO in a recent article appearing in the publication, State Government.[1] Compliance conformation, writes Mortimer A. Dittenhofer, is a determination that the will of the legislature has been followed. Under performance auditing, he says, the auditor determines the efficiency and effectiveness of the state's operations, as well as faithful adherence to legislative policy declarations. The auditor establishes that the decision maker assembled adequate intelligence before making spending decisions, that alternatives were considered, and that the decision was in compliance with organizational objectives and goals.

Lennis M. Knighton, professor at the Graduate School of Business Administration at the University of Texas in another recent issue of State Government[2] says that "the audit of executive activities and state programs must clearly go beyond a statement that funds were spent legally and honestly and must include an examination and report of the manner in which executive officials have discharged their responsibility to faithfully, efficiently, and effectively administer the programs under their direction."

The change of name, however, would not prevent the legislature from changing the Auditor's present duties--either, as some have suggested, making his duties exclusively those of a post-audit nature since pre-audit is a duplication of functions performed elsewhere--or, as others have suggested, creating a separate auditor post accountable to the general assembly.

[1]Mortimer A. Dittenhofer, "Is Auditing a Fourth Power," 43 State Government, 179, 181 (Summer, 1970)

[2]Lennis M. Knighton, "The Case for a Legislative Post Auditor," 43 State Government 265, 269 (Aut. 1969)

Auditor of State: DRAFT No. 2

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor GENERAL, 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.

To be added to Section 1 (or elsewhere in Article III): THE AUDITOR GENERAL SHALL VERIFY THAT MONEYS APPROPRIATED BY THE GENERAL ASSEMBLY ARE SPENT ACCORDING TO LAW AND SHALL HAVE SUCH FURTHER POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

This draft recommends retention of the office of auditor (with name change to indicate post-audit functions) as a constitutionally elective office, coupled with a statement of duties to insure that the scope of the duties of the auditor general be responsive to new trends in public audit controls.

Included in this report are the provisions of some recent constitutional revisions governing the state audit function in Connecticut, Florida, Illinois, Michigan, and Virginia.

By constitutional amendment adopted November 7, 1972, the state of Kansas eliminated both auditor and treasurer as constitutionally elective officials.

Comment: The current holders of executive offices in Ohio expressed the view that a constitutional statement of duties pertaining to executive offices should be supplied for all or none of the current offices. The auditor of state made the following suggestion for constitutional language pertaining to the duties of his office:

"THE AUDITOR OF STATE SHALL BE THE CHIEF ACCOUNTING OFFICER. NO ASSETS SHALL BE TRANSFERRED INTO OR OUT OF THE STATE TREASURY EXCEPT UPON WRITTEN PAY-IN ORDER OR WARRANT OF THE AUDITOR OF STATE. HE SHALL KEEP FULL ACCOUNTS OF ALL ASSETS IN THE TREASURY, ALL TRANSFERS OF SUCH ASSETS, AND OF ALL APPROPRIATIONS MADE BY THE GENERAL ASSEMBLY.

"HE SHALL BE THE CHIEF INSPECTOR AND SUPERVISOR OF PUBLIC OFFICES, WHO SHALL INSPECT BIENNIALLY AND SUPERVISE THE ACCOUNTS AND REPORTS OF EVERY STATE OFFICE, STATE INSTITUTION, TAXING DISTRICT AND PUBLIC INSTITUTION WITHIN THE STATE. HE MAY SUPERVISE THE EXPENDITURE OF ANY PUBLIC MONEY BY ANY ORGANIZATION RECEIVING SUCH FUNDS FOR ITS USE. HE MAY PRESCRIBE A UNIFORM METHOD OF ACCOUNTING AND REQUIRE SUCH DOCUMENTATION AS HE DEEMS NECESSARY IN ORDER TO ADEQUATELY SUPERVISE THE HANDLING OF ALL PUBLIC MONEY AND PROPERTY.

"HE SHALL BE THE CUSTODIAN OF PUBLIC LAND RECORDS, WHO SHALL KEEP ALL DOCUMENTS RELATING TO THE SURVEY OF PUBLIC LANDS WITHIN THE STATE MADE BY THE GOVERNMENT OF THE UNITED STATES OR ANY AGENCY THEREOF."

It is the opinion of the Committee that the suggested language is much too specific. It is essentially statutory in nature. The final paragraph, having to do with public lands, is clearly a matter for legislative disposition.

Auditing function in selected state constitutions

CONNECTICUT - Constitution of 1963 - treasurer and comptroller are elected.

Art. 4, Sec. 24. The comptroller shall adjust and settle all public accounts and demands, executive grants and orders of the general assembly. He shall prescribe the mode of keeping and rendering all public accounts. He shall, ex officio, be one of the auditors of the accounts of the treasurer. The general assembly may assign to him other duties in relation to his office and to that of the treasurer, and shall prescribe the manner in which his duties shall be performed.

The Connecticut provision relative to the elective treasurer is:

Art. 4, Sec. 22. The treasurer shall receive all monies belonging to the state and disburse the same only as he may be directed by law. He shall pay no warrant, or order for the disbursement of public money, until the same has been registered in the office of the comptroller.

FLORIDA - Constitution of 1968

Art 3, Sec. 2. The legislature shall appoint an auditor to serve at its pleasure who shall audit public records and perform related duties as prescribed by law or concurrent resolution.

Art. 4, Sec. 4 d. The comptroller shall serve as the chief fiscal officer of the state and shall settle and approve accounts against the state.

Art. 4, Sec. 4 c. The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.

ILLINOIS - Constitution of 1970

Art. 8, Sec. 3 (a). The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly by vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. The Auditor General shall serve for a term of ten years. His compensation shall be established by law and shall not be diminished, but may be increased, to take effect during his term.

(b). The Auditor General shall conduct the audit of public funds of the State. He shall make additional reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor.

Constitutional commentary to the new Illinois provision points out:

> "Section 3 has no counterpart in the 1870 constitution. This Section provides for an Auditor General to perform a post-audit function. This officef will perform functions which complete the cycle under which the major elements of fiscal management are allocated between the Legislative and Executive Branches. The Comptroller and the Governor are primarily responsible for internal fiscal controls within State government. They perform a pre-audit of expenditures... The Auditor General, under this Section, has the authority and responsibility to assure that funds have been expended for the purposes intended by the General Assembly. The post-audit function is placed under the control of the General Assembly.

MICHIGAN - Constitution of 1963

Art. 4, Sec. 53 - The legislature by a majority vote of the members elected to and serving in each house, shall appoint an auditor general, who shall be a certified public accountant licensed to practice in this state, to serve for a term of eight years. He shall be ineligible for appointment or election to any other public office in this state from which compensation is derived while serving as auditor general and for two years following the termination of his service. He may be removed for cause at any time by a two-thirds vote of the members elected to and serving each house. The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.

VIRGINIA - Constitution of 1971

Art. 4, Sec. 18. An Autitor of Public Accounts shall be elected by the joint vote of the two houses ofthe General Assembly for the term of four years. His powers and duties shall be prescribed by law.

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary 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.

This draft abolishes the office of auditor as a constitutionally elective one.

Comment: The duties that have attached to the office are departmental in function. The General Assembly should make the determination as to how auditing is to be done and provide for an official, board, department or commission to do it.

The pre-audit function is purely administrative and by its nature could be handled by the state department of finance. Post-auditing--to insure that moneys were expended for the purposes for which they were appropriated and to judge over-all performance--ought to be done by an officer responsible to the legislature, which appropriates the funds.

The Model State Constitution would constitutionally require the state legislature to appoint an auditor to conduct post-audits as prescribed by law and report to the legislature and to the governor. The Committee is impressed with its drafters' rationale: "In view of the tremendous growth of state expenditures over the past half-century, the post-audit function has become a necessity. The post-audit function is crucial not only to insure honestly among administrative officials, but also to insure that officials of the executive branch have made their expenditures in line with policies established by the legislature."

There is merit to Lennis Knighton's response to the assertion that the auditor of state should be totally independent of both the executive and legislative branches of government and not subservient to the pressures of either. He argues:[3]

"If an auditor is appointed by the Legislature, he may be subject to pressures from individual legislators or from legislative committees to engage in practices and pursue policies that are not in keeping with the standards of good auditing. To avoid this problem, some States have successfully used joint, bi-partisan legislative audit committees to coordinate the work of the auditor; and laws have been passed prohibiting any legislator or administrator from interfering with the hiring of audit staff or the conduct of audit work.

"A similar political problem exists in the case of the elected auditor, one that may be even more dangerous. One cannot be elected to office unless he is known by a majority of the voters and unless his name is associated with a cause or issue that the voters find appealing. Consequently, the auditor must make news by the things he does, or the people in the next

> election may assume that he has done nothing. Thus, there is considerable incentive to blow small problems into major scandals and to trumpet audit recoveries, deficiency findings, and other evidence of malpractice on the part of state officials as being the measure of the value of the audit. This practice is comparable to a police department trumpeting the number of arrests as the measure of effectiveness of its work when in fact its primary public duty is to deter or prevent crime. Similarly, the most beneficial aspects of an audit are not those items normally reported in news accounts, but the quiet reinforcement of management and legislative controls, the inducement to good management practice, and the promotion of excellence in administration. An elected auditor, however, is too often likely to find this work unappealing, as it seldom makes good news copy."

Another weakness in the elective system, according to Knighton, is the matter of competence. He asserts that real progress in audit work is being made in such states as California, Michigan, Wisconsin, Florida, Illinois, and others where a legislative post-audit program has been adopted and headed by a competent, experienced and professional auditor. "Professional audits are conducted by professional men, and the surest way to have a professional man in charge of the audit function is to appoint him for his professional competence, not elect him for his popularity and sex appeal."

There is further reason for removing the auditor from the ballot. The amount of state budgets and procedures of fiscal control have changed drastically since 1851. Freezing a particular pattern of control into the constitution is inadvisable. The legislature ought to be free to try different formulations of financial controls.

At the present time, the state auditor is disbursement officer for state warrants, but his audit related duties, being restricted to pre-audit, are minimal.

[3]Lennis Knighton, "Is Auditing a Fourth Power? No," 43 State Government 258, 262 (Autumn, 1970)

Ohio Constitutional Revision Commission
Legislative-Executive Committee
March 12, 1973

The Treasurer of State

Three proposals for dealing with the office of Treasurer of State are attached. They are: (1) retain the office as a consitutional, elective office; (2) retain the office and add a general description of duties to the Constitution; (3) abolish the office as a constitutional, elective office.

Treasurer of State: DRAFT No. 1

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant 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.

Comment:

This draft proposes that the elective office of the treasurer of state be retained in the Constitution. Its rationale for calling for no change in the present constitution is based upon the philosophy that no change should be made unless it has been demonstrated to be a beneficial or necessary one.

The Legislature has always prescribed the powers and duties that attach to the office of the treasurer, and the Committee 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. "Despite the assurance that the legislative power is plenary in the absence of specific constitutional limitations...courts tend to offset the legislative effort in many cases by a narrow reading of the statutory language and the constitutional formulae which may apply."[1]

The Committee feels further that no compelling reason exists to designate the office of treasurer as one that should be responsible to the governor. The functions of the office are such that the governor has no reason to exercise control in their execution. The treasurer under such a view should continue to be responsible to the people.

[1]Note, "Idaho Constitutional Revision: Two Views," 7 Idaho L. Rev. 87 (1970).

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant 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.

To be added to Section 1 (or elsewhere in Article III): THE TREASURER OF STATE SHALL BE CUSTODIAN OF ALL TAXES COLLECTED BY THE STATE, AND OF SUCH OTHER FUNDS AS MAY BE PROVIDED BY LAW. THE TREASURER SHALL HAVE SUCH OTHER POWERS AND DUTIES AS ARE PROVIDED BY LAW.

This draft retains the elective office of treasurer of state in the Constitution, with the addition of a statement of duties, as set forth above.

Comment: The present Treasurer of State has expressed dissafisfaction to this Committee about the fact that the Constitution fails to contain a general statement of duties that pertain to the office. The present holder of office has suggested language to the Committee, not to increase the scope of the Treasurer to any large degree, she says, but "for the purpose of correcting a previously existing void in the Constitution, having to do with a clear cut method of handling and accounting for the moneys of the taxpayers of the State of Ohio."

The provision suggested by Treasurer Donahey is as follows:

"The Treasurer of the State shall be the custodial of all state moneys, to whom shall be paid all state taxes levied by the General Assembly of Ohio, and shall be custodian of, and to whom shall be paid, all premiums, license fees, rotary funds, depository funds, and any special accounts not otherwise mentioned herein and any moneys by any agency of the State of Ohio that is supported in whole or in part by any appropriation out of the General Revenue Fund or any other fund by the General Assembly of Ohio, and shall be fully accountable for the same."

In a presentation of the provision to the Committee, Mrs. Donahey's representative added that it was the treasurer's position that there should not be any constitutional revision having to do with the treasurer's office unless there is a similar delineation pertaining to other executive officers.

The Committee is of the considered opinion that the proffered provision is overly detailed. It contains references to matters of a transitory nature, better left to the general assembly to act upon, as exigencies require.

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor 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.

Article III establishes the elective office of treasurer of state and contains no general description of the duties of the office.

This draft eliminates the constitutional status of the treasurer of state as an elective official. It favors enabling the general assembly to provide for a qualified appointive official to assume responsibility for operating the state treasury and supervising investments.

Comment: In 1851 when the office of the treasurer of state was established as an elective one, no one questioned the wisdom of creating six elective offices in the executive department--or at least there is no recorded debate upon the subject. The Convention accepted the report of its committee on the executive department with little recorded division, and committee proceedings are not available. Like many another convention of this era, its proceedings do not evidence serious thought by the delegates of the purpose, function, and structure of the executive department. The principal issue over which there was debate concerned the length of term for executive officers. Under Ohio's first constitution both treasurer and auditor were selected triennially. There was considerable objection voiced over reducing the auditor's term, and it was subsequently increased from two years in the original draft to four years in the final one, to accord with biennial sessions.

However, politically independent executive officers fragment executive control, "render fulfillment of gubernatorial responsibility subject to the control of other executive officers, and make fair and intelligent citizen assessment of executive branch responsibility impossible."[1] Both modern and model constitutions have reduced the number of constitutionally elected officials.

The treasurer is clearly an administrative official only--with no policy forming discretionary powers. Fiscal functions performed by the treasurer of state and by the auditor of state in the performance of his internal pre-audit duties could be integrated within the department of finance.

[1]John J. Flynn, "Constitutional Difficulties of Utah's Executive Branch and the Need for Reform," 1966 Utah L. Rev. 351, 355.

Constitutional Revision Commission
Legislative-Executive Committee
March 12, 1973

The Secretary of State

The Committee has considered: (1) retaining the office of Secretary of State as a constitutional, elective office; (2) retaining the office of Secretary of State as an elective office and adding to the Constitution a general description of the duties of the office, particularly those relating to elections; (3) abolishing the office of Secretary of State as a constitutional, elective office. Attached are proposals to do these three things, together with a commentary supporting and setting forth the rationale for each, for committee consideration and action at its next meeting. Also attached is a proposal to repeal Section 8 of Article XV, and a copy of a letter from the Secretary of State supporting this proposal.

A fourth possibility with respect to the Secretary of State is not given here, because the Committee discussion did not indicate any clear preferences for this. It would be to retain the office as a constitutional office but not an elective one. The questions posed by this approach would be: would the legislature have complete responsibility for providing for the office and its duties or should the Constitution specify duties and also an appointing authority?

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be electedoon 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.

Article III establishes the elective office of Secretary of State. It does not contain any general description of the duties of the office, not does any other constitutional provision contain such a discription.

This draft makes no change in the constitutional elective status of the office.

Comment: Under the Ohio Constitution, the Secretary of State has a number of specific duties pertaining to elections--in regard to laws submitted by referendum petition and proposed laws and constitutional amendments--and, by virtue of statute, has numerous responsibilities that have elevated the position to one of a policy making level. Perhaps originally viewed as a purely ministerial or clerical post, under duties prescribed by the Ohio Constitution of 1802, the office has long since evolved into one whose duties go far beyond that of a mere keeper of official records and documents.

In recommending no change in the method of selection of the Secretary of State, one of the major arguments for popular election to the office is recognized--that it has more policy making authority than commonly recognized, particularly in the important areas of elections and corporate regulation. The way in which the secretary carries out his statutory duty pertaining to ballot form may, indeed, affect the fate of the vote on questions and issues. The Committee takes into account the statement of a commentator on the subject that intimate involvement with the administration of elections gives the secretary the "necessary latitude to make decisions of considerable political and policy import." The making of decisions as to whether qualifications for incorporation are met and maintained is further indication of a policy making role in the executive department of state government. As a constitutional member of the apportionment board under Article XI, the Secretary of State can wield further influence. The Committee, in adopting the position favoring an elective secretariat, takes a favorable attitude toward what one authority has described as "the growth of secretarial responsibilities beyond the custodial and house-keeping duties which originally constituted the secretary's raison d'etre."

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, a majority of the Committee 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.

The Committee has examined the provisions of both the Constitution of 1802 and the present Constitution of 1851, as amended, as they pertain to the office of Secretary of State. Originally, the office was one that was filled by the legislature and a general statement of duties was provided. Under the original Constitution of 1802 the office of Secretary of State was apparently regarded as primarily clerical or ministerial in nature. Duties described by Section 16 of Article II of Ohio's first constitution were "to keep a fair register of all the official acts and proceedings of the governor" and "when required, lay the same, and all papers, minutes, and vouchers relative thereto, before either branch of the Legislature." However, the office holder was also required to "perform such other duties as shall be assigned him by law."

The legislature has by statute designated the Secretary of State as chief election officer of the state. The original legislation affecting the functions of the office in this respect was passed in 1892. (89 Ohio Laws 455) The Ohio Secretary of State has a number of other responsibilities that have been imposed by law. Ohio corporation laws require that proceedings for the organization and operation of all corporations involve filings in the office of the Secretary of State. The Secretary is also chief filing officer under the Uniform Commercial Code.

In refraining from attempting a constitutional statement of duties that attach to the office the Committee endorses the rule that with respect to legislative powers a state constitution is a limitation upon, not source of power, that may be exercised. As in most states the Ohio Secretary of State has long exercised an elections function, and the Committee endorses the legislative assignment of elections functions. By exercising such functions the Ohio Secretary of State has been significantly involved in a policy making role under a variety of statutory formulations over the years. In the Committee's view the Secretary has long served in a capacity that goes far beyond that of chief clerk.

In general the Committee favors legislative freedom to expand the office as the necessities of a particular period require. The Committee finds merit to the claim "that some official is needed who can supervise experimental governmental programs which are inaugurated on too small a scale to warrant the creation of a new and separate office specifically charged with their administration." Historically, throughout the United States, it is the office of Secretary of State to which 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.

Such flexibility is desirable, and the Committee supports the proposition that a definition of what officers do has no place in the Constitution and is a statutory matter.

Except as limited by constitutional provisions, it is within the power of the legislature to prescribe the duties and powers of elected authorities, and the legislature may increase or diminish such duties and powers from time to time as exigencies require.

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant 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.

To be added to Section 1 (or elsewhere in Article III): THE SECRETARY OF STATE IS THE CHIEF ELECTION OFFICER OF THE STATE, AND SHALL PERFORM SUCH FURTHER POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

This draft adopts the position that the Secretary of State should be elective. See commentary attached to Draft No. 1. In examining the functions of the office and its relationship to state government the Committee has concluded that the Secretary should continue to be elected, particularly if the duties of office include being chief elections officer. The elections function constitutes an important function of state government and is an appropriate place to separate executive authority.

In deciding to retain the Secretary of State as a constitutional elective office the Committee chooses to include some general statement of duties that would not leave it to the discretion of the legislature as to whether the Secretary would continue to function as elections officer. The basis upon which some members of the Committee favor retaining popular selection as a means of choosing the Secretary is dependent on whether the office includes an election function. The general public views the secretary of state as the appropriate judge of the elections system, and it is this element of the job of secretariat that is persuasive support for the position that he should have some independnece from the governor.

The original designation of Secretary of State as chief of elections was enacted in 1892 and became Section 2966-2 of the early Revised Statutes of Ohio in the following form: "By virtue of his office the secretary of state shall be the state supervisor of elections, and in addition to the duties now imposed upon him by law, shall perform the duties of such office as defined herein." 89 Ohio Laws 455. The Committee favors the language proposed by this draft as more in keeping with contemporary statutory definitions of the powers and functions of the office in other states.

Secretary of State: Draft No. 3

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant 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.

Comment: This proposal would remove the Secretary of State as a constitutional, elective official. It holds the Secretary to be what the name connotes--a position that is subservient to the governor as chief executive of state government.

The office of Secretary of State involves little or no exercise of discretionary authority. Most of the duties pertaining to the office may be described as perfunctory. James T. Havel, writing about the office in 1960, reported that the "near unanimity of opinion among scholars regarding the clerical and basically ministerial nature of the functions performed by secretaries of state has continued unabated. . ." He points out:

> "Those scholars, public officials, and politicians who describe the duties of secretaries of state as ministerial, administrative, and routine generally maintain that the office of secretary is essentially a depository for public documents. As an office of record, its duties are important, but largely of a housekeeping nature. The secretary's responsibilities, they suggest, are so closely defined by law, that he is allowed almost no leeway to formulate public policy. To them, he is basically a filing officer, performing relatively simple clerical functions, executing directives issued by others . . ."

The proper role of the Secretary is that of executing, not making policy. The definition of "Secretary of State" in Webster's Third New International Dictionary includes the following: "the head of a department of the government of a United States state whose miscellaneous duties include the making and keeping of records." Subscribing to this definition, the Committee favors removal of the Secretary from policy making boards and as chief of the elections function. A few state constitutions establish a state board of elections with general supervision over the election machinery. Illinois and Virginia are two states with new constitutions that do so. A number of other states provide for an elections board by statute. The Committee prefers the latter course as a more flexible one.

The legislature can provide for record and publication functions, as well as the elections function, in the manner best befitting the needs of a particular time.

If the Secretary of State is removed as a constitutional, elective office, other constitutional provisions giving the office particular duties and providing for his election would probably have to be amended also.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
March 12, 1973

The Attorney General

Attached is a proposal to retain the attorney general as a constitutional, elective office without the addition of duties in the Constitution. Other possibilities, not included here, are: (1) abolish the office as a constitutional, elective office; (2) add a statement of duties to the Constitution.

ARTICLE III

Section 1. The executive department shall consist of a governor, lieutenant 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.

This draft retains the attorney general as an elective office and continuation of the present system under which the duties of office are prescribed by statute.

Comment:

A. Background of Recommendation

The Committee has had before it three research memoranda dealing with the office of state attorney general. It has learned that in 1971 the National Association of Attorneys General, following a two year study, published a comprehensive report concerning the powers, duties and operations of the office of the attorney general in the 50 states. The study was conducted under grants from the National Institute of Law Enforcement and Criminal Justice of the U.S. Department of Justice and involved, in addition to the research findings of its professional staff, the input of every state attorney general or his representative, acting as liason to the Association's Committee on the Office of Attorney General (referred to in the Report and hereafter as C.O. A. G.).

This report, then, was a valuable starting point for staff and committee because it provided much information about the relationship of the office of attorney general to state government, its essential functions, and, furthermore, trends in the area of the administration of criminal justice at federal, state and local levels that have affected the office.

The Report was an important source of information concerningthe nature of the office of attorney general, historically and as it operates at the state level today, because so little can be found in Ohio case law regarding the role of the attorney general as a member of the executive department of the state.

B. History of the Office in Ohio

Although many specific duties have been assigned to the office of Ohio attorney general over the years, his general duties as prescribed by Chapter 109. of the Ohio Revised Code differ little from the duties established by legislation which created the office of attorney general in 1846. From the inception of the office its holder has been required to appear on behalf of the state in all cases before the supreme court. Similarly, he has been required to appear for the state in any court when required by the governor or general assembly and upon written request of the governor to prosecute any person indicted for a crime.

From the beginning the attorney general's relationship to county prosecutors has been fixed by statute. Both in the original act of1846 and in Section 109.14 of the Revised Code, the attorney general has been required on request to advise with prosecuting attorneys. The requirement that prosecuting attorneys make annual statistical reports concerning crimes prosecuted has been retained in Section 309.15 of the Revised Code, which provides further that prosecuting attorneys "shall furnish to the attorney general any information he requires in the execution of his office, whenever such information is requested by him."

The attorney general's responsibility to furnish legal opinions to state officials and to the general assembly was also a part of the legislation that created the office.

It is clear that the Act of 1846 viewed the attorney general as state prosecutor. The law required him, at the request of any of named executive officers to "prosecute every person who shall be charged, by either of those officers, with the commission of an indictable offence (sic.), in violation of the laws which such officer is specially required to execute, or in relation to matters connected with his department." He was and is required to cause to be prosecuted the official bonds of all delinquent officeholders and to prosecute all assessors and officers connected with the revenue laws of the state.

The Ohio Constitutional Convention that proposed the Constitution of 1851 made the office of attorney general constitutional, but neither the published proceedings and debates of that convention, nor subsequent ones record discussion as to the nature of the office. Delegates to the 1851 convention acknowledged the statutory existence of the office but reportedly expressed no dissatisfaction with the functions that had been established by law.

Among the few reported cases dealing with the powers of the attorney general is one in 1920 that challenged the constitutionality of statutes vesting the attorney general with rights and powers of a prosecuting attorney. The statute was upheld in State ex rel. Doerfler v. Price, 101 Ohio St. 50 on the basis that prosecution for violation of state criminal laws is a state, not local, function, calling for exercise of state powers. The attorney general, being a constitutional officer, said the court, was chargeable with such duties as were prescribed by law in the exercise of this function.

C. The Prosecution Function of the State Attorney General and His Role in the Administration of Criminal Justice

The Committee called upon the staff to research available law relative to the prosecutorial role of the state attorney general because there was a consensus that as chief prosecutor the office holder ought to be an elective official, not a person selected by the governor, as the administration's attorney.

The Committee has learned that the institution of the office of attorney general in colonial America had English origins that have left a permanent mark upon the character of the office. However, a point clarified by research furnished the Committee is that in Ohio the attorney general has derived his powers from legislation. Research Study No. 20 discusses the rule in some states that the attorney general derives some powers from the common law--e.g. in such nebulous areas as the abatement of nuisances, but Chapter 3767, of the Revised Code, giving the Ohio attorney general authority to abate nuisances, adds the specific proviso that nuisance in this context is that which is so defined by law.

In England the attorney general became chief prosecutor, but in this country the enforcement of criminal law has from an early date been a matter of local concern. However, a point stressed in the N.A.A.G. Report is that: "There is a commonality of interest between the Attorney General and local prosecutors, whatever the legal relationships may be in a particular jurisdiction. Both are public prosecutors, subject to legislative definition of powers and duties and to judicial definition of the law and procedure."[1]

Although county and city prosecutors have played a major role in the prosecution of crimes against the state, practices have varied from state to state, and a clear trend toward a greater role for the state attorney general is a dominant theme of the Report. A substantial portion of it is devoted to the prosecution function of the state attorney general, his relationship to law enforcement agencies, and to his role in the area of criminal justice. Innumerable studies and programs for improving the administration of criminal justice have incorporated proposals for enhancing the role of the state attorney general. The N.A.A.G.'s own recommendations with respect to the attorney general as prosecutor are appended to this Committee report.

One area of responsibility examined is the authority of the attorney general to initiate prosecutions. Most state attorneys general may initiate prosecutions in at least some circumstances. In Ohio, as noted above, the attorney general may do so on request of the governor. Only six states gave an unqualified negative response to the C.O.A.G. questionnaire regarding authority to prosecute.

Another topic explored is the authority to intervene, supersede or assist local prosecutors. The attitudes toward authority to intervene on the part of surveyed attorneys general was strongly in favor. The Report reveals numerous degrees of authority to intervene or supersede; the attorneys general of only five states have no such power. As noted earlier, the Ohio attorney general has long been allowed to appear in any court in which the state is interested upon request of the governor or general assembly. The Report also points out that a state attorney general often enters a case at the request of a local prosecutor. Some common reasons given for this occurrences are:

"(1) the case is unusually difficult or presents unusual questions of law
(2) the county attorney is not experienced;
(3) the county attorney is prosecuting a public official whom he works closely with in his daily work;
(4) the defendant is a personal friend of the county attorney, or possible relative
(5) the case was originally investigated and handled by a state agency..."[2]

The Report observes that these conditions could be faced by local prosecutors in any state, and could make the attorney general's intervention sought after by the prosecutor.

Another subject discussed in detail in the Report is the extent of legal powers possessed by state attorneys general in investigation and prosecution. One power that has been the subject of specific study and much comment is the power of subpoena--the process to cause a witness to appear and give testimony. Of 54 jurisdictions reporting to a C.O.A.G. survey, (the number includes Guam, Puerto Rico, Samoa, and the Virgin Islands), 19, including Ohio, given the attorney general no power to issue investigative subpoenas. Another 11 report broad powers. Twenty-four jurisdictions reported limited powers.

A 1959 study of the need for subpoena powers reported that the controversy concerning whether attorneys general should be granted subpoena powers "centers around the problems of potential infringement of civil rights and of effective criminal investigation. On both these issues, as well as on several of lesser importance, opinion is sharply divided."[3]

Concludes the N.A.A.G. Report on this matter:

"Apparently, the main reason the Attorney General is denied subpoena power is that it is normally a judicial and legislative function, and the Attorney General is concerned with prosecutions. It appears that the question is one of precedent, rather than principle."[4]

At least two broad range studies of the criminal justice system have been conducted at the federal level. Both have called for increased authority on the part of the state attorney general over local law enforcement andprosecutions. The first, completed in 1931, was done by a commission appointed by President Hoover. The second, conducted by the President's Commission on Law Enforcement and Administration of Justice, resulted in the publication of The Challenge of Crime in a Free Society (February, 1968) which states:

"States should strengthen the coordination of local prosecution by enhancing the authority of the state attorney general or some other appropriate statewide officer and by establishing a state council of prosecutors comprising all local prosecutors under the leadership of the attorney general."[5]

The N.A.A.G. Report cites the recommendations of a variety of other studies for strengthening the attorney general's relation to local prosecutors.

One important step in criminal justice reform has been the American Bar Association's development of Standards Relating to the Administration of Criminal Justice. They resulted from a pilot study undertaken by the Institute of Judicial Administration in 1963, followed by a three year study in which the Institute served as secretariat. About the role of the state attorney general in the effectuation of such standards the Report states:

> "It is recognized by those working for implementation of the standards that, regardless of the extent of the Attorney General's direct contact with criminal justice, he is the chief law officer of the state and is a proper person to guide development of the better administration of justice generally."[6]

The scope of the standards has been a matter of continuing study by the National Association of Attorneys General.

The President's Commission on Law Enforcement and Administration of Justice proposed a major federal program against crime, which was in part responsible for the enactment of the Omnibus Crime Control and Safe Streets Act of 1968. That act, because of the broad planning grant programs that it established, the comprehensive approach to crime control that it attempted, and the widespread effects upon the state criminal justice system that it contemplated, is legislation that has been of considerable interest to the National Association of Attorneys General. That Association has recommended that the state attorney general be a member of the criminal justice planning agency in each state--the agency specifically designated by the federal act to receive grants, with responsibilities set out in federal law, and subject to further guidelines developed by the law enforcement assistance administration in the federal department of justice. Appended table 7.232 from the N.A.A.G. Report reveals that in 52 jurisdictions the attorney general or a member of his staff serves on the state board under the omnibus act.

D. Membership on Boards, Commissions and Other Duties

The N.A.A.G. Report reveals further that the state attorney general has been designated a member of a variety of boards and commissions. By questionnaire and computer search of state statutes data was obtained from the 50 states as to specific agencies upon which the attorney general serves. The number ranges from two in several states to 35 in Florida. Ohio is average in assigning the attorney general to 17 boards or commissions.

The Committee on the Office of Attorney General has recommended that the Attorney general's membership on boards ought to be restricted--specifically to boards which set policy for broad areas of criminal justice. This policy, it is reported, is in keeping with most studies, as well as with the views of most attorneys general, past and present.

Reportedly, consumer protection has generated more interest among attorneys general in recent years than any other single area of activity. The N.A.A.G.'s survey reports that the attorney general has exercised leadership in initiating consumer protection programs in most states. A C. O. A. G. survey showed that 31

of 38 attorneys general believe that the state's consumer protection activities should be primarily under their jurisdiction. The N.A.A.G. has taken an interest in consumer protection for many years and has had a standing committee on the subject. In 1969 the Association held two educational work-shops on consumer protection for its members.

Another subject covered by the Report is the matter of state bureaus of investigation and identification. Such agencies exist in virtually all states. Although functions and organizational structures vary, they are said to represent a response to the impact of technology and training on crime control. In eight states, as in Ohio, the investigatory agency has been placed in the attorney general's office. Most such agencies are located in departments of public safety or state police.

A number of states have, like Ohio, created peace officer training agencies and have designated the attorney general as director or participant in their activities. It is the thesis of Samuel Dash, in his consultant's report to the N.A.A.G. (cited in Research Study No. 21) that the state attorney general must play a greater role in the control of organized crime. Furthermore, in the area of street crime, he calls for the state attorney general to: (1) establish a state-wide criminal justice center, with training resources and specialized investigatory services and to sponsor other criminal justice programs; (2) provide guidelines for local prosecutors to assure uniformity in the application of the state criminal law, primarily because of his appellate responsibilities in this area; and (3) maintain staffs fully knowledgeable in the state criminal justice system and trial procedures in order to serve the state well in proceedings before the United States Supreme Court.

Dash maintains:

> "The state Attorney General is in a unique position to assess how the system of criminal justice is working within a state and to identify the impediments which cause delay or disruption of the process. The prestige of his office permits him to initiate innovative programs leading to the implementation of a comprehensive system of criminal justice."[7]

E. Rationale for Committee Recommendation

In recommending the retention of an elective attorney general the Committee believes that it is following the advice given by a prestigious writer on the subject of state constitutional government when he urged that "states concerned with the revision of their constitutions need to take a careful look at the duties and responsibilities assigned to the attorney general and be careful to see that the office is not provided for in a manner inconsistent with the nature of the duties and responsibilities assigned to it."[8]

History of the office in Ohio supports the proposition that the Ohio attorney general serves a prosecutor's function. The general statutory duties attached to the office have always recognized the attorney general as chief prosecutor for the state in all criminal cases before the supreme court and before other courts upon request. His relationship to local prosecutors has alway been specifically acknowledged and directed by statute. Reportedly in practice the local prosecutor works closely with the Ohio attorney general in criminal appeals.[9]

The Ohio supreme court has said that the prosecution of crimes and offenses for the violation of state laws is a state function and has upheld statutes conferring specific prosecutorial functions upon the attorney general.

The designation of attorney general as chief law officer of the state connotes far more than a mere advisory role. Some notable studies concerning state and local relationships in the criminal justice system have called for much more centralization of the prosecution function. Others have urged strengthening the coordination of local prosecution by enhancing the authority of the state attorney general. With these recommendations the Committee is in accord.

Trends discussed in one of the most comprehensive studies of the office ever undertaken reveal that the direction for the future is evidently toward broadening the authority of the state attorney general to initiate criminal prosecutions. "Both prosecutors and attorneys general apparently believe that the latter should be able to initiate prosecutions," reports the N.A.A.G.'s study.[10] The findings were specifically as follows:

> "The C.O.A.G. survey of local prosecutors showed that 421 out of 630, or about two-thirds of the respondents, believed that the Attorney General should be able to initiate local prosecutions. An even larger number, 481 of 618 responding, said that he should be allowed to initiate criminal proceedings of an inter-jurisdictional nature. Former Attorneys General agreed: Of 104 answering the question, 89 said that the Attorney General should be able to initiate prosecutions. Of 33 incumbent Attorneys General responding, all but one advocated authority to initiate litigation."[11]

Legislative developments at the federal level clearly recognize the office of state attorney general as the logical one to be designated as the state criminal justice planning agency. That the attorney general as chief law officer is the appropriate official to participate in law enforcement planning is the thesis of most authorities. Model criminal justice planning board legislation developed by the National Association of Attorneys General specifies that the attorney general be a member. The President's Commission on Law Enforcement and the Administration of Justice expressed accord. In the Committee's view this special role to be exercised by the holder of the office of attorney general is another persuasive reason for retaining the office as an elective one.

Experts maintain that the nature of organized crime creates special problems that differentiate it from most areas of litigation. It is the view of many authorities on the subject that special strategies on the state level will be required for some time to come. Says the N.A.A.G. Report, "there is virtually no state that does not have some syndicated gambling, narcotics trade, or other

manifestation of organized crime."[12] Here again, in the Committee's view, is basis for retaining the attorney general as an elective official because of the important leadership that he must provide with respect to crime control.

The trend toward expanded authority in such areas as consumer protection suggest that the role of the attorney general as attorney for the people is one that is universally receiving greater recognition. Such a direction supports the view that the attorney general ought to be elective.

Furthermore, viewing the attorney general as an offic r who exercises important responsibilities that are not within the scope of the governor's duties and interests, the Committee does not recommend that the office be one that is gubernatorially appointive. It is influenced by the points for election as summarized in Research Study No. 20: (1) that the attorney general is the attorney for all people and should therefore be chosen by them; (2) that the attorney general does not act as agent for the executive branch; (3) that the legislature also relies upon his advice, so that checks and balances are strengthened by maintaining the office as it is presently constituted; and (4) the issuance of advisory opinions should not be made from the position of advocacy for a particular administration but solely on the basis of law. When the Committee adds to these considerations the possibly increasing responsibilities of the attorney general as prosecutor and leader in criminal justice reform, it has summarized its position on this question.

In making this recommendation the Committee specifically notes that the source of authority exercised by the Ohio attorney general has consistently been statutory. Although members of the Committee might question the assignment to the office of such police type functions as are involved in the operation of the bureau of criminal identification and investigation, they acknowledge the position advanced by some scholars that the attorney general as chief prosecutor has an interest in seeing to it that all participants in the criminal justice system are functioning successfully.

Future debate over the pros and cons of extending the attorney general's investigative authority can be expected. Clearly, the specifics of the attorney general's function as prosecutor should not be spelled out in the Constitution, but should be left to statute. The flexibility to add or subtract duties in this area is especially important because more changes and new solutions are required.

Intent of the Committee

The Committee sees no compelling need to define the nature of the attorney general's duties in even the most general of constitutional terms. It is satisfied that the legislature has seen fit to define the duties of the office with sufficient specificity that the problems concerning the nature of the office under English common law have never plagued Ohio courts. The Committee views the attorney general as chief law officer for thestate and intend by recommending no change an endorsement of the present role of the office in state government. That Ohio law has been in keeping with current trends in the area of criminal justice is a point in favor of such a position. To attempt a constitutional definition of duties could raise unnecessary questions and impede development of the office as an instrumentality of further reform in the administration of criminal justice.

Footnotes

1. National Association of Attorneys General, The Office of Attorney General, 118 (February, 1971)

2. Id. at p. 136

3. L. Fein and Frederick Stackable, The Subpoena Power of the Attorney General: A Review, 8 (1959)

4. N.A.A.G., op. cit. supra, Note 1, at 163

5. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 149 (February, 1968)

6. N.A.A.G., op. cit. supra, Note 1, at 100

7. Id. at 575

8. Byron Abernathy, Some Persisting Questions Concerning the Constitutional State Executive, Governmental Research Series No. 23 (Lawrence: University of Kansas, Governmental Research Center 1960) 49

9. N.A.A.G., op. cit. supra, Note 1, at 143

10. Ibid.

11. Ibid.

12. Id. at 127

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (RECOMMENDATIONS)

THE PROSECUTION FUNCTION

6. Local prosecutorial services should be organized in districts sufficiently large to require full-time prosecutors, with adequate staff.

Prosecutors in the majority of states serve only a single county and serve only part-time. A district system should be adopted to assure full-time prosecutors. Pay should be adequate to attract and retain qualified persons and to allow prohibition of private practice. Prosecutors should serve a minimum of four years.

7. The method of selecting local prosecutors should depend on conditions in the particular jurisdiction.

In most jurisdictions, the local prosecutor is independently elected; in a few, he is appointed by the Attorney General, the Governor, or a judge. There is no single best method: what is appropriate for Delaware would not necessarily be so for California, although both have good prosecution services.

8. The Attorney General should be able to institute removal proceedings against a local prosecutor or local law enforcement officer for misfeasance, malfeasance or nonfeasance, as defined by law.

Where evidence indicates that a local official has conducted himself and the affairs of his office improperly, the Attorney General should have the authority to bring a removal action against that official. The law should provide adequate procedures to prevent possible misuse of such power.

9. The Attorney General should call periodic conferences of prosecutors and should issue regular bulletins concerning developments in the criminal law and other matter of interest.

Coordination between the Attorney General and other prosecutors in the state is essential, to assure interchange of ideas and information and to maintain continuity of policy. The Attorney General should take the initiative in calling conferences and otherwise keeping prosecutors informed of developments in statute and case law. He should also assume leadership in developing and implementing statewide standards.

10. The Attorney General should develop and retain a staff of specialists who would be available to other criminal justice agencies on request.

The Attorney General should have a "lending library" of men and material that other state or local officers could draw on as needed. This would include specialists in various areas of investigation and prosecution, administration, accounting, and special equipment needed in the detection or prosecution of crime.

11. The Attorney General should be empowered to initiate local prosecutions when he considers it in the best interests of the state.

At common law, the Attorney General had full authority over local prosecutions. The office of county or district attorney represented a division of the Attorney General's powers. In those states where the local prosecutor is independently selected, the Attorney General should retain power to initiate prosecutions when, in his opinion, the interests of the state so require. Experience demonstrates that such authority, when granted, is used only infrequently.

12. The Attorney General should be empowered to intervene or supersede in local prosecutions.

In those rare instances where local prosecutors are unable or unwilling to prosecute a case properly, the Attorney General should be able to enter the case and to assist or direct the prosecutor. Where such power presently exists, it is rarely exercised, but it should be available to the Attorney General.

13. The Attorney General should appear for the state in all criminal appeals.

In the great majority of jurisdictions, the Attorney General handles all criminal appeals. In others, he assists the local prosecutor. The Attorney General should take all criminal cases on appeal, to assure uniform quality of appeals, provide the necessary expertise in complex cases, and to assure a thorough review of the record by someone who was not previously involved. The prosecutor should work with the Attorney General when appropriate to assure that he is adequately informed about the case.

14. The Attorney General should have broad subpoena power.

Eighteen Attorneys General have no subpoena power; twenty-four have such power only in connection with certain statutes, such as consumer protection. Only eleven report that they have broad subpoena powers, yet this is an essential tool if the Attorney General is to conduct investigations, succeed in litigation, and otherwise to act as the state's chief law officer. Many states which deny broad subpoena power to the Attorney General give it to less important officers and agencies.

15. The Attorney General should have power to call a statewide investigatory grand jury.

Statewide problems cannot be met solely on the local level. The Attorney General should have authority to call a statewide grand jury to investigate organized crime and other matters of general importance.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
April 26, 1973 (recompiled)

REPORT

Introduction

The Committee on the Executive hereby submits its recommendations on the following present sections of Article III:

Section	Subject	Recommendation
Section 1	Executive department	Amend
Section 2	Term of office; limitation on term	None at this time
Section 3	Election returns	Referral to another committee
Section 4	Declaration of election results	Referral to another committee
Section 5	Executive power of governor	No change
Section 6	Reports from executive officers to governor	No change
Section 7	Governor's recommendations to general assembly	No change
Section 8	When and how governor convenes general assembly	No change
Section 9	When governor may adjourn general assembly	No change
Section 10	Commander-in-chief of militia	Referral to another committee
Section 11	Executive clemency	None at this time
Section 12	Seal of state	No change
Section 13	How grants and commissions issued	No change
Section 14	Ineligibility to office of governor	No change
Section 15	Vacancy or disability of governor	Amend
Section 16	Lieutenant governor	Repeal and re-enact
Section 17	Line of succession to governorship	Repeal and re-enact
Section 18	Vacancies to be filled by governor	None at this time
Section 19	Compensation	Referral to another committee
Section 20	Officers to report to gov.	No change
Section 21	Appointments subject to advice and consent of senate	None at this time

While all of Article III pertains to the executive department, material affecting the executive is located in other articles of the Constitution.

Several sections in Article XV, containing miscellaneous provisions, were considered to be sufficiently related to the subject of the executive department as to merit recommendation. Article VII, on public institutions, and Article VIII, on public debt and public works, also contain sections related to the executive department.

The Committee on the Executive hereby submits its recommendations on the following present sections of Article XV:

Section	Subject	Recommendation
Section 2	Public printing	Repeal
Section 5	Duelists ineligible to office	Repeal
Section 8	Bureau of statistics	Repeal

The Committee on the Executive makes no recommendation at this time on the following present sections of Article VII:

Section	Subject
Section 2	Directors of penitentiary; trustees of benevolent and other state institutions to be appointed by the governor
Section 3	Filling of vacancies in such offices

The Committee reviewed the provisions of Section 12 of Article VIII, calling for the Governor to appoint a superintendent of public works for the term of one year. Although related to the executive branch, this matter has already been handled by the Commission through the recommendations of its Finance and Taxation Committee.

The Committee has had presented to it other proposals affecting the executive department of government that for various reasons have not resulted in recommendations at this time. These include certain provisions that have become popular in the literature of constitutional revision, including, among others, provisions for state executive reorganization, constitutional recognition of the governor's budgetary powers, and executive enforcement of compliance with law.

The Committee makes no recommendations in these three areas at this time but reports the results of its exploration of these subjects.

ARTICLE III
Executive Department
Recommendations

Section 1. Executive department

Present Constitution

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.

*So in the original file in the office of the Secretary of State.

Committee Recommendation

The Committee recommends the amendment of Section 1 to read as follows:

Section 1. Elected officials; duties

The executive department shall consist of a governor, lieutenant 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.

THE SECRETARY OF STATE SHALL BE THE CHIEF ELECTION OFFICER OF THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

THE AUDITOR OF STATE SHALL BE THE CHIEF AUDITING OFFICER OF THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

THE TREASURER OF STATE SHALL BE CUSTODIAN OF SUCH STATE FUNDS AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

THE ATTORNEY GENERAL SHALL BE THE CHIEF LAW OFFICER FOR THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

Comment

Section 1 of Article III of the Ohio Constitution ordains that the Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, and Attorney General are elective officers. This report to the Commission recommends no change in elective status of any officer. However, the Committee favors the addition of a general statement of duties pertaining to the offices of Secretary of State, Auditor of State, Treasurer of State, and Attorney General. For each of these offices the present Constitution contains no general description of executive function. In its initial report to the General Assembly the Commission incorporated a recommendation for a constitutional provision pertaining to the powers and duties of the Lieutenant Governor.

Committee Procedure

The Committee considered alternatives for each office specified--including abolishing the office as a constitutionally elective one, revising the scope of its responsibilities by constitutional directive, and limiting the authority of the General Assembly to prescribe powers and duties that attach to each office. It invited the present holders

of all executive offices to express their views about their respective offices, particularly as to the advisability of election versus appointment, and the necessity of inserting a constitutional statement of duties. Each cooperated with the Committee, and none came forward with a proposal for change in the method of selection of any officer named in Section 1 of Article III. The Committee carefully considered each suggestion made to it having to do with enumeration of duties, and in each instance has selected language intended to give the General Assembly full authority to prescribe by law the powers and duties of executive officers. In doing so, the Committee notes its belief that the General Assembly already has such power. However, in the commentary that follows covering each individual proposal the Committee expresses its views about the relationship of the particular office to state government in its rationale for retaining and describing that office.

General Conclusions

After study of research materials made available to it, consideration of testimony, and written submissions by present holders of all of these executive offices, and considerable discussion and debate on the issues involved, the Committee has concluded that no compelling reason exists for revising the executive article to eliminate any office as a constitutionally designated one or to change the method by which any officers are selected. Its philosophical approach to the question of whether any existing office ought to be retained as an independent, elective one was the thesis that in the absence of constitutional obstacles to the effective functioning of state government, change should not be recommended for its own sake or for the sake of experimentation. Thus in its deliberations concerning each office covered by this report the Committee addressed itself to the question of whether the Governor's authority is in any manner handicapped by the constitutional provision for election. Cognizant 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, the Committee has in each instance considered whether the status quo hinders exercise of the Governor's duty to govern and to see "that the laws are faithfully executed." No need for change has been demonstrated as necessary or beneficial.

Some of the present holders of executive offices suggested that if any constitutional enumeration of duties be added for one office, it should be added for all. To the degree that the Committee wishes not to be misunderstood as proposing distinctions between the offices in question in terms of importance or as expressing dissatisfaction with the present operations of any particular office, it tends to agree that the package ought to be considered as a whole.

A. Secretary of State

THE SECRETARY OF STATE SHALL BE THE CHIEF ELECTION OFFICER OF THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

1. In examining the functions of the office of Secretary of State and its relationship to state government, the Committee has concluded that the Secretary should continue to be elected, particularly if the duties of office include being chief election officer, as now prescribed by statute. The Committee adopts the position that the election function constitutes an important function of state government and is an appropriate place to separate executive authority.

2. In deciding to retain the Secretary of State as a constitutionally elective office, the Committee recommends inclusion of a general statement of duties that will

continue the Secretary's role as chief election officer and not leave such a designation to legislative discretion. The general public views the Secretary of State as appropriate judge of the election system, and it is this element of the job of secretariat that is persuasive support for the position that it should have some independence from the Governor.

3. The Committee acknowledges the traditional opinion among many scholars of state government that the Secretary of State performs clerical and basically ministerial, not policy-making functions, and that, therefore, the position should be appointive. However, in recommending no change in the method of selection, the Committee also recognizes the cogency of one of the major arguments for popular election--that the office has more policy-making authority than is commonly recognized, particularly in the important areas of elections and corporate regulation. The way in which the Secretary carries out his statutory duty pertaining to ballot formulation, indeed, may well affect the fate of the vote on questions and issues. The making of decisions as to whether qualifications for incorporation are met and maintained is further indication of a policy-making role.

4. In general the Committee favors legislative freedom to expand the office as the necessities of a particular period require. The Committee finds merit to the claim that some official is needed who can supervise experimental governmental programs which are inaugurated on too small a scale to warrant the creation of a new and separate office specifically charged with their administration. Historically, it is the office of state Secretary of State to which have 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 such flexibility is desirable.

5. Recognizing, too, that in the absence of constitutional inhibition and without specific constitutional authority the General Assembly may prescribe powers and duties, the Committee recommends that, in view of testimony that it has heard, the General Assembly should consider the existing statutory duties of the Secretary of State with a view to consolidating into that office similar duties which are placed elsewhere. The Secretary of State is popularly regarded as the chief depository of records for the state, and the Committee 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 AUDITOR OF STATE SHALL BE THE CHIEF AUDITING OFFICE OF THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

1. The proposal for describing the Auditor's function was the subject of lengthy Committee discussion, and the decision as to its final form was not easily made. Arguments were presented that the more important function of the Auditor of State is that of the review of expenditures after they are made rather than before, instead of the examination of vouchers to establish the validity and legality of claims against the state. Testimony and evidence of some expert witnesses from the accounting field representing internal auditing associations called for recognition of an auditing responsibility that incorporates determination as to whether programs have been administered in accordance with legislative authorization and policy and whether planned program objectives have

been achieved. Furthermore, with respect to the Auditor of State and the Director of Finance, the Committee has noted some statutory duplication of function, particularly in the requirements that make both responsible for prescribing a uniform system of accounting and reporting. However, after considerable debate upon the arguments for broadening or revising the scope of the Auditor's office, the Committee has concluded that the powers and duties of the office are better developed by law than by constitution, so that the Auditor's function can continue to be responsive to the needs of a particular time.

2. The Committee's intent in making this recommendation is to retain the present procedure whereby the legislature 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 avoids use of the terms "public funds" or "funds of the state" because such a provision would require definition and could be construed as altering present practices under which the Auditor's responsibilities to audit the accounts of political subdivisions of the state are prescribed and described by law.

3. Endorsement of the continued election of the Auditor of State recognizes the merits of having an independent auditor to serve as a check upon the fiscal operations of the executive branch. The Committee acknowledges the popularity of the view that an independently elected Auditor provides a valuable means of validating the legality of public expenditures.

4. The recommendation recognizes that the General Assembly can create its own legislative auditor to conduct performance audits, which could include an examination and report to the General Assembly of the manner in which executive officials have discharged their responsibilities to faithfully, efficiently, and effectively administer programs under their direction.

C. Treasurer of State

THE TREASURER OF STATE SHALL BE CUSTODIAN OF SUCH STATE FUNDS AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

1. The Committee feels that no compelling reason exists to designate the office of Treasurer of State as one that should be responsible to the Governor. The functions of the office have been such that the Governor has no reason to exercise control in their execution. The Treasurer under such a view should continue to be responsible to the people.

2. The Committee finds no reason for making a major alteration in the way that state funds are presently handled, and in selecting the terminology pertaining to a general statement of duties wishes to make its intention clear on this point. With respect to state funds the Treasurer would continue to be custodian of such funds as are provided by law. The provision recognizing the authority of the General Assembly to assign specific powers and duties to the office is in keeping with present practices and is consistent with the other proposals in this report. The references to "such state funds" and "such powers and duties" are both modified by the final expression, "as are prescribed by law."

3. The legislature has always prescribed the powers and duties that attach to the office, and the Committee 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 ATTORNEY GENERAL SHALL BE THE CHIEF LAW OFFICER FOR THE STATE AND SHALL HAVE SUCH POWERS AND DUTIES AS ARE PRESCRIBED BY LAW.

1. The Committee is committed to the position that the Attorney General should continue to be an independent elective officer because the Attorney General operates as the attorney for the state, not attorney for the Governor and, therefore, the office holder should be independent of the chief executive. The Attorney General should not be regarded as an agent for the executive branch and should continue to be free to give advice to all parties to whom he owes the statutory obligation without being hampered by dependency upon gubernatorial endorsement. Under this view, the Governor is but one of the attorney general's many clients. The Attorney General in Ohio has long been an officer exercising important responsibilities that are not within the scope of the Governor's duties and interests.

2. The Attorney General is the attorney for all of the people and should, therefore, be chosen by them. The trend toward expanded authority in such areas as consumer protection suggest that the role of the Attorney General as attorney for the people is one that is universally receiving greater recognition. Such a direction supports the position that the Attorney General ought to be directly responsible to the people at large.

3. A general definition of the Attorney General's relationship is advisable because of the unique relationship of the office to state government. The Attorney General has been required to furnish legal advice to either house of the General Assembly as well as to state officers and agencies. Some authorities have described the office as executive, yet quasi judicial (based upon the function involving issuance of advisory opinions on questions of law) and have described as "special" the relationship of the office to the legislative branch. To provide, as does this proposal, that the legislature shall prescribe the powers and duties of the office may arguably be termed surplusage because the General Assembly has authority to do so without specific provision on the subject. However the Committee, in its deliberations with regard to the office, has expressed concern and reservations about the potential exercise of powers not set forth in the law, based upon the common law origins of the office. While the Committee has found in Ohio no judicial recognition of authority not specifically prescribed by statute, it has framed its proposal in such a way as to express its view that only statutory powers and duties should be recognized.

4. The Committee has reviewed the position of the National Association of Attorneys General and the recommendations of a variety of other studies at the state and national level for strengthening the Attorney General's role in reforms related to the administration of criminal justice. Whatever changes in the office are made as a result of increasing emphasis upon coordinating the Attorney General's role with that of local prosecutors and broadening of prosecutorial or investigative powers, particularly in the area of organized crime, should, it believes, come about as a result of legislative mandate, not

constitutional directive. It is for this reason that the committee has deliberately chosen to define the Attorney General as "chief law officer" in accordance with a long standing definition in the statutes of the office. The Committee would defer to the legislature and the exigencies of the future to further specify the prosecutorial and other functions of the office. Such a general statement of duties is consistent with the practice of statutory assignment of specific responsibilities from the inception of the office by statute, in 1846, to the present date.

Section 3. Election returns

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.

Section 4. Declaration of election results--Present Constitution

Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Committee Recommendation

The Committee recommends the referral of Sections 3 and 4 of Article III to the Committee to Study Education, Elections, and the Bill of Rights.

Section 5. Executive power of governor

Present Constitution

The supreme executive power of this State shall be vested in the Governor.

Section 6. Reports from executive officers to governor --Present Constitution

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.

Section 7. Governor's recommendations to General Assembly

Present Constitution

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.

Section 8. When Governor may convene general assembly

Present Constitution

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.

Section 9. When Governor may adjourn the general assembly

Present Constitution

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.

Committee Recommendation

The Committee recommends retention of Sections 5, 6, 7, 8, and 9 of Article III without change.

Comment

The Committee recommends retention of these sections, because, in studying the executive branch of government in Ohio, it was felt that these sections in no way hamper its successful operation, and that they have served the executive branch of government well. These sections appear to give rise to no serious questions, and none of the authorities that have been consulted by the Committee have given any reasons why they should be deleted. The Committee recognizes that were it dealing with a clean slate, it might not include all these sections, or might provide for some rearrangement of the material, yet no good reason has been presented for changing them, and it has been the philosophy of the Committee that unless a constitutional provision is in some way hindering the operation of government, and if there are no specific reasons for removing such constitutional provisions, such as obsolescence, they are better left in the Constitution. Accordingly, the Committee on the Executive feels that it may well be useful to retain Sections 5, 7, 8, and 9 in Article III.

The Committee recommends the retention of Section 6 because together with Section 20 it provides for necessary communication between independently elected officials in the executive department and the Governor. The Committee felt that particularly if the officers in the executive branch were to remain in the Constitution as independently elected officials, these provisions were of value to insure appropriate communication.

Section 10. Commander-in-chief of militia

Present Constitution

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.

Committee Recommendation

The Committee recommends referral of Section 10 of Article III to whichever committee of the Commission is assigned the subject matter of the state militia, subject of Article IX of the Ohio Constitution.

Section 12. Seal of state

Present Constitution

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. How grants and commissions issued

Present Constitution

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.

Committee Recommendation

The Committee recommends retention of Sections 12 and 13 of Article III without change.

Comment

These sections have been part of the Ohio Constitution since 1851, and all but 11 of the states have constitutional reference to a great seal. It was felt by the Committee that these sections have historical significance, and that they are not obtrusive nor capable of creating problems. The seal of the state is basically a tradition, and an example of state authority. Further, it was felt that if there is to be a seal of the state, it is a matter of constitutional importance, so that it could not be abolished by executive authority nor by the legislature.

Section 14. Ineligibility to office of governor.

Present Constitution

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.

Committee Recommendation

The Committee recommends retention of Section 14 of Article III without 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 Committee finds merit in the constitutional inhibition upon simultaneously serving as Governor and holding other public office. This recommendation is consistent with the Committee'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 Committee finds no reason to suggest its revision or repeal.

Section 15. Vacancy or disability of governor

Present Constitution

In the 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.

Section 16. Lieutenant Governor

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.

Section 17. Line of succession to governorship

Present Constitution

If the Lieutenant Governor, while executing the office of Governor, shall be impeached, displaced, resign or die, or otherwise become incapable of performing the duties of the office, the President of the Senate shall act as Governor, until the vacancy is filled, or the disability removed; and if the President of the Senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of Governor, the same shall devolve upon the Speaker of the House of Representatives.

Committee Recommendation

The Committee recommends the amendment of Section 15 and repeal and re-enactment of Sections 16 and 17 to read as follows:

Section 15. (A) In the case of the death, CONVICTION ON impeachment, resignation, OR 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 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 EITHER 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.

Section 16. DETERMINATION OF DISABILITY AND SUCCESSION

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 DAYS AFTER TRANSMITTAL OF SUCH DECLARATION.

THE SUPREME COURT HAS ORIGINAL, EXCLUSIVE, AND FINAL JURISDICTION TO DETERMINE ALL QUESTIONS CONCERNING SUCCESSION TO THE OFFICE OF THE GOVERNOR OR TO ITS POWERS AND DUTIES.

Section 17. VACANCY EARLY IN THE TERM; VACANCY OR DISABILITY OF GOVERNOR-ELECT

WHEN FOR ANY REASON A VACANCY OCCURS IN BOTH THE OFFICE OF THE GOVERNOR AND THE 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.

Comment

These three sections would restate the present constitutional provisions for succession in the event of the governor's death or disability, supply procedures for contingencies not covered under the present succession provisions, and remove ambiguities as to the status of one who serves in the capacity of Governor under varying situations.

Questions specifically addressed by this recommendation include the following:

1. How a disability in the office of governor is to be initiated and who is chargeable with making the determination as to its existence;

2. Status of the successor to the governor in the event of the latter's death and in the event of disability;

3. Succession to the office of governor in the event of death of a person elected to become governor between the November election and the second Monday of January, when the gubernatorial term commences; (there is authority to the effect that the term "governor" as it appears in the Ohio Constitution does not include "governor-elect.");

4. What powers, duties, and compensation accrue to the holder of the position of Governor during the disability of the Governor.

The past experience of several states indicates the need for some method of determining whether a Governor is incapable of performing the duties and functions of his office. Early in its deliberations concerning these questions the Committee decided that the state Supreme Court should have original, exclusive, and final jurisdiction to determine the questions of gubernatorial disability and succession. In some states the legislature makes such determinations, but the Committee rejected such a plan because of the possibility that it could result in the introduction of irrelevant political concerns.

Alabama, Illinois, Mississippi, and New Jersey are among states in which the Supreme Court makes the decision of whether the Governor is disabled and the Model State Constitution so recommends. The Committee is in agreement with rationale of MSC drafters that "all issues relating to succession under the state constitution will eventually wind up in that court, anyway." Furthermore, MSC Commentary argues persuasively that:

> "The delegation of 'original' and 'exclusive' jurisdiction of issues represents an effort to allow such cases to be disposed of with promptness and finality so as to shorten the interregnum which might result from a governor's disability...With the supreme court exclusively authorized to sit as a trial

court which can render a final, unappealable judgment, the delay and uncertainty are avoided which may otherwise result from appeals..."

The Committee also favors designating the General Assembly as the triggering mechanism for getting the question of disability before the Court. It prefers constitutional specificity on this point and rejects alternatives that the General Assembly provide by law for raising the question and the MSC. choice that would leave the question of standing to sue to the discretion of the Court, for development in a traditional case by case manner. The General Assembly, composed of elected representatives of the people, it reasoned, should go on record in such a matter.. The initiation of the question would be by joint resolution requiring a two-thirds vote.

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 (presumably any condition which renders the Governor unable to discharge the duties of his office). The Committee selected this provision over the more general one that the Court would be constitutionally directed to determine whether the governor is "able" to discharge the duties of gubernatorial office.

The second paragraph of proposed new Section 16 allows the Governor to initiate a proceeding to determine whether the disability has ceased to exist. Under the federal constitution and the similar Virgina provision, the President and the Governor, respectively, may commence such a proceeding. Section 16 would further guarantee notice, public hearing, and the right to be represented in proceedings to determine the existence or continuation of a disability.

The Committee also favors a constitutional requirement that the Court act within a specified length of time so that the question of disability could not remain for long unresolved. The twenty-one day period within which the Court would be required to act under Section 16 has precedent in the federal and Virginia constitutions.

Section 15 would be amended to distinguish between succession to the office when it becomes vacant and serving as Governor when the Governor is unable to discharge the duties of office by reason of disability. By virtue of division (D) anyone serving as Governor for the duration of the Governor's disability would have the powers, duties, and compensation of that office. The Committee rejects the idea adopted by the Model State Constitution and some other state constitutions of putting a time limitation upon the status of serving as Governor under such circumstances. A vacancy in the office of Governor is said to occur after six months in some provisions. Under the Committee's proposal, a Governor once disabled could always initiate a proceeding to be reinstated to office.

Division (E) of the proposed Section 15 prohibits simultaneous service as Governor and presiding officer of either house of the legislature but not that of Governor and Lieutenant Governor. However, it prohibits simultaneous receipt of compensation of office of Governor and that of any other office in the line of succession.

The present line of succession has been restated but retained. 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 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.

The Committee rejected an alternative adopted by some states that would allow the legislature to provide for subsequent succession in the event of a vacancy or disability in the office of the Lieutenant Governor. Political manipulation or machination by a hostile legislature would be avoided. It also decided against enumeration of other officials, elected statewide, as some states have done, reasoning that the end of the line of succession should be designated as a position that would or could always be filled without delay. The alternative, under such a concept, for example, could include naming the presiding officer of either house, or the most senior or junior member of the General Assembly because, unless the entire legislature were abolished, there would always be a person who could meet the qualifications. No reason is apparent for changing the present line or designations, and the provision assures that there would always be a holder of either of such positions to succeed to the office of Governor in the event of a vacancy or disability in the office of Lieutenant Governor.

Section 17 further contains a special procedure to be followed should the offices of Governor and Lieutenant Governor both 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, in the manner similar to the filling of legislative vacancies under Section 11 of Article II.

The filling of the temporary vacancy until such an election involves the question of providing for a line of succession to the governorship. A logical choice to fill the temporary vacancy prior to election under such a proposal would be the officer next in line of succession as is provided in proposed Section 17.

The New York Constitution similarly calls for election when the offices of both Governor and Lieutenant Governor are vacant. A Governor and Lieutenant Governor are to be elected for the remainder of the term at the next general election happening not less than three months after both offices become vacnat. The temporary President of the Senate acts as Governor for the period between the vacancy and the election.

Another question that could arise under the present provisions is the determination of a successor in the event of the death or disability of the Governor-elect. Under present Section 3 of Article III returns of the November election are transmitted to the President of the Senate, who during the first week of the session "shall open and publish them and declare the result." If there is no session in January, under Section 4 of Article III, the returns are made to the Secretary of State and the result declared by the Governor.

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. Consequently, there is no one with "governor-elect" status until the results are declared in January, although the term of office of Governor continues until his successor is "elected and qualified."

The second paragraph of proposed Section 17 provides simply that if for any reason the Governor-elect is unable to assume the office on the second Monday in January, the Lieutenant Governor-elect shall do so, either as Governor or serving as Governor,

depending upon the circumstances. Such a provision obviates the necessity of revising or eliminating Sections 3 and 4 of Article III, relative to transmitting of election returns. However, the Committee recommends referral of these sections to the Committee to Study Education, Elections, and the Bill of Rights.

In its initial set of recommendations to the Legislature the Commission has already recommended that present Section 16 of Article III be repealed, through its Committee to Study the Legislature. The present section designates the Lieutenant Governor as President of the Senate.

Section 19. Compensation of executive officers

Present Constitution

The officers mentioned in this article shall, at stated times, receive, for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected.

Committee Recommendation

The Committee recommends that Section 19 of Article III be considered with other sections of the Constitution concerned with the compensation of public officers, by a Committee on Public Officers.

Section 20. Officers to report to governor

Present Constitution

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.

Committee Recommendation

The Committee recommends retention of Section 20 of Article III without change.

Comment

The Committee 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. In the 1951 Wilder Report, Professor Harvey Walker, in his section on the Executive, recommended the deletion of Sections 6 and 20 of Article III, specifying that such deletions should be made "especially if the present elective state offices mentioned are made appointive." (p. 39) Following this rationale, the Committee believes that if the present elective state officers are to remain as such, the provisions should be retained.

ARTICLE III
Executive Department

No recommendations at this time

Section 2. Term of office;limitation upon service

Present Constitution

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.

Committee Recommendation

The Committee makes no recommendation with respect to Section 2 of Article III at this time.

Comment

The Committee has discussed the provision in Section 2 of Article III that no person "shall hold the office of Governor for a period longer than two successive terms of four years."

It has noted the ambiguity of the provision, based upon the two possible interpretations to which it is subject--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.

An interpretation from the Ohio Supreme Court is anticipated within the next sixty days. The Committee has been furnished research materials presenting the arguments for and against unlimited terms for governors, but because of the pending litigation, the Committee has deferred consideration of the alternatives to clarify or abolish the provision.

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Section 11. Executive clemency

Present Constitution

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

*So in the original on file in the office of the Secretary of State

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.

Committee Recommendation

The Committee makes no recommendation with respect to Section 11 of Article III at this time.

Comment

Section 11 of Article III gives the Governor the power after conviction to grant reprieves, commutations, and pardons for all crimes and offenses except treason and cases of impeachment, upon such conditions as he may think proper, subject to the proviso that regulations as to the manner of applying for pardons may be prescribed by law. In treason cases, under the same section, he may suspend execution and report the case to the General Assembly, who may grant pardon, commutation, or reprieve. Section 11 contains the further requirement that the Governor communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of action taken and reasons.

A staff research study of executive clemency provided the Committee with historical and contemporary information about pardoning practices in this country. It revealed that in approximately 75 per cent of U.S. jurisdictions the Governor exercises the power of pardon and other forms of executive clemency. The advisory pardon board or authority has become a widespread institution, in most cases acting in an advisory capacity to the Governor, and in a minority of states acting as final arbiter in clemency decisions.

Pardon agencies were created in response to charges that the pardoning power was being abused. However, for all the widespread condemnation of pardon abuses, reports have documented few actual instances of manipulation in the pardon process. Only sporadic instances of unwise and undiscriminating exercises of the pardon power have been reported. No documentation has been found to support charges of reckless use of the pardon power that were made in Ohio in the latter part of the 19th century.

Most pardon authorities, as in Ohio, are statutory and not constitutional. A recent report on the Ohio Constitution to the Wilder Foundation favors a board that includes experts. Noted with approval is the Pennsylvania practice of including a lawyer, penologist, physician, and psychiatrist or psychologist on the Board of Pardons. The Pennsylvania Board is constitutional but the requirement regarding experts as members is statutory.

Among the states with recently adopted, amended, or revised constitutions, or in which constitutional revision had been studied in the past decade, there had been no discernible trend toward standardization of pardoning practices. The constitutions of the two newest states give to the Governor a broad pardon power. Under the Alaska constitution, the chief executive may grant pardons, commutations and reprieves and may

suspend and remit fines and forfeitures. The power is subject to procedures prescribed by law and does not extend to impeachment. In Hawaii the Governor may grant all of these forms of clemency for all offenses, subject to regulation by law as to the manner of applying for clemency. The Model State Constitution retains executive clemency but permits delegation of the power under procedures prescribed by law. The purpose of the delegation provision, say its drafters, recognizes that "the granting of pardons involves complex judgments of a correctional and behavioral nature" in which chief executives are not trained, and hence, the Model "expresses the view that a state constitution should leave the matter to legislative development."

In Ohio the matter of pardon has been the subject of legislative development, and no problems have been called to the attention of the committee that could not be solved by legislation. Among the options presented in the staff research study was the removal of treason as an exception to the pardoning power, as did the proposed New York Constitution of 1967, on the basis that treason convictions might be inconsistent with the federal constitution. The Michigan Constitution of 1973 eliminated treason as an offense for which the governor does not have authority to reprieve, commute, or pardon. The reference to treason could be removed as obsolete inasmuch as only two cases of completed treason prosecutions by a state have been uncovered--that of Thomas Dorr of Rhode Island (1844) and one involving John Brown of Virginia (1859). However, Ohio statutes recognize the crime of treason against the state (Sections 2921.01 and 2921.02 of the Ohio Revised Code). Framers of the federal constitution debated whether states should retain the right to enact laws for treason, and the proponents of state power prevailed in limiting the federal constitutional provision to treason against the United States.

No justification has been established for revising the present provision governing executive clemency in Ohio. The present Governor expressed satisfaction with Section 11 as it stands. No case has been made for affixing constitutional permanency to pardon authorities, designed to assist the Governor in the discharge of his clemency powers.

Section 18. Vacancies to be filled by governor

Present Constitution

Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Committee Recommendation

The Committee makes no recommendation with respect to Section 18 of Article III at this time.

Comment

Section 18 provides that after the Governor fills a vacancy in the enumerated executive offices, a successor shall be elected for the unexpired term at the next general election in an even numbered year that occurs more than 40 days after the vacancy, with the proviso that appointment is for the remainder of the unexpired term in the event that it ends within one year immediately following such election. The election provision was last amended in 1969 when both Section 18 of Article III and Section 2 of Article XVII (Elections) were amended to provide for the elimination of the short term election of state officers to fill a vacancy, where the remainder of term is less than one year. Section 2 of Article XVII is virtually a duplicate of Section 18 of Article III, except by its terms it applies to vacancies "in any elective state office other than that of a member of the General Assembly or of Governor."

Section 18 of Article III applies to vacancies in all of the executive offices except that of Lieutenant Governor, and Section 2 of Article XVII apparently applies to all executive offices. The Committee studying the elections provisions will want to consider Section 18 of Article III in conjunction with Section 2 of Article XVII because of the apparent conflict in the two sections. The Committee to Study the Executive defers consideration of this section because it involves the broader area of elections.

Section 21. Appointments subject to advice and consent of senate

Present Constitution

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.

Committee Recommendation

The Committee makes no recommendation with respect to Section 21 of Article III at this time.

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 Committee has taken no action on this matter at this time.

ARTICLE XV
Miscellaneous

Recommendations

Section 2. Public printing

Present Constitution

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.

Section 5. Duelists ineligible to office

Present Constitution

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.

Section 8. Bureau of statistics

Present Constitution

There may be established, in the Secretary of States* office, a bureau of statistics, under such regulations as may be prescribed by law.

*So in the original on file in the office of the Secretary of State.

Committee Recommendation

The Committee recommends the repeal of Sections 2, 5, and 8 of Article XV.

Comment

A. General Conclusions

Article XV, captioned "Miscellaneous" 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 constitutional convention debates disclose that the provisions were adopted to meet specific problems of that period. Their adoption as part of the fundamental law can hardly be justified in the first place because the subject matter of the sections in question has to do with matters transitory in nature and clearly within the province of the legislature. Two 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 sections recommended to be repealed are sections 2, 5, and 8 of Article XV. The specific reason for each recommendation and a statement pertaining to the historical perspective of each of the sections appear below.

The Committee's rationale for these recommendations could be described as 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 philosophy of the Committee has been to limit recommendations to retain or to add provisions relative to the authority of the General Assembly to act to those situations where historical precedents justify an exception to the general rule that the authority of a state legislature is plenary. The sections from Article XV included in this report do not come within such an exception.

B. Specific Provisions

1. Public printing

Any provision to single out public printing is inconsistent with the basic function of a Constitution. The evil to which the original version of the section was addressed was legialtive "wrangling and quarreling" each session on the subject of who should do the state printing. As passed in 1851 the section required that printing be let out on contract.

The amendment of the section in 1912 added the alternative that printing could be done by the state in such manner as shall be prescribed by law and, for reasons not made clear by the reports of the proceedings of the 1912 constitutional convention, added the final sentence relative to stationery and supplies. The concern in 1912 was that the General Assembly not be required to enact laws requiring executive officers to award printing contracts and to enable the state to establish a printing department when the volume of printing reached such proportion as to justify such action.

Section 2 is clearly obsolete, having first been proposed to meet specific problems that disturbed critics of the legislature some 120 years ago, and subsequently amended 50 years ago to remove the original restrictions on legislative action that it imposed in this area. History reveals that even some of the delegates of the 1851 Convention regarded the section as an unnecessary singling out of a subject matter that was within the province of the legislature to control.

2. Duelists ineligible to office

The section on dueling is wholly obsolete. The section is unnecessary in view of other qualifications that have been established by statute for the holding of public office. Furthermore, 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. Furthermore, Section 4 of Article XV 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 General Assembly, of course, has power to define crimes.

The legislature has inherent power to regulate eligibility to office by statute. The singling out of dueling was considered both outdated and violative of good constitutional draftsmanship by some who debated its inclusion in the Convention of 1851.

Statutory material should be deleted from the Constitution unless there exists some compelling reason for making an exception to such a rule. Little can be anticipated in the way of opposition to removal of a dueling provision of this sort.

3. Bureau of statistics

This provision 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 would have 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 Secretary of State. The creation of any kind of state agency to collect statistics of any sort is not a matter of a fundamental nature. The provision is dated and obsolete, and even the 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.

The present Secretary of State, in response to the Committee's request for a position upon its recommendation regarding Section 8, has advised the Committee of his agreement that this provision should not be retained in the Constitution.

ARTICLE VII
Public Institutions

No recommendations at this time

Section 2., Directors of penitentiary; trustees of benevolent and other state institutions to be appointed by the governor

Present Constitution

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. Filling of vacancies in such offices

Present Constitution

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.

Committee Recommendation

The Committee makes no recommendation with respect to Sections 2 and 3 of Article VII at this time.

Comment

Sections 2 and 3 of Article VII give the Governor power to appoint trustees of the "benevolent and other state institutions" with the advice and consent of the senate and to fill vacancies in such posts. They could be covered by a general appointment section, as suggested by the 1970 Wilder Foundation report, or they could be amended or repealed because of their obsolescence.

OTHER PROPOSALS BEFORE THE COMMITTEE

No recommendations at this time

Among the popular proposals presented to the Committee were ones to expand the executive article by dealing with the following subjects: (1) Executive reorganization; (2) The budget as an executive responsibility; (3) Executive enforcement of compliance with law.

Committee Recommendation

The Committee makes no recommendation as to the adoption of proposals for executive reorganization, an executive budget, or enforcement of compliance with law at this time.

Comment

A. General Conclusions

Having embraced a philosophical attitude that amendments ought to be developed only in response to constitutional barriers that threaten the effective operation of the branch of government under study, the Committee has discussed but not acted upon a number of suggestions that would broaden the executive article. The reluctance to act more hastily on some of these proposals should not be misunderstood as reflecting a view that a strong and independent legislature is inconsistent with an efficient and effective executive. On the dontrary, the Committee agrees with the proposition that "true separation and balance of powers calls for a strong legislature, a strong executive, and a strong judiciary; and that when numerous checks and balances are established within the executive branch, that branch is rendered weak and incapable of fulfilling its responsibilities in the large and basic balance of powers of the three departments of government." However, to this date, the Committee has not been convinced that constitutional revision along the lines described below is vital to the efficient operation of Ohio government.

Such a posture on the part of the Committee to study the Executive Article is not intended to foreclose future consideration of some or all of the matters included within these popular reform proposals.

Nor does this committee want to be understood as excluding testimony or other evidence relative to the desirability of constitutionally clarifying executive powers and duties. It proceeds cautiously by limiting its initial set of recommendations to matters upon which it has had the benefit of considerable expert opinion and to which it has given great scrutiny. To go beyond its present recommendations without adequate foundation risks attaching constitutional rigidity to transitory ideas about how the executive can most effectively discharge its responsibilities and limiting future experimentation by the very inclusion of insufficiently considered constitutional solutions.

B. Specific Proposals

The Committee retains an open mind concerning the following specific proposals to which it has given some study, and, as to the possibility of others, is not prepared

to call the executive department a closed study.

1. Executive Reorganization

A twentieth centure administrative reform movement has resulted in popularization of recommendations for:

(A) Constitutional authority for the governor to initiate reorganization of executive departments and agencies, subject to legislative veto--a provision included in model executive articles of the Model State Constitution and the National Governor's Conference and eight state constitutions; and

(B) Constitutional ceiling (commonly 20) on the number of executive departments--in the same model articles and nine state constitutions.

The Committee has considered arguments for and against executive reorganization initiative under constitutional authorization. Ohio governors presently propose specific 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. See, for example, Senate Bill No. 318 of the 109th General Assembly. This legislation has not been adopted in Ohio, but similar reorganization acitivity has taken place in other states by virtue of legislation, without constitutional change. A recent publication of the Council of State Governments reports upon executive branch reorganization in 12 states where "significant restructuring" has occurred in the last seven years. Of the group, four states effected such reorganization by the legislature without constitutional mandate.

In summary, the committee's rationale for not recommending constitutional recognition of such authority at this time is in its belief that if such a plan is desirable, comparable results can be achieved by legislation.

Cogent reasoning has been advanced both for an against a constitutional limitation on the number of executive departments. However, 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. Finally, although a constitutional ceiling has significant support, the committee notes that Massachusetts repealed its constitutional limitation in 1966, and the rejected New York Constitution of 1967 would have effected removal of the limitation. In the latter state, convention commentary pointed out that despite the numerical limitation on civil departments to 20, there were 150 state administrative units reporting to the governor.

In an address to the Committee the present Governor of Ohio stated that the executive branch is presently organized into 23 departments, 83 bureaus and agencies, and 161 boards and commissions. Such a structure is clearly cumbersome, and the Governor called for executive integration. However, the question to which the Committee addressed itself was whether executive programs are being delayed or frustrated by constitutional

infirmities.that obstruct administrative integration, and on this point it remains unconvinced that the solution to executive fragmentation lies in constitutional limitations of the kind currently popular.

The principles of public administration supporting reorganization are said to be: grouping of agencies into broad functional areas; establishment of relatively few departments to enhance span of control and pinpoint responsibility to the chief executive and legislature; delineating single lines of authority to the top; administration of departments by single heads. With these goals the committee has little quarrel. However, in the absence of a demonstration that compelling and immediate needs justify a delineation of reorganization authority in the Constitution, the committee has been guided by the following policy rules:

Constitutions should be confined to fundamental matters, avoiding unnecessary detail so as not to foreclose different approaches in the future.

Policy should be to deal sparingly with organization of the executive branch in the state constitution.

Statutory-type specifications along lines recommended by advocates of reorganization for administrative integration are not justified in a constitutional provision.

The constitutional issue is "one of eliminating specific constitutional impediments to integration...and of otherwise preserving constitutional neutrality on questions of how state administration is to be organized and conducted."

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," there is no explicit provision for an executive budget in the Ohio Constitution. 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. Many 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 legislature. The 1970 Report of the Wilder Foundation on the Ohio Constitution recommends that the duty to submit a balanced budget be clearly 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.

Another popular revision has been 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 a 1972 publication. In Ohio the budget is adopted biennially, but appropriations are made for each year of the biennium separately. The Committee has had the benefit of contrasting arguments for a biennial budget and for an annual budget, but it has also recognized that notwithstanding andministrative 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 periods, and the effect is to advance executive power. On the other hand, annual budget systems correspond with annual legislative sessions.

In other states a direction is clearly discernible toward constitutional provisions for an executive budget, submitted annually, with supporting legislation. The Model State Constitution calls for the Governor to transmit an annual budget estimate "setting forth all proposed expenditures and anticipated income of all departments and agencies of the state, as well as a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues." Its drafters reason:

> "No single act in the fiscal process is of greater importance that the preparation of the budget, which enables the governor to develop a comprehensive fiscal program for each fiscal year. Recognizing this executive responsibility, the Model requires that the chief executive develop not only proposals for an expenditure program but also a plan for the raising of the necessary revenues. Any new or additional revenues the governor feels are necessary must be spelled out in his budget presentation.
>
> With such requirements the legislature is in a position to evaluate the executive's comprehensive fiscal plan, to increase or decrease items and to strike out or add items. These broad powers are balanced by the governor's power to veto appropriation bills."

However, the Committee also finds that there is much to be said for a legal structure which facilitates adaptation to changing circumstances. This view might agree with those who believe that flexibility is necessary in budget processes, and that such problems should be left for legislative, rather than constitutional, determination, with neither an anuual nor a biennial budgetary provision written into the Constitution. It has been pointed out that the legislature in Ohio can always make supplemental appropriations or amend the appropriations act to change appropriations if it wants to.

Consequently, in accord with its general philosophical approach, the Committee does not at this time endorse constitutional revision pertaining to the executive role, the budget process, or the frequency of budget submission. It does, however, remain receptive to further evidence that a specific constitutional provision would alleviate some specific problems that the executive department confronts in carrying out its budgetary responsibilities.

3. Executive enforcement of compliance with law

A third question that the Executive Committee has explored but briefly is whether the Governor should be empowered to investigate any part of the executive department and enforce compliance with law by proceeding against officers.

The 1970 Wilder Commission Report, State Government for Our Times, recommends constitutional authority for the governor to investigate any part of the executive branch. Although under Section 6 of Article III the Governor" shall see that the laws are faithfully executed" the Model State Constitution and some newer state constitutions have specifically recognized a constitutional duty to investigate possible misconduct.

Reasons the Wilder Foundation report: "Constitutional affirmation of this duty can prevent unnecessary conflict between the governor and the legislature."

The Committee has not received testimony or research materials on this question of expanding executive authority.

Dr. Warren Cunningham, a member of the Committee, prepared a comprehensive revision of the executive article, containing many of the matters of change that the Committee elected not to act upon at this time. His complete proposal, containing an outline of a re-written article on the executive department, appears as an appendix to this report.

APPENDIX A

SUGGESTED ARTICLE UPON THE "EXECUTIVE" FOR THE CONSTITUTION OF THE STATE OF OHIO

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Prepared and submitted for the consideration of the Committee on Revision of the Ohio Constitution by: W. Cunningham, Miami University.

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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 SCHEDULES 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 be adjourn 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 executived 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 omitted 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.

ATTORNEY GENERAL WILLIAM J. BROWN'S STATEMENT REGARDING RECOMMENDATION OF EXECUTIVE BRANCH COMMITTEE REDEFINING THE POSITION OF ATTORNEY GENERAL IN THE OHIO CONSTITUTION, ARTICLE III, SECTION I

The committee studying the Executive Branch has recommended to the Ohio Constitutional Revision Commission an amendment to Section I, Article III of the Ohio Constitution. The amendment, insofar as it relates to the Office of the Attorney General states: "The Attorney General shall be the chief law officer for the State and shall have such powers and duties as are prescribed by law." The committee comments as follows: "[T]he committee favors the addition of a general statement of duties pertaining to the offices of Secretary of State, Auditor of State, Treasurer of State, and Attorney General. For each of these offices the present Constitution contains no general description of executive function."

On page 7 the committee comments further:

> "A general description of the Attorney General's relationship is advisable because of the unique relationship of the office to state government. The Attorney General has been required to furnish legal advice to either house of the General Assembly as well as to state officers and agencies. Some authorities have described the office as executive, yet quasi judicial (based upon the function involving issuance of advisory opinions on questions of law) and has described as 'special' the relationship of the office to the legislative branch. To provide, as does this proposal, that the legislature shall prescribe the powers and duties of the office may arguably be termed surplusage because the General Assembly has authority to do so without specific provision on the subject. However, the committee, in its deliberations with regard to the office, has expressed concerns and reservations about the potential exercise of powers not set forth in the law, based upon the common law origins of the office. While the committee has found in Ohio no judicial recognition of authority not specifically prescribed by statute, it has framed its proposal in such a way to express its view that only statutory powers and duties should be recognized." (Emphasis supplied.)

Attorney General William J. Brown suggests that the proposed changes would take away from the office of the Attorney General the historical common-law powers and duties of the office, which have been recognized by both the Ohio Legislature and Courts. The Attorney General submits this would severely injure the office and the people of the State of Ohio.

A. The Ohio Legislature has already recognized the Attorney General's common-law powers.

Ohio Revised Code Section 109.26 provides in pertinent part:

> "In addition to all his common law and statutory powers, the Attorney General shall prepare and maintain a register of all charitable trusts established or active in this State. . . ." (Emphasis supplied.)

Moreover, Ohio Revised Code Section 1331.13, dealing with the Attorney General's antitrust activities, specifically provides that the Attorney General may proceed "for a violation of a law, common or statute, against a conspiracy or combination in restraint of trade. . . ." (Emphasis supplied.)

Thus, it can be seen, in at least two sections of the Ohio Revised Code, that the Attorney General has been specifically authorized by the General Assembly to proceed under the common law.

B. The Ohio Supreme Court has already recognized the Attorney General's common-law powers.

Contrary to the Committee's comment, the Ohio Supreme Court has repeatedly acknowledged the existence of common-law powers of the Attorney General. In Eichenlaub v. State, 36 Ohio St. 140 (1880), the defendant appealed his con-

viction for committing a misdemeanor. The Ohio Supreme Court stated at the outset:

> "At common law the Attorney General has authority to proceed by information in all cases of misdemeanor, except misprision of treason, though in practice rarely does so except when directed by some department of the government. Id. at 141.

Later, the Ohio Supreme Court expressly stated that the office of the Attorney General has duties beyond those delegated by statute. In State ex rel. Doerfler v. Price, 101 Ohio St. 50 (1920), the Court considered and stated the following:

> "[T]he Attorney General of Ohio is a constitutional officer of the State, in the Executive Department thereof, chargeable with such duties as usually pertain to an attorney general, and especially with those delegated to him by the General Assembly of Ohio. . . ." Id. at 57. (Emphasis supplied.)

Finally, the Ohio Supreme Court this year in Brown v. Buyer's Corp., 35 Ohio St.2d 191, 196 (July 18, 1973) acknowledged the existence, but not the extent, of the Ohio Attorney General's common-law authority. The Court held:

> "Having determined that the amended complaint alleges the existence of a charitable trust, as defined by R. C. 109.23, it is unnecessary to determine the extent of the common law powers of the Attorney General in dealing with charitable trusts." (Emphasis supplied.)

Hence, both the legislative and judicial branches of Ohio government have acknowledged and approved the existence of common-law powers and duties beyond those duties delegated to him by the Legislature.

C. The Attorney General is presently engaged in important litigation based upon his common-law powers which may be adversely affected by the proposed constitutional amendment.

At present there are several important law suits pending in the courts of Ohio which were initiated by the Attorney General on the basis of his common-law power. The most significant of those cases are in the areas of environment and charitable trusts.

1. State of Ohio ex rel. Brown v. BASF Wyandotte Corporation, et al. (Cuyahoga County Court of Common Pleas). This was an action brought for the State of Ohio on behalf of its citizens and inhabitants by the Attorney General for the alleged mercury pollution of Lake Erie, the Detroit River, Lake St. Clair, the St. Clair River and the tributaries thereto. The Attorney General has prayed for a permanent injunction against any further discharges of poisonous mercury or compounds thereof into any of these waters which find their way into Ohio. The Attorney General also prays for 45 million dollars damages to the fish, aquatic organisms, and economy of Ohio caused by the tortious acts of the defendants. This suit was originally filed in the United States Supreme Court by former Attorney General Paul W. Brown and thousands of man hours have been spent in the preparation of the case for trial. If the Attorney General lacks the common-law power to bring this action, it may be that there would be no department or agency of the State of Ohio to bring such an action against foreign polluters of waters which find their way to Ohio.

2. State ex rel. Brown v. Sherwin Williams Company (Cuyahoga

County Court of Common Pleas). This case involves an action for damages against the Sherwin Williams Company for pollution of the Cuyahoga River. While the Attorney General has express standing under Chapter 3767 of the Ohio Revised Code to bring an action for an injunction to abate a public nuisance, there is no statutory authority for him to maintain an action for damages to the environment. The Attorney General's position is that an injunction is not sufficient to compensate the State for the damage done by polluters.

3. State ex rel. Brown v. Newport Concrete Company (Hamilton County Common Pleas). Here the Attorney General asserts a public trust over the waters of the Little Miami River with an affirmative obligation on the part of the State of Ohio, as trustee of those waters, to maintain them for the maximum benefit to the public. The suit alleges that the activities of the defendant in the construction of a private dam interfere with the lawful use of the trust property by potential beneficiaries thereto. It is the position of the Attorney General that he is the proper plaintiff by reason of his common-law obligation to protect the corpus of trusts for the beneficiaries thereof.

4. Brown v. Buyer's Corporation (Ohio Supreme Court remanded to Hamilton County Court of Common Pleas). This is an action to enforce public charitable trust and requesting relief by way of an injunction and accounting. The amended complaint is based upon the Attorney

General's statutory and common-law powers.

In addition to the foregoing cases, two previous cases in the Cuyahoga County Court of Common Pleas have been terminated in favor of the State of Ohio pursuant to consent judgments. In State of Ohio ex rel. Brown v. International Salt Company, Inc. and State of Ohio ex rel. v. Metals Applied, Inc., Judge Joseph Nahra of the Cuyahoga County Court of Common Pleas entered preliminary injunctions finding "that the defendant's conduct constitute a public nuisance under the common law." Judge Nahra further held that the Attorney General was authorized to seek an injunction against the defendants under the above quoted language.

Thus, while private citizens may avail themselves of the common law in their own litigation, the Attorney General would, under the proposal, be precluded from invoking the common law for the benefit of all the people.

All of the above lawsuits currently pending, to the extent that they are grounded on the common-law power of the Attorney General, would be proscribed by the proposed constitutional amendment. Moreover, continuation of the present litigation in some of these cases may be jeopardized by such an amendment.

D. Conclusion.

The proposed constitutional amendment, when construed with the committee's comments, would eradicate over 100 years of legislative and judicial development of the common-law power of the Attorney General of Ohio. It would also destroy centuries of judicial precedent developed in England and the United States concerning the common-law powers of the Attorney General. The "concerns and reservations" of the committee about the potential exercise of powers not set forth

in statute, is unwarranted. The limited use of the common-law powers is demonstrated by this memorandum. Furthermore, the courts are the proper branch of government to strike down any unauthorized or irresponsible use of common-law powers by an attorney general. The proposed amendment is unnecessary and unwise. It jeopardizes litigation involving claims for millions of dollars allegedly due to the State of Ohio through the efforts and diligence of the Attorney General. There is no reason to tamper with the long-held view that,

> ". . . the principles of the common law, which make the Attorney General the proper representative of the people of the State in all courts of justice, and charge him with the official duty of interposing for the protection and preservation of the rights of the public, whenever those rights are invaded and there is no other adequate or available means of redress." Hunt v. Chicago Horse & Dummy Ry., 121 Ill. 638, 13 N.E. 176 (1887).

E. Suggested Proposal for the Office of Attorney General.

If a general statement of duties pertaining to the office of the Attorney General is desirable, Attorney General William J. Brown submits that the following language would be appropriate. "THE ATTORNEY GENERAL SHALL BE THE CHIEF LAW OFFICER FOR THE STATE."

Furthermore, the Attorney General emphatically requests the Commission to disapprove and strike the last two sentences of comment 3 on page 7 of the Legislative Executive Committee recommendations.

Finance and Taxation Committee

Chairman, Mr. Nolan Carson

First Meeting, April 15, 1971

Last Meeting, May 14, 1973

Minutes begin on page 1371

Research begins on page 1630

REPORT OF THE FINANCE AND TAXATION COMMITTEE
THE OHIO CONSTITUTIONAL REVISION COMMISSION

April 22, 1971

The Finance and Taxation Committee (Subject Matter Committee III) held its initial meeting in the offices of the Commission at 11:30 A.M. on April 15, 1971. Messrs. Ocasek, Bartunek, Carter, Hovey, Wilson and Carson were present.

The Committee discussed in detail various methods of initiating its study of those provisions of the Ohio Constitution which deal with finance and taxation. The Committee decided upon the following course of action:

1. At its next meeting to be held at 9:00 A.M. on Thursday, May 27, 1971, an Ohio constitutional scholar will explain in depth each constitutional provision dealing with finance and taxation and also specify interpretive and other problems that have arisen with respect to each provision.

2. At this meeting, the Committee will consider a form of questionnaire and covering letter to be used in advising various groups and organizations of the study being undertaken by the Committee and in soliciting recommendations for changes in the structure and/or provisions dealing with finance and taxation. It is hoped that the questionnaire will assist in focusing responses toward specific recommendations for needed revision.

3. After the Committee has approved the form of letter and questionnaire, it will be mailed promptly to various groups and organizations throughout Ohio notifying them of the Committee's hearing schedule.

4. The Committee will begin its series of hearings as promptly as feasible after the questionnaire has been distributed and will afford all interested persons the opportunity to appear and present their views.

Respectfully submitted,

Nolan W. Carson,
Chairman

Ohio Constitutional Revision Commission

Finance and Taxation Committee
May 27, 1971

Summary of Meeting

The Finance and Taxation Committee met in the offices of the Commission at 20 South Third Street, Columbus, Ohio, at 9 a.m., May 27, 1971. Present were Chairman Carson, and Messrs. Guggenheim, Carter, and Wilson. The speaker was Dr. Arthur D. Lynn, Jr. of Ohio State University, who discussed the provisions of Article XII of the Ohio Constitution, which Article relates to finance and taxation.

Dr. Lynn suggested that in reviewing the revenue article, the committee and the Commission might consider three alternatives: the first is to recommend that the Constitution contain no revenue article. This is the approach favored by those who develop model state constitutions. Four states do this. In this situation, presumably the courts would enforce the "public purpose doctrine" to determine the validity of a tax, and the federal constitutional limitations on the taxing power of the states, such as due process and equal protection, would continue to be applicable; the second approach would be to have the Constitution contain a simple statement that the legislature may not delegate or transfer the power to tax, or abrogate the application of due process concepts, although this approach would seem to be nothing more than "constitutional window dressing;" the third approach would be to include a detailed revenue section, which is characteristic of Midwestern constitutions dating from World War I and the mid-nineteenth century.

The present revenue article of the Ohio Constitution, he stated, is rather more detailed than may be necessary, and consideration could be given to opening up some areas which are presently foreclosed to legislative judgment.

As to particular provisions, Dr. Lynn indicated that he saw no harm in leaving the prohibition against the poll tax, contained in Article XII, Section 1, in the Constitution.

On the other hand, he indicated that Article XII, Section 2 is a "draftsman's horror" from the point of view of containing so many provisions. He pointed out that the ten-mill limitation contained in this section has not limited the real property tax rate, but has meant "outside" levies which have had to be referred to the electorate. He suggested the committee may wish to consider either abolishing the existing limit, or increasing it to give the taxing authorities "sufficient room to manoeuver."

He indicated that a more fundamental problem with Section 2 is the sentence "Land and improvements thereon shall be taxed by uniform rule according to value." He said, "For roughly a century, we have failed to achieve that ideal with any great degree of success." One line of thought is that the Constitution should permit real property classification for tax purposes. One effect of this might be to stimulate "private urban renewal" in central city areas. This would not answer the question of whether the General Assembly would choose to classify real property, but it would give the legislature the right to answer the question. Given modern urban problems, there is merit in considering whether certain types of improvements should be taxed at a lesser percentage of market value, or assessed value, than land itself.

With regard to exemptions, he stated that consideration might be given to pulling all exemption provisions in the Constitution into a single Article, considering their interrelationship. He expressed the view that Ohio's present conservative policy in regard to exemptions was appropriate.

Professor Lynn next discussed Article XII, Section 5a, headed "Prohibition of expenditure of moneys from certain taxes relating to vehicles for other than highway purposes." He pointed out that fiscal scholars since about 1700 have been critical of "earmarking," but that public opinion has not. In his view, the alternatives here are either to retain the present system of "earmarking," to abolish it, or to broaden it to include all public transportation systems.

Dr. Lynn then discussed Article XII, Sections 7, 8, and 9, authorizing an inheritance tax and income tax, and mandating the apportionment of inheritance and income taxes, respectively. He stated that these sections should be viewed in their historical context. In 1912, when these sections were enacted, the United States did not levy a federal income tax, the State of Wisconsin had just levied the first state income tax, and inheritance taxes were in transition to their modern forms. He noted that "it is not immediately obvious why a constitution should prescribe the amount of the exemption the General Assembly may provide, in establishing either an inheritance tax or an income tax. The $3,000 income tax exemption of Article XII, Section 8, he noted, was probably based on the $3,000 exemption granted by Wisconsin at the time. Given subsequent developments in federal income taxation, and the tendency of most states to "piggy-back" on some facet of the federal system, it would seem logical to consider deleting this provision, to give greater flexibility for tax design to the legislature, or for coordination with the federal system.

He stated that, although there has not been too much of a problem in connection with the inheritance tax provisions of the Constitution, their presence in the document goes into more detail than is necessary in a constitution. With respect to the apportionment of inheritance and income taxes, he noted that the committee might wish to suggest that the State send back to the local units an equivalent amount, rather than specifying a specific source of funds. Similarly, it may not be the best approach to apportion inheritance taxes and income taxes in the same fashion. Inheritance taxes seemed to him to be a rather inappropriate source of revenue for local government because of their wide fluctuation, particularly in the smaller governmental units. Also, he suggested that the committee may wish to consider what units of local government the Constitution should specify, for the purpose of clarity, if the apportionment concept of Article XII, Section 9 is retained.

With respect to Section 10, authorizing excise, franchise and severance taxes, Dr. Lynn stated that, since the General Assembly would presumably have the authority to levy such taxes in any event as part of its legislative authority, these provisions may not be necessary, but may provide a degree of clarification. The same applies to Article XII, Section 12, prohibiting taxation of the sale or purchase of food sold for consumption off the premises.

At the conclusion of his presentation, Dr. Lynn again indicated that he would permit the legislature to make the judgment on the classification of real property, as the needs of the times change. Even if the "uniform rule" is not eliminated, he said, it should be liberalized.

Dr. Lynn further indicated that it may be desirable, for purposes of clarity, to put into the Constitution a provision clarifying the doctrine of pre-emption, although the legislature could, even without constitutional change, simply indicate that, in enacting a certain tax, it does not thereby intend to pre-empt the levy of a similar tax by local government.

In response to a question of Mr. Carter whether, in taking a long-range view of the changing needs of the State, the revenue provisions of the Constitution ought

not to be as broad as possible, Dr. Lynn indicated that he would "open up" these provisions, within the present framework, to give the legislature more discretion to solve fiscal problems.

In response to the Chairman's request for comments or questions from observers present at the meeting, Mr. Russell Lloyd, of the Ohio State Automobile Dealers Association, commented in regard to Article XII, Section 5a, dealing with the "earmarking" of certain taxes for highway purposes. He said that this earmarking has worked rather well in Ohio, and that a recent proposal in California to broaden a corresponding provision of the constitution of that state was severely defeated.

Mr. Guggenheim, a member of the committee, stated that, in instances where language is to be removed from the Constitution because it is unnecessary or revised because it is badly drafted, the Commission could avoid controversy over the meaning of the removal or revision of such language by stating the reason for the removal or revision, and stating whether or not a change in constitutional interpretation was intended by the deletion or revision. He stated the hope that the Commission would look at its task of revising the Constitution not as a defensive, but as a creative one.

Ohio Constitutional Revision Commission
Finance and Taxation Committee

Remarks of Mr. C. Emory Glander at the meeting of May 27, 1971

Mr. Glander - I was very much interested in the discussion regarding the provisions of the Constitution which authorize specific kinds of taxes, such as inheritance taxes, income taxes, excise, franchise and severance taxes, I think most of which came into the Constitution in 1912, isn't that right, Art?

Dr. Lynn - Yes.

Mr. Glander - It's always been a matter of interest to me that the Supreme Court of Ohio, I think it was in the old case of Saviers v. Smith, said that the power of the General Assembly to levy taxes is an inherent aspect of its general legislative power under the section of the Constitution which I think is Article II, isn't it, relating to legislation?

Dr. Lynn - Right.

Mr. Glander: That may not have been the case, but I think that's the one in which they made this observation. Nonetheless, I think I agree with Art's statement that no harm is being done by leaving in the Constitution those provisions for specific kinds of taxes. As a matter of fact, to take them out might raise the implication that maybe they're to be excluded. You know how the courts sometimes twist things around--that the elimination of something which is already there may indicate an intent on the part of the people, in this case, toremove that authority. I don't think it would, but certainly I believe that no harm is done in leaving those provisions. I also think that no harm is done in clarifying certain aspects of the constitutional language which may be ambiguous. We might have had differences of opinion as to how it ought to be clarified, but certainly that is a function, it seems to me, of this Commission--to decide not only whether you ought to leave something in or put something in, but also to see if what's there ought to be clarified. I think that's about all I should sayat this point.

Mr. Carson- May I ask you a question, Mr. Glander?

Mr. Glander - Yes.

Mr. Carson - What do you consider to be the most troublesome section or provision dealing with taxation?

Mr. Glander - Well, of course, the most troublesome provision right now, as indicated by the Park Investment case, is the matter of equalization of values for real estate tax purposes. That is a very difficult situation. I think that equalization and the goal of uniformity is a very worthwhile one. It's one of those virtues toward which, however, we strive but never entirely achieve.

We have a lot of things that create the problem. For example, you can't reappraise every county every year. This is a terrific problem. So we finally came in Ohio to the matter of sexennial reappraisal. Well, every six years certain counties have to be reappraised. But, in view of the changes in the economic circumstances, county "A", that gets reappraised this year, is going to be on a different level from county "B", that might get appraised five years from now, you see, or two years or three years. So this is a very real practical problem, and I don't have the answer to it. I do say to you that I am a traditionalist in the sense that I do think there's great virtue in the "uniform rule." But how you achieve it without getting involved in a lot of litigation such as the Park Investment case is another problem. I don't know whether I've answered your question.

Mr. Carson - Very helpful.

Mr. Wilson - Do you feel, Mr. Glander, that if we did go to some variable method of assessment--based on my original comment on zoning--that we'd probably wind up with more cases instead of less?

Mr. Glander - Well, it all depends on really--it all depends on how you classify. First of all, you're going to have two diverse schools of thought in the matter of classification of real estate. I'm not going to take a position on that issue.

Then the method of classification is a matter, again, that's not just semantics, but a matter of technical constitutional language.

Mr. Carter - It could be.

Mr. Glander - It could be, and the reason I say that is that--you know, in the 1930's when we got classification of tangible personal property, the legislature adopted the 70% classification as a general rule, and then provided a 50% valuation classification for certain classes of property, such as manufacturing and agriculture and mining. It sounded simple. Nevertheless, there's a whole row of cases that try to decide who's a "manufacturer"--what kind of a process is a "manufacturing process." I think you can say there's twenty cases in that area, if not more. Which illustrates the point that you raise, that classification in itself, even though you agree in principle, presents a lot of practical problems.

Mr. Wilson - Even if you go to a variable rate based upon zoning for some of these, you still have the problems of the mechanics of assessment, before you get to the value to which the rate has to apply.

Mr. Glander - That's right.

Mr. Wilson - And you wouldn't remove that by changing to a variable rate.

Mr. Glander - May I volunteer one thought that's rather significant, I think, in this area.

Mr. Wilson - Sure.

Mr. Glander - You know, the issue that's ~~not~~ involved really in the Park Investment case is whether the Board of Tax Appeals should fix a specific percentage of market value, not to exceed 50% as the statute now provides--a specific percent of valuation. This sounds simple, and, of course, this is what the Court really said in the second Park Investment case. And I remember that the Board of Tax Appeals had some proposed rules where they had alternative percentages that they were talking about after the second Park Investment case, varying I think from 38% of true value to 42% of true value. You also remember that the legislature suspended the authority of the Board of Tax Appeals until 1972 in this particular situation. Now, it's rather significant that the latest sales ratio studies made by the Board of Tax Appeals show that the average state-wide value of real estate for tax purposes has fallen to about 32%. Whereas three or four years ago there were certain counties which were above 40%--one of them Hamilton--there are none of them 40% now. I think the highest is 38 point something--maybe you know the particulars. Well, this is just one facet of the problem.

I think the legislature did a good thing when it legitimatized fractional valuation, as this had become a fact of life, and we've been thumbing our nose at the Constitution for all these years. But Ohio is not alone in doing that. This seemed to be the situation all around the country. So, I think it's proper to authorize fractional valuation in order to avoid great dislocations. But the point is, how are you going to implement it, and who's going to do it? Should the Board of Tax Appeals do this--should the legislature itself do it? Should the Constitution provide? I'm not answering the questions--I'm just raising some questions

that grow out of the Park Investment case, aloud.

Mr. Carter-In your view, would it be advisable that the Commission try to keep the taxation limitations as broad as possible to give the legislature the maximum flexibility over the next 50 to 100 years?

Mr. Glander - Are you asking Art or me?

Mr. Carter - Both of you.

Dr. Lynn - I guess the burden of my remarks was, within the present framework. I would open it up a bit and give the legislature room to maneuver.

Mr. Carter - As I see it, Art, you're looking at the problems of today, and saying, with our problems of today, there may be reasons for doing certain things. My question is, should the Commission take a longer range view of constitutional provisions, which are quite different than legislative, and try and take a longer range view of what we're trying to do. And if so, doesn't that lead to the thought that we should be as broad as possible?

Dr. Lynn - Yes, because--you know, the time might come when Ohio would want to add a "value added" tax.

Mr. Glander - The Constitution does not impose any prohibition upon the legislature to levy, for example, a value-added tax, or to levy some other kind of tax that we don't now have, providing it doesn't violate federal constitutional requirements--that's all I think I'm saying. Now, at the same time, I have said this is a judicial interpretation--and I think Art made the suggestion--that maybe you ought to say it in the Constitution. But that's another matter--I don't know.

Mr. Wilson - Dick, granted your concept, maybe we ought to approach this with a degree of flexibility that will be of value decades from now.

Mr. Glander- May I add one thought here. It's interesting to note that the people of Ohio did put into the Constitution of Ohio a provision which gives the legislature rather broad authority in the area of taxation--the provision having to do with the referendum. The referendum may not be used to upset a revenue measure enacted by the General Assembly.

Ann - Or to enact a classification--which I think is rather interesting.

Mr. Glander - Yes.

Ann - From the first Park Investment case, the thought has always occurred to me that possibly the time might come when the Supreme Court would say that assessment had to b at market value--could not be at a percentage of market value. I wonder whether you think this is a possible conclusion, and wonder whether either you or Professor Lynn knows whether any state does assess at 100%.

Mr. Glander - Let me give you my answer. Art can probably particularize. One of the unresolved questions in the first Park Investment case was whether or not there is a mandatory duty on the Board of Tax Appeals to equalize at 100%. Keep in mind, the first Park Investment case did equate "true value" with "market value." Then the Court veered off and said, "Well, as a practical matter, we have fractional valutaion. All we decided in this case was that there must be uniform fractional valuation."

One of the reasons the legislature enacted the section which authorized fractional valuation at not to exceed 50% was the fear, in many quarters, that somebody might bring a mandamus action to compel equalization at 100%. And, incidentally, the statute on which the Court relied did then, and does in fact now, require that. And, there were several states in which this issue was raised, in which the Court did go all the way, and it created a lot of havoc, as you can imagine. I think Kentucky was one, and so did another southern state or two.

Ann - Kentucky went through a reassessment. But did they actually assess at 100%?

Mr. Glander - I haven't looked at the Kentucky statute, and they may have changed the Constitution, I'm not sure.

Mr. Carson- I wonder if either of you gentlemen could tick off the pro's and con's of permitting reasonable classification of real property improvements. I think it was mentioned that this might well be helpful in urban renewal areas, in core cities, and so on, but I wonder if you could elaborate on the pro's and con's of this approach. (Dr. Lynn answered the question. Mr. Glander continued as follows)

Mr. Glander - Keep in mind we're talking about property taxation, and keep in mind also that the principle of uniform treatment of property for tax purposes is a time honored principle which exists in the constitutions of I don't know how many states--

Dr. Lynn - There are 43 with some variation on this theme.

Mr. Glander - I think the caveat I would have is that, if you consider classification, that you might put land in one classification and improvements in another. But when you start subdividing and making subclasses, for example, in improvements, that's where you're going to get into some trouble, I think. You could get some popular support for uniformity--for the "uniform rule," for instance, as to land on the one hand and improvements on the other. For the differential between the two-- I'm not making this recommendation, you understand. I may be flying in the face of what some of my clients would like, but I'm just speculating now, as an act of independence.

Mr. Carson - Would you be in favor of making the Constitution flexible so that the legislature could exercise its judgment in those areas?

Mr. Glander - Well, when you're talking about property classification, I have some difficulty in opening the doors wide. You might make some adjustments, but . . .

Mr. Carter - And the adjustments that you're suggesting for the Constitution might be that land . . .

Mr. Glander - I say, I can see how you might tax land, as such, on one basis and improvements on another. But when you begin to carve up improvements into a lot of categories . . .

Mr. Carter - Certainly, that shouldn't be done.

Mr. Glander - No, I don't think so, and I'm not sure that the legislature should be given authority to do that, either. But this is off the top of my head.

Mr. Carson - Let me ask a practical question--one which I'm sure you've all heard about. I live in a sort of country part of Cincinnati, and there are a number of truck farmers who live on my road. Recently, the land in the general area has been subdivided, and a number of nice homes have been built, not on our road but in the immediate area. Hence the land values where we live have grown, and the true value upon which the valuation is based of the land on this road is about $2,500 an acre. This makes it very difficult for a truck farmer to operate, when he has competition down the road whose land is valued at $500 an acre. Is there any speculation about this being a hardship because of the uniform rule question?

Mr. Glander - Oh, there is a hardship, and resentment. This is one of the arguments you make when you say that you would tax land on a differential basis from its commercial or industrial use if it had a factory on it.

Mr. Carson - This is a little different from zoning, actually, because the land is all zoned for residential and agricultural use.

Mr. Glander - Yes.

Mr. Glander - I'd like to underscore another point that Art made, because I have been known to differ. But I do think that the exemption provision of the Constitution ought to be reivewed in light of some of the statutory provisions which have come along since. You may find that there is some disharmony.

Mr. Carson - Do you mean the charitable exemptions?

Mr. Glander - The whole list of exemptions--religious exemptions, exemptions for eleemosynary and charitable institutions, exemptions for property use, exclusive use for public purposes--that whole group. It's in Article XII, section 2. In addition to that, I believe you ought to take a look at the statutory provisions which through the years have been designed to implement those constitutional provisions. There has been some liberalization of the exemptions by court decision.

Mr. Carson - Uh huh.

Mr. Glander - There are people who feel that the exemption situation is becoming somewhat inequitable. I don't want to pinpoint that, but I do think that it's a matter that ought to be studied.

Mr. Carson - Inequitable in the sense that it's broader or narrower?

Mr. Glander - Well, it may have broadened out to the point where property is exempted that perhaps should not be. I'm not saying that it is,but I can think of a case or two that liberalized the exemption provisions--the Denison University case is one of them, and there have been some others.

Mr. Carter - At the excuse of sounding like a broken record,but do you think this is a matter for the Constitution?

Mr. Glander - Yes, I think it's good for the Constitution to specify these exemptions. I think you ought to look at the language of the Constitution and then look at the statutes to see if the constitutional language is adequate for modern-day purposes. The language is rather quaint, anyway.

Ann- The legislature has managed to make some exemptions by writing very carefully around it, which might not be a service.

Mr. Glander - (in response to Mr. Guggenheim's remarks concerning a well drafted Constitution); I want to make it clear that I'm not opposing cleaning up bad language. I may not have made that clear. There are some areas where there are some ambiguities. Anything that can be done to clarify language which is likely to provoke litigation, I'm in favor of doing. The second thing is that I want to say it's unfortunate, that, unlike federal statutes, we do not have in Ohio any legislative record or legislative report, upon which the courts can lean in order to interpret the statutory meaning. It's a great problem for lawyers, as you know, and it's a great problem for the courts. They have to look at the statute and determine what it means from the four corners--from the words that are used whereas, if you did have published legislative reports, it would be like Congress.

Mr. Carter - May I follow up on that question?

Mr. Glander - Of course.

Mr. Carter - The poll tax--you more or less indicated that there would be no harm in keeping it in the Constitution. Of course, there isn't from a real standpoint. But I have a little trouble justifying leaving in obsolete matter of this nature. It just clutters up what will hopefully be a good document, and I would wonder what the objection would be to dropping section 1, as being no longer relevant to the Ohio situation?

Mr. Glander - The poll tax gets involved in emotions. You must remember, in this connection, how the poll tax has been misused in certain sections of this country--voting qualifications, among other things--and the problem that you would face would again be emotional. I have no objection to taking it out. We're not going to levy a poll tax, anyway, in Ohio. But if you take it out, someone's going to say: "Now what have they got in mind?" You know there are some people, not well educated, who might very well get some bad ideas about your motivation.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
June 17, 1971

Summary of Meeting

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission met at 9 a.m., Thursday, June 17, 1971 in the offices of the Commission at 20 South Third Street, Columbus, Ohio.

Present were Chairman Carson, and Messrs. Bartunek, Carter, Guggenheim and Wilson, members of the Committee.

Chairman Carson opened the meeting by stating that the Committee plans to hold a series of three meetings to solicit the views and recommendations from any interested individuals or groups with respect to any revision or additions which they may feel are needed in the Ohio Constitution with respect to finance and taxation, and that this meeting was the first of these. There will be another at 3:00 p.m., on July 14, 1971 and another at 9:00 a.m. on July 15. These meetings will proceed as long as there are speakers interested in presenting their views. Those interested in speaking are asked to contact Mrs. Ann M. Eriksson, Director of the Commission, as soon as possible, so that a schedule may be arranged.

Mr. Carson then introduced the speakers for the meeting, Mrs. Iola O. Hessler, of the Institute of Governmental Research, University of Cincinnati, and Mr. C. Emory Glander, speaking for the Ohio Chamber of Commerce. Mr. Glander is a former tax commissioner of Ohio.

Mrs. Hessler, who spoke first, is a Research Associate of the Institute, and was instrumental in preparing the 1970 Wilder Report published by the Institute. This report is an "in-depth" analysis of the problem area of the present Ohio Constitution.

After brief introductory remarks on constitutional revision generally, Mrs. Hessler spoke about specific areas of the Constitution. She stated that one of the most important questions for study, in the view of the Institute, is the "uniform rule" of taxing land and improvements, contained in Article XII, Section 2. She said that, In the opinion of many, there is a connection between the taxing of land and improvements thereon at a uniform rate and urban blight and the deterioration of neighborhoods. A study in which she participated indicates that the improvement of buildings in blighted or deteriorating neighborhoods is not attractive to many owners of property in such areas because they fear that the increase in taxes would more than offset the increase in rent which they could charge in such neighborhoods. As one consequence, many marginal buildings are torn down, and are replaced with small, surface parking lots, the aggregate of which may be very damaging to a city. Some sort of differential taxation of land and improvements in such areas should, therefore, be studied. Mrs. Hessler indicated that she would not hesitate to entrust the General Assembly with enacting laws permitting real property classification.

Next, Mrs. Hessler discussed the one percent limitation on taxation of property also contained in Article XII, Section 2. "This has been a real headache, and totally unrealistic," she said. She indicated that such restrictions on this, and debt limitations as well, come from an era of distrust of government, when it was said that "government is best which governs least." Yet, today we demand more and more from government. The dichotomy which all legislatures face is that, on the one hand, we believe in representative government, yet, on the other hand, we insist that we should

be able "to vote on everything," particularly taxes. As the average tax rate in Ohio now is about 42 mills, what limit should be set in the Constitution? Theoretically, the most logical step would be to remove the limit completely. What is actually done deserves a great deal of study, Mrs. Hessler said.

The next area Mrs. Hessler spoke about was earmarking. She indicated that, in her view, public transportation systems in urban areas are absolutely essential. For one thing, they are needed to bring together not only the suburbanite with his job in the central city, but also the worker who lives in the central city with the employment opportunities with industries "which have followed the automobile to the suburbs." She posed the question of whether funds now "earmarked" for highway purposes might not be earmarked for broader purposes, such as pollution, parking facilities, and public transportation.

Then, Mrs. Hessler commented on the inheritance tax apportionment provision of Article XII, Section 9. Since inheritance taxes vary so much from year to year in local communities but remain fairly predictable on a state-wide level, she said that it would make a lot more sense for the state to collect the tax, and return it to local communities on a basis such as population or need.

The question of pre-emption also needs thorough study, Mrs. Hessler said, especially in view of the fact that it appears the State will shortly enact an income tax, which many cities now have. Also, it is evident that the electorate will not tolerate much higher real property taxes, and local units of government may have to turn to a variety of other taxes to provide the increasing range of services which is expected of them, particularly in large metropolitan areas.

In response to a question by Mr. Wilson as to what limits should be imposed on any particular local unit of government in assessing taxes if the ten-mill limitation is removed from the Constitution, Mrs. Hessler indicated that, in view of the complex interrelationship of such units, and the sharing of functions, the whole problem of taxation must be worked out on a mutual basis.

At the outset of his presentation, Mr. Glander pointed out that property taxation, in general, has often been criticized for its lack of uniformity, equality and universality. For that reason, there is a good deal of suspicion of the property tax, and of the release of any controls over it in the Constitution. This suspicion is evidenced by such provisions as Section 1e of Article II, which removes from the powers of initiative and referendum any 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."

Mr. Glander then gave a brief history of property taxation in Ohio. From 1803 to 1825, Ohio derived the main part of its revenue from a land tax, which was not an ad valorem property tax. There were several classes of land, which were assessed on an acreage basis. In 1825, land classification was abolished, and it was provided, by law, that the valuation of real property be at its true value in money, without taking into consideration the value of improvements thereon. From 1825 to 1846, more and more classes of real property were included in the tax base. In 1846, the Kelley Acd was passed. It applied the "uniform rule" of taxation to all property not specifically exempted. This was embodied in the Constitution of 1851, in what is now Section 2 of Article XII. A 1929 amendment of the Constitution removed personal

property from the "uniform rule," and left only land and improvements subject to it.

The "uniform rule," Mr. Glander stated, is not peculiar to Ohio. Almost all state constitutions have some provisions in regard to it. Some state constitutions do permit classification of property, but strictly retain the "uniform rule" with respect to the various classes. Mr. Glander stated that there are those who favor taxing improvements on land, at a lower rate than bare land itself to stimulate building and rehabilitation of blighted areas. This method of taxation has been little used in the United States, and has been used primarily in New Zealand and Australia. But, he stated, in view of the history of the "uniformity rule" in Ohio, and the unpopularity of the real property tax itself, the business community, in Ohio, favors its retention.

In the same manner, the business community favors the retention of the ten-mill limitation, because the basic question is whether or not there should be any control by the voter of real property taxation. If there should be, the existing ten-mill constitutional limit is as good as any. The same applies to the $750,000 debt limit, and the provisions for voting on the State's bonded debt, although a way could very well be found to avoid cluttering the Constitution.

On the question of exemptions as listed in Article XII, Section 2, Mr. Glander stated that the language now in the Constitution should be left as it is, because the present legal problems do not arise from the constitutional language but, if there is difficulty, it is with the statutes which, of course, are for the Legislature to deal with.

Next, Mr. Glander turned to the problem of pre-emption which, he pointed out, arose from judicial interpretation of the Constitution, in 1919. "The rule is that if a state levies the same or similar tax, then municipalities are prohibited from entering that field", he said. Our Supreme Court has, over the years, ~~tied~~ this doctrine to one of four bases: (1) State sovereignty, (2) the implied intention of the legislature when it levies a tax and makes provision for sharing it with a municipality, (3) the desire of the legislature to avoid double or multiple taxation, (4) the intent of the Legislature (without elaboration as to the basis of the intent). There is a deep-seated feeling against double taxation, and this public policy consideration may have been the underlying motivation of the Court in these cases, Mr. Glander said. Since the legislature could always release its preemptive right, there is no necessity to put a provision in regard to it into the Constitution.

In regard to "earmarking," Mr. Glander stated that the Ohio Chamber of Commerce had, at one time, taken a position against it in regard to motor vehicle fuel taxes and license fees. However, there is a strong feeling that highways should be paid for by highway users. So, there may be strong opposition to "knocking it out." However, there are those who believe that "earmarking" in a constitution is an undesirable "straight jacket" he said.

At the conclusion of Mr. Glander's presentation, Mr. Carson remarked that, if there is to be a provision in the Constitution on the question of pre-emption, perhaps it ought to be to the effect that unless an act of the legislature specifically states that by enacting any given tax, it is pre-empting the field, the presumption shall be that it has not done so.

Constitutional Revision Commission
Finance and Taxation Committee
July 14 and 15, 1971

Summary

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission met on July 14 and 15, 1971 at the office of the Commission, 20 South Third Street, Columbus. Present at the July 14 and 15 sessions were Chairman Carson, and Messrs. Carter, Guggenheim and Wilson, members of the Committee. Mr. Ocasek, also a member of the Committee, attended the session on July 15.

The speakers on July 14 were Mrs. Richard Brownell, representing the League of Women Voters of Ohio; Mr. Robert Graetz, representing the Ohio Council of Churches; and Mr. Charles Calhoun, of the Ohio Public Expenditure Council. Mr. Edgar Lindley, representing the Ohio Education Association, spoke on July 15. The foregoing speakers, with the exception of Mr. Calhoun, presented position papers to the Committee on which they elaborated in their discussions. The presentation of Mr. Calhoun, who represents a nonprofit, nonpolitical research and educational group, was of an informational nature. Mr. Ralph Gibbon, of Cleveland, also spoke on July 15, at the invitation of the Committee. The emphasis of Mr. Gibbon's remarks was on constitutional problems in connection with bonding, particularly municipal bonding, in which field he has had a great deal of experience.

Mrs. Brownell indicated that the basic concern of the League, which began a study of the present Ohio Constitution about 4½ years ago, is for a Constitution which is flexible, concerned with fundamental principles, clearly written and logically organized.

Mrs. Brownell then turned to the first major and specific area on which the League had taken a position. The League favors the abolition of a fixed dollar debt limit and the substitution of a flexible debt limit tied to an indicator of the state's economic wealth. This could be done by a simple formula, which would not be difficult to interpret but still prevent the debt from "getting out of hand," she said.

Mr. Wilson asked Mrs. Brownell about the suggestion, made by some who favor the retention of a fixed dollar debt limit, that the way to avoid cluttering up the Constitution with bond amendments is to require not a constitutional amendment but a popular referendum on each law proposing the issuance of bonds. While she was not sure the League had taken a definite stand on this point, Mrs. Brownell indicated that, it seemed to her, such an approach would not encourage fiscal responsibility by the Legislature, since it could still pass it off to the voter. Mrs. Brownell cited as an example of flexible constitutional debt limits which have been enacted in the recent past, the debt limit of Pennsylvania, which is 1.75 times the average of the revenues received by the state in the last five years.

Mrs. Brownell next briefly alluded to those sections of Article VIII dealing with the Sinking Fund and Public Works, and expressed the opinion that, although there may at one time have been justification for having provisions in regard to these matters in the Constitution, that justification very likely no longer exists, and consideration should be given to removing them from the document.

The second major area in which the League has taken a position, Mrs. Brownell indicated, was that the Constitution should specify that the power to levy state taxes and to determine their use resides in the General Assembly. These provisions already exist in Article XII, Sections 4 and 5, but other sections limit them--such as Article XII,

Sections 7, 8, and 9, relating to income and inheritance taxes, and Sections 10 and 12 dealing with excise and franchise taxes. The League feels that these taxes should be handled by the General Assembly in statutes. The League also feels that "earmarking" provisions should be removed from the Constitution, in order to give the General Assembly flexibility in dealing with state programs on the basis of need rather than on the basis of the source of particular funds. This would mean the elimination of provisions "earmarking" certain funds for highway purposes and 50% of income and inheritance taxes for local governments. Inheritance taxes are an unpredictable source of funds for local governments, and steps should be taken to increase local government funds in a more predictable manner, Mrs. Brownell stated. Also, if and when an income tax is adopted, it should be distributed on the basis of need rather than origin. Mrs. Brownell noted previous testimony before the Committee to the effect that the permissible uses of highway taxes should at least be broadened to include other forms of transporation, such as mass transit, so as to give the General Assembly the power to decide where the money will go. She spoke in support of this approach, and pointed out that in 1967, "earmarked" highway taxes represented 30% of the state's tax income, and that in the future we probably will not need 30% of our tax income for highways.

The third major plank in the League's position is support for an addition to the Constitution requiring the Governor to submit a budget outlining his program and proposing sources of revenue to meet anticipated expenditures. At the present time, the only constitutional requirement is that the Governor communicate to the General Assembly the condition of the state and recommend measures for adoption. The requirement that he submit a budget is contained in statute. The League feels, however, that this matter goes to the fundamental balance of power between the executive and legislative branches of government--particularly as it relates to planning--and should be reflected in the Constitution.

On the question of pre-emption, the League of Women Voters feels that this is a technical matter which can be handled by statute and need not be referred to in the Constitution. Also, the League does not favor a broadening of tax exemptions.

In conclusion, Mrs. Brownell touched on the ten mill limitation in Article VIII, Section 2--candidly stating that the League had not reached a consensus on what changes, if any, should be made in this area, and on the "uniform rule" of real property taxation, on which the League has likewise not taken a position, although many members have expressed concern about this rule in relation to the need for adequate housing. She suggested that a thorough study of both the ten mill limitation and the "uniform rule" is in order.

At the end of Mrs. Brownell's presentation, Mr. Wilson returned to a point she had raised earlier--the proposed elimination of the 50% "turn-back" of inheritance income taxes to local government, now mandated by Article XII, Section 9, and the concept that the state ought to distribute tax monies on the basis of need rather than on the basis of place of origin. Because of the doctrine of pre-emption, the financial tools available to municipalities in Ohio are very limited, and might well be further restricted by elimination of the "turn-back," he said. Further, what constitutes "need" is difficult enough to determine on the local level, as county budget commission problems indicate, and would not be made easier by shifting the determination from the local to the state level. "If we eliminate the only thing they've got, I really believe the cities will go out of business," Mr. Wilson said. Mrs. Brownell remarked that she hoped the General Assembly would write income tax laws which would assure local governments the funds they presently have.

Following Mrs. Brownell's presentation, Mr. Robert Graetz spoke on behalf of the Ohio Council of Churches. He began by reading the following two excerpts from a policy statement entitled "Quality of Life and Tax Revision," adopted by the Executive Committee of the Council on January 14, 1971:

> "The Ohio Council of Churches is concerned with improving the quality of human life and recognizes tax revision as a high priority means for achieving that goal. It affirms that government has the responsibility to provide needed public services which secure, maintain and enhance a wholesome quality of life for all citizens. It is committed to achieve, and will work for, those legislative changes which will provide adequately and equitably needed public services for all citizens. Its commitment grows out of the belief that citizens, individually and corporately, have a responsibility to share their love, moral support and material goods with all men as brothers."

> "Clearly, Ohio needs a revised tax structure that would be: (1) <u>adequate</u> to meet the pressing needs of our citizens; (2) <u>equitable</u>, so that the tax burden does not fall most heavily on those least able to pay, as it does with our present property and sales taxes; and (3) <u>responsive</u> to the general economic growth. Only a modernized tax structure reflecting these features will provide adequate funding."

Mr. Graetz then read to the Committee the following specific proposals for change in the Ohio Constitution:

> "1. Tax Levies on Real Property for School Operating Purposes (Article VI, Section 2; Article XII, Section 2)

> "It seems clear that the intention of Article XII, Section 2, is that the tax burden on real property be equalized throughout the state as far as possible. As a matter of fact the property tax rate for school operating purposes ranges from $9.10 to $45.80 at present, because of the difference in the total real value of the property being taxed. In order to achieve greater equity, we would recommend that some provision be made for at least a portion of the income realized from tax levies on real property to be shared throughout the state. We do not believe it is proper to penalize one school district or county because of the absence of industry or other wealthy real estate holdings."

> "We are disturbed by the fact that the one type of tax levied in the State of Ohio that is most subject to voter approval or disapproval is the tax levy for school operating purposes. We note that Article VI, Section 2 places the responsibility for raising funds for the operation of schools with the state government. If the recommendation above regarding the sharing of revenues from real estate tax levies for school operating purposes is not adopted, we would recommend that some provision be made either for the state to be required to provide adequate funds for public education or for the General Assembly to be able to mandate taxes at the school district level in order to provide adequately for public education. Such an action would not eliminate the possibility that voters in a district would still use the route of the referendum to change an action taken by the General Assembly or their local school district. This right should not be taken from them. But our primary concern is for the provision of an adequate education for all of the children of the state."

"2. Highway Funds (Article XII, Section 5-a)

We note that Article XII, Section 5-a, limits the expenditure of monies received from taxes related to the use of motor vehicles to items related to public highways. It is our belief that such a limitation is discriminatory in its operation. Some persons on the lower economic levels of our society are paying taxes at an effective rate which is out of proportion to their income, compared to those on higher economic levels. Such persons would receive greater benefit from investment in forms of public transportation other than highways. In accordance with the basic principles stated at the beginning of our presentation, we believe that these highway funds should be made available for investment in all forms of public transportation, in order to provide adequately for the need of all of the citizens of our state. We would recommend such changes in our Constitution."

"3. Apportionment of Inheritance and Income Taxes (Article XII, Section9)

We note that Article XII, Section 9, states that no less than 50% of the income and inheritance taxes collected by the state must be returned to local governmental entities. We are aware that in most cases such return can be made through the normal channels of the school foundation and other funds already provided by the state to local levels of government. It is our belief, however, that there may be instances at present, and others may develop in the future, where the requirements of Article XII, Section 9 could not be met without returning more money than would normally be provided to certain of our counties. It is reasonable to assume that these would be the wealthier counties which are not as much in need of state support as the poorer counties. Once again, in accordance with the basic principles which we have enunciated, we would recommend that Article XII, Section 9, be modified or repealed entirely."

"4. Municipal Services (Article XVIII, Section 3)

We note that Article XVIII, Section 3, provides municipalities with the authority to offer police, sanitary and other services within their limits. We note also that Article XVIII, Section 6, allows municipalities to share public utilities, through the route of one municipality selling such services to others. It is our belief that many public services could be provided in a more efficient and more economical manner if municipalities could share such services. These could include police and fire protection, sanitary services, etc. We would recommend that provision be made in the Constitution for enabling the General Assembly to adopt legislation pertaining to such sharing of services, or in some other way to encourage this type of sharing."

Mr. Wilson asked how the General Assembly could be expected to mandate taxes for each school district--a suggestion contained under (1) above--when there are 3,500 to 4,000 school districts in the state. Mr. Graetz responded that this approach would be a last resort, and that what the Council hopes for is an adjustment in property taxes, so there could be some kind of sharing on the basis of need across the state. The other possibility, he said, is that the state be required to provide for the public schools, as if the whole state were a single school district.

Mr. Carson asked whether under (4), the Council was proposing that all real property taxes be abandoned. Mr. Graetz stated that the Council did not intend this, but that

there should be some relief in the property tax field. He added that the Council also advocates a graduated personal and corporate state income tax.

Mr. Graetz indicated that the Council had not yet developed a policy on the question of charitable exemptions, but was in the process of doing so.

Mr. Calhoun, at the beginning of his presentation, stated that it was not his purpose to urge any particular constitutional changes, or to oppose or promote any type of tax or method of taxation. He stated that his purpose was to share the results of some of the Ohio Public Expenditure Council's research on such matters as the ten mill limitation, classifications, and exemptions.

Mr. Calhoun first gave a brief history of peoperty tax rate limitation in Ohio, and said that the present ten mill limitation is among the lowest in the nation. In 1970, he indicated, the average tax rate in Ohio was $45.30 per $1,000 of taxable value, and ranged from a low of $16.00 to a high of $78.10 per $1,000 of taxable value. Current Ohio law requires a levy of 17.5 mills for school purposes alone in order to participate in the School Foundation Program, he noted.

Total property taxes levied in the state in 1970 were $1,766.7 million, up 9% from 1969. Seventy-one percent of this total, including 85% of the increase, was for school purposes. Between 1960 and 1970, property taxes levied for all purposes increased $934,3 million, or 112.2%.

There is increasing reliance on municipal income taxes, apparently in reaction to voter rebellion against higher real property taxation. In 1971, the amount realized from local income taxes is expected to exceed $300 million, Mr. Calhoun said.

During the current session of the General Assembly, he continued, several joint resolutions have been introduced proposing to amend Article XII, Section 2, to mandate classification of real property at specific percentages of true value in money. For example, H. J. R. 7 would set the following scale: agricultural property, 25%; residential property, 32%; industrial property, 40%; and commercial property, 45%. The impetus for such proposals as H. J. R. 7 comes from the Park Investment case, in which it was held that all real property must be taxed at a uniform rate.

Mr. Calhoun further stated that a proposal to amend the Massachusetts Constitution to allow real property classification was recently defeated. Opponents of that amendment argued that classification would, in their words:

"(1) leave many uncertainties because of the ambiguity of its language;

(2) open the door to discriminatory legislation;

(3) raise perplexing problems of administration and enforcement;

(4) stimulate an annual flood of favor-seeking legislation from groups desiring new or more liberal classifications;

(5) serve no better than traditional methods (by selective exemptions and alternative excises or income taxes) as a way of favoring particular classes of property;

(6) tends to favor homeowners at the expense of business and income producing properties, at risk of impairing business activity and the livelihoods of the homeowners whom it has sought to protect; and

(7) prove difficult to control or terminate if serious abuses did develop under the amendment."

Mr. Calhoun further stated that of the 29 states whose constitutions now allow general classification, only Minnesota has taken the step of fragmentizing its property tax base, and recognizes 24 classes of property. In the opinion of some observers, classification has not worked well in that state. Mr. Calhoun suggested that the answer to Ohio's high property taxes may be not in classification, but in a shift away from property as a tax source.

Mr. Calhoun apparently feels that the question of charitable exemptions is essentially a legislative matter, but one of which the Constitutional Revision Commission should be aware. He cited the following statistics: the total valuation of real property in Ohio exempted from taxation in 1971 is $4,708 million. In the decade beginning in 1961, valuation of exempted real property rose by 74.1%, while the valuation of property whoch was not exempt rose by only 38.3%. From 1970 to 1971, valuation of exempt real property rose 8.1%, while the valuation of nonexempt real property rose only 4.7%. These figures support the Council's conclusion that real property exemptions are constantly increasing on a statewide basis, and that while many exemptions may and do serve beneficial social ends, each exemption proposal should undergo a critical investigation to determine its potential effect on Ohio's local government tax climate."

Mr. Wilson asked if Mr. Calhoun had any statistics available on how Ohio stands in terms of property taxes when compared to other states. Mr. Calhoun cited a recent study done by his organization showing that Ohio ranks 26th in this regard, or about average. He indicated that real property taxes in general are not high in Ohio, but that they have become a great burden in some areas of the state and to certain people.

He further indicated that if the present ten mill limitation were raised to 25 mills, for example, this would create an additional tax burden, primarily on real estate, of about $585 million. But it also would shift the burden of financing schools even further to the local level because one of the factors used in the School Foundation formula is the amount of local taxable wealth.

The first speaker on July 15 was Mr. Edgar Lindley of the Ohio Education Association At the outset, he made clear that his remarks were directed primarily at three features of Article XII, Section 2: the ten mill limitation, the "uniform rule", and the provisions authorizing exemptions.

Mr. Lindley pointed out that history, custom and practice indicate that the people want to control real property taxation. He believes, however, that the present ten mill limitation on the taxation of property without a vote of the people is arbitrary and unrealistic. Further, he does not believe that the ten mill limitation was embodied in the Constitution as an expression of distrust of government by the people, but rather as a recognition that there are certain minimal and fundamental functions of government which must always be provided for, regardless of economic, social or emotional stresses. He pointed out the fact that in the 1965 case of Denison University v. Board of Tax Appeals the Supreme Court stated that the power of the General Assembly to grant exemptions from taxation is limited only by Article I of the Constitution, the Due Process Clause, as a result of the amendment of Article XII, Section 2 in 1931. In essence, his position was that if the people gave the General Assembly so much power in the area of exemptions--which can and do increase the tax

burden on nonexempt property--it is not reasonable to say that another provision of Article XII, Section 2--specifically the ten mill limitation--reflects distrust of the people in their government. However, he noted, the present limitation bears no relationship to the cost of minimal but essential governmental services. He suggested that since the costs of such services varies with the times, the basic limitation ought to be fixed in relation to such costs, or the question of the basic limitation could be made subject to a periodic referendum, along the lines that the question of calling a constitutional convention is now under Article XVI, Section 3. Mr. Carter asked whether the matter of setting a basic limitation could not be entrusted to the Legislature. Mr. Lindley said that, in view of the fact that a certain amount of stability is desirable in this area, he would not favor any plan which would permit revision every year or two, but would be less opposed to one which permitted review every ten or twenty years. However, he said that in his opinion a popular referendum would be less subject to partisan political pressure than control by the Legislature.

Mr. Ocasek expressed doubt that the people would ever mandate a limitation higher than ten mills upon themselves. However, he pointed out, recently enacted legislation, and legislation now under consideration in such areas of schools health departments and mental retardation, does or would impose continuing levies, the result of which is exactly that of higher mandated millage. Mr. Lindley said that, although the philosophy of the people of the State of Ohio today may be such that they would not vote for a higher basic limitation, we should look at this in terms of the Constitution and twenty or forty years from now, when the people could very well vote for it.

In regard to charitable exemptions, Mr. Lindley suggested that serious consideration be given to clearly defining and limiting their scope. He noted that there has been constant pressure for expansion of exemptions by a "me-too-ism" type of concept.

In 1966, the Supreme Court pointed out that 13% of the property in the state was on the exempt list, and this has probably risen since then. Further, there is no provision for periodic review of the qualification of exempt real property, and any taxpayer who challenges the continuation of the exempt status of property has the burden of showing that it should be returned to the tax duplicate. "Essentially, the question is whether the taxpayers of this state should be required to subsidize any and all manner of charity, or only those which is not provided privately would, of necessity, be provided by the government," he said.

Then, Mr. Lindley turned to the "uniform rule." He indicated that he had some strong feelings on this, as a former Assistant Attorney General in charge of tax litigation. "True value" is said to be that value which a willing buyer would pay to a willing seller, neither being under a compulsion to buy or sell," he said. As applied to ordinary residential property, such value can be fairly well estimated because there are sufficient actual sales for comparison. Property not frequently sold, however, poses additional problems, and there are cases on record in which the opinions of expert appraisers vary within a range of plus or minus 50%. Further difficulties arise from such cases as Pennsylvania Railroad Company v. Porterfield, 16 Ohio St. 2d 130 (1968), in which the Supreme Court said, in essence, that the value of business property is affected by the value of the business using that property. Even residential property is appraised differently in diverse parts of the state due to different appraisal techniques and different appraisal philosophies, Mr. Lindley said. In conclusion, he advocated the abrogation of the "uniform rule," to the end that classification be allowed, that equality of treatment be afforded to all property within a class, and that the representatives of the people be able to determine the distribution of the tax burden between the various classes of property. In Mr. Lindley's view,

the number of classes should be small enough to make classification feasible, yet large enough to accommodate the economics of the situation. "The problem of appraisal could be solved by the definition of appraisal techniques by the Legislature, Mr. Lindley believes. There is no recognized appraisal technique in Ohio today, he said.

At the beginning of his presentation, Mr. Gibbon pointed out that, despite the $750,000 debt limitation contained in Article VIII, Section 1, the bonded debt of Ohio on June 30, 1970 was in excess of $1,000,000,000. This had come about because of a series of constitutional amendments contained in Article VIII,Section 2. He felt that the present method of authorizing debt--that is, by constitutional amendment--may not be conducive to proper planning.

Mr. Gibbon spoke of the need for a clearer understanding of the function of revenue bonds, although these have been placed outside the constitutional debt limitation of Ohio and many other states by judicial interpretation. For example, he pointed out, in practice, the credit rating of the parties involved--as, for example, a well-established corporation which leases a facility built with revenue bond financing made possible by Article VIII, Section 13--often makes more difference in the cost of a bond than whether it is a revenue bond or a general obligation bond. He also emphasized his belief that there may be situations in connection with such state facilities as turnpikes, parking garages and university dormitories when, even though they were financed by revenue bonds, the state would feel compelled to step in to "rescue" them with general tax revenues rather than risk losing them or damaging its credit rating. He also pointed out that revenue bonds may be serving a useful purpose in keeping down the per capita indebtedness of the state and its political subdivisions, thereby helping to keep the interest on general obligation bonds lower than they would be otherwise.

Generally, Mr. Gibbon favored tying the state's debt limit to its revenues by some reasonable formula. In his view, not only would such an approach permit better planning, but it would enable the state, through action of the Legislature, to acquire capital improvements which may be absolutely essential to the proper functioning of government, but the need for which may not be fully realized by the electorate. One such area of need at the present time, according to many who work in the field, is water conservation, he said.

Mr. Gibbon commented briefly on Article VIII, Sections 4, 5, and 6. Section 5 prevents the assumption by the state of the debts of its political subdivisions. Section 4 prevents the extension of the credit of the state and the state's becoming a joint owner or stockholder, and Section 6 extends the latter prohibition, against becoming a joint owner or stockholder, to municipalities. He pointed out that these sections stem from the abuses of the canal and railroad era of the last century, and that the prohibitions contained in them put barriers either between the state and its political subdivisions or between the public and private sectors of our economy which may not be in accord with present-day thinking on the relationship of these entities to each other.

Mr. Gibbon stated that, in his view, the framers of the Constitution intended that the matter of the debt limitation of the state's political subdivisions be left in the hands of the General Assembly. The problem in this area arises not so much from the ten mill limitation, he noted, as from the fact that Article XII, Sections 2 and 11 have been construed to impose what is, in effect, an indirect debt limitation. Section 2 imposes a ten mill limitation on taxation of real property without a vote of the electorate. Section 11 requires that no bonded indebtedness of the

state or any political subdivision shall be incurred unless at the same time, a tax is levied to pay the interest on the bonds. Since no unvoted debt can be incurred if the millage needed to repay it would, if added to the millage already imposed on real property in a taxing district, cause the total to exceed ten mills, and every district is already levying at least ten mills for taxing purposes, the coupling of Sections 2 and 11 means that no bonded indebtedness can be incurred without a vote, not even, as in the case of sewer districts, when the proposed bonds would be paid out of assessments or fees and not taxes. This has often resulted in local governments being unable to finance needed capital improvements, even though there would have been a sufficient financial base to do so.

Mr. Gibbon also pointed out that in 1968 Ohio cities reported collecting $127 million from general property taxes, $197 million from local income taxes, and $270 million from charges for services. These statistics clearly indicate the decline of the relative importance of the property tax as a source of revenues. Yet, local governments can not use revenues derived from income tax to finance capital improvements, because income taxes may be taken from them by the doctrine of pre-emption, he noted. He advocated a recognition of this shift of the local tax structure, stating: "It's not that the financial base is not there--it is that the structure is antiquated and "1912-ish." And this is part of the structure problem--not just on a political boundary basis, but of recognizing the reality of where the financial base is--that is, income tax and services--and that property tax is nowhere near as important . . ."

The July 15th session was the third of a series scheduled by the Finance and Taxation Committee for the purpose of hearing the views of individuals and groups, particularly in regard to Articles VIII and XII of the Constitution. The presentations which were made during these sessions had been most informative and had produced much thought-provoking discussion. At the conclusion of the third session, Chairman Carson, on behalf of the Committee, again thanked all of those who had participated.

The next meeting of the Committee was set for 1:00 p.m., Thursday, August 26, 1971.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
July 15, 1971

Remarks of Mr. Ralph Gibbon

Mr. Gibbon - It's a great privilege for me to be here and to share my views with you, because I think that outside of restructuring government at the local level the subject that you are concerned with--finance and taxation--is obviously the key thing that needs to be done, it seems to me, in the revision of our Constitution. I do not have any prepared statement. I would like not to treat it that way. I would like you to ask me questions any time you want on anything, but I understand that what you would like at the moment are my views on Article VIII and Article XII, particularly the subject of debt limitation, since that's my peculiar field of expertise. I am the head of what we call our public law department. It is the part of our business that deals with public securities. We have been bond counsel and counsel in other relationships to municipalities and other branches of local government and of the State of Ohio for many years, and therefore the subject that we have under consideration this morning is something which we have given a great deal of thought to over a long period of time, and I regard it as being of exceeding importance.

I'd like to start with Section 1 of Article VIII--and by the way, you tell me how much time you want to take and shut me off when it comes time to be shut off, since this is the kind of thing I think I could probably talk about all day, but I'm sure half an hour will probably be enough. Section 1 provides that there shall be a limitation of $750,000 on the debt of the State of Ohio. The provision dates from '51--and by the way, how much testimony have you had on this? I don't want to be repetitious and I would like to get to the heart of the matter as quickly as possible.

Mr. Carson - We've had four meetings with most of the time on taxation.

Mr. Gibbon - Well, as you know, it dates from '51 and things were different then, and on the face of it $750,000 seems utterly absurd and it obviously is. To have a debt structure of an activity such as the State of Ohio--$750,000 is obvious to everyone as being inadequate. As a matter of fact, I did some homework

before I came down. The bonded debt of the State of Ohio as of June 30, 1970 is approximately $1,000,000,000. This in spite of the debt limitation of $750,000. Now this was occasioned by a series of amendments to the Constitution which are in here as 2a to 2i. Some were for very specific purposes like the World War II bonus, some of them for highways, some for universities and some for very broad purposes, such as development purposes and capital improvements, as in Section 2i. And so the technique developed of making the limitation actually meaningless in the present day and simply expanding it by a series of constitutional amendments, which means that every time you want to finance capital improvements and do some borrowing, you whip up all the political mechanism that's necessary to do this, and have to submit at a particular time a vote to the electors. I personally don't think that this is a very wise way to do business. It doesn't permit planning, and so it seems to me that the history of our State has shown that the $750,000 limit in Section 1 is obviously not adequate.

There is another thing that has been happening in the State since 1851, however, which is of equal significance, perhaps even greater, than the series of constitutional amendments that have gone on, because we have a series of cases in the Supreme Court of Ohio which, in effect, and in accordance with the judicial trend throughout the country, have defined obligations which you and I, I am sure, would consider to be our debts because they are sums certain and they are owed, and by dictionary definition they certainly would be a debt. They have been construed by the Supreme Court of Ohio not to be debts within the meaning of this debt limitation. These constitutional decisions, in my opinion, were brought about because of the restrictive nature of Section 1, and similar restrictions throughout the United States. So we find in this state and other states a concept of when a debt is not a debt--it's something else.

Mr. Carter - Can you give us an example?

Mr. Gibbon - Oh yes, the Ohio Turnpike is the obvious example. The Ohio Turnpike now has outstanding debt in the amount in excess of $200,000,000. It started out with a bond issue of $325,000,000 which is substantially more than the $750,000 debt limitation of the State of Ohio. They are obligations of an agency of the State of Ohio.

Mr. Carter - Isn't the common distinction that they are limited to the revenue?

Mr. Gibbon - And the idea of when a revenue bond is not a debt started way back in the case of Kash vs. Miller, which is the grandaddy of all these cases, in 1922. Kash vs. Miller established the principle that where you have a borrowing where there is no obligation to pay on the State of Ohio's part from general revenue--the tax revenues and so forth--but solely from the revenue generated by the facility that is built with the borrowed money, that is not a debt. Another obvious example is a bridge where the bonds are paid for from the tolls of the bridge. Another obvious example--more recent, is the Underground Parking Garage, where I parked my car this morning. There is $6,600,000 that is not a debt of the State of Ohio because it is to be paid for from the revenues. Now, another example is our state universities, where dormitory revenue bonds have been issued--bonds payable solely from revenues. The total of this amounts to approximately half a billion dollars--again as of June 30, 1970 and, you see, none of this is included within the $750,000 limitation.

Mr. Carter - My impression is that most of the new constitutions in other states have exempted revenue bonds and revenue obligations from the debt definition. Are you suggesting they should not be?

Mr. Gibbon - No, I'm suggesting that it is very unrealistic to think in terms of a $750,000 debt limitation, just initially. Also, referring directly to your question, I think that the state has lost--that is the General Assembly or the Constitution--has lost control over revenue bond financing if it ignores it. If revenue bonds are not to be included within the debt limitation, then it should be recognized that you

have a vast amount of financing outside this limitation.

Mr. Carter - Is that bad in your view?

Mr. Gibbon - No, it isn't bad in my view--I simply want it recognized. However, there are revenue bonds and there are revenue bonds! That is, it isn't clear what revenue bonds are, and I think this has a bearing on the matter. I think that, for example, there is a distinction between a revenue bond which is payable solely from the proceeds of the particular facility from a revenue bond which is payable primarily from the particular facility, but ultimately, if necessary, from the general taxing proceeds of the state. I think that you kid yourself if you think in terms of the debt of the State of Ohio as applying solely to those obligations to which are pledged the full faith and credit of the state. This is true not only with the state, but applies also to a much vaster amount of financing which goes on at the local level. The truth of the matter is, I think, and bond buyers rely on this as an axiom, as something likely to happen, that if the Turnpike, for example, did not have enough revenue from its tolls the state credit would suffer drastically if the bonds were not paid, and although there is no compulsion upon the General Assembly to "cough up" the money to bail out, let's say, the Turnpike Commission, it is very likely that it would happen. The West Virginia turnpike bonds were certainly marketed on the thought that this was about to happen. It seems inconceivable to me that the State of Ohio would really let the Underground Parking Garage do down the drain. Isn't it likely that the same attitude would be taken with reference to the dormitories in the various universities of the state, the borrowing for which at the present time amounts to $200,000,000? These are revenue bonds which are payable solely from the proceeds of the bonds, but there are many other kinds of bonds where this is not true and yet they are revenue bonds. This is going on more and more.

Mr. Wilson - What happenened with the West Virginia bonds? They were in default.

Mr. Gibbon - The West Virginia bonds were renegotiated and have been remarketed. The state did not step in and bail them out.

Mr. Carter - Well, we're of course a constitutional revision group. What does that line of reasoning suggest to you in the way of proposed additions to the Constitution?

Mr. Gibbon - Well, it suggests to me that Section 1 should be revised to attempt to place a more realistic ceiling on debt. I think that there should be a limitation on the amount of debt that the people of the state will permit the General Assembly to incur. I think that it leads to the thought that the method by which we incur debt today, namely continual amendment to the Constitution, doesn't lead to adequate ability to plan and it doesn't permit you to acquire facilities which are not appealing from a political point of view but which are absolutely necessary to run the state. For example, in the water field, the necessity of acquiring land for reservoirs and so forth is obvious to everyone who works in it. But it doesn't have the necessary appeal, for instance,as sewage abatement facilities do at the moment, or roads. Every time you put one of these amendments forward, you have to have a couple of "sexy" issues that will get the voters' attention, and then you drag in some of the things that are absolutely essential and necessary by the heels. This is a poor way. I would suggest that very serious consideration be given by your Committee in thinking about this problem to a bill which was considered by the Finance Committee of the House in the 107th General Assembly. It's HJR No. 60. This was a bill worked on assiduously by the then Chairman of the Finance Committee, Mr. Fisher. I think that it was a very good bill in its concept. Actually it never got out because the Administration came along with its own proposal which ultimately became Section 21. I reviewed it before I came down here. It attempted to place an overall ceiling on the amount to be issued in any one year--in this case $100,000,000 for highways and $150,000,000 for other purposes, so that there would be a limit on the yearly amount. And then there was an overall limit of

$750,000,000 for highways, and in addition a limit which was equal to the total revenues of the state for the preceding fiscal year. Now the total revenues of the state in the year 1969 were pretty close to $3 billion, so that you had a proposed overall debt limit on all kinds of capital improvements for the state of $3 billion, but a limitation of $150,000,000 that could be issued in any one year, and with reference to highways a limit of $750,000,000 overall, and no more than $100,000,000 in any one year. In many states you have a flat approach such as this--no more than so many dollars. In some states you have an approach of no more than a certain percentage of assessed valuation of real property. I don't see much merit in the latter. This again harks back to the days when our tax structure was based mostly on real property, and that day's gone by, and there doesn't seem to me to be any relationship between assessed valuation of the property in the State of Ohio and the proper amount of debt that should be for the State of Ohio. Some formulas for determining debt limits are equated in some way to total revenues of the state, and that makes a little more sense to me.

Mr. Wilson - It seems to me to be a current trend.

Mr. Gibbon - Yes, it is. As a matter of fact, I think what you really will face is the same kind of reasoning that is faced when an administration comes up with the amount of a bond issue. They're going to work backwards. And this is about what I think you probably will do. When you finally come to grips with this, you're going to figure out what you think the need is in the foreseeable future, and I think that you're going to limit it to, say, twenty years. It's sort of a nice figure because, after all, the Constitution says we're going to reconsider the Constitution every twenty years, so it's not a bad horizon. What do you think you're going to use in the next 20 years, and for what purposes? Are you going to phase out highways and so forth--that kind of thinking. And how much do you think you ought to be limited to every year? And you can come up with round figures on this, and then you tie that in to some kind of

relationship that on its face is reasonable. That's about the way, I think, you come up with these things, with the thought that you continually and always have the possibility of amending the Constitution when you want to, but you just don't have to amend it so often, and you have the additional capacity to issue revenue bonds in the various kinds of proceedings.

Mr. Wilson - You've answered my question. The $3 billion you were talking about that could have been the limitation would have been exclusive of revenue bonds.

Mr. Gibbon - Yes, that's what I would think would do it.

Mr. Carter - I have two questions. A number of the states have put in provisions for short term indebtedness, in the current fiscal year, to solve transient problems of collection and that sort of thing. Have you given any thought to that? You're talking about long term debt here.

Mr. Gibbon - Yes, I'm talking about debt mostly for capital improvements. Of course I certainly would build in the capacity to issue short term paper in anticipation of the long term, for a variety of reasons.

Mr. Carter - The second thing I'd like to ask you--of course amending the Constitution is an awkward process, so the thought has been proposed that, to the extent that you want voter approval on certain things as you go along, you should be able to do it by referendum rather than by amendment to the Constitution.

Mr. Gibbon - You mean initiated referendum?

Mr. Carter - No, the Legislature--

Mr. Gibbon - I see, you mean voluntarily refer a thing--

Mr. Nemeth - The passage of a law by the Legislature which would not become effective until it had been voted on by the electorate.

Mr. Gibbon - What is the advantage of that?

Mr. Carter - Oh, it saves cluttering up the Constitution right now.

Mr. Gibbon - My whole approach would be to give as much power to the General Assembly as possible.

Mr. Carter - I understand that, but my point was,have you given any thought to this concept--if you're going to grant so much power to the Legislature by the Constitution. As you pointed out, it's hard to project what will be needed in the future. We're not omnipotent to anticipate what is going to happen. So it would be well in the Constitution to give flexibility, short of a constitutional amendment, for the voters to approve certain additions to that debt limitation .

Mr. Wilson - This would be a process of ratification rather than physical amendment to the Constitution, as for example Sections 2e through 2i.

Mr. Gibbon - I am considering it now. The thrust of what you would be doing is not to clutter up the Constitution.

Mr. Wilson - It boils down to that.

Mr. Gibbon - Fine. The Constitution should not be cluttered up with amendments of this sort, no question about that, and this is a practical way of doing it. But I also want to finish up by saying I wouldn't do it. That is, I would give large grants of power to the elected officials--

Mr. Wilson - I understand your position.

Mr. Gibbon - I have perhaps one other comment about the Constitution in Article VIII which I think probably falls within my realm of expertise which I hate to let go without making some comment about, and then there are some which are not within my expertise about which it would like to comment, too!

For instance Section 5 of Article VIII is not within my realm of expertise--it's mainly a political question, I'm sure./ I don't understand why the state could not assume the debts of a municipality. It would be highly desirable from the standpoint of the public weal that the state should be able to assume the debts of its political subdivisions if the time ever comes. This idea of dichotomy between the state and the subdivisions, it seems to me, is "old hat" and is not in accordance with our present-day thinking.

Mr. Carter - You wouldn't of course make it positive--

Mr. Gibbon - No, not at all--just remove the inhibition from doing that.

It seems to me that the state and its political subdivisions and the federal government are all becoming part of a piece, and also the private sector of our economy. I think it's too bad that we would permit these concepts of over 100 years ago to prohibit the proper functioning of government.

There's an amendment to the Constitution recently in Article VIII, which is Article VIII, Section 13. This is a very dramatic piece of legislation, overwhelmingly voted by the people. This amendment was drawn by Henry Crawford and me during the last administration. It indicates, it seems to me, so clearly that the philosophy of our times has changed. You know, I find myself out of sympathy with the concepts in Article VIII, Section 13. In the same way, I find myself out of sympathy with urban renewal activities which I was largely responsible for putting through the Supreme Court of Ohio. But fortunately people don't think the same way that I do, so that Article VIII, Section 13 was overwhelmingly approved by the people. But I want to point out that it is contrary to the thoughts that were expressed by the Constitution in Article VIII, Sections 4 and 6. I don't think that Sections 4 and 6 and 13 are particularly compatible. They express a philosophy of government and social thinking that's utterly different, and I would suggest to you that one or the other ought to give, and I don't think there's any choice really that you have. I think 4 and 6 have got to give, because the whole thrust of our social activities at the present time indicates a growing together of the public and private sectors of our society.

Mr. Carter - Absolutely necessary.

Mr. Gibbon - I am convinced of that also. When I said I had problems with this, they go to the abuse of these interconnections. I don't think there's any doubt but what the people ought to be able to put a manufacturing establishment into the "Village of Podunk" if they want to in order to enhance the welfare of the people of "Podunk." I think that it may be questionable that the "Village

of Podunk" should finance $100,000,000 worth of activity for a large corporation. It could get its money somewhere else. But this is a matter of philosophy.

Mr. Carter - Hasn't that been pretty well taken care of by the IRS?

Mr. Gibbon - Yes it has, by Congress putting its nose, unconstitutionally perhaps, into what it has no business to do and which probably will be tested shortly. So far, the lid being put on at $5,000,000 is good from my point of view, and I think from a social point of view, which I think is one of the reasons why it has not been tested in the Supreme Court. You're right--but that's not thanks to our Constitution.

Mr. Carter - Are you suggesting that perhaps we should look at this matter as part of our constitutional deliberations?

Mr. Gibbon - You certainly might. I am not suggesting that. I am really suggesting that sections 4 and 6 are not compatible with 13, and I think that 4 and 6 need a good deal of thought as to whether they should stay in, anyway. As you know, they inhibit the lending of aid and credit by the state and by the subdivisions to any private person, corporation, and so forth. And you know that these provisions came in because of problems mostly with the railroads and so forth. It is interesting to observe that when, in connection with recent railroads, the State of Ohio was asked to "cough up" umpteen millions of dollars, these sections came into play. Now, there is a serious question as to what these things mean. For example, suppose that that the "City of X" wants to build a road out to serve this"Corporation Y", which had just located, having come in from Indiana. Is this a lending of aid and credit by the "City of X" to "Corporation Y"? It has never been considered to be such, but for the life of me I don't know why. Let us suppose that it wants to build a water line also to serve this corporation and also a sewer line. And what about urban renewal activities which are designed very much to aid corporate enterprise? Indeed, as a matter of fact, one of the basic functions of government is to aid private persons. That's what it is for to a large extent. So that's what all its

activities are about. So, what 4 and 6 mean, particularly with the attitude that's expressed in 13, is a mystery to me, and I think it's not only a mystery, I think it's a definite stumbling block in many kinds of financing that are very, very useful for the public good. I'm thinking--take a parking garage, for example, which has now been determined by the Supreme Court of Ohio to be a proper public purpose for a city to spend its money on. Suppose it wants to build this parking garage, up above, but it wants to add space for stores underneath--a shopping center. Now what do these things mean--these sections of the Constitution when you consider that kind of enterprise? They mean enough so that bond counsel isn't about to approve such financing, that's what they mean! So that you might consider whether this was a desirable thing to do. Take the whole activities of the New York Port Authority--this kind of activity. "State port authority"-that's sort of a bad word, but this sort of thing is inevitably going to happen. Airport financing, for instance. How much of that--

Mr. Carter - Mr. Gibbon, I've heard the example of Comsat on the federal level. There is a very reasonable likelihood that such ventures would be of interest to the State of Ohio if they were permitted to be done on a state level.

Mr. Gibbon - Very good. Absolutely. I couldn't agree with you more. And we intend, in Northeast Ohio one of these days, to build a great airport in Lake Erie, if the environmentalists will let us. All of these activities--and the larger they get the more it is absolutely necessary to have a partnership between public and private interests. These two Sections stand to thwart a good many of those projects and, in my judgment, have had their day. All I say about it is that it is much too narrow. I would actually leave this subject to the courts to regulate on the common law principle of "public purpose." Is this a proper "public purpose"? And "public purpose" changes. What was "public purpose" last year is not "public purpose" this year. As society changes, it changes and that's what a constitution ought to do--not freeze things, but to permit it seems to me, an efficient function of government without the horrible inhibitions that

are in this Constitution--I mean our existing structure of government. So for my money, I would eliminate them.

I would also eliminate sections 7, 8, 9, 10, 11 and 12, which seem to me to have no real utility. You might want to tinker around and preserve some form of reporting system, but the Sinking Fund--no Sinking Fund any more. The bonds are serial bonds, so--

Well, are there any questions that anyone of you would like to get back to?

Mr. Guggenheim - To clarify my own thinking a little--what does the federal Congress do?

Mr. Gibbon - Congress has no debt limitation. Congress controls it.

Mr. Guggenheim - I'm just trying to get this thing in perspective a little. Things like Fannie Mae and R. F. C. are the equivalent of the revenue bond situation--the general credit is not pledged?

Mr. Gibbon - We don't have that problem in the federal government because they don't have any debt limitations. This whole notion of revenue bond financing--the device--was promulgated by lawyers to circumvent debt limitations.

Mr. Nemeth - Could you comment on the cost of this approach--that is the cost of revenue bonds?

Mr. Gibbon - Well, it's a very interesting subject. You're referring to the fact that revenue bonds sell at a higher cost, a higher rate of interest than general obligation bonds?

Mr. Nemeth - Yes.

Mr. Gibbon - In the first place, this isn't always so. Well, let's take for example, what you would classify as a revenue bond under Article VIII, Section 13. It hasn't got anything to do with the credit of the "City of X." This is not a consideration of the bond buyer. What that bond buyer is looking at is what is the credit of the lessee of that facility--the private enterprise. Then, if it's Republic Steel or other well known corporate organizations, the cost of these bonds is very low, because they're looking at the credit of

the lessee. The gimick, of course, is that it's a bond issue by the public so as to be exempt from federal income tax. That's the point. Now, on the other hand, if you take a bond that's issued by a company not very well established, the cost of that bond may be high. However, I am sort of playing with you about this, because there isn't any question that, generally, revenue bonds on the average sell at a higher cost and bring a higher yield than bonds to which are pledged the full faith and credit. The Ohio Water Development Authority just marketed some $45,000,000 of revenue bonds and previously marketed another $25,000,000. They sold at rates which are quite comparable to the general obligation bonds. But, there again you have a peculiar kind of a thing, where the revenues that they are talking about are the contracts and the various pledges that they have from cities all over the State of Ohio.

Now, another interesting fact about this is--well, let's get down to cases. Take the $6,600,000 Underground Parking Garage bonds that were used to finance the Underground Parking Garage. I have no doubt but that if they had been sold as general obligation bonds of the State of Ohio, there would have been a substantial interest cost,--no question about that.

Just the other day, in thinking about this conference, I thought a question of this sort might be posed. And it occurred to me--and I don't think you can get an answer on this--that if all the bonds of the State of Ohio and its various subdivisions which are classified as revenue bonds had been issued as general obligation bonds--you turn to Moody's for example, and it will show the debt of the State of Ohio as $1,200,000,000--

Mr. Wilson - Our ratings would go to pot.

Mr. Gibbon - Right. It's sort of like the parochial schools, in an entirely different field. They are performing a function which otherwise would not be performed or would have to be performed by the state. So revenue bonds are performing a function which, if it were performed by general obligation bonds would probably mean that the general obligation bond rate would go up all along

the line. So the per capita debt would be higher. But what you say is true, that on the whole--generally--a buyer of bonds would rather have the full faith and credit of the state as opposed to the revenue of a particular enterprise. But it isn't anywhere near as much as you think.

Mr. Carter - If we were to recommend the elimination of 4 and 6, wouldn't it be just as well to recommend the elimination of 13, as being moot at that point?

Mr. Gibbon - No. I wouldn't because there would be a serious question of "public purpose," and that has already been handled very nicely by the courts, specifically on this amendment. No, I would leave that alone.

Mr. Carter - Well, I don't often take a position this early in the deliberations, but I certainly agree with you on Sections 4 and 6, which have bothered me, because it seems to me that the whole thrust of our more complex society is that we have to have an increasing partnership between government and private enterprise to solve the problems that we have, whether they be environment, housing, or transportation. In every respect we have to get together to solve the problems. To have this barrier to keep them separated is thwarting the purposes.

Mr. Gibbon - They will not be solved in any other way, in my judgment. I couldn't agree with you more. I would go easy on 4 and 6. I would think perhaps in terms of-- I think you'll have a hard time in selling this.

Mr. Carter - Just a flat repeal would raise all kinds of spectres. So I think that what we ought to try to do is to establish some guidelines that would hopefully permit our purposes to be achieved without permitting abuses to creep in.

Mr. Nemeth - May I ask a question? Would you take the same approach to debt limitations of political subdivisions as you do to the debt limitations of the state?

Mr. Gibbon - No sir, I would not! That brings us to Article XII. In my judgment, the provisions in the Constitution that have to do with the debt limitations of local subdivisions have been thwarted by judicial interpretation of Article XII, Sections 2 and 11, and in my judgment the disposition of debt limitations should

stay right where I think the Constitution intended it to be, namely in the hands of the General Assembly. Article XIII, Section 6 and Article XVIII, Section 13 give power to the General Assembly to regulate the debt structure in municipalities and local subdivisions, and in my judgment that's where it belongs. But unfortunately, Article XII, Section 2, which is a tax limitation, has been construed by the courts to be a debt limitation, and there lies the tale of a lot of our problems today, and particularly in the field of local government. It has hamstrung local government. In direct answer to your question, I think that the handling of debt limitations at the local government level should remain where it is, that is as far as the Constitution is concerned, in the hands of the General Assembly--after you deal with Sections 2 and 11. I think that the General Assembly has done a good job with reference to debt limitations on local government-- and besides that's within their prerogative. If they don't do it, it isn't a question of the Constitution. It's a question of political pressure on the General Assembly to do what they need to do--to give the cities the power to work out their own destinies. But the perversion, I think, of Article XII, Section 2 into a debt limitation has been the problem. Unless you have some specific questions, I'm taking up a lot of time. Maybe we ought to turn to Article XII.

On the question of a tax limitation I don't have any suggestions as to whether it should be ten mills, fifteen mills, or twenty mills. I feel actually that it isn't a question of needing constitutional change insofar as a tax limitation is concerned. The General Assembly has it quite within its power at the present time to handle this matter. It has at the present time passed legislation which limits itself to assessed valuation of 50%, instead of true value, as the Constitution indicates it should be. So all they have to do if they want to give relief is to gather their political courage and do something about it. Instead of limiting it to 50% they could set it at 75%. Actually, the way it is at the present time, valuations have slipped from approximately

80% of true value some years ago to where they are now down to some 30% of true value. Obviously this has hamstrung local government. The county auditors have been put under pressure--political pressure--and with inflation and so forth they haven't kept up, that's all. Their valuations have slipped somewhere down around 35%. All they have to do to remedy that situation if they really want to give a shot in the arm as far as the property tax is concerned, is to be a little courageous. It's not a constitutional problem. It's a political-legislative problem. I have no particular quarrel with 10 mills. My quarrel comes with the judicial interpretation of combining Section 2 and Section 11 and coming up with the conclusion that it's a debt limitation--it's a ten mill debt limitation, the so-called "indirect debt limitation." Whether it's good or bad, it's far too late in the day to boot that around. The Supreme Court of Ohio in the Portsmouth case in 1935 held in effect that no general unvoted city bonds--in this case now we're dealing with municipalities when it comes right down to it, rather than the state, but that's no small matter because most of the financing in the state is done at this level, rather than the state level--that no general obligation nonvoted city bonds could be issued, if the annual millage pledged to service those bonds exceeded 10 mills, or where the proposed taxation if added to the taxation already existing would in any one year during the life of the bonds cause the millage to exceed 10. Now, what does this mean? It's a little difficult to really grasp it. But actually what's happening at the present time is that all these subdivisions are levying ten mills. I don't know of any that aren't levying the full ten mills--that is, for tax purposes. And that, in a sense, is the ten mill limitation. That's not what I'm talking about. What I'm talking about is the indirect debt limitation, which requires that wherever you have bonds which pledge the general credit of a community--and this would not apply to revenue bonds--you cannot issue unvoted debt where in servicing that debt you would exceed ten mills.

It's such a theoretical thing because you see if you issued unvoted debt and you had to bite into the ten mills for the debt purposes, every dollar that you would take to service those bonds would be that many fewer dollars which you would be able to use in the ordinary operations of the city, because they depend on that ten mills. You wouldn't pay the mayor, and so forth. This is applicable even today, under the Portsmouth decision, although under practical operation would never be paid from taxes but would be paid, for instance, from special assessments. When you have a street put in in front of your property by the city, it is probably put in through a special assessment proceeding, and these bonds are issued and they levy a special assessment against your property in order to pay for those bonds. Those bonds, however, under Article XII, Section 11 require the pledge of the full faith and credit, and require the levying of a tax to pay those bonds, even if there's no anticipation that that levy is ever going to be made. Now, let's suppose that the debt is so much that it will take up 10 mills of that particular subdivision. That means that even though you would never levy taxes in order to pay for those bonds--that they would be paid year after year by special assessment--and this same reasoning is applicable in a much more serious field such as water and pollution abatement facilities, which are self-supporting activities--even though the rates that were levied in order to service the sewer and water bonds came in year after year and the bonds were paid off, if you got up to 10 mills, you could issue no more unvoted debt in that community. Worse than that, no other debt by anybody else who had any taxing power with reference to that particular subdivision could be issued, because no tax could be placed on any parcel of real estate. Now this is not a theoretical problem. In Ohio in three or four places it's getting close to where it is a problem. A small community has done just exactly what I have said and has issued bonds which have taken them, when you add theirs to whatever else has been imposed on that particular property in that particular subdivision, up to 10 mills. The county wants to put in a water system or a sewer system and

wants to issue general obligation bonds. It can't do it, because the amount of millage that it would impose on property in this village would cause that millage to exceed 10. Therefore, they're stymied completely, even though there's plenty of credit and plenty of money available--they have all the sewer rates that they need in order to service the bonds. They're completely stuck without a vote of the people.

Now this is completely irrational. There isn't any point in it, and it ought to be done away with. It would be a very significant thing for the health of local communities if the ten mill limitation was understood by constitutional revisionists and, once understood, its impact grasped and then eliminated. Now the General Assembly has grasped this in the debt limitations which it places upon them--which is an entirely different kind of debt limitation. Acting pursuant to Article XVIII , Section 13 or Article XIII, Section 6 which give it this power, it has imposed debt limitations upon municipalities, and it has provided exceptions from those debt limitations for facilities which are in effect self-supporting facilities, such as special assessment financing--water, sewer, transportation, anything that is a self-supporting bond. The list is "yea long" as to those that are exempt from their debt limitations because they are paid other than from general obligation--

Mr. Carter - You still run into the constitutional problem--

Mr. Gibbon - This is the sticker, and it all stems from the Portsmouth case, and it's just as simple as that. Now I could elaborate, but that's the essence of it.

Mr. Carter - Mr. Gibbon, you pointed out the ten mill limitation was really a falacious one from the standpoint related to true value in comparison to assessed value, which is running around 30%. Would not that same thing apply to the debt problem?

Mr. Gibbon - Yes. If, for example, the General Assembly had the courage to insist--and the courts too, and the Board of Tax Appeals, and all the county auditors--to begin to tax property at its true value as they do in some other states, you would

of course enhance the capacity to borrow.

Mr. Carter - I raise the question of whether that isn't in fact there, today.

Mr. Gibbon - It is, but you need much more than that when you're talking about, for example, a county sewer district, which is the entire county, and they want to put in a sewage disposal plant which runs into a great many millions of dollars. There seems no reason why this should be limited by anything except the ability of this system to support itself.

Mr. Carter - My point is, Section 2 says "no property shall be taxed in excess of one per cent of its true value in money." Now it seems to me that's quite a different restriction, as this committee has discussed before, than the ten mill limitation as it's popularly applied. I'm wondering if this question has ever been tested in the courts.

Mr. Gibbon - Well, I don't quite get your point. You are not to tax property in excess of ten mills of true value.

Mr. Carter - Now true value is not assessed value. So is the block at ten mills of assessed value or is the block at ten mills of true value?

Mr. Gibbon - It depends on whether you're talking about a tax limitation or a debt limitation. As far as the debt limitation is concerned, we do not know what true value is. All we know when we come to approve bonds is the value as it appears on the duplicate of the county treasurer.

Mr. Carter - You are not at liberty to interpret this.

Mr. Gibbon - We have no machinery by which we can say of our own knowledge, so that instead of approving a million dollars we would approve ten million dollars. We have no machinery by which we can say, "Aha, that is true value."

Mr. Carter - So in essence it is a real block.

Mr. Gibbon - It is a real block, a very important block. I don't want to over-emphasize its importance because I think there is something you could do that is much more important than that, by your activities: repealing Section 11.

Mr. Carter - You think that's the answer?

Mr. Gibbon - Not entirely. I would approach it in two ways. I would repeal Section 11. Section 11 when combined with Section 2 has caused the Court to come up with the idea that it's an indirect debt limitation.

Mr. Carter - May we have that citation?

Mr. Gibbon - The Kountz case? 129 O. S. 272

Section 11 provides that no debt of the state shall be incurred unless in the legislation in which you incur the indebtedness you provide for levying and collecting annually by taxation an amount sufficient to pay. So that if you were going to issue bonds to construct a sewer, you have to put in your legislation under this section of the Constitution, in order for the issuance to be valid, a provision for levying a tax even though you have no intention whatsoever ever to levy a tax. So the Court said: "Well, when you have to do that, obviously that must be construed with Section 2, and you cannot levy more than ten mills. So obviously you're stuck. If you want to put out unvoted bonds which would cause the debt service charges at any time during the life of that issue to be in excess of ten mills, it's illegal.

Mr. Carter -You would eliminate that and leave it up to the Legislature, which has already addressed itself to this problem, as to what the appropriate debt limitations of municipalities should be.

Mr. Gibbon - I would, however, also make it clear by providing in Section 2 or negating in Section 2 any idea that Section 2 could possibly be construed by the courts to be an indirect debt limitation, because some courts in other jurisdictions without a provision such as Section 11 have come to the same conclusion as our courts did. I would make it a positive statement that this was not a debt limitation and was not to be so construed, and develop some kind of language of that sort. Now also--and I would not put this in the Constitution--if I had to do with it, I would draft companion legislation to salvage the advantages that come from Section 11, and at the same time give support to securities of local subdivisions in those areas which are becoming increasingly important.

It's rather interesting to see the change, actually, in the revenues of local subdivisions, that is,what the local subdivisions depend on. The financial report of Ohio cities in 1968 showed total revenues of $127,000,000 plus

from the general property tax. The local income tax was $197,000,000. So that what we're talking about is not as significant today as it was 25 years ago, and something ought to be done about that. The revenue generated by the income tax at a local level is enormous and it should be tapped for the construction of long-term improvements.

Mr. Carter - It generally is, isn't it, by local legislation?

Mr. Gibbon - Well actually it is and it isn't. You cannot issue bonds based on income tax revenues, for the reason that they are subject to being whisked away by the General Assembly, under the doctrine of pre-emption. And also you should think about charges for services of the cities in Ohio--$270,000,000 in 1968, for water, sewer and that kind of thing as compared to $127,000,000 for the general property tax. What you really ought to do is to think in terms of providing a base for the issuance of securities at the local level based upon the revenues of the local community--and those revenues include income tax, services, and property tax--and all of those pledged for the obligations of the local community. Then you begin to generate a real base for finance. The cities are in a terrible financial plight, there isn't any question about that, but largely it's a question of restructuring local communities. It's not that the financial base is not there--it is that the structure is antiquated and "1912-ish." And this is part of the structure problem-- not just on a political boundary basis, but of recognizing the reality of where the financial base is--that is,income tax and services--and that property tax is nowhere near as important. And I would provide in connection with such things that you would protect the bondholders' right to have income tax levied as long as the bonds are outstanding, and that the state could not come in and pre-empt them.

Mr. Carter - That couldn't be done now by local legislation?

Mr. Gibbon - No, they can not, because they can't control what the General Assembly is going to do.

Mr. Carter - Then it becomes a constitutional matter.

Mr. Gibbon -It becomes a constitutional matter in the sense that so many of these things in the Constitution are constitutional matters: it could be left to the General Assembly. But if I were doing it on a constitutional review commission--if I took out Section 11 of Article XII--I would substitute something for it, which would give the necessary financial strength to the local communities which they do get from this. It's just that it is not responsive enough.

Mr. Carter - I think that's a very interesting point, and of course this gets back to your earlier observation that we can't discuss financial considerations in a vacuum--without getting together with the local government section.

Mr. Gibbon - There just isn't any question about that. Again you see, the need of the city where I come from, Cleveland, qua Cleveland, are insuperable, if they are to be solved by the financial capacity of Cleveland. That's the reason why they want a "bail-out" from the federal government. But the financial plight of the City of Cleveland, qua Greater Cleveland is far from insuperable. The financial base is there. It's a question of structure. It's a difficult question, but at the heart of any financial tools that you would develop. Anything else is really a piecemeal operation.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
August 26 and September 17, 1971

Summary of Meetings

The Finance and Taxation Committee met at 1:00 p.m. on Thursday, August 26 and at 9:30 a.m. on Thursday, September 16, 1971. Present at the August 26 meeting were Chairman Carson and Mr. Carter, and present at the September 16 meeting were Messrs. Carter and Wilson.

At the August 26 meeting, there was a section-by-section examination of Articles VIII and XII, with a view to establishing which of their provisions the Committee could hope to act on at an early date, and which of their provisions are of such a nature that the Committee must view decisions in regard to them as being further in the future.

It was agreed that Chairman Carson would prepare a memorandum outlining the order of priorities agreed on at the August 26 meeting, and containing recommendations for the disposition of those sections which the Committee could act upon at an early date. Mr. Carson emphasized that these recommendations, either as to priority or as to disposition, should not be regarded as final decisions by the Committee at this time, but only as a basis for discussion by all its members.

The above memorandum, dated September 10, was prepared and mailed to all Committee members. It reads in pertinent part as follows:

"RECOMMENDATIONS FOR IMMEDIATE ACTION

Art. VIII, Sec. 5. No assumption of debts by the state.

It is recommended that this section be deleted. It is suggested that circumstances could conceivably occur where the legislature might feel it is in the best interests of the State of Ohio to assume obligations of a local unit of government and it would seem that there is no overriding need through constitutional provision to prohibit such action by the legislature if it should deem it desirable. The prohibition against assumption of debts "of any corporation whatsoever", which appears to include private corporations, is repetitive of the prohibition contained in Article VIII, Section 4, which section will be studied by the Committee in more detail before a final decision is reached on it.

Art. VIII, Sec. 12. Board of public works.

It is recommended that this section be deleted. It would appear that the office of superintendent of public works need not be a constitutionally created office with a rigid one-year term fixed. It is suggested that the creation of state offices such as this should be a legislative function. If the Committee recommends deletion of this provision, the Legislative Service Commission should be requested to determine whether any legislative action is required to assure the continuation of the office.

Art. XII, Sec. 1. Poll Tax.

It is recommended that this provision be retained in the Constitution. Although the record of the 1851 convention debates seems to indicate that this provision was inserted to prevent taxation on a "head tax" basis rather than to prohibit imposing

a tax on the right to vote, poll taxes today certainly are thought of as affecting the right of franchise. Although the United States Supreme Court has declared that poll taxes violate the United States Constitution and it could be argued this section is unnecessary, it would seem there is no good reason to delete a provision which prohibits discriminatory activity such as the imposition of a tax on the right to vote. Furthermore, it is conceivable that the United States Supreme Court might reverse itself and under that circumstance it would appear this section should be a part of the Ohio Constitution.

Art. XII, Sec. 4. Revenue.

It is recommended that this provision be retained. There seems to be no good reason to delete it and would seem to be an appropriate subject to be included in a state constitution. It would seem, however, that this provision should more properly be included in Article VIII and perhaps it could be combined with one or more sections in that article to provide a more meaningful presentation of allied provisions.

Art. XII, Sec. 5. Levying of taxes, and application.

It is recommended that this provision be retained. The first clause which prohibits the imposition of any tax unless it is authorized by statute would seem to state the obvious but would, nevertheless, seem to be an appropriate safeguard to be retained in the Constitution. The second clause requires each taxing statute to define the object of the tax and to require that the revenues received from the tax be used only for the stated purposes. Although the Committee has been advised that the provision contained in this second clause can be rather easily circumvented by providing broad, general objects in taxing statutes, nevertheless there seems to be no compelling reason for deleting the requirement. This also seems to be a proper subject for inclusion in the State Constitution.

Art. XII, Sec. 7. Inheritance tax.

It is recommended that this provision be deleted. The Committee has been advised that the legislature possesses the inherent power to impose taxes of any variety so long as the Constitution does not prohibit the imposition. The Committee has also been advised that there seems to be no need for a constitutional revision to permit graduated inheritance taxes or to permit the levying of different rates upon different types of inheritances. Certainly, the limitation on the maximum exemption is more properly a function of the legislature. In summary, it is believed this provision can be deleted in its entirety without impairing the right of the legislature to impose the type of tax permitted by this section. In order that there may be no later legal question, however, it is recommended that a carefully phrased "savings clause" be added to the Constitution to insure that the legislature possesses specific power to impose this type of tax in the future.

Art. XII, Sec. 8. Income tax.

It is recommended that this section be deleted under the same reasoning stated in the recommendation in respect of Article XII, Section 7. The "savings clause" suggested in the discussion of Section 7 would also protect the right of the legislature to impose income taxes.

Art. XII, Sec. 10. Excise and franchise taxes.

It is recommended that this provision be deleted on the same basis discussed in

respect of Sections 7 and 8. The "savings clause" which has been suggested would empower the legislature to impose the types of taxes mentioned in this section.

Art. XII, Sec. 12. Excise tax on sale or purchase of food prohibited when.

It is recommended that this provision be retained in the Constitution. It seems to embody a policy question of sufficient social importance to merit constitutional attention. In the event that the Committee should decide to recommend to the Commission that Articles VIII and XII should be revised in their entireties and submitted to the legislature as complete articles, we would recommend that the first clause of Section 12 ("On and after November 11, 1936") could be deleted without affecting the substance of the provision.

" PROVISIONS REQUIRING ADDITIONAL CONSIDERATION

All of the sections contained in Article VIII and Article XII other than those set forth above seem to require additional consideration before the Committee is in a position to act upon them. The sections which are recommended for later disposition are as follows:

Art. VIII, Sec. 1. Public debt.

Art. VIII, Sec. 2. Additional, and for what purposes.
(including subsections 2b through 2i.)

Art. VIII, Sec. 3. The state to create no other debt.

Art. VIII, Sec. 4. Credit of state: the state shall not become joint owner or stockholder.

Art. VIII, Sec. 6. Municipal and political corporations not to own stocks, etc.

Art. VIII, Sec. 7-11. Sinking fund.

Art. VIII, Sec. 13. Program for economic development.

Art. XII, Sec. 2. Taxation by uniform rule; exemption.

Art. XII, Sec. 5a. Prohibition of expenditure of moneys from certain taxes relating to vehicles for other than highway and related purposes.

Art. XII, Sec. 6. No debt for internal improvement.

Art. XII, Sec. 9. Apportionment of inheritance and income taxes.

Art. XII, Sec. 11. Bonded indebtedness; interest and sinking fund.

The memorandum was discussed at the September 16 meeting. Mr. Carter and Mr. Wilson indicated general agreement with the order of priorities suggested in it, and Mr. Nemeth, of the Commission staff, indicated that the specific recommendations contained in the memorandum for the disposition of certain sections represented the thrust of presentation before the Committee and discussions at Committee meetings. The memorandum will be taken up again at the next Committee meeting, the date of which is to be announced.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
December 16, 1971

Summary of Meeting

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission held a meeting at 9:45 a.m., December 16, 1971 at the office of the Commission, 20 South Third Street, Columbus. Present were Chairman Carson,Senator Ocasek and Messrs. Bartunek, Carter, Guggenheim and Wilson.

Chairman Carson presented a memorandum which he had prepared for the committee, with the assistance of Mr. Nemeth of the Commission staff. Mr. Carson emphasized that the memorandum did not necessarily reflect his own thinking on the subjects covered or that of any member of the committee or of the staff, but was intended only "as a crude vehicle to help us crystalize our thinking" regarding some substantive portions of Articles VIII and XII.

The first point covered in the memorandum was a possible redraft of Article VIII, Section 1, relating to state debt. Mr. Carson stated that the committee had several options open to it on the question of what to recommend relative to the debt limit. These include:

(a) Maintaining the same debt limit

(b) Omitting any limitation on debt

(c) Increasing the dollar debt limit to a higher fixed figure

(d) Basing the debt limit on a formula: (e.g. a percentage of State revenues collected; a percentage of assessed valuation of real and/or personal property in the State; a percentage of taxes collected by the State; a percentage of appropriations authorized by the legislature during the year)

He also pointed out that the committee in the past had discussed several ancillary questions relating to the debt limit, among which are the following:

(a) Whether the debt limit should include or exclude revenue bond obligations

(b) Whether the Constitution should impose any limit on the terms of bonds - some states have felt it desirable to include a limitation on the maturity (and the 1968 amendment itself imposes a thirty-year maturity limit) Article VIII, Section 2 (i)

(c) Whether it is desirable to provide that additional bonding authority over and above any debt limit imposed should be effected through simple referendum rather than constitutional amendment

(d) Whether or not specific authority for the issuance of tax anticipation obligations should be included in the Constitution

(e) Whether or not "interim financing authority" (i.e., short term borrowings which may carry over into another fiscal year made necessary by reason of

failure of revenues or other unusual circumstances) should be included

(f) Whether or not we should delete subsections (b) through (i) of Section 2 (which set forth the elector approved bonding amendments) and protect the validity of all presently outstanding bonds through an appropriate savings clause

(g) Whether it may be desirable to delete Sections 7 through 11 of Article VIII, which deal with the operation of the sinking fund (Experts who have appeared before the committee have indicated that under present day financing techniques the sinking fund concept is not utilized)

However, Mr. Carson pointed out, the mechanics for issuing debt obligations must be provided in some way. With these factors as a background, he set forth the following draft of a new Article VIII, Section 1 for the committee's consideration:

" Article VIII, Section 1. State debt. /To replace Sections 1, 2, 3, 7, 8, 9, 10 and 11 of Article VIII/

(a) The General Assembly may from time to time authorize the incurring of indebtedness by the State or any of its agencies or instrumentalities, and the issuance of bonds, notes and other obligations evidencing such indebtedness, including without limitation, tax supported obligations and revenue obligations, for the purpose of providing public capital improvements of every character including without limitation the acquisition of improved or unimproved land for public purposes, the construction, reconstruction or other improvement of public buildings, highways and other capital improvements, and the participation with the federal government or any political subdivision or public authority of this State in providing public capital improvements through grants, loans or contributions, provided that the aggregate principal amount of all such indebtedness incurred in any one fiscal year shall not exceed percent of the average of the annual tax revenues collected by the State during the previous two fiscal years as certified by the Auditor of State and no indebtedness shall be incurred if the total of such indebtedness and the aggregate principal amount of all such indebtedness then outstanding shall exceed times such average of annual tax revenues.

(b) The General Assembly may authorize the incurring of additional indebtedness or indebtedness for other purposes if the question whether the debt shall be incurred has been submitted to the electors and approved by a majority of those voting on the question.

(c) In addition to the authority provided in subsection (a), the General Assembly may authorize the borrowing of money to meet appropriations for any fiscal year, but all debt so contracted shall be paid before the end of the next fiscal year.

(d) In addition to the authority provided in subsection (a), the General Assembly may authorize the incurring of indebtedness for the purpose of repelling invasion, suppressing insurrection or riot, defending the State in war, or dealing with man-made or natural disasters.

(e) No bonds, notes or other obligations issued by the State shall mature later than thirty years from their respective dates of issuance, except

that the General Assembly may in the enactment authorizing an indebtedness, extend the term of the obligation to no more than fifty years by the affirmative vote of three-fifths of the members of each house.

(f) The General Assembly may authorize the incurring of indebtedness to retire indebtedness previously incurred if the new indebtedness matures on or before the maturity of the debt to be retired.

(g) The General Assembly by law shall provide the procedure for incurring and evidencing debts of the State."

Mr. Carson summarized the effects of such a section as follows:

(a) It would eliminate a fixed dollar debt ceiling and substitute a formula based on a percentage of state tax collections during the two previous fiscal years

(b) The limit would cover general obligation bonds, revenue bonds and notes issued for providing capital improvements

(c) It would include a thirty-year maturity limit on bonds but permit the legislature to extend that limit by a three-fifths majority vote

(d) It would permit voter approved bonds outside the limit by referendum rather than constitutional amendment

(e) It would authorize tax anticipation financing if authorized by the General Assembly

(f) It would permit borrowing outside the debt limit in the case of certain specified calamities

(g) It would replace the detailed sinking fund sections with a provision requiring the General Assembly to establish bond mechanics.

Mr. Bartunek led off the discussion on Section 1 (a) by asking why it was suggested that revenue bonds come under the debt limit--and pointing to the Ohio Turnpike and the parking garage under the State House as examples of projects which were financed by revenue bonds and are self-sustaining. Mr. Carson answered that an alternative to excluding revenue bonds from the debt limit would be to set the overall debt limit high enough so there would be no reason not to include both general obligation and revenue bonds within the limit. He said that it has been suggested to the committee that we are perhaps "fooling ourselves" in not regarding many revenue bonds as debts of the State. Mr. Bartunek replied that while he understood the argument that the state would likely step in to rescue some revenue bond projects--such as the Turnpike--he thought that the proposal in the draft was an undue restriction on revenue bonds, although he certainly agreed that a limit ought to be put on general obligation bonds.

Here, Senator Ocasek raised a point on the difficulty of defining what is a revenue bond and what is not a revenue bond. He made reference to Article VIII, Section 2i, adopted in 1968, which, inter alia permitted the issuance of revenue bonds for certain stated purposes, but made no provision for the payment of interest on the bonds to be issued. Therefore, the General Assembly has to provide the

money to pay such interest and, because it has refused to do so, such bonds have not been issued. Mrs. Eriksson stated that although these bonds are called revenue bonds, they are very distinctly hybrids.

Mr. Carter commented that he found a problem in logic in the proposition expressing the overall debt limit in terms of a percentage of tax revenues, and then including within that debt limit both debt which is supported by tax revenues and debt which is supported by other kinds of revenues.

Mr. Bartunek added that the inclusion of revenue bonds in the debt limit would give such bonds a new test of success--not whether they can succeed on their own basis, but whether they can succeed because they are backed by the State of Ohio more than impliedly. Mr. Carson said that it would not be the intent of the proposal to say that a "pure"revenue bond"would be backed by the full faith and credit of the state. Mr. Bartunek pointed out that it could be argued, however, that if a revenue bond comes under the overall debt limit, it ought to be paid off just like full faith and credit bonds. Mr. Carson said that he had not made up his mind on this, and the point of including this proposition in the draft was to get the committee to consider whether or not revenue bonds should be regulated as to a dollar limit. It was generally agreed that this was a valid question.

Mr. Bartunek said that there are at least three built-in restraints on revenue bonds: first, someone has to conceive a program in which they are used; second, the General Assembly has to enact the program into law; and third, people have to invest in the bonds.

Mr. Nemeth referred to Article VI, Section 3 of the Hawaii Constitution as amended in 1968, which is a very elaborately worded provision excluding not only revenue bonds, but certain general obligation bonds of "self-supporting" projects not only from the state's debt limit, but the debt limit of political subdivisions as well. Although some sentiment was expressed that such a provision may be an alternative to the draft presented, the wording of the Hawaii provision is too verbose.

Mr. Carter stated that, before getting into the details of a debt limit, the committee ought to decide if it wants to recommend a debt limit at all. He pointed out that the ideal, exemplified by the Model State Constitution, is not to set a debt limit and to permit the legislature to decide--although he did not believe that this approach would be acceptable to the people. Mr. Wilson said that, because of the ease with which the national debt limit is raised by law, the people have lost faith in any debt limit controlled by those who make appropriations.

Mr. Carson expressed the hope that the Committee would not make a decision on this question at this meeting, the only purpose of the memorandum being to stimulate thought.

He then commented on some of the other features of the draft of Section 1. He said that the debt limit in Section 1(a) would be intended to cover capital improvements only. Debt in excess of the limit specified in Section 1(a), or for purposes other than capital improvements, would be subject to popular referendum under Section 1(b) of the draft.

In reference to Section 1(c) of the draft, Mr. Carson said that authorization to borrow to meet appropriations should probably be limited to loans which are

repaid within a particular fiscal year, rather than by the end of the next fiscal year, as appears in the draft. Mr. Nemeth pointed out that the present Constitution does not contain any such authorization, and that it was his understanding that where such borrowing has occurred in the past it was done as the result of administrative decision.

Mr. Carson pointed out that the provisions of Section 1(d) are largely carried over from the present Constitution, but have been expanded to specifically authorize borrowing to suppress riots and to deal not only with natural, but also man-made disasters.

In regard to Section 1(e), fixing the time within which bonds would have to mature, Mr. Carson pointed out that the present Constitution does not contain a general rule, although Article VIII, Section 2(i), passed in 1968, contains a 30-year limitation. He stated that some other constitutions do set limits and that this section was put into the draft for discussion purposes. Mr. Nemeth mentioned that a more flexible approach would be to limit maturity dates to the probable useful life of the projects being financed, and perhaps to include a provision that the legislature is to make the determination of "probable useful life" in the law authorizing a debt, and that this determination shall be conclusive.

Mr. Wilson suggested that perhaps the Constitution should contain a 30-year limitation but that the General Assembly should be authorized to extend this by three-fifths vote to any length of time instead of being limited to 50 years.

Mr. Bartunek expressed support for a "probable useful life" approach, stating that any fixed limit, such as 30 years, may invite the issuance of bonds for longer periods than necessary in some cases, and on the other hand prove to be inadequate in other cases which we can not now foresee.

Mr. Carter asked what the rationale was for including a time limit on maturity dates in a constitution. Mr. Carson replied that many constitutions have such provisions, the apparent intent of which is to prevent refinancing a bond issue ad infinitum and to "prescribe just how long the legislature may put the state 'into hock' with a particular bond issue."

Mr. Carson then spoke about Section1(f) which would specifically allow refinancing of bonds, as long as the original debt was paid off on or before its original maturity date. As Mr. Carter pointed out, this would permit taking advantage of lower interest rates as market conditions change.

Concerning Section 1(g), which would require the General Assembly to prescribe the methods for incurring and evidencing the debts of the State, Mr. Carson said that this provision was intended to cover the elimination of the sinking fund provisions from the Constitution. Mr. Wilson suggested a change in wording to "incurring, evidencing and retiring" debts of the State.

Mr. Carson suggested that this section should contain a provision specifying that, in any law authorizing a debt, the General Assembly shall specify the manner of repayment. It was generally agreed that such a provision should be included. Mr. Wilson said that this had been the intent of his suggestion. Mr. Nemeth pointed out Article IX, Section 9(b) of the 1970 Illinois Constitution as an example of an existing provision of this type.

Mr. Carson then read to the committee the draft of a possible new section which would replace existing Sections 4 and 5 of Article VIII and would read as follows:

"Article VIII, Section 2. Use of Appropriations or credit for private purposes prohibited.

No tax shall be levied or appropriation of public money or property made, nor shall the credit of the State be used, directly or indirectly, except for a public purpose declared as such by the General Assembly in the enactment authorizing the levy, appropriation or use of credit."

Present Article VIII, Section 4 prohibits the extension of the credit of the State and prevents the State from becoming a stockholder or joint owner; present Article VIII, Section 5 prohibits the assumption of the debts of any political subdivision or corporation. Mr. Carson pointed out that both of these provisions were inserted into the Constitution in 1851 and were the result of various financial entanglements in which the State had become involved during the canal, turnpike and railroad building era, particularly 1825-1850.

A section such as set out above would omit these restrictions and substitute a public purpose requirement, which is now a part of the Constitution by implication. It would permit the State to enter financing arrangements involving the private or quasi-public sector when such participation would be beneficial to the people of the State, Mr. Carson said.

Then, he read the draft of a new Section 3, which would replace existing Section 6:

"Article VIII, Section 3. Municipal and political corporations not to own stocks, etc.

Except as may be otherwise provided by law, no political subdivision of this State, by vote of its citizens, or otherwise, shall become a stockholder in any joint stock company, corporation, or association whatever; nor raise money for, or loan its credit to, or in aid of, any such company, corporation or association."

Present Article VIII, Section 6 contains an absolute prohibition against the activities mentioned in the above draft. The effect of such a revision would be to continue the prohibition, but to authorize the General Assembly to prescribe otherwise by law, Mr. Carson indicated. He noted that the words "county, city, town or township" in present Article VIII, Section 6 had been changed in the draft to the inclusive phrase "political subdivisions", and the references to insuring public buildings and the rates charged by insurance companies have been deleted as not falling within the purvue of Article VIII. If this reference to insurance companies is determined to be a necessary part of the Constitution, he said, it should be put into the article on corporations. Provisions for insuring State buildings, on the other hand, can be made in the Revised Code alone, he said.

The next point covered in Mr. Carson's memorandum was the suggested deletion of Article VIII, Section 13, relating to industrial development bonds. He said that this would not be done as an expression of opposition to its concept, but in order to remove detailed verbiage from the Constitution. He indicated that additional study and advice would be needed before final action could be taken on this point, to assure that deletion of this section would not cause undesirable legal effects.

Mr. Carson felt that this section could probably be deleted and the projects it encompasses could be preserved by appropriate "public purpose" clauses covering both the state and its political subdivisions.

Then Mr. Carson read what could become a new Article VIII, Section 4. This type of provision would be necessary if the committee desired to recommend the deletion of all bonding authority sections from the Constitution, he said, and would be intended to act as a "savings clause." The language of the section, which borrows from existing Article VIII, Section 13, would be as follows.

"Article VIII, Section 4. State debt recognized. /New Section/

All obligations of the State or its political subdivisions, taxing districts or public authorities, its or their agencies and instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, incurred under authority of any provision of this Constitution repealed after such obligation has been incurred shall, nevertheless, remain in full force and effect and shall be secured by the same sources of taxation or revenue as before such repeal."

While it was agreed that a provision of this type would be absolutely necessary if any of the bonding authority provisions were deleted, it was also agreed that the grammar of the draft could be improved. Senator Ocasek took exception especially to the use of "its or their" in the second line.

Then Mr. Carson read a portion of his memorandum containing the following:

"Article XII, Section 2. Taxing and exemption authority of the General Assembly.

Without limiting the general power of the General Assembly, 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. 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."

He pointed out that, except for the rearrangement of elements in the section, and deletion of references to bonds which it is believed are no longer outstanding, no substantial changes have been made in this section. He emphasized that because of the critical policy questions raised by Section 2, he would propose deferring revision recommendations for the time being, and undertaking a joint consideration of the problems involved with the Local Government Committee.

Next, Mr. Carson suggested renumbering Article XII, Sections 4 and 5 as Sections 3 and 4, since there is no Section 3 at the present time. (Present section

4 provides for raising sufficient revenues to pay the expenses of the state and the interest on the State debt; present Section 5 provides that taxes may be levied only according to law, and that every law imposing a tax shall state the object.)

Then, Mr. Carson read the following draft of a section dealing with "earmarking" of taxes for highways and highway related purposes. It was as follows:

"Article XII, Section 5. Prohibition of expenditure of moneys from certain taxes relating to vehicles for other than highway and related purposes. /Would replace Section 5a/

Except as may be otherwise provided by law, 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."

Mr. Carson noted that Article XII, Section 5a contains an absolute prohibition against using the moneys mentioned in it for any other than the stated purposes. He set out the four alternatives which in his opinion are open to the committee in dealing with this section:

(a) Leave this prohibition unchanged

(b) Broaden the permissible uses of the revenues, still restricting the use to transportation forms

(c) Repeal the section entirely

(d) Leave the prohibition in the statute as an expression of elector intent but give the legislature the authority to deviate.

He pointed out that a provision such as set out above would be responsive to the fourth of the alternatives listed. This area, he said, also involves critical policy questions which need further study, and the foregoing is merely illustrative of one approach which the committee could take.

The next item in the memorandum was the suggested deletion of Article XII, Section 6 headed "No debt for internal improvement," which section authorizes capital improvement bond issues only by constitutional amendment. Mr. Carson pointed out that this section, too, was inserted into the Constitution in 1851 to prevent the state from financing canals, turnpikes and railroads. It would seem, he said, that if the State should ever in the future wish to build such projects or any other capital improvement project for the public good, such authority should not be foreclosed--particularly in view of the suggestion that the General Assembly's authority to incur debt be subject to a flexible debt limitation, which could be exceeded only by popular referendum, and that all such projects would be subject to the public purpose requirement under Article VIII.

Next, Mr. Carson turned to Section 9 of Article XII, relating to the apportionment of inheritance and income taxes. He suggested that the committee confer with the Local Government Committee on how to deal with this section. He listed three possible alternatives:

(a) The section can be retained unchanged

(b) The section can be repealed

(c) The section can be clarified.

He suggested that, at the least, clarification is required, and that if the section is retained, it should be renumbered as Section 7.

Then, he turned to Article XII, Section 11. headed "Bonded indebtedness; interest and sinking fund." He suggested that the Committee consider the repeal of this section. The committee has been informed that the interpretation of Section 11, which requires that in any legislation incurring or renewing indebtedness, provision must be made to collect by taxation an amount sufficient to pay the interest on the debt, along with Section 2 of Article XII, which contains the ten mill limitation, has been such that it creates an indirect debt limitation which hampers the ability of local government units to issue nonvoted revenue bonds, even though there is no need to utilize tax moneys to service the debt which would be incurred.

Mr. Bartunek said that if the committee should, by the deletion or amendment of this section in effect exempt the revenue bonds of local subdivisions from their debt limit, it would also be more consistent, philosophically, to exempt the revenue bonds of the state.

Mr. Carson observed that one way in which the problems now posed by Section 11 might be alleviated would be to amend the Section by deleting the requirement for the levying of a tax and inserting a requirement for the collection of sufficient revenues--the latter, of course, being made up of both tax and nontax sources.

Finally, Mr. Carson made reference to the fact that, in his memorandum of September 10, 1971 there was a tentative suggestion that references to the authority to levy specific types of taxes (income, inheritance, etc.) be deleted from the Constitution, since the state has an inherent power to tax and there is no need to authorize the levying of specific taxes in the Constitution. He stated that he thought further staff research was required, however, on the question of whether or not a "tax savings clause" would be needed, so that there could be no question of the authority of the General Assembly in the area of taxation.

The next committee meeting was set for 9:45 a.m. on January 20, 1972. At that time, the committee hopes to be in a position to vote on the policy questions involved in rewriting Article VIII.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
January 20, 1972

Summary
of Meeting

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission met at 9:45 a.m., Thursday, January 20, 1972, at the offices of the Commission, 20 South Third Street, Columbus. Present were Chairman Carson and Messrs. Carter and Guggenheim, Senator Ocasek and Mr. Wilson. Also present was Mr. James H. Leckrone of the Department of Finance. Mr. Leckrone attended at the request of Mr. Hovey, who is a member of the committee but could not be present.

Mr. Carson opened the meeting by conveying to the committee the regrets of Mr. Bartunek, a member of the committee, at his inability to attend due to illness.

Mr. Leckrone presented a letter from Mr. Robert H. Baker, Assistant to the Director for Legal Affairs, in the Department of Finance. The letter contained the comments of the Department relative to the draft proposals for changes in Article VIII contained in Mr. Carson's memorandum of December 13, 1971 to the committee, which comments had been requested by Mr. Carson. The substantive portion of this letter, which was one of the bases of the discussion at this meeting, read as follows:

"ARTICLE VIII, SECTION 1, STATE DEBT

A) This section sets a new debt limit based upon the principal amount of all indebtedness including revenue bonds not exceeding a percentage of the average total tax revenue collected during the previous 2 fiscal years.

The Department of Finance believes that a debt limit based upon a specific dollar amount in inherently unworkable. Any definite dollar limit that is meaningful today is bound to be too low in the future if for no other reason than inflation The State needs to move to a debt limit that is flexible, will reflect dollar inflation, and will be workable in the uncertain future.

The Department does believe that formulation contained in this draft should be modified. The draft ties tax revenue, the ability to pay debt carrying charges, with the principal amount of the debt outstanding. The problem is similar to a lender determining how much money to lend on a signature loan. The proper question is the size of carrying charges that the borrower can afford to pay and not solely the size of the loan since the total annual payments are a product of the principal amount of the loan and the interest charged for the use of the money. The burden of borrowing $100 million at 1½% is far different than borrowing the same sum at 5%. Thus a debt limit could be created that ties interest and principal payments to some maximum percent of available State monies.

The definition of available State monies will be something of a problem. Terms such as "State revenues collected," "taxes collected by the State," or "appropriations" are inherently ambiguous. To be workable the base must be quantifiable and determinable so that the debt limit can be calculated at any time. Total revenue received in the State Treasury may be a proper base that can be quantified.

Regardless of the definition of the base, the debt limit will be specified percentage of that base. Obviously if the defined base is made smaller during drafting, ie: total revenue less federal funds or total revenue less federal funds

and local government transfer payments, the limiting percentage should be increased.

The Department has no objection to limiting the amount of debt that can be issued in any one year as well as total debt, but care should be taken that large borrowing needs can be met in a single year. Assuming a 30 year maturity requirement, the permitted amount of borrowing in a single year should be well in excess of 1/30 of the total debt limit.

The draft of this Section includes revenue bonds within the debt limit. Under our proposal such bonds would affect the debt limit to the extent that prior issued bonds now require State general funds to meet principal and interest payments. "Hybrid" bonds currently require general fund rental appropriations, and they should be included in a definition of debt carrying charges.

B) This Section permits additional debt to be issued upon a vote of the General Assembly and the approval of a majority of the people in a referendum. The Department believes that such standy-by authority subject to a vote of the citizens is a desirable provision. Use of a referendum is preferable to a Constitutional Amendment.

C) This subsection permits "tax anticipation" borrowing. Currently, the State's tax revenue is received unevenly throughout the year. The State builds up a cash position in April and May of each year and then spends against that balance until the following Spring. This phenomena was a contributing cause to the State's well known "cash flow phenomenon" problem this year. The ability to borrow against future tax revenue would alleviate problems caused by the monthly revenue distribution of the State's tax structure.

D) The Department does not oppose this subsection but would point out the vagueness of the terms "mad-made or natural disasters." Given a liberal judicial interpretation, this may be a loop-hole which will be a way of avoiding a debt limit altogether. For example, would a depression be a man-made disaster?

E) This subsection limits the maturity of debt that may be issued. The Department knows of no reason to create such a requirement. Debt maturities are a function of the capital market and who can tell what maturity will be demanded by the capital market several decades from now. The second comment (d) on page 4 of the draft raises the question of "interim financing authority" to permit borrowing against revenue to be received in future fiscal years. The Department believes that this would not be a sound authority unlike the power to borrow against anticipated revenue for the current fiscal year. Under existing section 125.09 of the Revised Code, the Governor has the power to reduce expenditures in such a situation. Borrowing authority in such a situation could lead to the costly practice of borrowing for operating expenses.

F) This subsection permits debt to be issued for refunding purposes after interest rates have declined. If the Finance Department suggested debt limit device is adopted or the device in the draft, this section is surplusage.

G) The Department of Finance agrees that the Commissioners of the Sinking fund are no longer necessary and supports this subjection.

ARTICLE VIII, SECTION 2, PUBLIC PURPOSE

This section prohibits the use of public money or credit for private purposes unless authorized by the General Assembly. Under the existing sections 4 and 5 of Article VIII, the State is prohibited from lending its credit to private citizens, corporations or political subdivisions. The Department of Finance supports the intent of the change contained in this draft section. However, we oppose the deletion of the prohibition against the State assuming the debt of political subdivisions. This local debt would be a possible contingent liability of the state that may affect our current preferred status in the capital market.

ARTICLE VIII, SECTION 3, MUNICIPAL ENTANGLEMENT

The phrase "Except as may be otherwise provided by law" in line 1 and "by vote of its citizens, or otherwise" create two exceptions to the intended prohibition that overlays and are so broad as to make the limitations meaningless.

The Department believes that a relaxation of the current absolute prohibition is in order but that the entity that will assume responsibility for each relaxation should be clearly identified in the Constitution. This is an area that has historically been abused and some definite body should be identified to make the requisite decisions as to these types of expenditures or loans.

ARTICLE VIII, SECTION 13, ECONOMIC DEVELOPMENT

The Department of Finance has no objection to the deletion of this section but cautions the bond counsel should be consulted to assure that the new language contains sufficient authority to issue development bonds and that no savings section for bonds issued under this section is required.

ARTICLE VIII, SECTION 4, STATE DEBT RECOGNIZED

This section should be included in your revisions, but we believe that you should specifically "save" those authorized but not issued 2i bonds."

The first point of discussion was the suggestion in the above letter of tying the interest and principal payments on state debt to some maximum percent of available state monies in any fiscal year instead of expressing the ceiling on the state debt in terms of the average of state tax collections in the two previous fiscal years, as suggested in the draft proposal of December 13. It was brought out that, to anyone's knowledge, no state presently used a formula such as suggested in the letter. Mr. Leckrone also suggested that, if there is to be a debt limit, perhaps the total of general revenue funds would be a more appropriate "benchmark." Mr. Carson stated that the committee had already concluded that it would recommend a debt limit. He also said that the committee had considered using General Fund revenues as a "benchmark", but had decided against using it because what goes into the General Fund may be changed too easily to make General Fund revenues a satisfactory measure of state debt, for constitutional purposes. Also, he pointed out, the committee had considered and rejected the use of "revenues" or "state revenues" as a measure, on the basis that these terms are very difficult to define precisely enough to be meaningful. The committee, he continued, had also talked about and rejected the concept of tying state debt to the total real property tax duplicate, on the basis that this would not be flexible enough and wasn't really related to the state's capacity to repay bonded debt. He stated that the committee had

concluded that about the best thing that could be done was to tie the debt limit to state taxes collected.

Mr. Leckrone agreed that there should be a debt limit. However, he said, he did not believe that tax collections are predictable enough "because these reflect the ability and the expertise in a department of taxation, which is difficult to predict if you are using a 'taxes collected' basis."

Mr. Carter replied that any debt formula in a constitution is necessarily a compromise, and a state's tax collections reflect, as a first approximation at any rate, both the needs of the state and its ability to service its debt. In practical terms, based on 1970 figures and assuming a constitutionally authorized bonded indebtedness of $1.2 billion, the formula in the draft proposal of December 13 would raise the debt limit by about $300 million, he pointed out. Assuming that state tax revenues will increase as they historically have, the formula should cover the state's capital needs in the foreseeable future, he said.

Mr. Carter then again raised the question as to whether a term like "tax revenues" is definable. Mr. Leckrone said that defining the term would trouble him but that perhaps the question ought to be answered by the Treasurer. Senator Ocasek pointed out that, in practice, there is some quarreling about what should be included in the definition, the matter is eventually worked out. He stated that, basically, he was in agreement with Mr. Carter's thesis. "Everything we try has a 'sinking spot' ", he said, "but the draft proposal is far superior to what we have in the Constitution now."

Senator Ocasek also agreed that a two-year average of tax collections was sufficient for determining the basic debt limit, because it would quickly reflect changes in the state's position. He said that a five-year average, which has been suggested by some, would unreasonably delay capital improvement programs which could be undertaken as a result of a jump in state tax collections, such as will result from the new state income tax.

Mr. Leckrone mentioned the difficulty of estimating future tax collections. Mr. Carter said that it would not bother the concept in the draft if one didn't do a good job of estimating because the limit would be tied to past years. The formula, he said, would give the voter protection because it would not give the General Assembly carte blanche freedom in the area of a debt limit. It would be readily understood by the voter--what it really is, is one year's state tax revenues as the basic debt limit," he said.

Mr. Wilson then expressed support for the concept embodied in Mr. Carson's draft of including all bonds--revenue,"hybrid", and full faith and credit--within the debt limit. He said that he wanted to set a ceiling on any debt which could be incurred by the action of the legislature, and to set a ceiling high enough so that it would not "hamstring" the legislature. He also expressed concern about projects which are self-supporting now, but might not be in the future because of technological obsolescence, and which the state may then have to pay off through taxation.

Mr. Carter said that, if revenue bonds were included logic would require the inclusion of the revenue produced by improvements financed by revenue bonds in the base for determining the limit.

Senator Ocasek stated that this would produce a debt ceiling so high that it would not be acceptable to the people. Mr. Carter agreed.

Mr. Guggenheim said he favored the inclusion of any bond for the payment of which the state could, at any stage, become legally liable. Senator Ocasek emphasized that he definitely favored the inclusion of "hybrids", for that reason. Noting Mr. Wilson's reservation, those present arrived at the consensus that section I(a) of the proposal should be redrafted to exclude "pure" revenue bonds, but with the understanding that "hybrid" bonds would fall within the basic debt limit.

Mr. Carson then again asked whether there was any feeling within the committee to tie the state debt limit either to the real property tax duplicate or the General Fund. Senator Ocasek said that the General Fund would be his second choice, but that he foresaw, in the future, a widening gap between the total budget and state tax receipts, if the federal government takes over state programs such as welfare. There was a general concern among those present that any debt formula proposed by the committee should be based on state tax receipts. The problem, Mr. Guggenheim pointed out, is defining what constitutes a tax. He suggested that this be spelled out in the comments accompanying the committee's recommendations, and that he did not believe this could be spelled out in detail in the Constitution.

Mr. Carson then said that the committee would not make a decision on the amount to recommend as a basic debt limit until the committee received the figures on state tax revenues which it has requested, and that the committee would hold a separate meeting on this point, if necessary.

The committee then proceeded to consider Section I(b) of the draft proposal in regard to permitting bonded indebtedness by popular referencum for amounts greater than authorized in Section I(a), or for purposes other than capital improvements. Mr. Nemeth of the staff asked whether the committee wished to specify the type of election at which such an issue could be submitted. Mr. Carter said that he was concerned only with having the issue submitted to the voters. The consensus of those present affirmed this view. Mr. Nemeth also asked whether the committee wished to specify what should appear on a ballot regarding such an issue--that is, purpose, amount and manner of repayment. Senator Ocasek said that the Secretary of State now has the power to design the ballot within the guidelines of the law, and he would be happy to leave it that way. The committee members present agreed. There was also agreement on the basic principle expressed in this section.

The committee then turned to the question of interim borrowing authority. Mr. Nemeth asked whether the committee wished to recommend a provision authorizing borrowing to meet a failure in revenues, such debt to be paid within twelve months after it is contracted. He pointed out that authority to borrow to meet a failure in revenue exists in several of the newer state constitutions, including the 1971 Virginia Constitution. Mr. Carter said that he feared that such a provision might allow a spendthrift administration to saddle a future administration or General Assembly with debt. Mr. Leckrone stated that such borrowing authority could also lead to the costly practice of borrowing for current operating expenses, as was pointed out in the Department's letter, and the Department does not believe this to be sound authority. The consensus of the committee members present was that a provision granting such authority should not be included in the Constitution.

The committee reached no conclusion on the question of whether it should recommend authority for "tax anticipation" borrowing, which is contained in Section I(c) of the draft proposal. Mr. Carson asked Senator Ocasek to prepare a recommendation

for the committee to consider for presentation at or before the next meeting.

Then the committee discussed Section I(d) of the draft, dealing with authority to borrow in emergencies. Mr. Guggenheim questioned the necessity of using the phrase "man-made or natural" in relation to disasters, since all disasters are inherently either one or the other. It was decided to delete the quoted words as unnecessary, and to recommend the borrowing authority contained in Section I(d) of the draft.

Next, the committee discussed Section I(e) of the draft proposal, which contains a maturity limit on bonds. Mr. Nemeth pointed out that a debt maturity provision is a rather common type of provision, and is included in the constitutions of both New York and Pennsylvania, among others. Mr. Carter noted that the Constitution does not contain a general provision of this kind at the present time. He was of the opinion, also expressed by the Department of Finance in its letter, that debt maturities are a function of the capital market. He said that putting such a requirement into the Constitution would be cluttering it up with legislative detail. There being no support for the inclusion of such a provision among the committee members present, it was decided to delete it from any future draft.

In regard to Section I(f) of the draft proposal, authorizing the refunding of outstanding debt, it was decided that this section should be retained in a future draft, if it is legally necessary. Mr. Carson gave an example of the type of situation when this type of a provision would be useful, namely the theoretical situation when the state had reached its debt limit but at the same time wanted to refinance an existing debt at a lower rate. In the absence of such a provision, it would perhaps be argued that the state had no authority to do so. Senator Ocasek expressed concern that silence on this point might be construed as a prohibition. Mr. Carter said he saw no problem with leaving such a provision in a proposal if it is necessary. Mr. Leckrone said that if there is any doubt as to whether such a provision was needed, he would rather see it included.

The committee then turned to Section I(g) of the draft proposal, which would require the General Assembly to provide the mechanics for incurring, evidencing and retiring state debt, and require that every law authorizing a debt to state the method of repayment. Mr. Carter said that the latter provision would prohibit indefinite obligations. There was a general consensus among the committee members present that a provision of this type ought to be among the proposals. Mr. Carson expressed concern that this section also make absolutely clear that only the General Assembly can pledge the full faith and credit--the taxing power--of the state. The members of the committee who were present agreed.

At this point the committee turned again to a portion of Section I(a) of the draft, particularly that portion which authorizes "participation with the federal government or any political subdivision or public authority of this State in providing public capital improvements through loans, grants, or contributions." Mr. Nemeth indicated that a provision of this type may not be necessary if the power which the provision would confer is an inherent power of the state. Also, he pointed out that there may be a problem with defining such terms as "political subdivision" in this particular context. Senator Ocasek stated that he would very much like to see a provision of this type in the Constitution. After much discussion, the committee concluded that, since intergovernmental cooperation does not necessarily involve the question of state debt, a clause specifically authorizing such cooperation would be more appropriately placed in another part of the Constitution,

and that the committee would consider this matter separately at a later date.

The committee then turned to a discussion of Section 2 of the draft of December 13, on the prohibition of the use of credit for private purposes, and those present expressed agreement both with the principle and with the wording of the proposed section.

Section 3 of the draft, prohibiting municipal and political corporations from owning stock, provoked substantial discussion. Mr. Nemeth again pointed out the problem which may arise with the definition of such a term as "political subdivision", in view of the fact that it is not now defined in the Constitution and is defined in various ways, for various purposes, in the statutes. Mr. Carter expressed doubt about the wisdom of attempting to put a definition into the Constitution. He suggested that, instead, it would be more appropriate to use a broader term, so as to include all governmental entities within the state--from single-purpose district to any form of general government. Those present agreed.

Then, the committee turned to Section 4 of the draft, which is labeled "State debt recognized". Mr. Carson said that the intent of this section--the final version of which may be put in the form of a schedule rather than being recommended as a section of Article VIII--is, in effect, to act as a "savings clause" for that Article, and also as a "separability clause" for any statutes which may be affected by the repeal of any existing provision of the Article. He said that this section would have to be extensively revised before a final version was agreed on. However, he noted that the committee hoped to accomplish the following objectives in any such proposed provision: first, the continuation of all revenue bonding authority now derived from Article VIII and any laws enacted to implement this authority; second, the continuation of full faith and credit bonding authority to the extent that the General Assembly authorizes the issuance of such bonds prior to the repeal of any section; third, the recognition of all debt obligations issued or other acts done in the past under authority of any repealed section of Article VIII; fourth, the recognition of the continued validity of laws enacted to implement any repealed section of Article VIII, if they are not inconsistent with a new provision of Article VIII, until such laws are amended or repealed; and fifth, the separation of any statutory provision which must fall because it is inconsistent with a new provision of Article VIII, to the extent that such a provision can be separated from related provisions.

Mr. Nemeth was instructed to prepare a new draft incorporating the necessary changes, and to distribute such a draft to committee members as soon as possible.

The next meeting of the committee was set for 9:00 a.m., Friday, February 18, 1972 at the Commission office.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
March 1, 1972

Summary of Meeting

Present at the March 1 meeting were Chairman Carson, Messrs. Carter and Wilson, Representative White, and staff members Mrs. Eriksson and Mr. Nemth. Mrs. Brownell, League of Women Voters, Mr. Baker from the Department of Finance, and Mr. Loewe of the Ohio Chamber of Commerce were also in attendance.

The meeting opened with a discussion of one item the committee had discussed but never decided--whether to require an extraordinary legislative majority in order to enact a debt law within the debt limit.

Mr. Carson - The way the draft reads, a simple majority in the legislature could authorize debt up to the formula limit. Presently, you've got to go to the voters with everything. It might make the voters in Ohio feel a bit uncomfortable if they know that a simple majority or perhaps even one party on a policy vote could authorize debt.

Mr. Wilson - I like three-fifths of the legislature to authorize debt. According to Julius' memo, Delaware has three-fourths, Illinois has three-fifths and Minnesota has three-fifths.

Mr. Carter - It seems to me that it is in the public interest, on questions of debt obligations, that you're trusting more to the legislature. In return, there should be a pretty strong approval by the legislature and I find that to be entirely consistent.

Mr. Wilson - The issue is important enough to the State of Ohio, certainly, that 60% of the legislators ought to be in favor of it. From the local government standpoint, the trend is to reduce the special majority required on bond issues in primary elections from 44% to 50% but that involves voter approval, and I think it might be more difficult to get 55% or 60% voter approval than it would to get 55 or 60% in the legislature, as the legislators are better informed and more closely involved in these things. The voter doesn't have that contact.

Representative White concurred in the extraordinary majority requirement.

The committee then reviewed the latest draft and a critique of that draft containing the essence of most of the bond counsel comments. It starts with the words "The state may by law." Staff added the words "by law" because there had been some concern that it might not be clear enough that the General Assembly, and not some other state official or agency, was to authorize the issuance of debt.

Mr. Nemeth noted that the extraordinary majority requirement could be incorporated at this point without having to change any of the other language agreed upon so far. One suggestion would be "The state may, by a law passed by the vote of three-fifths of the members elected to each House of the General Assembly."

It was noted that the reference should be to those "elected" and not "appointed" since other similar references in the Constitution say "elected" and one Commission recommendation in H.J.R. 44 is changing "appointed" to "elected" in the section for filling vacancies. The word "elected" is used in all of the other sections of the Constitution.

All agreed to the language.

Attention was then directed to the words "for capital improvements, including land and interests therein." The words "and interests therein" were added as a result of the conversation with bond counsel. If those words were not there, there could be doubt about the acquisition of rights of way and easements.

Mr. Carter - The question is, if you limit it to "capital improvements" which this section does, does buying land constitute a capital improvement?

Mr. Wilson - It is an acquisition.

Mr. Carson - Is a 20-year old building a capital improvement? Would "real estate" be a broader term than "land"?

It was noted that one suggestion is to add:"including acquisition of real estate and interests therein." Not so much because real estate would not qualify as a capital improvement but because it might not be clear whether simply acquiring something as opposed to constructing or reconstructing would be an improvement. All are satisfied that the language "for capital improvements" includes constructing, reconstructing, improving, making additions to, planning, etc.

Mr. Wilson - What about "demolition of"? Is that a capital improvement? If you buy a building and tear it down?

Mrs. Eriksson - I would think that if you're willing to take a broad view of capital improvements, anything like that would be included. Here's where our comments and the intent of the Commission ought to make some impact.

Mr. Carson - My concern is that the word "improvements" following "capital" sounds to me not to include acquisition of buildings as property.

Mr. Nemeth - The expression "capital improvements" historically has come to mean improved structure; making something which exists better.

Mr. Carson - If it has a set legal meaning and if under these words the state could issue bonds and buy and pay for an existing building, then I don't want to change the words.

Mr. Nemeth - There is very little doubt in my mind that the term "capital improvement" includes any newly built or existing building.

Mr. White - Why has "and the interests therein" been added?

Mrs. Eriksson - To include such things as easements and rights of way. One other problem is whether we should include "participation with the Federal government, etc." In the comment you will find reference to an Alaska decision which was referred to in our meeting with bond counsel as having a possible relationship to this problem. We researched that particular decision to try to reach a conclusion on whether or not we needed to include that language in the draft. It's still my opinion that it is not necessary, but it's possible that some of you might feel that we should include that language. The language in other Ohio constitutional amendments for bond issues is varied. Some say "including participation with the Federal government and with other governmental entities." Some say "in conjunction with." If joint ownership is in question, and bond counsel did not think there was any real problem of joint ownership, the "participation" language would not necessarily authorize joint ownership. It was included in a 1953 highway bond

issue, which was some years before the Alaska case, so it could not be related to the Alaska case.

The Alaska case holds that the City of Juneau could not issue bonds for money to be used to purchase land which was going to be given to the State of Alaska. The City of Juneau was investing a million dollars in seven acres of land to which it would retain no title and, of course, it would not have any title to any of the government buildings which would subsequently be built on the land. The court said that this was not a "capital improvement."

Mr. Wilson - Isn't the language "and interests therein" broad enough to cover it?

Mrs. Eriksson - I don't think "and interests therein" would necessarily include a joint federal-state project. When the federal government participates in highway construction, there is no joint ownership. That is simply a question of receiving money from the Federal government and meeting Federal government standards, then using the money for that purpose.

Mr. Carter - Are there things which you can visualize as being owned jointly with the state and federal government?

Mr. Nemeth - A water conservation project which was built from federal funds by the Army Corps of Engineers to which the Federal government expected the state to contribute a certain amount of money, and in fact it agreed to pledge for as long as 20 years, for example.

Mr. Carter - I can think of other areas, such as parks, pollution treatment, some of the Federal housing programs. There is a trend in forming partnerships between governmental entities and private enterprise. It seems to me that the state and Federal government might well get together on various types of housing programs. I think that what we want to do in the Constitution is take a very broad view, and make sure that we permit the things to take place in the future that we can't visualize today. I would like to broaden this language as much as we can rather than to make it restrictive and inadvertently hamstring some public program in the future which is a good argument for omitting the language all together. We should trust our representatives.

Mrs. Eriksson - What I would like to say is that the state may, by law, contract debt for capital acquisitions and/or improvements, to make it clear that we're not taking a narrow view which has caused some discussion here. I think "improvements" probably includes "acquisitions," but if there's any doubt, let's put it in. Broaden it as much as we can. The committee agreed that there is substantial doubt as to whether or not the purchase of raw land would be considered to be a capital improvement, and that the language should include "acquisitions."

Mr. Wilson - If we could use accounting language, we could say "the state may contract debt by law for asset acquisitions." I like this insertion of the word "capital" twice for "capital acquisitions and/or capital improvements."

Mr. Carter - The next question is do you want to include this phrase "including participation with other governmental authorities"?

Mr. Carson - Once you start giving examples of additional authority that you want to make clear they have, you're excluding perhaps the possibility of other authorities. There may be a time when this Constitution is still in existence that the

state might want to participate in some private enterprise but by mentioning "governmental authorities" have you not excluded that possibility?

Mrs. Eriksson - Unless there is something in the Constitution prohibiting it, there's no reason why the state cannot enter into a joint agreement with a county to build a building.

Mr. Carter - The state has, inherently, all the powers that are not taken over by the Federal government. All the rest of the powers are left to the states, or to the people. If this Constitution does not limit those powers, they are there for the state to use. If this general concept is true, then all these things become limitations, and any time you put something in it's a bit of a tendency to take things away rather than granting powers. With that philosophy I would agree that we shouldn't put anything in there that we don't need.

Mrs. Eriksson - We now read "for capital acquisitions and capital improvements." Is that the general consensus?

Mr. Wilson - That, I think would cover my one comment about demolishing a building to create open space.

The committee then considered the major question what the limit should be. The present draft reads "the aggregate principal amount of all such debt contracted in any fiscal year." After meeting with Mr. Baker and bond counsel, there was again raised the question of basing the debt limit upon debt service requirements rather than principal amount.

Mr. Carter - Mr. Chairman, at the last meeting I was one of those who felt that "debt service" would be too confusing and too difficult to administer and we could handle the problems more simply by relating to the debt principal. After giving this a fair amount of thought, I changed my mind. I think there is a great deal to be said for structuring the debt of the state in relation to debt service rather than to principal amount. At the last meeting, I mentioned the idea of the state issuing preferred stock that never has to be repaid, as has been done in Canada and elsewhere, very successfully. If the legislature had that kind of flexibility, the principal amount becomes irrelevant. It's no longer even pertinent because it never has to be repaid. Our proposal does not do that, but the idea of doing things on a debt service basis makes a lot of sense. I also thought that it was probably very difficult to do. I was interested to learn that it isn't all that difficult to do it; it is a routine function that could be performed by the Treasurer's office, a rather simple compilation of amortization schedules that could readily be done, and be certified by the Treasurer. I would like to suggest we consider this method.

Mr. Wilson - I'd like to suggest that different wordage might be more acceptable to the layman. When you talk "debt service" he ordinarily wouldn't know what you mean. If you would use the words "principal and interest" for the words debt service, it would be easier to understand.

Mr. Carter agreed, noting that principal and interest due in any one particular year is the "debt service."

Mr. White - Is there any limitation on the due date on the bonds - a maturity date? Could the legislature make the bonds payable never, so that the only thing we would be paying out for that debt service would be the interest?

I believe in representative government and I think that we should give the legislature as much flexibility as we can. It is very difficult to write any kind of constitution that has any detail in it that is still relevant 50 years from now.

Mr. White - Is the concept of issuing bonds that never have to be repaid repugnant to you? We're saying to investors "We want you to buy a security." He indicated that there is a feeling that a debt is a debt and ought eventually to be repaid.

Mr. Carson - What concerns me about a no-maturity debt is that one legislature in a relatively short time could exhaust the total debt limit, if you're going to have a debt limit at all. The reduction in the principal permits you to borrow more in the future, plus the growth in the base. Mr. Carter noted that financial planning would be difficult if you were to sell everything in stock and tie up all of the future revenues of the state with interest. It would tie the hands of the state for a long time.

Mr. Carson - Look at the history of bond issues since the 50's. You'll see that the state, by and large, has gone to the voters in an orderly program. They've gone to them as money was needed and they have used the money wisely, I trust. They have sold bonds in increments year after year. It seems to me that if we have a debt limit at all that that's what we ought to be aiming at to permit the state to have capital funds available as they are needed year after year. I just don't see how you can do that unless there is some limitation. I would recommend heartily that we consider a maturity limit.

Mr. Baker - I would like to comment on a couple of these points. First, you should realize that any administration would want to borrow money as cheaply as it can, and that forces you to look at the market conditions. If we said, how about issuing preferred stock for the State of Ohio, the interest rate on that stock, in order to sell any of it, would be about 13%; Yet we could sell general obligation bonds for 25 years at 4½%. What any administration would recommend is obvious. We're talking about a problem that is more a theory than a reality. The capital market of today or 20 years from now is going to determine the issue.

It was noted that Federal series E bonds continue to be sold. Mr. Baker commented that the Federal government can print money and the state can't. They always have the ability to pay off the Series E bonds. And that is the reason why the state should never go into permanent debt; the debt should be retired as we go. You could limit this to 20 year debt but then allow the debt to be rolled over. The way that you prevent it is not necessarily with maturity but is simply saying that I can't roll the debt over, regardless of what the maturity is. I think this could get us in trouble, because at that point I can sell a general obligation bond with 20 year maturity but if I could roll that over in 20 years I might do it.

Mr. Wilson - And yet the voters authorized this roll over in issue. The 1968 bond issue, which contained $500,000,000 highway bonds that will roll over forever.

Mr. Carter - Mr. Baker, I think your points are good ones. Since we're writing a constitution, not legislation, it would be well to try now and picture the way things are going to be done in the future. I happen to be involved in corporate finance to a great degree. The techniques that are being used today in corporate finance weren't even dreamt of 20 years ago. Great changes have taken place--the kinds of securities, the kinds of financing that you can do.

Mr. Baker - I support the debt service approach very strongly. I do think, though, that there is a problem using debt service approach, if in fact you can roll a debt over forever.

Mr. Carter - Another point bond counsel and the Department of Finance point out is that an annual limit is apparently not a real problem from a practical standpoint. I'll just read what they say. "Restraint upon the amount of debt that may be incurred in any one year appears to be unusual in the context of the flexible debt limits employed by other states. Even in the absence of such a restraint it is the practice of the state to issue debt only as moneys are needed to make capital expenditures." Can you picture the legislature going overboard in any one year? Is this realistic if you have faith in the legislative process?

Mr. Carter - We're talking about 30 years hence. Is it possible for a group like this, then the legislature and then the voters, to set up the kind of restraints on abuses sometime in the future? Is that the role of the Constitution?

Mr. Baker - I think it is the role of the Constitution. To limit the powers of the legislative, administrative or judicial branch.

Mr. Carter - In the past when people have tried to put restrictions in the Constitution to meet a current problem, it came back to haunt the state of Ohio later. So my philosophy is to have a constitution with a minimum amount of limitations.

Mr. Carson - We have really decided that we will have a debt limit, and now the question is whether there would be any maturity requirement? And whether there's to be an annual limit, as well as an aggregate limit. Are we satisfied, if we adopt a debt service provision, that no additional safeguards against tinkering are necessary?

Mr. Wilson and Mr. Carter suggested that a requirement be added that a given percentage, perhaps no more than half, the debt service shall be applicable to the payment of interest each year. This would mean that the principal would have to be repaid. Such a provision would replace any required maturity limits and the state could not tie up all of its future revenues to service present commitments. It also provides the needed flexibility.

Mr. Carter then commented on the bond counsel memo on whether Section 13 should be repealed, noting that Section 13 deals not only with what the state may do but also with the authority of political subdivisions and other public bodies. It is specifically designed for a specific purpose. It was voted on by the people, and there is good reason for leaving it in the Constitution. It was generally agreed that Section 13 would not be repealed because of its effect on political subdivisions. It was also noted that the section permits the state to guarantee a debt, which is a contingent liability which may turn out to be assumption of debt. It also permits the state to lend its credit. These things the state can do under the committee's draft, without Section 13, if a public purpose is declared.

Mr. Carson - We previously agreed that, by repealing Section 13, we did not want to eliminate the purposes of Section 13. We were permitting the legislature to declare a public purpose on these things that were permitted. However, we did ignore that local subdivisions are given powers under Section 13 which we did not take care of in these drafts, except in the "savings" clause, and I assume that that has been the problem and not with respect to state debt or instrumentalities of the state.

Mr. Carter - The problem then is that Section 13 is not so long that it's not worth separating state from local powers.

Mr. Carson - One other way to do it would be to empower the General Assembly to declare a public purpose for local governments to exercise certain powers as they do in our new provision for the state.

It was agreed by the committee that, since local government debt provisions have not yet been studied, Section 13 should not be repealed at this time.

Mr. Nemeth - Section 2i had an even more tortuous history, I think. This is really the area which prompts me to say that a public purpose clause by itself probably won't do the trick. In 1939 the General Assembly created the Public Institutional Building Authority, which as far as I can determine was the spiritual and legal predecessor of the Public Facilities Commission. The purpose of that commission was to improve, build or repair structures for the state's benevolent or penal institutions and the essential idea behind it was really that this would be done through revenue bonds. That is, through pledging moneys which were produced by or appropriated to a particular facility. The Supreme Court took an extremely narrow view in two cases of what constitutes a revenue bond. The first case is The Public Institutional Building Authority v. Griffith in 1939 and the second one The Public Building Authority v. Neffner. In the Neffner case the General Assembly was particularly careful to frame the statute in such a manner on the surface at least, as to create a revenue bond situation. The statute specifically provided that the bondholders could look for payment only to the special fund which was set up for the repayment of the bonds and to nothing else, and it was also provided that only fees generated by the facility involved which, in this case, would have been Apple Creek State Hospital, were to be used for the repayment, but the Court didn't buy the argument. What it finally said was--if you create a situation where you pledge the revenues produced by a facility and the result is that other funds, as a consequence, have to be diverted to providing certain of the services that were originally provided by the facility from the revenues which it was generating, you were still creating a full faith and credit situation, a debt of the state, in spite of the fact that the only thing you tried to do was to set up a revenue bonding situation. Then followed what appeared to be a series of ad hoc attempts to circumvent the state's constitutional debt limitation. One of the most interesting cases is Preston v. Ferguson which was decided in 1960. That involved the School Employees Retirement System and the Director of Highways. There were no bonds involved. What the General Assembly tried to do here is to give the Highway Department a method of acquiring land for rights of way for the construction of highways, before it was actually needed. Through biennial appropriation procedures, the board in question was given the authority to purchase and hold title to lands for eventual resale to the Department of Highways, and in the purchase of these lands the Director of Highways was to act as agent of the board.

There are two particular features of the 2i revenue bond provision which are interesting. It permits the pledging of funds other than those generated by the facility itself. This permits what the Neffner case prohibited. There is provision in 2i that these funds are not subject to further appropriation which I think was put in to get around the problem of biennial appropriations. The section specifies the purposes for which such bonds can be used: mental hygiene and retardation, parks and recreation, state supported and state assisted institutions of higher education including technical education, pollution control and abatement and water management, housing of agencies of state government. Those are the five areas for which these bonds can be issued.

Mrs. Eriksson - The basic issues here are: under our present draft, if we repeal 2i,we are eliminating this type of financing, because it would not then fall within the traditional bond financing. In other words all of the cases cited are still going to be applicable to the interpretation of debt and appropriations. So the issue is whether or not the committee wants to retain this type of financing. If you want to retain this type of financing, then revenues are included in these pledges which you're also going to be including in your base. They are not tax revenues but they are revenues which are subject to appropriation by the General Assembly, except for student fees at a university. The basic thing to decide here is whether this type of financing should be retained.

Mr. Carson - We need more information about how much it's been used and whether it is necessary with the debt limit we're proposing.

Mr. Carter - We could recommend leaving 2i in the Constitution at least temporarily. The question then is whether its provisions are included in the formula and whether we include the revenues in the base. It was noted that 2i includes revenue authority and $500,000,000 continuous highway and $259,000,000 for capital improvements.

Mr. Carson - If 2i is left intact, we should account for what is already authorized in the formula.

Mr. Carter - For my part I have no objection to leaving 2i intact, except that the particular purposes may not be appropriate later on. Of course, I don't mind that too much because we don't have to use them.

Mr. Carson - It appears that under the 2i revenue bonds or quasi-revenue bonds proposal that the legislature has authorized $152,000,000 bonds called mental health facility bonds and $265,000,000 in higher education bonds. Not all of that has actually been issued. The legislature has operated under 2i in a total of $317,000,000. As of June 30, $115,000,000 have been issued.

Mr. Nemeth - There are additional bonds for water pollution. Those are just partial figures for the facilities which the Public Facilities Commission issues.

Mr. Carson - One possibility would be to amend to leave in section 2i but to take out the general obligation highway and capital improvements bonds, and leave in the special revenue bonding authority. Another possibility would be to leave 2i in without change. The committee has been thinking of creating a debt limit which would replace everything, general obligation bond-wise, that we have. If we meant that, it would mean that we would not want another kind of authority existing in 2i. I think there has been some criticism of the revenue bond authority within the committee but we haven't acted on this. Perhaps the sentiment would be to leave in the revenue bond authority that's in there.

Mr. Carter - I do like the idea of having general obligations in one place so that future legislators can balance these priorities, instead of setting them forth in the Constitution. I think the General Assembly should establish the priorities, since the people may not realize exactly what they were voting on as a practical matter. I'm in favor of dropping the general obligations and reflecting these in the debt limit. As far as the hybrid revenue bonds are concerned, I frankly don't know enough about them, to have a position on it.

Mr. Nemeth - Given the history of litigation in Ohio, the Court has consistently taken the position that only a pure revenue bond falls outside the debt limit.

Mr. Carter - I'm not against the concept of hybrid bonds, but I'm trying to think how do we handle them in the Constitution, with reference to 2i?

Mr. Nemeth - We might save what we want to save through a savings clause. A great deal of thought would have to be given as to how we word it.

Mr. Carson - We're going to keep Section 13, which is vital. Perhaps we should also keep the revenue bond part of 2i. We might take the general obligation part out and put it over under the debt limit and leave the rest of it alone. Mr. Carter agreed. He noted that inclusion of the revenues twice might not be significant if revenues are used as an indicator of general economic activity. If revenues and indebtedness are related to a degree of precision, then it would make a difference. There's one other alternative, of course. You could increase the limit enough to give the flexibility that 2i would otherwise give.

It was noted that, if the priorities presently created by 2i are repealed, many groups with interests in those projects will object.

Mr. Nemeth - I am not sure that we ought to completely abandon the idea of taking both of these sections out with a savings clause.

Mrs. Eriksson - Could you save the revenue bonds by a savings clause? Perhaps that language should be kept in the Constitution. I would recommend repealing 2i and re-enacting the revenue portion if that is what the committee wants to do.

Mr. Nemeth - A savings clause could make constitutional the existing statutes. This would differentiate the presently existing situation from the situation that existed 30 years ago, because the Constitution would be saying that statutes which are now in effect which allow this type of financing are valid even though there may not be any specific reference in the Constitution to them.

Mr. Carter - I would suggest the way of proceeding would be: (1) to dissect the two parts of 2i, eliminating the general obligation bond provisions and (2) keeping the revenue bonds with all the necessary language to preserve it as is. We would bring the general obligation bonds under the umbrella of the limit.

Mr. Carson - If you eliminate them from 2i, you would have them under the umbrella.

The committee discussed three drafting possibilities, assuming that the desired result is to eliminate the general obligation bonds but retain the revenue bonds. One is to repeal the section and re-enact the revenue portion. The other is to amend the section and strike out the general obligation ones, and the other is to repeal the section and write a savings clause, such that, in effect, the existing statutory authority would be preserved.

Mr. Carson - The statutory authority apparently only authorized a certain monetary limit of bonds. We would be validating a statute passed after the constitutional amendment while we're repealing the constitutional amendment.

Mr. Nemeth - You would be saying that that statute is all right and it can be amended or repealed as the General Assembly may in the future decide.

Mrs. Eriksson - Presumably the General Assembly could add purposes to it.

Mr. Carter - We should consider what attitude the Constitution wants to take toward these hybrid revenue bonds for the future. I think that the starting point is to adopt it the way it is now, as it is in our draft, and then it becomes a matter for discussion when we get to it.

Mr. Carson - We need more information about the use to which these bonds have been put so far.

Mr. Nemeth - What 2i permits is the issuance of hybrid revenue bonds for the stated purposes in this particular section, and before 2i the Court consistently said that nothing but a pure revenue bond falls outside the debt limit. If you had a hybrid of any type that fell within the debt limit.

Mr. Carter - So the question is do we want to authorize hybrid bonds in the Constitution and, if so, do we want to limit their purposes? And I think these are the kinds of questions we ought to be looking at. So that's the question.

The committee then discussed the tax anticipation provision draft which the draft provides should be paid within the same fiscal year. Mr. Baker agreed with the committee on this draft.

Bond counsel had noted that, as the seasons change, there are some changes in state cash flow. Mr. Carter expressed concern that this idea of one administration committing the next administration on tax anticipation notes. It was agreed to keep the present committee draft that any notes must be paid off before the end of the fiscal year.

Mr. Carson - Under this authority, it is not possible for continuous borrowing to be incurred. You cannot use a new borrowing in the next fiscal year to pay off an obligation of a prior year. You might use the authority several times during the same fiscal year.

The committee discussed retention of repeal of the section prohibiting the state from assuming local debt. No change was made in the decision to permit the General Assembly to assume local debts. It was agreed that this would afford maximum legislative flexibility.

Attention was directed to Section 2, the public purpose section. It was noted that the section requires a public purpose declared as such by the General Assembly in the law authorizing debt, and that was drafted specifically to require the General Assembly to declare a public purpose. Do we want to require the declaration?

Mr. Carson noted that this would be a new requirement in the Ohio Constitution, although the Constitution now requires all tax legislation to state the purpose of the levy. The objective would be to make it clear that the General Assembly can set to rest what is a public purpose, particularly in the issuance of debt.

Mr. Carson - Our purpose here was merely to protect bonding authority, to make sure that the legislature indicated a public purpose in the statute authorizing the issuance of bonds. To put to rest the question whether the use of bond moneys is a public purpose--if the Constitution permitted them to so declare it in the law, this is a way of really sealing up the question. You wouldn't have to go to the Supreme Court to determine whether this was a public purpose.

Mr. Carter - Isn't our only question as to whether we delete that last phrase "in the law?" Perhaps we should drop the last phrase. I think it is important that the legislature stand up and say "this is O.K." and I like the public purpose declared as such by the General Assembly.

Mr. Carson - You can only declare it thrcugh legislation. Each time they take action they are passing a law so it would be in the law if you are requiring this, I believe. It has been suggested that we take out the words "declared as such by the General Assembly" and say "for a public purpose determined by the legislature." It would then be inferred from the legislation, rather than requiring the statement that you did this for a public purpose.

Mr. Carter - We are all agreed then that we really want to make sure that the legislature has to say what is an appropriate public purpose.

Mr. Carson - The only reason for putting this public purpose clause in was so that the legislature would have the determination, not the Supreme Court of Ohio.

It was agreed to retain the section as drafted. The next section examined was the savings clause. It was drafted on the assumption that both section 13 and section 2i were going to be repealed, and needs to be looked at further. The savings clause must protect outstanding obligations. In some sections, there are no longer outstanding obligations.

Mr. Nemeth - The Korean War bonds have a balance of around $4,000 and may stay that way forever.

Mr. Carson - Is it possible to preserve these with a schedule so that you wouldn't even need a savings clause in the Constitution? You could provide in the schedule that, although repealed, 2c through 2h shall nevertheless remain in force and effect until all the outstanding obligations are fully paid. They did that in one of the 1912 amendments. This would be one way to get them out of the Constitution and get the savings clause out of Article VIII also. If done, you can say: even though repealed, this shall nevertheless be in full force.

Mrs. Eriksson - There is a schedule attached to section 2 of Article XII when the 10 mill limit was enacted, preserving tax levies. Some of those were being preserved for all time. It is not considered part of the section itself when the section is redrafted.

It was agreed that a draft would be prepared on the basis of today's agreements, assuming the repeal of 2i and the inclusion of the revenue portions of 2i in some fashion.

Mr. Carter - We could have blank percentages and have a substantive discussion on the approach. And we may not have a final definition of the term "revenues." We want to include a provision requiring not less than 50% to be applied to principal each year as a part of the debt service requirement.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
March 16, 1972

Summary of Meeting

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission also met at 6:30 p.m., March 16, 1972 at a "working dinner" at the Athletic Club of Columbus. Present were Chairman Carson, committee members Mr. Bartunek, Mr. Carter, Mr. Hovey, Senator Ocasek and Mr. Wilson and Mrs. Linda Orfirer, Vice-Chairman of the Commission. Mr. Guggenheim was also present.

The principal item of discussion was the question of the type of state debt limit the committee would ultimately recommend to the Commission. Mr. Carson pointed out that the committee had originally hoped to be in a position to present a draft of Article VIII at the Commission meeting on March 17, for consideration by the Commission. He noted that the committee had had two types of state debt limits under consideration, one based on the aggregate of the principal of the general obligation debt of the state, the other based on the annual debt service requirements--the amounts needed to pay principal and interest--on the general obligation debt of the state. He added that the latter approach was the second one to be suggested to the committee, and was taken up by it in that order.

Those who favor the "principal amount" approach, he said, argue that the aggregate principal amount of the outstanding debt is readily ascertainable and that a debt limit based on it could be expressed rather simply in a constitution. Those who favor the "debt service" approach, on the other hand, argue that such a limit would be more realistic because it takes interest costs into account, which the "principal amount" approach does not do.

Mr. Nemeth, of the committee staff, presented a table prepared at the committee's request, showing the debt service requirements on the presently outstanding general obligation debt, by years through maturity.

The committee, after lengthy discussion, came to the consensus that it would recommend the "debt service" approach. After further discussion, it concluded that it would recommend as a base for the debt limit all of the revenues of the state subject to appropriation by the General Assembly and available for the payment of debt, excluding borrowed money and money required to be returned to local government units under Article XII, Section 6.

In view of the fact that the decisions reached at this meeting required additional research and deliberation, it was decided not to submit a draft at the Commission meeting on March 17, and to delay such action until the April meeting. The next committee meeting was scheduled for Thursday, April 13, at 6:30 p.m., also at the Athletic Club.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
April 13, 1972

Summary of Meeting

Present at the meeting at the Athletic Club, Columbus, for the April 13 meeting were Finance and Taxation Committee members Carson (chairman), Bartunek, Bell, Carter, Guggenheim, Hovey, and Wilson. Staff members Eriksson and Nemeth were also present.

The committee discussed, amended, and put in final form a draft of Article VIII (Debt) for presentation to the Commission at the April 21 meeting. In discussing whether to include in section 1 (A) as part of the purposes for which debt could be contracted, "participation with other governmental entities by way of grants, loans, or contributions" or similar language, which has been included in prior bond issue constitutional amendments, the committee determined that such language should not be included since it did not appear that it was necessary. However, in order to assure that debt for capital improvements and acquisitions would not be limited to projects owned solely by the state, the committee, on a motion by Mr. Wilson seconded by Mr. Bartunek, agreed to change the language presently in the draft so that it will permit debt to be contracted for "capital improvements, capital acquisitions, land, and interests in the foregoing."

Mr. Hovey stated that he felt that "interests" might be construed to mean not only a specific portion of the ownership, or ownership of a portion of the rights associated with property, but also the interest that the state has in performing a service, such as providing moneys for community health centers in order to enable people to receive this type of service locally.

Next the committee discussed what should be included in the revenue base, a percentage of which would constitute the debt service limit. Mr. Hovey moved, seconded by Mr.Bartunek, that federal aid be excluded from the base. The motion was agreed to.

The committee next considered the problem of placing an annual or biennial limit on the issuance of debt, in addition to the overall limit, or, alternatively, placing a limit on the amount, within the available limit, that each General Assembly for the next few sessions could issue, in order to prevent contracting debt to the limit by one or two legislatures. It was noted, however, that the capacity of the state to contract debt is limited by market considerations.

The committee considered specific language proposed by Mr. Carter which would place a 15% of the base principal amount limit in a legislative biennium. It was noted that capital improvement bills are biennial bills, and that if they were drawn up on a fiscal year basis, there would have to be two capital improvement bills. However, Mr. Bartunek pointed out, if the General Assembly decided to have annual budgets, a limit expressed in terms of a biennium would cause problems. Mr. Hovey said it didn't make a lot of difference whether it was a three-year bill, a two-year bill or a one-year bill, as long as the constitutional provision accomplishes its purpose of being a limit on each General Assembly, preventing the abuse of the permissive authority for issuing debt. Mr. Carter pointed out that he proposed the biennium concept in order that a single General Assembly would not have to be so concerned about the problem of the date of a bill. This problem is made more acute by the fact that the state "contracts debt" at the time it issues bonds rather than at the time it authorizes their issuance, he stated. Following further discussion, Mr. Carter suggested that, in view of the practical problems involved, the Committee reword the biennium approach along the lines of a limit on each legislative session.

Without coming to a conclusion on the foregoing topic at this point in the meeting, the Committee then turned to a discussion of the rationale of the flexible overall debt limit which it had been discussing at past meetings. Mr. Hovey stated that one approach would be to make all debt for capital needs unvoted debt, with the Committee agreeing on what would constitute reasonable spending levels for this purpose and structuring a debt limit within which such spending levels would be possible. Another approach would be to take the average of the principal of the new general obligation bonds actually issued by the state in the last ten to fifteen fiscal years, and projecting this average into the future with, for example, a four per cent increase per year to allow for increased costs of construction, and then devising a formula which would allow this level of spending within an unvoted limit. Theoretically, this would allow a level of spending which would be the same as that which the General Assembly would take to the people, the people would approve, and the administration would issue if everyone behaved in the future exactly as they have for the past ten or fifteen years. Anything above that level would have to be approved by a vote of the people, he said.

Mr. Hovey pointed out that the latter system, although based on historical precedent, would nevertheless allow the General Assembly to set priorities, as the elected and paid representatives of the people.

Then the Committee turned to a discussion of the provision contained in Section 1 of the draft before it, which would require that at least a certain per cent of the debt outstanding at the beginning of any fiscal year be repaid during that year, a matter which had also been considered previously by the Committee. Mr. Carter said that with a four per cent repayment one-half of the debt would have to be paid off in about 17½ years. He also noted that of the total of the general obligations bond issues now outstanding,at least 5.90% is scheduled to be repaid each fiscal year, so that a four per cent requirement would fit well into the present picture. The draft provided that four per cent of the debt "contracted pursuant to division A of this Section" should be repaid. Some members of the Committee had interpreted this to refer only to debt contracted after the provision went into effect. Mr. Carter said he had read it to refer to all debt. After discussion, the Committee decided to delete the quoted language, in order to avoid any possibility of confusion on the point that the repayment requirement refers to all debt outstanding, whether contracted before or after the effective date of the provision, should it be adopted. The Committee also agreed to the insertion of a four per cent annual repayment requirement in Section 1.

The Committee then turned to the question of the percentage of the base which should be prescribed as the limit for annual debt service. Mr. Carter suggested that six per cent be used for purposes of discussion. Mr. Carson expressed the fear that while six per cent might be adequate to continue programs funded by general obligation bonds as we have in the past if the personal income and corporate franchise taxes remain in effect and yield as much as expected, that percentage would not be enough if the revenue base were lowered by such an event as the repeal of these taxes, which is a possibility at this time.

Mr. Hovey agreed, but stated that if people don't want a tax--not necessarily just this income and franchise tax--they should realize that the capability for operating programs is reduced, and spending levels should be reduced in such circumstances.

After further discussion, Mr. Wilson, seconded by Mr. Guggenheim, moved the adoption of Section 1-A with the inclusion of six and fifteen as the percentages. Mr. Carson suggested that the fifteen per cent figure could also be expressed in terms of debt service, which he would prefer. Mr. Hovey replied that this might produce awkward situations, since the General Assembly is used to voting on principal amounts.

Mr. Bartunek then asked whether Mr. Wilson would accept an amendment to his motion, changing "biennium" to "fiscal year" in division A of Section 1, and changing the corresponding percentage from fifteen to seven and one-half. Seven and one-half per cent was changed to eight per cent after some discussion, and Mr. Wilson accepted the proposed change. The motion was then adopted without objection.

The Committee next considered the need for a provision in Section 1, not only that the General Assembly make provision for the payment of the debt, but that it have the duty to set aside money for the payment of debt in lieu of payment. Such a provision, it was noted, would be required in instances when no principal payment needs to be made on a series of bonds in a particular fiscal year, as is the case with term bonds. Mr. Bartunek moved the inclusion of such a provision, and without objection, the motion was adopted.

The Committee then discussed language included in Section 1 of the draft, the purpose of which is two-fold: (1) it states the proposition that if a debt is refunded before maturity, the refunding debt is to be counted instead of the refunded debt for purposes of computation under division A, and (2) it permits moneys which have been set aside for payment to be counted as having been paid that year. Mr. Bartunek moved the adoption of the language, seconded by Mr. Carter. The motion was adopted, without objection.

There was no comment on division H of the draft, which remained unchanged.

While there was no opposition to Section 2 of the draft, which is the public purpose clause, the discussion indicated some concern over the consequences of the General Assembly omitting such a clause from a bill authorizing debt to be incurred. However, no change in language was recommended.

In regard to Section 3 of the draft, which is a verbatim copy of the revenue bond provisions of present Section 2(i) of Article VIII, discussion revealed some concern that, even though there was no change in language from the existing section, its submission to the General Assembly as, in effect, a new amendment would create a certain amount of uncertainty in the bond market and open the provision to a possibility of change. The Committee considered the possibility of leaving Section 2(i) of Article VIII unchanged and simply providing in a schedule that no more general obligation bonds may be issued under it after the effective date of the new Article VIII, should it be adopted, or leaving 2(i) alone on the assumption that, since it contains authorization for capital improvement bonds, such bonds would fall under the new Section 1(A) by their very nature.

Mr. Carson suggested that Section 3 be submitted to the Commission as it was drafted for its determination. Mr. Bartunek so moved, the motion was seconded, and, there being no objection, it was adopted.

Mrs. Eriksson indicated that there had been no change in the "savings clause" from the last draft.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
May 24, 1972

Summary of Meeting

A meeting of the Finance and Taxation Committee was held on May 24, 1972 at the Athletic Club. Committee members who attended were Chairman Carson, Messrs. Carter, Guggenheim, Hovey and Senator Ocasek. Also attending were Director Ann Eriksson and Julius Nemeth of the staff. Guests included Mr. Robert Baker and Mr. Troy Grigsby of the Department of Finance; Mr. William White of the Ohio Environmental Protection Agency; and Attorney Richard Desmond of Cleveland.

Mr. Carson: We have some distinguished visitors with us, and I wonder if we could discuss some of the recommendations for changes in Section 13 of our recommendation. This committee recommended that it not be amended, but the subjects with which their recommendations deal were not considered by this committee, so we are glad to have these folks here to give us their insight. I think one of the questions we all have is the substantive need for this kind of authority for housing, pollution abatement, etc. Perhaps the subjects could be discussed separately.

Mr. Baker: I am Robert Baker, from the Department of Finance. The Administration has a proposal before the House State Government Committee that would create a housing finance agency. The question is, if the bill is passed, could that body issue debt? The problem involved in financing debt is a question of whether the state can issue revenue bond debt for the purpose of aiding, in this case, private housing corporations or partnerships -- clearly non-governmental housing entities, pursuant to Section 13. The question is, is Section 13 broad enough to include anything besides industrial revenue bonding? And I think the basic decision reached by counsel was that no, Section 13 is not broad enough. The same thing is essentially true for environmental protection. People looking at environmental protection can see that at one time the state may want to assist industries in the state in solving environmental problems, and state credit may be the device to use. I think Troy Grigsby could talk about the kinds of programs for a state borrowing authority in housing.

Mr. Grigsby: Actually, this problem has come up more than one time in several other states which have housing systems -- that is, whether or not the state's credit can be used to back up revenue bonds issued for purposes of developing housing authorities, particularly for lower income families. Our situation is that there has been developed a mechanism which was and is an attempt to circumvent whatever constitutional provisions there might be to avoid what thought there might be on the part of the legislature or others that it might affect the issuance of bonds for housing purposes. The housing development commission has concluded that housing is in fact a public purpose and that there is a role and a function for the state to play. The creation of a housing development agency has taken place in several states, where the agency has the ability to call an interest rate reduction. What that means is that in the selling of bonds at a tax exempt rate, it is able to loan that money for the purpose of housing for lower income families at a range lower than the market range. Only through that mechanism can the money be loaned. There are other ways that this can be used as well, but that basically is the tool that they use. The Housing and Community Development Commission has determined that in the state of Ohio five hundred thousand low income houses are needed, and I think it is important to note that we are only talking about low income housing. There is a quality need, meaning that there are people in the state of Ohio who are living in housing which would be condemned, which is a further need. In the issue of are we in fact duplicating what the federal government is doing there are several problems involved. It will insure projects that are submitted to it -- but this does not necessarily mean that it works in terms of needs of low income families. Secondly, because of the nature of the federal government mechanism, it does not respond to what might be considered the unique problems of a given state. What we are saying is that in addition to financial capability,

the state also retains the ability to determine where the units of housing will go, which is not a consideration of the federal government. There has been considerable news coverage about the problem programs of the federal government in this area. As to the nature of bonds, these are called "moral obligation" bonds. The good faith and credit of the agency is pledged to the repayment of the bonds. There is a "moral obligation" on the part of the state. In the last analysis, the state, then, has the moral obligation, but the first obligation is on the part of the agency. There is still the question though, of whether or not even those bonds which are issued as moral obligation bonds are legally allowed under the Ohio Constitution. Our approach has been to submit legislation with the full recognition that that question has not been resolved. We concluded that it would be in the best interest of the state if we were to provide in the Constitution a clause for the issuance of bonds for the purpose of supporting housing of lower income families. I would be glad to answer any questions which you might have.

Mr. Carson: I can just ask you how in procedure these are expected to work. I understand that the housing finance agency that might be created would sell revenue bonds pledging what -- the credit of the state?

Mr. Grigsby: We are not talking about a true revenue bond. That is where you pledge the proceeds from whatever it is to pay off the bonds. What would happen with a housing planning agency is that it would be given authorization by the legislature to issue bonds. It would then issue bonds in the amount of money that it anticipated being its need. There are some states which have unlimited amounts. The case in point is Michigan, which does have a three hundred million dollar bonding limitation. It recently submitted to the Michigan legislature an additional request for eight hundred million dollars to increase its limitation. My information is that it has been approved. Massachusetts has only recently been raised similarly. As far as the economics of the housing market, it would not be feasible or practical to issue bonds to that point where someone brought in the projects, because in most cases it is necessary to respond to that non-profit developer at the point where he makes a request. A developer must wait for an agency to get the money to go ahead, so it issues bonds to fund its anticipated projects over a given point of time.

Mr. Carson: The revenues which are pledged then, are the revenues of the agency, whatever they may be, is that correct?

Mr. Grigsby: The agency is able to loan out money at the low market interest rate. It can loan the money at a rate where it has income and that income is used for several purposes -- administration, pay-off, and to maintain its capital reserve fund. The structure is such that the repayment of the bonds is scheduled such that as money comes in, it pays off the bonds on which it owes at a given point in time. I might point out to the Committee that those programs which are presently in existence, although limited, have been very successful - all of them - to the extent that they are now receiving proceeds from their loans and using them for administrative purposes. There are additionally charges which the finance agency can add on to a loan, which makes it highly practical. There is in this state a severe problem, and there is not existing at any governmental level an agency which can respond to the problem as it exists in any part of the state. The problem is in terms of the condition of the units - some of the units are a problem. There are at least two other reasons. One is that certain programs have money set aside which enhances its capacity to develop units - because it operates on a statewide basis which is the most effective.

Mr. Guggenheim: I agree with the area of concern which is being expressed here because it obviously needs attention. When you say the state has a moral obligation and these are not revenue bonds, are you saying that the general revenues of the state are not pledged for these bonds?

Mr. Baker: In essence what happens is that the agency borrows a pot of money and

lends it out to developers. The developers pay it back just like they would pay a bank back. The mortgage repayments cover the agency's responsibilities - but there is no lease that is paid to bondholders. The scheme of moral obligation was devised - a reserve fund is created in the agency, and every year the director of the agency determines how much money is needed for repayments, and the amount of money available to him to make those payments and then sends a request to the legislature to make available the difference. But there is no requirement in any of the statutes that the legislature appropriate the money. The whole thing is set up so that the legislature supposedly has a "moral obligation". Any state that has a housing finance agency operates similarly.

Mr. Guggenheim: I have this problem about the fact that we are working on a Constitution. What this gentleman has in mind is very contemporary, but it may not exist 25 years from now. What is "moderate income"? There must be a thought behind this.

Mr. Grigsby: Right now this is defined by FHA, but I don't think the issue is what is moderate or what is low, but whether there is a public purpose in terms of the state assuming the responsibility for meeting a housing need for any income.

Mr. Guggenheim: I would buy that, but I think you have made a terrible mistake by spelling out your means. Are you comparing yourself to the FHA? Is this a sort of state adaption of that?

Mr. Grigsby: Not at all.

Mr. Guggenheim: I might be against it because I have a number of close friends who have become millionaires in the last 25 years on FHA. What I am saying is that everyone believes that housing is a valid purpose, but I think it is a dreadful mistake to spell out how you are going to accomplish this.

Mr. Hovey: But let's assume that the program Troy describes will result in a worse disaster than anything FHA has ever seen. Then the question is that a disaster we can prevent in the Constitution must also be considered.

Mr. Carson: What I would like to know is what dollars currently are within the confines of low and moderate income?

Mr. Guggenheim: I think my friends got a high appraisal and then they built it for less. I may be wrong.

Mr. Carter: Remember we are writing a Constitution - we are not writing statutes here. I don't have to take my hat off to anyone on the need for housing. We remember that I wanted to strike something out at the very first meeting because of the same problem. I wonder if we are trying to solve the problem here. One of the biggest things we have done in this committee is to revise Section 4. Frankly, one of my main reasons for doing this was to permit just what you are talking about, and we had done it, I thought. Now if we haven't done that, I would like to know. My second question is that I have a great problem with mixing it up with industrial revenue bonds -- conceptually and politically. This is going to be called public housing. I think it ought to stand on its own and have an opportunity to be examined, but it's a question of how rather than if. And I think that what we want to do in the Constitution is give the legislature enough latitude to deal with all the things you are talking about.

Mr. Baker: Let me respond to the first point. I think we got into a discussion of whether bond counsel had been willing to include this provision. If Mr. Desmond had been willing to say yes, then we wouldn't have come to you with this proposal. But the fact is that his answer was no, and that is why we felt it should come before the Committee. In Squire Sanders' opinion, the new Section 4 does not go far enough in the housing or environmental protection areas.

Mr. Carter: I would like to know why.

Mr. Baker: I think we should turn to environmental protection activities. We are currently in a situation in the EPA area where we don't have to go before the legislature and we have a program we are just waiting for constitutional amendment to save. By not changing the Constitution, we will be foreclosing various needed activities. Bill White will discuss this.

Mr. Guggenheim: I have to ask a question -- what these gentlemen are touching upon, housing, environment -- why can't we include them? "Including but not exclusively limited to, the following..." We don't have to tell them exactly what is meant by housing.

Mr. Hovey: The thing is that this would permit others in the state to issue bonds too, for instance local governments, under Section 13.

Senator Ocasek: I have a comment. Someday, you people interested in housing are going to have to give this sales pitch to the legislature, to convince them that this is what they ought to do for the public welfare. We are interested in making this possible for the legislature to do, according to the constitutional provision - make the language broad enough.

Mr. White: With regard to the environmental area, unlike the housing area, we are dealing with regulation of the private sector. The question is how the people, through the constitutional process, strike a balance between providing for industrialization and also a good environment. Power plants which pollute the air also provide our power. It is not easy to strike a balance and until 1949, it was not even considered. It is a recent area. One wonders what would have happened if air pollution had existed to a great extent in 1965. But we are dealing in an area of increasing state regulation. And the federal government is becoming increasingly active. It appears to be the consensus that the federal government is going to give the states an opportunity for their own activity to clean up the environment, and to prevent the environment from getting dirty. But the states are going to be somewhat powerless to provide financial mechanisms whereby the states can respond to the federal mandate, unless some vehicle like this exists. Basically, what we are talking about is an area of substative regulatory action, which would concern itself with industry and business. In this kind of a situation, the question becomes whether or not the Constitution should provide for public financing for a private program in the public interest. The existing Article VIII, Section 13, does provide for that with regard to economic employment, and whatever justification there was in 1965 for adopting that kind of provision, I feel certain in my own mind that now the need is much greater for amending it to include the housing and environmental areas. And it works for the public interest in two ways: first, it works from the strict environmental standpoint, and second in the economic sense, because otherwise it is a burden on the consumer, and if an orderly way can be arranged, it can be less of a burden. Specific ways in which public funds would be used in the environmental areas are; monitoring, as required by federal or state laws, and to submit detailed informational reports. Monitoring equipment is expensive. And then of course there are the usual anti-pollution devices and solid waste disposal and recycling. These all require development and are costly.

Mr. Carson: Do I understand that your goal here is to make it possible for state funds - borrowed moneys - to be made available to the private sector? You didn't intend for loans to be made to municipalities?

Mr. White: That can be done now under the authority of the Air and Water Quality Authority. Section 13 is not required to authorize that.

Mr. Hovey: We do authorize strict revenue bonds now for water pollution and we could do so for air pollution. The question when you get down to the issue is whether the state can lend its credit for the benefit of private entrepreneurs, under circumstances where the legislature determines that this is in the public interest.

Mr. Guggenheim: On the water pollution -- the state has some sort of board which approves these bonds which are issued by a municipality and then sold with the state's credit backing.

Mr. Hovey: Not exactly. The way the current water pollution control program works is that it is a combination of state bond money and federal grant money which finances sewage treatment plants devised by municipalities, which pay the state sewage fees and which bonds are issued by the Ohio Water Development Authority. They are state bonds. There is no city credit associated with these projects.

Mr. Guggenheim: It is a revenue bond of the state then for which the city has a contract but the state has the contract with the bondholder? The city's contract with the state is to collect the tax, and if it is not, then the city is responsible to make good from the general revenue fund?

Senator Ocasek: Who picks the projects for where we are going to do this kind of thing?

Mr. Hovey: The Administration, defined as a board under the control of the Administration and the general assembly.

Mr. Guggenheim: I am still not clear. The city's obligation is to pay the fees, but these are bonds issued by this state commission?

Mr. Hovey: Bond counsel has exercised what I consider to be fantastic ingenuity to make this up.

Mr. Guggenheim: What has that got to do with it?

Mr. White: Nothing, that's the problem.

Mr. Carson: The theory is that this committee perhaps hasn't done a broad enough job in writing Section 2 and amending Section 4 to provide the legislature the ability to settle this question of public purpose. My original hope was that we could delete Section 13 and rely upon the legislature's determination of what a public purpose is. Section 2, as you know, applies only to state debt and Section 4 applies to local debt, and it would seem to me that Section 4 particularly would provide that the legislature could provide under what circumstances local government could lend their credit, and we have tried to do the same thing in Section 2. But I take it your firm doesn't think we can rely on that as enough concerning the definition of public purpose.

Mr. Desmond: No, and I don't think it can be left to definition by the Court. In similar cases, the Supreme Court has said that it can't be done in a legislative act.

Mr. Baker: The last time I saw Section 4 it was still applicable to political subdivisions. A great deal of this pollution control may end up being done locally, but on Sections 2 and 4 we have doubts, and that is the position of bond counsel. We think the problem is there. In your discussion of this item, you are right. I think that you are talking about trying to take care of the problem. Other states have enacted similar measures for air pollution control devices. Therefore, we are in a less competitive position than we might otherwise be. We need to maintain this in Ohio because it also affects employment.

Mr. Carson: We all agree with this, it's just a question of how it's done.

Mr. Hovey: Let's suppose that this committee in its wisdom decides that we don't want to pass on these schemes but we want the legislature to be able to do this. What specific language can we use to allow the legislature to do this, to lend the credit of the state, when they in their wisdom may see fit to do so?

Mr. Desmond: You can't take away from the judiciary the power of deciding whether a legislative act is arbitrary and capricious.

Mr. Hovey: We are trying to deal with the public purpose doctrine only, and we want to make it clear that a legislative determination of public purpose satisfies the Constitution.

Mr. White: The problem is then how does bond counsel know that a particular determination to finance and lend credit is not possible?

Mr. Hovey: For right now, let's deal only with the question of how a constitutional issue can be raised about public purpose, where the legislature declares that it is a public purpose. Then you can deal separately with the question of "arbitrary and capricious".

Mr. Baker: The thing that is important to understand is the Ohio Bond Commission case. It was a question of public purpose. There was a statute to declare this was a public purpose, but the Court looked not to the legislature, but to the Constitution.

Mr. Grigsby: State ex rel Saxbe v. Brand, which was an attempt to do industrial revenue bond financing by legislative action; and the supreme court knocked it in the head, which is a further example.

Mr. Hovey: Why don't we take a specific piece of constitutional language and you tell me what's wrong with it -- a provision that says that anything that declares in a bill a public purpose shall be deemed a public purpose. That's my suggested constitutional provision.

Mr. Desmond: Let me go ahead and add what I think you are trying explicitly to say, which is that the courts of this state are without any power whatsoever to rule on a legislative definition of public purpose whether it be in the best interests of the state or not, and whether or not it violates another provision of this Constitution or the common law of the state.

Mr. Guggenheim: Is there a common law of the state, Hal?

Mr. Hovey: I do want to override the common law whatever that may be, but I'm not trying to override any other provision of the Constitution.

Mr. Desmond: But the Court would say that the definition of public purpose was for naught because it was arbitrary and capricious.

Mr. Guggenheim: Do you approve of this draft as a constitutional draft and the purpose it includes? The Constitution is full of these phrases. You can't get away from the review of the Constitution by the Courts. But I think there has been a tremendous mistake made in the drafting of this to refer to specific income levels, etc. I think we are kidding ourselves, and I am rather surprised. If there is anything certain, if you write two sentences in the Constitution, and I wouldn't write more, it is still going to be interpreted by the Courts. Call it arbitary and capricious, due process, equal whatever -- it's still going to be interpreted by the Courts. This is part of the system. So write it in two sentences and try to write the sentences as cleanly as you can.

Mr. Desmond: The problem is I don't think you can do it in the state's judiciary in two sentences; you could do it federally, but not in the states. They have a different approach. Our Ohio Courts are conservative in nature and they believe in literal tradition in the Ohio judiciary and it doesn't show any sign of changing.

Mr. Guggenheim: Then I would suggest, sir, that you come up with a draft -- I don't know any constitutional draft that won't come up for court interpretation.

Mr. Carson: Dick, look at Section 4. In this section, we have added the words "as provided by law". Is there any question in your mind that that section would permit the legislature to lend credit, according to the supreme court. Would they challenge the lending of credit to the private sector if authorized by the general assembly under that section?

Mr. Desmond: I think they would.

Mr. Carson: Could we do something like this as a public purpose clause, rather than mention pollution and housing and be so specific?

Mr. Desmond: The problem is now that you have constitutional provisions that deal with this kind of thing. Are you going to repeal them?

Mr. Carson: Let's say you leave Section 13 in, first of all, and you don't amend it, but broaden Section 2 as far as the state power goes to perhaps put some of the same language in we have covering municipalities?

Mr. Desmond: I'm sorry but I haven't been dealing with Section 2, but my feeling is that you would have to litigate each time to determine whether the general assembly was acting in a fashion that was enforceable.

Mr. Hovey: What if you changed Section 2 and put specific authority in for the legislature to approve the lending of credit to the private sector, as we have done in Section 4 with respect to local government?

Mr. Desmond: What are you going to do with Section 4, with respect to public purpose? What I am suggesting is I think the Court could dump you, because they could take this thing in two facets -- making the determination of public purpose and then the Act. So the whole thing falls.

Mr. Hovey: Let's try it another way. Suppose we decide that we want you to draft for us something that will enable local government and state government to decide whether the subsidation of a private company is something that should be done. Could you draft such a provision, and what would the language be?

Mr. Desmond: I suspect that we could draft the language but you might end up with language which might permit the state to set up operating subsidies. I think we could produce something in a few days and say, here's our first run at it and we want a chance to let it sit for a while and then perhaps make some suggestions. But it might be ultimately possible. It would be different from what is now in Section 4 though. I have not worked with you people on this concept. I have not considered this in the light of the constitutional provisions on taxation. That is just one that jumps to mind immediately, so I am not prepared to answer the question.

Mr. Carter: I think it is fair to say right now, that Dick is a Section 13 advocate at this point. I think you can see what is upsetting us; what we were trying to do was to give broad authority to the legislature to do this kind of public-private cooperation in financing in the future. Now by what you are raising, it seems to indicate that we haven't done the job right in what we thought we had accomplished. If we haven't, that is what we would really like to do.

Mr. Desmond: I didn't think that you had done a total job as far as court review is concerned.

Mr. Guggenheim: We never could, but we have to do it as clean as possible, and annotate it as well as we can.

Mr. Carson: Dick, as I understand it, there are two things that Section 13 was devised to do. One was to make it clear that the lending of the state's credit to the public sector did not violate the Constitution. Is that correct? Now the language in Section 4, if that were broadened, it would settle that first question, would it not?

Mr. Desmond: I think you have to do something more with it. One of the problems here is that these are the current constitutional words, and the Court has already gone beyond that in interpretation. I think if you are going to do what you are talking about, the words need some additional modification in Sections 4 and 6.

Mr. Carson: I think we had hoped through general language to give as much power as possible to the legislature to determine how the state and local governments should work with the private sector.

Mr. Baker: Bond counsel could not find explicit authority for exactly what it is that has been done, so bond counsel has a problem with deciding if what has been done is legal. Bond counsel would demand that we have a court test.

Mr. Carson: But he has also said that he thinks he can write language that would probably solve most of the problem and that would fit your intent.

Mr. Baker: We have picked out three areas of lending credit and we have a proposal, and in essence, it allows bond counsel to look at something. If the intent is to have no specifics in the Constitution, you may find yourself with tremendous broad discretion, but you may have also necessitated a court test every time a bond is issued.

Mr. Guggenheim: Is there any conceivable way we can avoid a court test?

Mr. Baker: That is what we felt we did in our version of Section 13.

Mr. Grigsby: You raise a good point as to whether any legislative determination of income as low or moderate was a good idea. That might be subject to a judicial challenge; but that does not make the bonds invalid, it just means you've got to move some people out.

Mr. Guggenheim: Yes, but you would get into court, and you might get into court on the quality of the environment and you might get into court on pollution abatement. But I'll buy your draft. I really think you are going to court on any new constitutional provision that hasn't been tested.

Mr. Carson: Dick, you said that you don't think you can write anything that would give you enough comfort so you wouldn't have to test the meaning of "public purpose" every time?

Mr. Desmond: At the moment, Nolan, you are coming at me cold. I don't have the information on the subject, but I would be concerned. I'm not sure that we would have to test every one. You might get the Court to say that that section means what it says and we have no authority and the legislative act is conclusive. But if they do that, that will be a brand new approach, because up to this point they have undertaken to be the conscience of the general assembly.

Mr. Carter: It is true that they haven't had this kind of language before?

Mr. Desmond: This is true, but you are also taking away part of their empire. I think you could write the language and we might litigate it and get the proper determination. I think what I opt for is to take care of the things that we now know we want to do, and then let's talk about and try and put together the broad language for the general assembly to try to move forward, at the same time. That takes care of our future problems and those things that we can't foresee today and leaves it for the general assembly to go back to the people.

Mr. Hovey: I'm not sure that I understand. Is it your opinion that you can write language that would allow the credit of the state of Ohio to be used for the purpose of subsidizing such privately owned, privately constructed housing, such that you could certify the obligations without a court case?

Mr. Guggenheim: And this draft in your opinion meets that test? I'd buy the draft. I think we're going to court on whatever we write. I think it is irrelevant whether the gentleman thinks it will require a test or not because it undoubtedly will.

Mr. Hovey: The real question is about the bonds. So on this draft you can endorse bonds specifically related to lending the credit of the state for housing,and pollution control? Is it your opinion that you could write language that would permit the general assembly to lend the credit of the state for the subsidation of yo-yo manufacturing, a) by listing that in the section, and b) without listing that in the section, such that Squire Sanders would put its name on the bonds?

Mr. Desmond: The answer to that is yes, you could do it if it were specifically listed in there. If it were a later enactment, or special, the rules of statutory construction would mean that it prevails, as those rules apply to constitutional construction. With respect to not listing it in there, then the answer gets fuzzy, because you are then talking about trying to do things without specificity and the history of our Court has been a conservative one, where it has leaned over backwards to insist that any new constitutional concept, rather than being enacted by the general assembly, goes back to the people. And that is exactly what they told us in the Brand case. They pointed to Nebraska, and said "Look, if you want this, get a constitutional amendment".

Mr. Carson: Could I try one other thing I am thinking of? It looks to us like whatever comes out of Article VIII is not going to be on the ballot until November '73. Would there be any possibility or point of the administration trying this Section 13 amendment now, perhaps on the May ballot, with the broad changes outlined here?

Mr. Baker: I think there are, from the administration's point of view, things going on right now that we would like to do. There is some merit in doing this regardless of what happens to the rest of this proposal, although in some ways it would be nice to have this as part of the whole package of decisions in Article VIII. It's obviously a political decision, whether you want to separate these issues out, for a vote of the public, but I do think that this Section 13 draft could stand on its own feet as a separate issue.

Mr. Carson: I honestly think you'll have some difficulty with a substantial number of the members of the Commission with adding further statutory language to the Constitution. Frankly, I do. Have you given thought to that subject, Bob, at this point?

Mr. Baker: Nolan, I would say frankly that our intention was to discuss this with the Commission and get the Commission's reaction before we would get the feeling on whether or not the Commission would want to endorse it. If a group such as the Commission would prefer not to make this part of the language, we would have to sit down and see what they would want to do with it.

Mr. Carter: My reaction is that this is a ballot-public question. I am sure that it is, and I don't think the Commission can duck it.

Mr. Carson: What I am talking about is the hesitancy to deal with this kind of language. I am not trying to duck the issue. The substantive validity of what we're supposed to be doing here is a question of our duty to be writing into a Constitution a provision that will survive and last and stretch, and this is kind of contrary to what we are supposed to do. And at least some of the members of the Commission are going to feel that way.

Mr. Carter: I think we all agreed at the start of this Committee that the wave of the future is agreement between the public and private sector. And I think this is an awfully important thing to try to get into the Constitution. And as Nolan said, we were hoping to do this in a broad and general way. I understand that you are saying that without dealing in specifics, you doubt that we can do that.

Mr. Desmond: What I really am saying is that you aren't going to be able to do it unless you have a willing court.

Mr. Carter: You are saying that the Courts are not likely to accept general statements?

Mr. Desmond: I don't know that, and I wouldn't be will to say that, but what I am saying is that I don't know if they will.

Mr. Carter: And you see, what we're saying is that when we deal in specifics like that, we've lost the ball game.

Mr. Carson: Is there perhaps a middle ground between the two, and that is for the Commission to take Section 13 by itself and recommend that it be submitted at an earlier election than the package, to take it by itself because of the necessity of meeting the problems of our overindustrialized state -- that this is suggested to be submitted to the people immediately, and then continue later on with the rest of our recommendations?

Mr. Carter: If we are to do this, I think we can just as easily do it all at one time, because nothing will be on the ballot until 1973 anyway. I think the Commission likes that approach rather than taking a piece here and a piece there.

Mr. Carson: I withdraw my suggestion. I was thinking of the possibility of this next May, with the rest of the package coming in November. But we wouldn't want to go in May.

Mr. Carter: I would think, though, that we should discuss Section 13. That is why Dick is here and there are a number of things that I would like to have discussed. And hopefully he would put that discussion in context with the other points we have raised.

Mr. Desmond: If you want suggestions from us with respect to the big job, we would be most happy to assist in the area which you are talking about. It's a question of what you want.

Mr. Carter: I do have some problems with Section 13, that I would like to bring up. One, I have the same problem with "low and moderate incomes". Housing is housing.

Mr. Guggenheim: I would stick in "including, but not limited to". I think if you are going to run a series of things, you run into trouble if you don't put a savings clause in, unless you want to limit it to those things. The thing I am saying is going back to draftsmanship principles. I don't know if in the Constitution we want to be limited to those particular purposes. I'm talking technique, not substance.

Mr. Carter: Another question I have which bothers me is if we are going to deal with housing -- I can easily see pollution abatement and that kind of thing, related to production and jobs -- it would seem to me that if we put it in the industrial revenue bond article, it is something that might sink the whole ship. And perhaps it might be better to list separately.

Mr. Guggenheim: That's a political point. I think you have a good point there.

Mr. Carter: Well, very often you can pass two things separately, but you lump them together and you lose them both.

My next point is one which is the most important one of all by far. It's this reserve concept, on a number of scores. One, it is open-ended. I think I ought to give you a little information on the feeling of the Committee on the whole debt limit question, which I think is important here. There is a strong feeling by the majority of the Committee that it would be preferable to have no debt limit, but we decided that this would be impossible, so therefore we are faced with a debt limit. Now, if we are going to have a debt limit specified, then it has to be a reasonable debt limit, because our legislative members have told us that the immediate result will be to bump up against it. What you have done here now is to open up an area where there is no ceiling, no limit. So the combination of housing and reserve is going to make it very difficult to work unless we have some restrictions, and one of the restrictions I thought about is, would it be possible to have the reserve funded by revenue bonds? Maybe it isn't. Obviously it is kind of a second mortgage situation. I pretty much came to the conclusion that it wasn't feasible myself, but I wanted to raise the possibility. Now, without that, assuming that you can't restrict it to revenue bonds, is there any concern about the theory of this being open-ended? Another possibility is that a reserve be included in Section 1.

Mr. Hovey: Your protection on revenue bonds?

Mr. Carter: Not for this, though. Here your reserve would be a general obligation.

Mr. Hovey: It's not clear to me exactly what the reserve is.

Mr. Grigsby: Well, what the reserve is is really a voluntary situation, where the general assembly could appropriate money voluntarily into the reserve. We assume that the general assembly would appropriate the money before the issuance of bonds so that the bondholder would know that the debt service was funded.

Mr. Hovey: But you couldn't do that without constitutional authorization anyway, so that this reserve has to be provided for in the Constitution. There is nothing in Section 2i about the prior appropriation of reserves. The way Mr. Cortese wrote the whole thing is that the pledge to the bondholders that makes the bond legally a revenue bond is from the fees that college students pay, and the way that that is interrelated is that debt service requests for appropriations are made from general revenue fund monies and fees for students never have been and never will be touched. So, we routinely appropriate funds to cover debt service for bonds that have been issued and bonds that will be issued in the future out of general revenue fund monies, and that is the way we work it. We do not need reserve fund authority.

Mr. Desmond: The difference is that you appropriate money for something that is going to be expended in the biennium. You haven't appropriated money which is instead going to be pledged. The problem is that the language that is in Section 13 right now says "provided that the money raised by taxation shall not be obligated or pledged for the payments of bonds, obligations, etc., enacted under this section", and when you put money into a debt service reserve you pledge it.

Mrs. Eriksson: There would be no question in your mind then that in effect you have

created general obligation bonds to the extent that moneys are pledged from the reserve?

Mr. Desmond: That's right. Generally, the reserve will run one to two years' debt service.

Mrs. Eriksson: But you have created a debt under our definition of "debt" in the proposal, because you are in effect pledging tax money? This is what was not clear to me. Even though the owner of the bond may have no right to such a pledge, if in fact such a pledge was made, have you not created debt, under our definition of debt?

Mr. Desmond: You would have to say that the debt service reserve is a general obligation of the state. I don't think you can say that because the operation is over a long period, the appropriation is not an obligation, it's a voluntary appropriation.

Mr. Guggenheim: I haven't looked at this before and I may be misreading this, but why do you have a reserve for housing and not for the others?

Mr. White: Those are the ones for which we feared that reserves might be necessary to do the job. With respect to pollution abatement, one of the things that has been kicked around and which may be tried is to get a bond issue for smaller corporations, whose credit separately wouldn't be sufficient to carry it, and then provide a "sweetener for the pot", if the general assembly wants to, by providing a debt service reserve to make the thing look better. In the housing area, we've already found that the experience of the public housing authorities is that they've got to have some sort of reserve provision in the legislation that provides for the bonds.

Mr. Guggenheim: My understanding is that there is a history of housing developments not producing sufficient revenue, which would make a bond purchaser a little leery because it wouldn't give him any security.

Mr. Grigsby: You are absolutely correct in saying that there is a factor in terms of housing developments, in terms of selling to individuals rather than corporations, which requires a reserve.

Mr. Carson: A moral promise of a reserve anyway.

Mr. Guggenheim: The draft says they may create a reserve, anyway. But you are establishing two categories of loans here -- the first category which you have sold in the past without any trouble, and the new category, where you may want to set up a reserve. There's a certain lack of uniformity here.

Mr. Hovey: There is at least a moral obligation to pay the difference between the income received by the agency and the debt service that has to be paid, is that true?

Mr. Grigsby: There is an obligation on the part of the state if there is a deficit, but whether or not this should be a requirement on the part of the government to make up the reserve or not is still an argument in the State Government Committee. It can also be optional on the part of the legislature. It all depends on how the legislature responds to questions.

Mr. Carson: Dick, my own reaction to this reserve is that unless there's some limit on this, or some application of the debt service formula, the legislature can be permitted to have any amount it wishes in the reserve, with the idea that housing is a huge, huge problem requiring many hundreds of millions, I am not sure that I would agree to this.

Mr. Grigsby: Aren't we confusing two things, though? One is made to meet the state reserve requirement, the other has to do with the ability of the agency to issue bonds.

I don't know if they are necessarily the same thing. What we are talking about is the state meeting its moral obligation for debt service on the outstanding bond, not necessarily on its face value.

Mr. Carson: I think we understand that.

Mr. Desmond: I have trouble with that, Nolan, because at one point you tell me that you would be willing to set this Constitution up so that the general assembly could appropriate any number of dollars that it wants to for the purpose of subsidizing any company, and you want to let the general assembly declare anything a public purpose that it wants to, and to permit it to pay debt service on general obligation bonds, putting entire confidence in the general assembly for that purpose -- and then you hit a provision like this.

Mr. Carter: If there were no debt limit at all in the Constitution, this would not concern us, but as I said earlier, we don't think we can have that. Once you put a debt limit in, that becomes in our view an authorization for the legislature. It's hard to mix those two up.

Mr. Guggenheim: If we included it in this debt limitation that we have, I think that would largely solve the problem.

Mr. Baker: I think there can be some limits, but the limits should be language limits rather than dollar limits.

Mr. Guggenheim: Well, we're against dollar limits, so I think we agree with you on that.

Mr. Baker: Really, I think what Troy is saying is that the amount voluntarily appropriated by the general assembly in any fiscal year to that reserve, together with the amount required in the fiscal year for principal and interest on the outstanding general obligation debt of the state, must not exceed six percent of the general revenues of the state.

Mr. Carson: Not exactly. In Section 1 is established a rather precise kind of debt limit. Now over here in Section 13, you suggest that we permit the state to operate without any limitations at all, appropriating additional sums of money for debt service. This is the concept here. I don't think we can sell them both in one package. I think we would be shot down immediately.

Mr. Desmond: What you're saying essentially is to treat this voluntary appropriation as a charge against this six percent debt limit?

Mr. Carter: If it is in fact borrowed. The legislature could appropriate it out of current revenues and not bonds.

Mr. Desmond: Your debt limit set in Section 1 is an indirect type of limit.

Mr. Carter: But is it not theoretically possible that this appropriation could be made out of current tax revenues without bonds at all?

Mrs. Eriksson: All debt service is appropriated out of current revenue.

Mr. Carter: My point, and maybe I am not making myself clear, is that you can set up this reserve without borrowing.

Mrs. Eriksson: The same way you pay debt service without borrowing. You don't borrow to pay any debt service.

Mr. Grigsby: The only reason you would appropriate money for this reserve is if you needed the money to pay off the bonds, and it's the same as a moral obligation issue or a revenue obligation issue.

Mr. Guggenheim: Alright. I'm straightened out.

Mr. Desmond: So I think that would be acceptable if that is what you want to do.

Mr. Carter: Now, is this limited to the state though? In Section 1(A) we are talking about state indebtedness. Now here we are also talking about local government indebtedness, aren't we?

Mr. Desmond: Here you do have local governments in the act, but they are in fact already captured unless you are going to do something with Article XII, Section 2.

Mr. Carter: On the tax limit?

Mr. Desmond: They've already got an indirect debt limit.

Mrs. Eriksson: But of course the language of Section 13 takes them out of Article XII, Section 11. If this reserve part would be construed to be a general obligation, it would take them out of the indirect debt limit because it would take them out of Article XII, Section 11.

Mr. Desmond: But they can't collect any taxes for it. You haven't given them any authority under Section 13 to levy any new taxes. They already have a lid on the taxes they can raise, so they have to appropriate it out of money they would spend on expenses. You haven't taken the cap off.

Mr. Carter: When you are dealing with current revenues or when you are dealing with debts there is a contest for priorities, and that is of course what this is all about. Now, I think what we're suggesting is that this should be put in the same pot as other priorities -- in the 6 percent limit.

Mr. Desmond: If somebody would be willing to give me a copy of this, I'd be willing to try to put a couple of words in here and see if we couldn't do something about capturing it within the six percent limit.

Mr. Carter: I think that's the only chance we have of getting it through. We're already having enough problems with Section 2i being outside of this debt limit. Incidentally, we've been talking negatively here, and I am very much in favor of this "create or <u>protect</u> job opportunities."

Mr. Guggenheim: I hate to be a devil's advocate because I really believe in the principles expressed here, but I am frankly concerned with how you phrase it, and I do believe that anytime you write a constitutional clause you are heading for court whether you like it or not.

Mr. Carter: Could we focus in on the next question for a moment -- whether it is advisable to put housing in under the revenue bond section? I am in favor of housing, don't misunderstand that.

Mr. Guggenheim: That bothers me. I'm even more bothered by the phrase about "the quality of the environment", if you can understand that. Twenty years from now that phrase could mean something entirely different.

Mr. Baker: As to the inclusion of housing in the section on revenue bonds, I think that is a tough political decision. I'm not so sure that it makes much difference in drafting. In New York this was also a problem, because of the connotation.

Mr. Carson: It would strike me that industry and commerce as a whole might probably think this is a good idea, making low cost money available to them, and if they were supporting this, I guess that many other groups would be supporting the other facet and maybe we would get the support of more groups that way.

Mr. Carter: I see what you mean. I don't think it's likely, but it is a matter of political judgment.

Mr. Carson: If we separate it into two sections, I take it you would have to repeat it all under a section.

Mr. Desmond: We could probably do it in a shorter way. I'm afraid that if you are going to do both revenue bond and guarantee you would end up with something that is almost as long anyway.

Mr. Carter: How about splitting it up into three pieces, one on the changes in the jobs and the environment, and then having a housing package, and then having a reserve that is applicable to the two.

Mr.. Desmond: I don't think it would be better.

Mr. Carter: I am just trying to raise all the possibilities. The environment is the thing right now, it's like motherhood. And you might argue that the housing piggybacks that and it will carry the housing. On the other hand, if you get this public housing specter raised, well, everyone reads all the bad things about public housing, and the whole thing might go to pot. You might carry housing on that, but on the other hand, it might set the whole blooming thing back. I don't think you will have very many people against the environmental change or the protection of jobs, those are easily done. I think we also might be subject to criticism, as we were the last time, for putting something in to carry the rest. I think we might have further trouble with the Supreme Court.

Mr. Guggenheim: Isn't this a recitation of certain public purposes?

Mrs. Eriksson: I think that every bond issue has about a million purposes in it. I think there might be a problem about combining this with the rest of Article VIII without providing for a separate vote on this section. This might be a problem.

Mr. Carter: How do you make a political judgment?

Mr. Grigsby: We thought about trying to stretch a point with the Supreme Court and deal with them, saying that housing was an industry and therefore was constitutionally okay. My recollection, though, is that we decided that that was really stretching the point, and that what we really ought to do was to have some provision in the Constitution which provided for bonding for the purposes of housing, and I think we are right at the point expressed in Section 13 that it should be a part of public purpose rather than by itself.

Mr. Carson: Dick, what would you say about our proceeding at this point with both in one section, with the idea that we would perhaps leave the question to the full Commission on the politics of how to present this. It could be very simply divided into two sections, you know, with no question at all. I'm not sure I am ready to give any valid opinion on how it should be presented to the voters.

Mr. Baker: One of the things that impressed me watching the Commission operate is that you do get reactions from many of the interest groups that will comment on this thing and help you to make the decision and I think that the procedure that you use in many of your discussions in putting it up to the Commission and letting the recommendations be subject to the opinions of others is really the best way to go about it.

Mr. Carson: I think we already have some things in our package that some members of the Commission may have trouble swallowing, but that is their right, and I'm sure that the legislature will make further suggestions. If you all have no objections then, why don't we consider it as one section at the moment, but make clear to the Commission that this could be separated into two sections very easily and that we would like to hear their views?

Mr. Baker: If the words "low or moderate income" were felt to have too much political impact, they could also be stricken. That has a political impact, and I would suggest to you that might need some consideration. The reason why that was put in was so that people in the banking and housing industry don't think that the state is going into their industry.

Mr. Carson: I mentioned this to Mr. Hovey. He said that didn't worry him.

Mr. Guggenheim: I haven't really thought this thing through obviously, but the old purposes of industry, commerce, distribution, and research are certainly very unlimited. If the bankers weren't concerned with purposes of industry why would they be concerned with purposes of housing? Housing is less broad than industry.

Mr. Carson: Housing is the greatest source of financing in the United States.

Mr. Guggenheim: I would have thought that the interpretations would be more similar.

Mr. Carter: Whether you put in low or moderate income or not doesn't really change the problems of the banker.

Mr. Desmond: Because under the government support provisions, 236 for example, that's just as good a business for bankers as the top dollar loans. So you really are not softening the situation.

Mr. Carter: I don't think you read me properly. What I am saying is that the savings and loan companies now finance low and moderate income housing through the government insurance programs, so it is a source of loans for them. This is a different way for them to participate, instead of making the loan.

It was agreed that the Department of Finance would work on writing a provision which would include the reserve for housing within the debt limit, and that the Committee would review the draft before the June 16 Commission meeting.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
July 19, 1972

Summary of Meeting

The committee met at 6:30 on the above date, at the Athletic Club in Columbus, primarily for the purpose of discussing how best to go about studying and deciding on the various issues involved in Article XII. Present were committee members Messrs. Carson, Carter, Guggenheim, Hovey, Ocasek and Wilson, Mr. Nemeth of the Commission staff, and Mrs. Elizabeth Brownell of the League of Women Voters.

First, Mr. Carson presented two possible additions to the "savings clause" of the committee's draft proposal for a revised Article VIII. Both of these additions are of a "housekeeping variety," and are for the purpose of effectuating the intent of the committee (1) to include all presently outstanding general obligation debt in the calculations to determine the debt limit under Section 1 of the proposed Article VIII, and (2) to assure that references to the equivalent portions of Article VIII, Section 2i, wherever they may be found, are construed as references to Section 3, to which section the equivalent provisions of Section 2i would be shifted under the proposed Article VIII. Mr. Carson stated that these additions were recommended by bond counsel and concurred in by the staff. There was general agreement among the committee members present that the additions should be recommended to the Commission, and Mr. Guggenheim offered to present them in a motion at the Commission meeting, the following morning.

Next, the committee again discussed the proposal for expansion of Section 13 of Article VIII. Mr. Carson said that it was his understanding at the last meeting that the proposed changes in the section would be acceptable to a majority of the committee provided the proposed reserve would be subject to the 6% limitation of Section 1. However, it was his understanding that the proposal, as it now stands, would not limit the amount which could be appropriated to the reserve, but that an appropriation to the reserve would limit the amount which could be appropriated for other debt under Section 1.

After considerable discussion, the committee decided to stand by its original recommendation for the present, and to decide what to do with the proposal at the next meeting.

In regard to Article XII, the committee discussed whether it would be preferable for the group to develop a rough draft of the Article first and then ask for outside comment, or to ask for outside comment first and then develop a draft. No decision was reached on this point. However, the committee did determine to begin the in-depth study of Article XII with Section 2. To this end, the staff was asked to provide reading material on the section, particularly material containing suggestions for alternatives. This was to be mailed to committee members as far in advance of the next meeting as possible.

The committee agreed to meet again on the evening of August 24 and on August 25.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
August 24, 1972

Summary of Meeting

Present at the meeting of the committee on August 24, 1972, at the Athletic Club in Columbus were Mr. Carson, Chairman, Messrs. Carter, Hovey, Guggenheim, Wilson, Mansfield, and Senator Ocasek. Staff members Nemeth and Eriksson were present, as well as Mr. Robert Baker, representing the Department of Finance, and representatives from the Ohio Chamber of Commerce, the Ohio Bankers Association, and the League of Women Voters.

Mr. Carson stated that the purpose of the meeting is to discuss Section 13 of Article VIII to see where we are and, if at all possible, to come to some meeting of the minds, and to present a recommendation to the Commission in September. Section 13 was excluded from the recommendation that was adopted at the July Commission meeting on the rest of Article VIII, and this still rests in the Finance and Taxation Committee.

Mr. Carson - We're still charged with coming back to the full Commission with a recommendation on whether Section 13 should stay as is, whether it should be amended with some or all of the changes presented so eloquently by Bob Baker, or any other changes that the committee might want to adopt. The recommendation for amendments presented to us really has four parts. One of the changes was to make some minor amendments in language to provide for job protection, in addition to the present words which require, in order to issue revenue bonds, you must show that there is a creation of jobs. The suggestion was that you might expand this to permit revenue bonds to be issued by a state agency or local government agency which would permit an established industry in Ohio to be financed with a new facility which would merely maintain the same job structure that they now have, but would not create new jobs.

The second part would add as permitted purpose for the use of proceeds from bond moneys, pollution abatement or prevention, waste disposal, enhancement of the quality of the environment.

The third aspect of it would be to permit revenue bonds to be issued for financing of housing and related facilities for low and moderate income families. The fourth aspect was the addition of the so-called reserve clause which would permit the General Assembly, if it so desired, to make appropriations to a reserve fund which would stand as a back-up for the bonds along with revenues which would be received from the contracts with the builders and the people that are using the facilities.

A good deal of the concern that has been expressed by some people on the committee has been the reserve clause, although it goes farther than that. I think there has been some concern about expanding the purposes of the section at all. Each of you has received from Ann a copy of a suggested different treatment that Mr. Carter has put together and I wonder if perhaps the best way to start would be to ask Dick if he would give us a synopsis of his suggestions. And then I'd like to get the thoughts and views of the members of the committee to see just where we stand.

Mr. Carter - It seemed to me at the last committee meeting there were a number of things that were not acceptable to the committee, primarily one that seemed to be uppermost was the mixing up of industrial development with housing, as being two separate matters. Can we separate the proposals into two sections, 13 and 14? I propose to eliminate housing from the present Section 13 and consider it as a separate matter. Now I think there was strong support in the committee of the idea of having pollution abatement in Section 13 as an important matter suitable for revenue bond financing. I think

there is strong support for broadening the purpose not only for new jobs but the protection of existing jobs which is very important to our community. I focused in on the idea, instead of talking about the environment which is an awfully broad thing, to think of 13 as an industrial revenue bond type of thing and limiting the new purpose to pollution control and water pollution abatement. The reserve fund would only be applicable to pollution revenue bonds in the purpose. My feeling was that if the reserve fund is a valid concept, and I am not sure that it is, but if it is I have great difficulty in distinguishing between a reserve fund for pollution abatement and not for general industrial revenue bonds. I am associated primarily with small businesses, and one of the problems with revenue financing as it is presently constituted is that it is largely limited to large industries with a credit rating which makes such financing possible--the bonds are sold on the credit rating of the company. The reserve fund offers on the favorable side an opportunity for an aggregation of risks by small companies if the legislature in their wisdom thinks it appropriate to aggregate those risks into a pool and to maybe make a change, something like an insurance fund, so that small companies could benefit from revenue bonds as well as larger companies. I'm not sure I am completely sold on the concept but that's the reason for it. So that was the basic idea as far as revenue bonds industrially. Then you brought up, Bruce, at our last commission meeting the question as to whether the bonds should be applicable to utilities for pollution abatement. Perhaps that is a discrimination, if you will, against utilities in that field. I didn't think there was a reason to do this, so I was perfectly happy to provide pollution abatement for utilities as well as other industries. Now that's the proposed revision of Section 13. Then I put housing in a new section with the idea that that should be considered separately. Then, as was brought up by a number of poeple, notably the League of Women Voters, if we're going to talk about housing, we should think in terms of other matters of public concern. If we put in a specific amendment that relates to housing, it tends to indicate to the courts that other things should be excluded, and I don't think that's the intention of a constitution so rather than just limit the proposed revised section to housing, I tried to broaden it so that it would give the legislature considerable latitude on what they could feel was an appropriate public purpose.

The chairman called for comments.

Mr. Ilovey - I have some fairly strong views. First let me say that these are personal views and not views of the administration and that Baker is here for the administration and I am not. It seems to me that in terms of issues that are important and can in fact be decided by the Commission, legislature, and the people at this time, we are talking more about pollution than anything else. If housing is controversial, as a member of the Commission I ought to be willing to sacrifice housing for pollution. There is a very practical decision to be made in this state in the next couple of years on things like where industries, such as the one Bruce is a part of, locate. This is extremely important. There are a lot of people who for technical and economic reasons, do not care which side of the Ohio River they are on, where there is major public policy issued from the standpoint of benefits to Ohio. Those same issues do not exist in housing. My person preference would be to write a very broad provision, that lets the legislature decide what is a public purpose. As a practical matter, what we can do will depend on the certification of bond counsel. I personally would like to support the amendments that involve housing. But housing is controversial and pollution is not. I am prepared to go with pollution alone.

I think the Carter proposals limit pollution more than they need to. I don't really think there's opposition to a fairly broad definition of environment that could be supported by revenue bonds. I think the best thing for the people of Ohio is to go with pollution without housing. On the reserve fund, I am not absolutely sure that I understand the issue. It would seem to me that the reserve issue is somewhat academic in the sense that, without a constitutional provision relative to reserves, we can have reserve funds anyway.

Mr. Mansfield - The concept of revenue bond financing is that the security of the bonds depends upon income produced from the facilities built with the money. Pollution abatement facilities are not income producing facilities.

Mr. Carter - The company that's issuing the bonds is standing behind the bonds; the way a revenue bond works is that a company leases the facility from a governmental entity and the sale of the bonds doesn't really have anything to do with the use of that facility; it is solely related to the credit of that company.

Mr. Mansfield - I don't understand revenue bonds that way.

Mr. Carter - There are different kinds of revenue bonds. In the industrial revenue bonds, the revenues are payments that are paid by the industry, and where they get those revenues from doesn't have to be related to the facility. And when we talk about the hybrid bonds you have a little different situation.

Mr. Hovey - Let's say that Ohio Power is going to build something that involves $2,000,000 worth of cooling towers that are pretty much dictated by pollution control regulations. Ohio Power thinks that their return on capital should be at the rate of 8 or 10 or 6%. The state says it can raise money on a 10, 15, or 20 year basis at 5%. And Ohio Power says couldn't we get together? What we're talking about is allowing the state via the General Assembly to decide that the two can get together. The state could say, "You design what you want to do in the way of cooling towers and we will sign an agreement with you by which we will construct your cooling towers and the essence of the agreement will be for you to pay us, subject to no contingencies, money so that we can retire our bonds in say 15 years and that the full faith and credit of Ohio Power is pledged to this endeavor. We will market the bonds which is our only function since we don't design the cooling towers--we don't really do anything but serve as a fiscal contact." This may not be good national public policy, but if West Virginia offers Ohio Power that possibility and Ohio doesn't and the different is 3% on $100,000,000 worth of capital investment Ohio Power would be crazy not to take West Virginia's offer. When the bond goes on the market, it is basically a promise of the Ohio Power Company to pay the state and the state turns over what the Ohio Power pays. Under those circumstances there is no state undertaking to pay. The credit rating that one will get on the obligation is the Ohio Power Company's credit rating and not the state's. There is no revenue from a cooling tower. The bonds are paid by the Power Company and the facilities are not generating any revenue. So your security is one thing and only one thing--the promise of the Ohio Power Company to pay.

Mr. Carter - Let me point out one thing. You're talking about hundreds of millions of dollars. The IRS has taken a very strong position on industrial revenue bonds. The limit for any one company in any one locality is $5,000,000 so that you have a very definite limitation on what you can do with revenue bonds. So it's not nearly to the advantage of large companies as you might think.

Mr. Wilson - I'm still going to maintain my objection to the inclusion of housing in the Constitution, as a public purpose. I do not feel that housing any more belongs in there than banking services, public utilities, legal services, accounting services. You do not have large numbers of companies engaging in pollution abatement; you do not have large numbers of companies engaging in mass transit, or education facilities. We do have those engaging in building housing and I can see no reason to spell out now that housing is a public purpose. I support Mr. Hovey's view we should put language in there which allows the legislature to declare a public purpose and not pin housing down in our Constitution. There are areas in the state of Ohio that have gotten rid of public housing. I do not think that we should say that housing, per se, is a public purpose.

Senator Ocasek - I think the legislature should have the right to declare what a public purpose is, and let the General Assembly debate whether housing is a public purpose. I won't try to second guess the court but I think really the language proposed goes too far, because it says "and housing and related facilities". We would not only have the houses, we could have a whole city if we wanted to, intended primarily for people of low and moderate incomes defined by the General Assembly. It may be public health facilities we need. We might want to build school buildings. I don't like naming specific concerns because we may need some others. I can buy the one on pollution abatement but I was never sold on putting housing in.

Mr. Nemeth - As far as the reserve part is concerned, I have serious doubts, whether that would be sustained without specific reference, because of the judicial history in Ohio of what constitutes a general obligation of the state. If a reserve fund were created to which general revenue would be diverted on a systematic basis, it would be at least a 50-50 chance as I see it that at least the reserve would be called a general obligation of the state.

Mr. Nemeth - And perhaps all of the bonds that were issued which the reserve backs might be called general obligations.

Mr. Robert Baker (Department of Finance) - This Commission has taken on the goal to draft a model constitution, or at least to clean up the verbiage in the present Constitution. Bond counsel, who suggested this language, want to have whatever they have to have to give a firm opinion in black and white. If Senator Ocasek is right, in what you have done in the first four sections of Article VIII, then you should recommend to the Commission the repeal of Section 13 because you have provided to the legislature sufficient power in the public purpose clause to lend the state's credit, etc. for whatever public purpose it declares.

Mr. Carson - We would not repeal Section 13 because of the inclusion of local governments.

Mr. Baker - But you can take care of local governments in other ways. But I doubt whether this committee and Commission want to run the risks involved in repealing section 13 and relying on the new public purpose clause. As far as including pollution is concerned, I don't think anyone would disagree. The second issue is the capital reserve fund. Let me make an important distinction, particularly with respect to pollution but I think it also applies to housing. It's a matter simply of how you merchandise your bonds. You will sell a principal amount of bonds. What you tell the bond purchaser is: we are going to give this money for environmental protection to industries in Ohio and they will sign leases, but you actually sell the bonds before you have the leases and the security is that if the state is a poor

manager of that program, the capital reserve fund means that the state is morally obligated to pay off the bonds. If you don't have a capital reserve provision you have to market the bonds for each individual project. You sell the program on a project by project basis, the leases then become the security for the bonds, and the reason why that is undesirable is because of the higher costs. In the housing area, most projects are too small to go to the market for money on a project by project basis. So if you are going to set up a housing finance agency to sell these bonds, in most peoples' opinion, you really need a capital reserve provision so that you can go out and issue $100 million worth of bonds and use the money to fund 50 different projects. We actually have a capital reserve device whenever we issue revenue bonds because the real security of the bondholder is that the state of Ohio will not let any of its bonds go into default even if the state is not legally obligated.

Mr. Carson - Mr. Hovey said that when you market these bonds, the bondholder is really looking to the security of the industry that is getting the money.

Mr. Baker - That is correct, but also I go back to the statement that you have a capital reserve fund anyway no matter on what basis you market the bonds. There is no legal way to force the state to pay, however, if it is a revenue bond.

Mr. Guggenheim - It's been the practice for states to come in and pay a revenue bond after it got in trouble, but there is no way the bondholder can force the state to pay.

Mr. Hovey - I think I can clear this up with an example. The General Assembly declare that the manufacture of skimobiles is essential to the Ohio economy, and it appropriates a subsidy of $10 per skimobile to manufacturers of skimobiles in Ohio. This would be O.K., because there is no public purpose case dealing with operating subsidies. Now the General Assembly proposes a revenue bond and uses the money to subsidize skimobile manufacture. The Ohio law differs significantly with respect to straight appropriations and borrowing. Restrictions are much greater on borrowing than they are on straight appropriations. There is a category of things for which the state can give cash tax money appropriations for which it may not borrow. If that category is sufficiently large, the reserve thing is relatively academic in the sense that if there is a category about which there is doubt that we could borrow for, there may not be doubt about whether we could appropriate sums for that purpose. If we can appropriate a $10 skimobile subsidy then it follows, I think, that we can legally appropriate a $10 skimobile subsidy which will be paid only on a contingency. If that's true, a reasonable contingency is the failure of something or other, such as a bond payment. So if we have the power to appropriate a skimobile subsidy, we have the power to appropriate a bailout for a skimobile bond. If that is true the reserve issue is not very important.

Mr. Guggenheim - If that is true, why put this in at all?

Senator Ocasek - If that is true, then where does the idea of class legislation enter? Would the court hold that you should also subsidize bicycles, etc.?

Mr. Hovey - The capability of the legislature to choose different objects for operating subsidies is pretty substantial; at the moment, we subsidize racehorses, breeding stock, livestock prizes, and if you can do that, you ought to be able to subsidize skimobiles. This is what you can do with direct appropriations; what we are debating is what you can do with borrowing. If you can appropriate for anything, I don't see why you have a problem in directly appropriating a reserve for the same thing. I

understand that you have a problem borrowing, and I understand that local government is different, but it seems to me the reserve issue is relatively academic. We consider it here with respect to housing, and we might consider it with respect to any other state function in the sense that I think the state can legally subsidize what it chooses to subsidize.

Mr. Carson - I'd like to raise a question. We have in Ohio an agency called the Ohio Water Development Authority which has been issuing bonds for pollution abatement facilities for municipalities and also to aid private industries in Ohio. Its brochure states: "OWDA also has authority to aid private industries in construction of treatment and water supply facilities through the issuance of revenue bonds with the industry paying the full amount of the costs. Applications have been received for 16 projects costing $43.2 million from industries under this program. Agreements have been signed for $9 million worth of these projects, and $2 million have been completed." This was dated April 11. I also have a brochure put out by the Department of Development which indicates that there is a similar air authority for pollution abatement facilities. This indicates that they will sell revenue bonds to construct air pollution abatement facilities and when they are fully paid for they will be turned over to the industry. So my question is: what is the need to amend section 13 unless it is to finance through Ohio bonds sick industries, that their backing isn't good enough for the bonds. Is that the reason?

Mr. Guggenheim - What you're saying is that they are doing it now.

Mr. Baker - These two agencies have certain bonding ability, which goes as far as their statutes permit. That bonding ability was not designed to be an environmental protection bonding ability. Each has its own individual authority to issue bonds. The water authority is probably under 2i but air is not under any specific constitutional authority. Most people think that these agencies do not have a broad enough authority for the state, qua state, to be involved in environmental protection on a broad basis. If the state should provide for what it needs 5 or 10 years for now, it may not fall strictly within the limits of those statutes.

Mr. Guggenheim - The question is not: how big is the statute, but how big could it be?

Mr. Carson - The air authority brochure contains the following information: "The General Assembly of the State of Ohio, in an effort to eliminate air pollution throughout the state and at the same time assist industry financially in meeting the federal air pollution standards, passed as an emergency act the Ohio Air Quality Development Authority effective in 1969 and specified its capacity to encourage and finance the construction of air pollution control facilities for industry. May include new installations or additions that aid in reducing or eliminating deleterious emissions. Must meet standards established under federal law. Agreement specifies the rights and obligations of both parties and may provide for the operation of the facility either by the industry or by the authority." The statute is very similar to the water development authority. I don't really understand why we need a constitutional amendment for this purpose. What other kinds of environmental problems do we have besides air and water? Solid waste, but you don't need revenue bonds for industry for solid waste disposal, what you need is some place to put the stuff or something to do with it. Noise pollution, lead poisoning and other similar types of pollution and I suppose you have aesthetic pollution. Apparently, however, there are two agencies which already have this authority we are talking about putting in the Constitution. And in the water quality area at least they are issuing bonds, for water pollution control facilities for industry. As of April 11, the Water

Development Authority had issued $100 million under the 2i general obligation bonds, and $105 million in revenue bonds under 2i, and got $12 million from the federal government. It says here in the release that applications have been received for $14 million in projects and agreements signed for $9 million. I don't really see why we put another laundry list in the Constitution unless we have a need for it. The authority for water pollution came from 2i, but I do not know where the authority for air pollution came from. The air pollution authority act took effect sometime in 1970, and the water development act in 1969.

Mr. Norman Baker (Ohio Chamber of Commerce) - People on our staff who work with this tell me that there have been three projects approved under the air pollution act, and that bond counsel advised that the constitutional basis is Section 13. In general industrial financing, not having to do with pollution, the Ohio Development Financing Commission in 1971 has approved guaranteed loans of $5.2 million--that would be under Section 13 and more than $50 million in tax-free revenue bonds.

Mr. Carson - Thank you. Let me go back to this job protection thing. As I understand the present Section 13, it requires that, in order to issue revenue bonds under Section 13, there must be new jobs created. The authority can issue revenue bonds to build and lease facilities for a company not now in Ohio or a business which wants to build a plant here and there will be employment by reason of it. You can take an existing company and you can enlarge that facility. So long as it results in new jobs. But you cannot finance a company that has an old antiquated plant in Ohio and needs a new one or needs to renovate an outdated plant in order to keep the business in Ohio. As far as I can see, that is the only thing this change would do--permit loans for the latter purpose. No other reason for broadening, other than to permit the state to sell revenue bonds to help an industry which has not been successful enough to save the money to renovate its own plant. Is this a proper purpose for governmental agency revenue bonds?

Mr. Hovey to Mr. Norman Baker - If the intent of this committee is to make available to industry in Ohio all the gimmicks which are available in any other state, what changes should be made in Section 13?

Mr. N. Baker - Mr. Carson has made a point about the air quality revenue bonds, which is correct, that their constitutionality has not been tested. Water development comes under 2i, and I have not heard that this is not sufficient. As far as industrial development, I think people are pretty happy with Section 13. There are some cases where the purpose of creation of jobs is not sufficient. I think there was a division of opinion among the business community, if not among the industrial developers, whether Section 13, as a policy matter, was the thing to do. We have not sounded out the industrial development people to see whether they feel they do not have sufficient language and need to protect jobs as well as to create them. It's pretty hard to determine the equities as between the industry that Nolan's talking about that just can't make it and therefore would like to have money for a new plant to put down the street which it could justify now as saving the jobs that would otherwise be eliminated by more efficient procedures, as opposed to another plant and equipment which under similar circumstances has seen fit not to try to get state help. There's a mixture of the private and public sectors here which I think would concern us at the Chamber, but as to the specific question of what is needed to be competitive, we don't have a specific answer. We do not seem to have a big uprising in the industrial development community to do what would be done here by broadening Section 13.

Mr. Anderson (Ohio Bankers Association)

Section 13 now includes the industrial development financing commission which has the authority either to issue revenue bonds or to guarantee loans. Water pollution is literally in the industrial category, which has not been tested except as it applies to industrial development; air pollution has not been tested. Housing is in between. Two years ago the legislature split the escheat funds between industrial financing and housing. The housing agency was given power to guarantee loans or make grants for purposes of planning low-cost housing projects. The state's power to lend its credit for that purpose has not been tested but it is assumed that because it is part of the escheat power it will not be tested. It has had mixed effect. No loans have been guaranteed under it but a number of loans have been made under it. So you have a whole mixed bag of things, some of which have been tested, some of which have not, some of which have been voted by the people and some of which have not. When we talk about financing water systems for municipalities or water pollution facilities for municipalities, already the stake is so great and no body is raising a question about it and I doubt that it will ever be tested. I haven't heard anyone criticizing the air pollution authority.

Mr. Carson - Bonds have been issued by the air quality development authority?

Mr. Anderson - Yes

Mr. Hovey - Leaving aside housing, which is obviously controversial, in effect all we are talking about is saving bond counsel from going into court on air pollution and solid waste, where it's problematical whether anything can reasonably be issued. We have a statement by the Chamber of Commerce, which is as concerned with this matter as anyone, that there doesn't seem to be all that much that the state could do that it isn't already doing for industry. Why is it, given those statements, that the administration wants the language changed?

Mr. Robert Baker - If these things will never be tested, then it really doesn't matter whether you amend Section 13 or not.

Mr. Wilson - Let me go back to the point you raised some time ago about the words "OR PROTECT". You noted that this might open the door to the preservation of obsolete or inefficient businesses. Perhaps we would be opening the door to some things which might infringe upon the normal operation of efficient businesses. Should we preserve buggy whip manufacturers in Ohio just to preserve those particular jobs if it is not an efficient business?

Mr. Carson - Mr. Carter did make one point that I would like to emphasize, and that is there might be some small companies that need environmental protection equipment that, individually, are not capable of being financed and they might need some assistance like this to protect existing jobs.

Mr. Carter - To me the most important change in Section 13 would be to add these words "or protect." I don't think we are talking about perpetuating inefficient industries. These are strict revenue bonds, most of them issued by local governments and the bondholder really looks to the credit of the company. There are many companies in the state of Ohio as elsewhere who have been in business 40-50 years and due to the cost of labor rising and the change in transportation facilities, etc. have to build a new plant. It doesn't mean that they have done a poor job, but circumstances cause them to build new facilities or to modernize. The question is not that

you are financing an inefficient industry--I see no way that can be done under a revenue bond because no one will buy it--the question is whether that company will go in Ohio for its new plant or whether it will go down south. We have a very real competitive situation. I would like to see us add those words "or protect" if we did nothing else. Then you are giving Ohio a competitive status with other states. If those words are added, I am impressed with Nolan's arguments that perhaps the rest is not necessary. If we are talking about protection of jobs and the industry has to put in pollution abatement facilities just to stay in business vis a vis moving to some place else, that might solve the whole problem.

Mr. Carson - Let me understand the situation about the company that needs a new plant because the old one is obsolete. If another state tries to lure that company with revenue bonds, I assume that if the other state can sell revenue bonds the company could get private financing in Ohio.

Mr. Carter - Yes, that is true.

Mr. Carson - And the company would still move to the other state to get the advantage of the state revenue bonds?

Mr. Carter - Absolutely. It's one of the many factors that are involved. It's not the sole factor. I'm familiar with a company in northwestern Ohio, a New York Stock Exchange company, that not so long ago we were trying to get them locate their new plant in our community and they finally went to Kentucky and the basic reason was that they couldn't qualify in Ohio for state revenue bonds because this "or protect" wasn't in Section 13. We're saying in Ohio that someone from Kentucky can come and build a plant but someone in Ohio who is not creating new jobs by building a new plant can't get state help. I feel very strongly that the addition of those two words is a very important competitive thing.

Mr. Carson - I have just a fact or two here that I wanted to mention in conjunction with housing. This has been the most controversial part of this ection 13 amendment to the members of the committee. The Governor's Advisory Commission on Housing sees the need for new units for low income people in this state as 487,000. Four years ago, the average cost of one new unit was $14,000 and it is probably higher now. This means that we are talking about at least $7.6 billion in financing to handle that kind of a program in its entirety. Aside rrom the fact that, politically, we all have twinges about whether the Commission proposing something about housing might not have an adverse effect on the other good things we are trying to do in Article VIII, we've been told by Squire, Sanders & Dempsey that they see no purpose to this amendment for housing unless you put the reserve language in. They cannot sell the bonds--the developers who are being financed cannot be financed on a straight revenue bond basis. Without the moral obligation--the implied promise of the state to pay--the bonds cannot be sold. They also say that if you limit this reserve capability to the Section 1 debt limit that would eliminate its utility as far as the revenue bonds were concerned. I have a real philosophical problem with this, when you are talking about 7 or 8 billion dollars worth of revenue bonds, potentially, with no limit, and when we've been very careful in the other parts of our proposal to make sure that we can't have a runaway legislature. I cannot approve anything that broad and sweeping.

Mr. Guggenheim - Would this reserve clause be a permanent commitment when the bonds are sold or would that just be authorized from time to time?

Mr. Carson - It would authorize the reserve and the legislature to make appropriations

to the reserve if the legislature wanted to do so. The legislation that is now in the legislature would require the housing finance agency to determine every year or two years whether there was enough in the reserve that they had received from the developers to pay the debt service on the bonds. If there is not enough they are required to report this to the Governor who then is required, in his budget to the legislature, to ask for an appropriation of enough money into the fund to make the fund adequate to pay the debt service.

Mr. Guggenheim - Would the commitment of appropriations be made with the bonds under this proposed amendment?

Mr. Carson - No.

Mr. Hovey - Let me ask another question in the form of an assertion. I assert that the legislature can pass legislation containing all versions of the reserves that are in the current housing legislation without this amendment.

Eriksson - I disagree. I think the reserve fund is not academic, and that the current legislation would likely be held unconstitutional if it were enacted without this provision. The reason is because the reserve is pledged to the bonds, even though at the time it is pledged it has no money appropriated by the General Assembly from taxes in the fund, I still think that when the General Assembly makes an appropriation to that fund, which has been previously pledged, it is creating a debt of the state.

Mr. Carter - In the Brand case, in 1964, the plaintiff argued that the money being borrowed was not state funds because the state was not obligated to pay off the bonds; therefore the specific limitations regarding debt in the Constitution did not apply. The Supreme Court held that present Section 4 would have no meaning if the restrictions apply only when a debt of the state was created. I would hope, of course, that with the changes we have made in Section 4 that problem would be eliminated.

Eriksson - One more comment about the reserve fund. My recollection from the prior testimony was that it was not really necessary for anything other than housing. The way it is written, it would apply to both housing and environmental pollution revenue bonds, but the testimony was to the effect that it was not necessary to sell the pollution bonds.

Senator Ocasek - I don't hear any strong sentiment in this committee for inserting the housing provision any way.

Mr. Carson - I want to call to your attention that there are two minor matters involving section 13 you might or might not want to fool with. One is that the section number, 13, is going to be still in here and cannot be changed to 6 unless we do something to change it, and the second matter is an outdated paragraph at the end of Section 13 referring to some laws which no longer exist, and other language in the section which is obsolete for the same reason.

Mr. Carter - I move that we recommend to the Commission the amendment of Section 13 to add the words "or protect" in the first line and delete the obsolete language. These would be changes to Section 13 as it presently exists in the Constitution, and not as it appears in the draft which is before you, which has a number of other changes indicated.

Mr. Hovey seconded the motion.

Mr. Mansfield - Will Section 13 be construed as placing a limitation on the new sections--especially the public purpose clause?

Mr. Carson -If you change Section 13 at the same time you propose these new sections, you are raising the possibility that Section 2 doesn't have any meaning. If you simply leave it there, we would explain in the comments that we do mean the public purpose clause to have some meaning and that we are leaving Section 13 basically because of its effect on local government.

Mr. Mansfield - As you know, Section 13 as it now stands has an exception for utilities. Could the new sections overrule that exception in Section 13?

Mr. Carson - I don't think so, because we are leaving it in, and we are, at the same time repealing other sections which we think conflict with the four new sections. The court did find a valid public purpose for having the public utility exception in Section 13.

Mr. Mansfield - My question at the Commission meeting did not relate to the validity of excepting utility construction from state industrial financing under Section 13, rather it was directed toward making sure that pollution abatement facilities would be permitted for utilities if Section 13 is amended.

Mr. Baker - If you let Section 13 alone, it will still prohibit any lending pursuant to Section 13 for pollution control equipment for utilities. If this Commission's amendments are adopted, sections 1, 2, 3, and 4, it isn't clear to me why that lending cannot be permitted by the General Assembly, even though it is prohibited under Section 13.

Mr. Carson - If this Commission proposes to the voters sweeping amendments to all the other sections in Article VIII and leaves Section 13 alone and that public utility exception remains in Section 13, it is hard to understand how the Court would permit the General Assembly to finance structures for utilities.

Mr. Guggenheim - How about pollution abatement facilities?

Eriksson - If issued under Section 13, I think such money could still not be available to utilities.

Mr. Carson - But under 2i, which is apparently where the authority for water pollution facilities for industry comes from, there is no exception for utilities.

Eriksson - If the legislature should determine to use part of the general obligation debt authority of the state as proposed in the Commission proposal for Article VIII instead of revenue bonds under Section 13 for pollution abatement facilities, or for any other purpose, then the exception for utilities in Section 13 would not apply.

Mr. Hovey - Perhaps we should drop the public utility exclusion if we are going into Section 13 anyway. It would always be optional with the utility whether they entered into this sort of agreement, and the way you present it to the voter is not that we are trying to help utilities but that utilities are bad polluters.

Mr. Mansfield - The purpose of the exclusion was to keep publicly-owned utilities--municipal, cooperative, whatever they may be, from borrowing money from the state

and building transmission lines or whatever and then being in competition with the private utilities.

Mr. Hovey - We could then simply add this language "except facilities used primarily for pollution control" and then keep the exception.

Mr. Mansfield - Yes.

Mr. Carter - I would amend my motion to do that.

Mr. Hovey - I would amend the second.

Mr. Mansfield - I think, by doing this, you remove a great deal of the force of what Mr. Baker said, because it is clear that you are re-enacting it if the people go along with it.

Mr. Carson - I'm not sure I understand. The Supreme Court said that the reason for the exception for utilities and the reason they went along with it was because the purpose of the section was to create jobs and utilities have franchises in their areas and if a utility gets state money to build a facility it can only be taking jobs away from another utility. I think that is how they justified it.

Mr. Hovey - The location of generating facilities for gas and electricity is footloose. They do not have to be located close to the user of the product because the technology of transmission is so advanced. So it doesn't make any difference about the transmission line losses over the Ohio River. A plant can locate just as easily in West Virginia as in Ohio and serve his customers. And that involves jobs in Ohio and tax base in Ohio. We're talking about $300 million facilities, and there are going to be about 1 a year of those things, and they can be located just as easily in West Virginia or Kentucky as in Ohio.

Mr. Carson - Section 13 goes far beyond the state of Ohio. If we repeal Section 13 we would take out the underpining from those local municipalities and their bond issues. I don't think this committee was willing to do that. We also felt that this is a good authority, the voters have adopted it, and we think it is good to keep it. The only question is, do we want to change it? Bruce, do I understand that you do not want any revenue bonds issued by any agency of the state of Ohio used to finance the construction of any public utility facility? Other than for pollution facilities?

Mr. Mansfield - Yes, that is correct.

Mr. Carson - You want that specific possibility--to finance pollution facilities?

Mr. Mansfield - Yes.

Mr. Carter - Is my amended motion on the floor? It does three things--(1) the addition of the words "to protect"; (2) elimination of superfluous language in several instances and (3) before the public utility exception, add the words "except for facilities used primarily for pollution control."

Senator Ocasek - As I understand it, that keeps the prohibition against using state revenue bonds for utilities except for pollution control facilities.

Mr. Carter - Correct.

Mr. Carson - With respect to Dick's language "to protect," I wonder, really, how big a problem it is in Ohio? Do we really have so many situations where you may have an industry with an outmoded plant and needs to have it replaced? Is that a big enough problem to have a constitutional amendment? And is this really necessary;, this authority for pollution control facilities for utilities?

Mr. Carter - My feeling is that adding these words "or protect" really brings in the environmental protection projects anyway, since most pollution abatement devices are necessary, not to create new jobs for prople, but just to keep an existing industry in business. If we're going to do that for industry generally I see no reason to exclude utilities. So it makes sense to me to do just what we're talking about. We're not saying that the state can float environmental bonds only for utilities but merely giving an affirmative statement that this can be done if the other can be done.

Senator Ocasek - We should not deny utilities when we are willing to give it to everyone else.

Mr. Mansfield - Of the aggregate cost of pollution control, a large portion will belong to the utilities.

Mr. Hovey - If it only makes the difference of one power plant in Ohio or West Virginia or Pennsylvania, it will mean $6 million yearly in taxes.

A voice vote was taken on the motion, which passed with one "NO" vote.

Mr. Carson - Let us consider changing the section number since we can only change it by amendment and we will end up with a gap from section 5 to section 13 in Article VIII.

Without objection, the recommendation will include the section number change to section 6.

Mr. Carson - Do any of the guests have any comments to make? I'm sorry that I did not ask for your comments before we took the action.

Mr. Norman Baker - We had a statement from the Chamber which I will read, since you are not adding housing.

Mr. Anderson - We were prepared to make some comments on the housing situation, but since you are not dealing with that, we have nothing to say.

Mr. Mansfield - Will we vote on section 13 and add it to the package voted on at the last meeting or will we vote on the whole package again?

Mr. Carter - We have already voted on the first five sections, and we will have a separate vote on section 13 as an addendum to what we've already acted on.

The meeting was adjourned until 9:30 the next morning.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
August 25, 1972

Summary of Meeting

Present at the meeting were Chairman Carson, Messrs. Carter, Wilson, Mansfield, Guggenheim and Senator Ocasek. Staff members Eriksson, Nemeth and Evans were also present. The chairman opened the meeting by calling attention to the public hearings held last summer on Article XII. A summary of that testimony has been mailed to all members, also a review of some of the tentative conclusions the committee made several months ago of some of the least important sections of Article XII. He noted that, after a brief review of the sections in Article XII, the committee would get into some discussions of Section 2, and determine what additional research, studies, factual data and so on it would like to have the staff work on. The committee is in no position yet to make any decision on at least Section 2 of the Article. He noted that each member had received a considerable amount of material on Section 2 from the staff.

Mr. Carson - First of all, there is a provision in Section 1 of Article XII that prohibits the imposition of a poll tax or requiring service which may be commuted in money if services are not performed. This was put in the Constitution in 1912. Today, people think of a poll tax as being a tax on the right of franchise which this was not intended to be. It was a head tax - $3 a head, I think - and back in those days it was customary that if the man worked on the streets of a city or village that he wouldn't have to pay the $3. My father did this. He worked on the streets and got, I think, $1 a day. So this was put in the Constitution in 1912 because they thought this sort of head tax and the servitude connotation working it off were not currently popular. I think our tentative conclusion on Section 1 is that we would not recommend a change, because people might think it means a tax on the right of franchise and here we are eliminating the prohibition from the Constitution and secondly, we're not sure that a head tax is a proper way to impose taxes in Ohio. So we had concluded that this should remain in the Constitution. If there any discussion on that? No one has suggested that we repeal it, that appeared before the committee.

Mr. Carter suggested rather than taking piecemeal action, going through the Article and then coming back.

Mr. Carson - All right. No tentative conclusion was reached on Section 2, since this is such a complicated section.

Article XII, Section 3 was repealed in 1931. Section 4 provides that 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. The recommendation was then that this provision be retained. I think we did suggest that it might more properly go in Article VIII although it could go in either Article XII or Article VIII. We didn't include it in Article VIII, however, when we recommended our revision. We have also had no testimony suggesting that this be changed or repealed.

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. I think our recommendation was that it be retained that the legislature does in fact earmark the purposes for which taxes are collected in the state. We recognize that it is easy to circumvent this by using broad language. I think that we thought this was a useful provision and one that there was no reason to change.

Again nobody had suggested that it be repealed.

Mr. Mansfield - May I come back to Section 4? Does that mean that there's a prohibition against deficit financing? If taken literally, what this says is that the General Assembly has to provide sufficient revenues to defray the expenses for each year.

Mr. Carson - This is so except to the extent you have permissible debt.

Mr. Mansfield - So far as operating is concerned, this would seem to prohibit deficit financing. We always have a balanced budget?

Mr. Carter - Yes, the Constitution demands it.

Mr. Carson - Section 6 - except as otherwise provided in the Constitution, the state shall never contract any debt for purposes of internal improvement. This was adopted in 1912 and the feeling of the committee then after understanding the reason for inserting this in the Constitution was that we feel that this might be properly deleted. The words "internal improvement" mean a state improvement project such as a canal or a state-owned railroad, something like this and the reason for putting it in was because the state had been in the canal business. The canals were prosperous for about 12 years and then the railroads took over the business, so it was not a very attractive venture for the state. We recommended repeal, since this section is redundant and repeal of Section 6 of Article XII was included in the Article VIII proposal. Section 6 of Article XII would be repealed as part of that package.

Section 7 was put in in 1912 to specifically authorize the imposition of an inheritance tax and it permits that it may be uniform or may be graduated and it provides that a portion of each estate of $20,000 may be exempt from taxation. Our thought was that the section be deleted. We were advised that the legislature has inherent power to impose any kind of a tax so long as the Constitution does not prohibit the imposition. So long as it doesn't violate equal protection or other sections of the Federal Constitution. We also thought that this $20,000 exemption provision was unduly statutory as a constitutional provision. So I think that we thought that this could be deleted as not needed in the Constitution. The scheme throughout is that in dealing with these tax sections that we would have either a schedule to Article XIII or a savings clause would be added to make it clear that our purpose in repealing these was not to repeal the authority, merely to dispose of unneeded authorizations.

Section 8 on the income tax is a similar provision. This was put in in 1912 to authorize the imposition of an income tax and again they added language permitting an exemption of up to $3,000 a year. Julius has prepared and you have in your materials a memorandum describing the important aspects of the debate in the 1912 Convention, on these subjects. There seemed to be no discussion on the real need. I think they were assuming that at that time there was a need to have specific authorization in the Constitution for an income tax or an inheritance tax, a franchise tax and an excise tax. These were passed really without any debate on the need for the sections. They were just assuming that they had to put it in the Constitution if they wanted to do it. That was a rather progressive convention and they were quite intrigued with the idea of an income tax and its graduated feature, as I understand from the Debates.

Mr. Mansfield - Did your committee ever consider the possibility of deleting a portion of those sections dealing with specific dollars?

Mr. Carson - Yes, and I think that had been suggested as one alternative.

Mr. Mansfield - I haven't studied this but off hand it seems to me that it might be a very good thing to leave the first sentence of each section.

Mr. Carson - I think that we were guided in this not by any intent to change anything but to try to delete from the Constitution unneeded material. Legally the legislature can impose these kinds of taxes.

Mr. Mansfield - I see a note that there is some doubt that these taxes can be graduated without specific constitutional provision.

Mrs. Eriksson - I think it might be wise for the committee to reconsider that decision if there is a feeling that authority for a graduated tax should be maintained in the Constitution. There is substantial doubt that the tax could be a graduated one if that language were not in the Constitution. We have written a memorandum on this, and it might be advisable not to take final action until you have considered this graduated question.

Mr. Carson - Assuming, however, that the committee did want to delete all the specificity and did think it wise to include a section making clear that the power of taxation is in the legislature, could graduation be included?

Mrs. Eriksson - I am not sure that a savings clause would be the appropriate way to give the legislature specific power to do something, such as provide for graduated taxes, which might otherwise be held to be unconstitutional.

Mr. Carson - Let us have the staff look into all four of these sections and come back to us with an itemization of our options here.

Mr. Carter - Bruce, for your information, the judgment reached earlier is that provided you didn't put a restraint on the legislature they had the inherent authority to enact these taxes. At the time we took that action, we also felt they had the authority to graduate taxes but I understand now that there may be other restrictions in the Constitution, in some of the general things, that raises a question in this matter.

Mrs. Eriksson - There are one or two other things about the income tax that we are working on. One is the question of adoption of federal definitions on a prospective basis, and whether this is an unlawful delegation of legislative power.

Mr. Carson - My suggestion has been that the staff give us at our next meeting if possible a memo on our options available in dealing with Section 7, Section 8, and Section 10, excise and franchise taxes. Let's consider all of them because I think the same principle is involved. I don't think that any of us want to do anything that would cut down the taxing options that the legislature has under these sections, but I may be wrong.

The next one is section 12 which prohibits the imposition of sales tax or use tax on food. This was inserted in 1936, about the time the sales tax was introduced in Ohio. I think our tentative thought on this was that it should remain in the Article.

Senator Ocasek - I would cast a dissenting vote. I don't think prohibitions on taxes should be in the Constitution. It would be difficult to get it out. I know the political implications but it isn't good to keep putting definite prohibitions in. It belongs in a statute, not in the Constitution. There are about 20 other exemptions in the sales tax which are not in the Constitution. If you follow that logic, we should take them out of the statute and put them in the Constitution.

Mr. Mansfield - I would dissent from your dissent. It seems to me that just because you have a prohibition on one thing doesn't necessarily mean that you ought to follow that same idea with respect to other exclusions.

Even though the legislature has the power to make any exclusions not prohibited by the Constitution, in this one the people said to the legislature,"You may exclude anything you please but you've got to exclude this."

Senator Ocasek - What is the logic for exclusions being in the Constitution? That's what I am asking.

Mr. Mansfield - Just to make sure that the people will control the legislature.

Senator Ocasek - Well then I'll come back and say that there shouldn't be a sales tax on Bibles, for instance. On this same logic, I should put it in the Constitution and fight for it to make sure the legislature doesn't tax Bibles. I don't want that started or we're going to have 50 exemptions in the Constitution.

Mr. Carson.- You'll notice the words in Section 12: "On and after November 11, 1936...." Our thought was that if we weren't going to make any substantive change we shouldn't even bother to take that clause out. In a real revision, I guess you would delete language like that.

Going on to the other sections, in addition to Section 2 which we have already mentioned, there is Section 5a which is the provision that was adopted by initiative petition in 1947 prohibiting the use of any moneys collected from gasoline taxes, and other vehicle taxes and fees for any purposes other than highway purposes. I think in one of the memos that we sent around that there were mentioned the different options we have in dealing with this subject: one would be to leave it the way it is; I am sure there will be substantial interests who would like to have it left the way it is. Also some rather forceful expressions indicated, however, that this is too restrictive a limitations on how these moneys can be used. The point most forcefully raised is the future needs of mass transit of course I understand Akron is deeply into this problem. We are in Cincinnati. Cleveland has been and the smaller communities are going to be in it too, I am sure. So it would be possible either to leave the section the way it is, to add some additional purposes in addition to highway purposes such as mass transit or other transportation related functions. Thirdly, you could add a clause which would keep the intent of this in the Constitution but say "except as otherwise provided by law" these moneys should only be used for highways. Which would really leave the decision to the legislature, permit them to deviate for any proper public purpose. Fourthly, I guess you could repeal the section. Those are the options. We have reached no conclusion. I personally feel, however, that this section is much too restrictive. It was passed at a time when we had no expressway in the State of Ohio, 1947, and I think something like 25% of the revenues in the State of Ohio come from these various types of highways and fuel tax revenues.

Senator Ocasek - This is most regrettable that we have to ignore one of our serious problems, and I will tell you that I would hope this committee would at least dare to suggest a change because the chances in the legislature are very slim. The lobbyists want to retain it for highway uses. How did we get around it with the transportation center? We permitted in that research center language about mass transit, airplane, all kinds of stuff besides motor vehicle. It was bond issue money.

Mrs. Eriksson - But the highway money is restricted to highway purposes. The transportation center can issue revenue bonds insofar as they have arrangements with persons wishing research to be done, these moneys to repay the bonds don't come from state taxes, but from contracts.

Mr. Carter - Getting back to 5a, I'm not sure that if you take a judicious course and try to make use of the automotive moneys for mass transit that you are going to meet opposition. It is my understanding that some of the people who were responsible for getting this in the first place are receptive to that. I think we should take a hard look at 5a.

Mr. Mansfield - Quite a few people in Akron during this recent campaign indicated their intention to vote against the proposed property tax levy on the basis that they were for a decent mass transportation system but didn't think it should be put on the property owners. So I think there is a lot of feeling that mass transit is directly related to automobiles.

Senator Ocasek - Your editor of the Beacon Journal pushed me into this bill. He did a lot of research in Michigan--they had the same exclusion in the Constitution but the Supreme Court had winked the eye at it and in Michigan they are subsidizing mass transit. The court said that mass transit was related to motor vehicles. Our court hasn't said that.

Mr. Carson - The one concern I have about using words such as "mass transit" is that we do have many counties in the State of Ohio where people would not expect to be benefited by mass transit; they think of it as an urban problem.

Mr. Wilson - Maybe it should be in terms of improvement in transportation.

Senator Ocasek - We did pass one, you know. We refunded some of the gas tax to the buses--a quarter of a million dollars statewide.

Mr. Carson - One thing I would like to ask the staff to do for us. Specifically, how much these taxes mentioned in 5a amounted to in the last fiscal year? Secondly, my understanding is that most of this money has been gobbled up for debt service on the highway bonds that are outstanding. It would be helpful if we knew, I think, whether this is all earmarked for the bonds over the next few years or when some of it might become available for other uses. It may be an academic thing today that we're talking about. I doubt there is very much available. Once you get all the highways built, then the funds should start to pile up a little bit.

Senator Ocasek - There is now talk about a 2¢ gas tax increase. The first time we did not have enough money pledged from the gas tax to retire the bonds and we had to dip $20 or $30 million dollars of general revenue money to pledge for the retirement of the bonds. Now Director Richley says that we're losing a couple of hundred million dollars of federal highway construction money this biennium because we had

to take operating money to retire bonds. We've never had that problem before. Have we heard about this lately?

Senator Ocasek - Our gas tax distribution is so complicated I have difficulty in figuring it out. This is the first time I'm aware of this happening--not having enough to pay the debt, so we took some general revenue money to do it. I think we ought to look into that. I don't want to get more debt than we can pay off.

Mr. Carson - We should have some information on this. Perhaps we could ask the truckers, the automobile club, and other groups that might have an interest in this to give us a statement.

Senator Ocasek - As a politician reads his mail, he will agree with what Bruce said, that most people want their gas tax money to go for highway purposes. I am in favor of an amendment to it but we've got a big selling job to do in the State of Ohio.

Mr. Carson - Are there any other questions on 5a? Section 6. I guess we touched on that briefly before--no debt for internal improvement. We have already acted on Section 6, to repeal it.

Section 9--apportionment of inheritance and income taxes. At the time we were considering this, the income tax had not been passed, but there is a lot of talk about the problems under this section on the return of the moneys. I think that the options that we thought we had available under Section 9 were No. 1 leave it alone; No. 2 repeal it; No. 3 to clarify it, and a fourth one to strengthen it.

Mr. Wilson - I'd like to make it do what the Constitution says. Instead of permitting the General Assembly to say that some of the money in the local government fund is now income tax money instead of the sales tax money that was in there before, and thereby retaining more money in Columbus, I think that most interpreters would say that any tax on any income would fall into this category and half of all such created new money would go back to local governments. Also, I still think that it's wrong to call the tax on corporate income a franchise tax and exclude it from this constitutional provision. I still think that's wrong. Local government has the short end of a pretty long stick, when they started substituting income tax money for other moneys already coming back to local governments.

Mr. Carson - We're starting fresh on these. I think we felt at that time that the very least that we could try to make it clear what was meant here. I had thought there were three problems in this section: one, how must the money be returned? May it be done in kind, or through appropriations? I feel that this is an uncertainty in here. Another uncertainty I thought was whether the franchise tax based on income is an income tax, or isn't it? I also thought there was uncertainty as to whether the legislature did have the full right to determine exactly whom this goes back to.

Mr. Glander - My recollection is that the constitutional provision says "as provided by law" and the legislature has enacted legislation so I am not so sure that there is any uncertainty as to the power of the legislature. There may be some uncertainty as to statutory language. May I bring up another question? It's a question of constitutional language on income tax as a matter of law, whether or not a tax measured by income is the same as the tax upon income. The position I have taken as I have expressed to this committee is that a tax measured by income does not technically become an income tax. If you want to clarify that to be measured by income is an

income tax, then you would have no question about that. This is a policy matter. I was asked this very question by the Task Force, did some research, and it was substantially to the effect that a franchise tax measured by income does not fall within the Constitutional provision.

Mr. Carson - On Section 9, perhaps the committee would like to have a staff memo exploring the legal problems, and the uncertainties. Perhaps Mr. Glander's opinion could be incorporated into it.

Mr. Glander- Yes.

Mr. Carter - Just one last comment. I do think that we should keep in mind at all times that we are writing a Constitution. We're not writing statutes, which is one of the problems we get into in the tax area, trying to make judgments that are properly statutory matters. I do think we should not overlook this question of, is it appropriate for a Constitution to try to take this kind of action?

Mr. Mansfield - In your judgment, what makes it improper?

Mr. Carter - I would like to, if I may, read one sentence to you that I read to the group last night before Bruce got there. It explains what I'm talking about. In the Hawaii report, commenting on constitutional writing with respect to finance and taxation, it says "one commentator submits the problem of what to include in the article on taxation and finance is a test of one's belief in our system of representative democracy, and that those who argue for constitutional checks are admitting a lack of belief in the capacity or desire of representatives of the voters to establish and maintain an equitable system of financing public expenditures." Now in that context I think this is a basic question that we are dealing with. Is this kind of provision--50% should be returned to the local government--appropriate for the Constitution or is this something that should be left up to the legislature? We're talking about 50 to 100 years in the future. Will this be applicable and what is local government? Our local government committee is dealing with regional governments now. It may be that as the structure of government changes the 50% thing could have little meaning to reality in 50 to 100 years from now. My opinion is that it is appropriate for legislative judgment.

Mr. Mansfield - You can always change the Constitution. It's a judgmental problem, not an inherent problem, how many restrictions people would like to put on the elected representatives. We all have opportunity to vote for candidates and it is pure coincidence if he agrees with you on what he votes for. So even if you may want to trust the legislature there may be limitations you want to place.

Mr. Wilson - The mere fact that, in my opinion, devious means were found to get around the constitutional requirement on this return of income tax to local governments further strengthened my belief that there should be some restrictions or prohibitions in it.

Senator Ocasek - This takes me back to the very first meeting of this committee when Joe Bartunek said we should write what we feel is basically right. A sales tax on food exclusion. That's a statute. Earmarking a lottery for education. That's a statute. But why do you do those things? You want a Constitution to be accepted, and I take the position that I want to write stuff here that can be sold to the people. I try to amend it as little as I can in order to give some flexibility.

But I have to agree with my colleague. The legislature is frustrated in trying to meet the needs of the people of 1972 society with a 1912 Constitution. So I'm the author of the hybrid bond and if that isn't circumventing bonded indebtedness, I don't know what is. I plead guilty but you know these devious things are done. We do them publicly because we're trying to get some money in the pot and it is very difficult to amend the Constitution.

Mr. Wilson - As you get closer to the people, I think you have to get more nitty and gritty so that a Constitution cannot be just a high statement of principle. State constitutions have to be a little more precise than the federal. When you get down to local ordinances and resolutions or parts of city charters which sometimes get voted upon, they're very detailed.

Mr. Guggenheim - It's very unfortunate that we can't write the kind of Constitution that Bartunek and I would like to see in Ohio.

Mr. Carson - I am one, frankly, who thinks there should be some controls over the legislature. And as you may know from the deliberations on Article VIII, I felt very strongly that the controls we have in Section 1 be there, that we just can't permit a totally unlimited amount of debt. I don't want the people in the room to think that everybody on the committee thinks that if we had our way that there would be no restrictions in the Constitution.

Mr. Guggenheim - I wish we could just put down general principles which is the way a constitution should read.

Mr. Glander - I hope I may be pardoned for intruding on this discussion. I would call attention to a case that is referred to on the second page of Research Study No. 15. The Supreme Court said that the power to tax is an attribute of sovereignty and in this state is included in the general legislative power which is conferred by Section 1 of Article II of the Constitution without limitation. Now my only footnote to that is if as a matter of policy you think that people should reserve some authority to limit then it has to be in the Constitution. If you want to give carte blanche to the General Assembly then you take out the limitations.

Mr. Wilson - Our Constitution has developed over the years into a complex document with a number of limitations. If we had one that was nearer to the pure philosophical aspect, it might be easier now to keep it clear. Because we have so many limitations, I don't think that in any manner, shape or form we could sell to the general public a broad philosophical statement of rights. We're going to have to come to some place in between the two, one which does include some of these limitations.

Mr. Carson - On this Section 9, are there any other questions that committee members have? That they would like the staff to give information on? I have suggested to them that they come back to us with a memo on what the problems are with the present language. There are additional policy questions. You might want to repeal it, you might want to change it. But it seems to me that this is a policy question. I'm not sure that this is a staff research project.

Shall we go on to Section 11? This is the one that provides that no bonded indebtedness of the state or any political subdivision shall be incurred or renewed unless the legislation under which the debt is created provision is made for levying annually by taxation in amounts that pay the interest on said bonds and provide a sinking fund for their final redemption at maturity. You may recall that Mr. Gibbon

of Squire, Sanders & Dempsey talked to us a year ago and his major suggestion is that we consider repealing Section 11 or changing it in some fashion so that we eliminate the problem of the implied debt limit - I think it was the Kountz case, which created the indirect debt limit when Section 11 is taken with Section 2. I have reread some of the transcript of testimony and I don't really understand why a local government bond issue supported by assessments, say a sewer assessment, must be supported by taxes and yet a state revenue bond is totally exempt from the same requirement.

Mrs. Eriksson - Most of the local government bonds issued under such circumstances are issued as general obligation bonds of the municipality even though they are supported by assessments. They are issued as general revenue bonds. The indirect debt limit question is very complicated, and we are planning to prepare a separate memorandum on that. There has been some development in H. B. 475 with respect to this whole question of debt limit because there's now a provision that an income tax can be used by municipalities as guarantee. You see Section 11 does not say that the tax has to be a property tax. The income tax hasn't been felt to be available as a guarantee of bonds because of the possibility that the state was always going to come in and pre-empt that tax. H. B. 475 now makes some provision for municipalities using income tax. I want to find out a little bit more about that, how that will work, and I thought I would prepare a memo for the committee on this question.

Mr. Carson - Good. You might just make a note, if you wish, that there are two other sections that really relate to the same subject. You have Section 2 of Article XII and Section 11 of Article XII and then you have Article XVIII and Article XIII, I believe. There are other sections dealing with the legislature's power to determine what taxes and what debt local municipalities may have.

Mrs. Eriksson - That is correct. Debt is regulated by statute. This is the indirect debt limit which means that there's also the ten-mill limitation regardless of what the legislature says.

Mr. Carson - I think one of the recommendations is that we might consider repealing Section 11, and then Article XIII, Section 6 will permit the regulation of municipal debt. It provides that the General Assembly shall provide for the organization of cities and restrict their power of taxation, borrowing money, contracting debt and loaning their credit. One suggestion had been that we might repeal Section 11 and incorporate in Section 6 of Article XIII something like we did in our Article VIII revision requiring the legislature when it creates debt to provide for its repayment. That's what Section 11 does. It requires that when debt is issued you've got to provide for its payment. So if you repeal Section 11, you may want to retain that theory but you may want to put it over into another section.

Mrs. Eriksson - The concept of there being a constitutional requirement that local government has to provide for repayment would strengthen local government debt.

Mr. Carson - But if you do just repeal Section 11 you might put that in in a more appropriate place.

Mr. Carter - I thought it might be helpful to bring us back to where we were, by reading Mr. Gibbon's comments on Section 2 and 11: "The restrictive impact of Sections 2 and 11 on financing capabilities of various Ohio subdivisions is a currently pressing problem. Taken together, the two sections amount to an overall debt limitation to be serviced by the ten-mill limitation. Accordingly it has been

impossible to finance viable and much needed self-supporting projects such as sewer and water facilities because of the remote possibility that taxes required to be provided by Section 11 might at some future time be levied to pay debt service charges on the bonds and that such taxes could not be levied within the ten-mill limitation." That's the problem that he was talking about. He goes on to refer to Article XIII, Section 6 and Article XVIII, Section 13 and he concludes that the General Assembly has specifically exempted the financing of self-supporting facilities from the municipal debt limitation but the 10 mill limitation has frustrated the will of the General Assembly and blocked a substantial number of feasible projects. I think that's a pretty good summary of the problem that we are dealing with.

Mr. Carson - I think a memo on this will be very helpful, including Section 2 of Article XII, Section 13 of Article XVIII, and Section 6 of Article XIII. They are all related and it would seem to me that if we want to do anything we might want to put them into one section.

Mr. Mansfield - Our chairman mentioned the fact that Section 11 of Article XII was the section requiring a sinking fund for retirement of principal and yet to go back to Article VIII, Section 7 so there must have been some reason why they had two different sections and it is not apparent on the face of the language.

Mr. Carson - Let me go to one other question that doesn't relate to a section, the question of pre-emption. We had discussed this at some length.

Mrs. Eriksson - We are going to prepare a memo on pre-emption.

Mr. Carson - The present Constitution does not, as you all know, include any provision with respect to the pre-emption question when the state levies a tax whether the local governments are prohibited or not from imposing the same kind of tax. It is something that has come from case law from the Supreme Court, and I think we thought we should investigate whether or not we should try to write a pre-emption clause which would make it clear without having to rely on court decisions what the state policy should be. I don't think we had reached any conclusion but we felt we should examine the subject to see whether it would be a proper thing to include or recommend. So we are going to get a memo on this subject.

Senator Ocasek - How would you write this?

Mrs. Eriksson - I think the proposal would be a statement in the Constitution either making it clear that when the General Assembly enacts the tax it does or does not pre-empt local governments from using the same tax, or saying that the General Assembly must specify whether it intends to to pre-empt. It wouldn't deal with specific taxes.

Mr. Glander - The General Assembly has the power at any time to say in a specific piece of tax legislation that nothing herein contained shall pre-empt the power of municipalities from levying a tax. They did exactly that in the income tax law that was passed.

Mr. Carson - And it also has the power to prohibit local governments from using a particular tax source.

Mr. Glander - There are two specific provisions, you mentioned one of them a moment ago,

in the Constitution. But this other, which you have correctly designated as a judicial statement, is the case of Zielonka v. Carrel, in which the Supreme Court enunciated the doctrine that when the General Assembly enters a particular tax field then by implication municipalities were precluded from the field. But there have been a variety of reasons expressed in the decisions. It came down finally in the Toledo case to the simple question of whether or not there was legislative intent. That is the basis of the doctrine. The General Assembly can always negative its intent to pre-empt.

Senator Ocasek - Are you telling me that if the legislature didn't pre-empt the field that there are court cases that say when the legislature does enter the field they do automatically pre-empt?

Mr. Glander - That is the case.

Senator Ocasek - I think we better do something about that. Give me an example of a case where the legislature entered the tax field and the court inferred that was pre-emption.

Mr. Glander - The most recent is one in which Youngstown sought to levy a consumer utility tax. That tax was knocked out by the court on the grounds that the state had entered the field by enacting the public utility gross receipts tax and offered a kind of twisted argument to the effect that, having levied a sales tax and exempted public utilities, the General Assembly intended the gross receipts tax to occupy the field.

Mr. Carson - Were the income taxes on the municipal level litigated?

Mr. Glander - The Toledo case was. There the issue was, since the Constitution said that the state could levy an income tax, did the constitutional provision pre-empt the income tax for the state even though the state had not actually levied such a tax? The Supreme Court said, in that case, that, until the state levied the tax, there was no pre-emption. The important point is that the doctrine of pre-emption rests primarily on legislative intent.

Mr. Carson - The legislature can always make it clear, either way.

Mr. Glander - And they did so in this latest tax legislation. There has been much dispute about the doctrine, but there it is.

Senator Ocasek - If the legislature means to pre-empt I think they should say so.

Mr. Carson - We will receive a memo on this subject. We have a local government committee which is very much interested in the things we are talking about here and there may be a conflict of jurisdiction, especially when we talk about Section 2 and the indirect debt limit. We should think about whether we have a joint meeting or meetings with them; whether we first get our minds in order and reach some tentative conclusions before meeting with them. Dick, I wonder whether you have thoughts on how it should best be handled?

Mr. Carter - I think it would be much better if this committee were to take the initiative, possibly even make some recommendations, and then to have a joint meeting with them. That would be better than trying to do the brainstorming together--it would be better to get input from them when we have some specific ideas of our own.

Mr. Carson - How deeply have they gone into the financing?

Mr. Carter - Very little. Their principal activity at the moment is trying to deal with structure of local government.

Mr. Carson - Going back to Section 2, which we have avoided so far, there are a number of problems in that section. Some minor ones, you will notice. In the middle of the paragraph are references to bonds outstanding in January 1913 and we've been advised that that part could be repealed, without making a substantive change in the Constitution. The last part of Section 2 contains the laundry list of exemptions. When you read the section, if there is any desire to amend it at all, it seems to me that the order of all this might be changed. It would read better if the last part of that section were really at the beginning of the section. Keep this in the back of your mind, and I think the memos we sent out last fall describe how it might be rewritten, to make it flow more logically.

The four major substantive aspects of this section revolve around the 10-mill limit (the 1% limit), the meaning of "true value in money", the uniform rule, and the exemptions. It has been suggested that the exemptions have been carried to some extreme in Ohio. In some of the materials which you received, there were some materials on exemptions, including a copy of a Western Reserve Law Review article proposing that exemptions be eliminated completely. We also have data from the OPEC and from the Board of Tax Appeals on the extent to which exemptions have increased, and the amount of money we're talking about.

The chairman introduced Mr. Edwin Ducey, Chief of the Division of County Affairs of the Board of Tax Appeals, to join the committee and make some remarks about Section 2, indicating the problems and how severe they are.

Mr. Ducey - With respect to the problems with Section 11 and the indirect debt limit, perhaps some history would be valuable. We operated in Ohio for many years after the adoption of the 1851 Constitution and until 1911--with an assessment system that required all property to be taxed by uniform rule, but the rate varied from taxing district to taxing district. We also had decennial appraisals during that period of time. There was no constitutional limitation on tax rates. In 1910, Ohio adopted its first statutory limitation--the Smith 1% Act. During that time, and until the Griswold Act of 1922, the bonds that were issued were term bonds, and you had a sinking fund which meant that the subdivision was supposed to levy sufficient money and place it in the sinking fund each year to retire the bonds at maturity. This led to some confusion in the state and in the political subdivisions because this often didn't happen, and led to refunding the bonds, etc. The city of which I was once city manager, for example, issued bonds for street improvements and the streets were worn out and many times the original cost spent in repair before the bonds were due, and the amount had not been accumulated to pay off the bonds. So with the adoption of the Griswold Act came to a time in our history where we can only issue serial bonds--they must be retired in substantially equal annual or semi-annual installments. At the same time, we adopted the Uniform Bond Act which specifies the maximum maturities for various types of municipal bonds. What we are talking about in this Portsmouth v. Kountz decision in connection with Section 11 of Article XII is this: in 1934 we adopted a constitutional amendment providing that no property taxed according to value shall be so taxed in excess of 1% of its true value in money--which is the present provision. At the same time the legislature has consistently and more recently has upped the debt limitations.

In the Portsmouth v. Kountz decision, in 129 O. S., the Court said that when you adopted a constitutional limitation on the rate, at the same time you adopted an implied limitation on indebtedness or the right to issue bonds. When we adopted in November of 1933 a constitutional amendment which reduced our tax limitation from 15 to 10 mills, without vote, we also adopted the first act providing for the school foundation program. This act brought into Ohio law for the first time a provision you presently find there in Division (D) of Section 5705.31, the statute providing for a minimum guarantee for subsidy. When we reduced from 15 to 10 mills, it was necessary to say how you were going to split that 10 mills up. So the schools conceived the idea of such a statute as this which would say that each subdivision was entitled to receive under the 10-mill limit 2/3 of the average amount it had levied for operations and debt service under the 15 mill limit. Now municipal corporations may incur unvoted debt, according to the statute, to 4½% of the the value of the tax duplicate. If the total assessed value of property is $10 million, the city could incur debt without vote of the people to $450,000. The tax duplicate, which is the base, includes real estate, public utility, and tangible personal property. These are the elements on which taxes are required to be levied by uniform rate. But even though that city in the example could incur debt to $450,000, but at the same time it (the legislature) has said that you are limited in issuing bonds for the acquisition of real estate, to 30 year maturity. You are limited to 25 years for bonds for the acquisition of fireproof buildings under the Uniform Bond Act, Section 133.20 of the Revised Code, and the limit is 10 years for providing furnishings and fixtures within a public building. So suppose the bonds were issued for a period of 20 years, so you have $22,500 falling due each year, and the city's share of the inside millage is not sufficient to pay off the bonds, so the court has said that even though the legislature has said you may issue that amount of bonds, you have to look at Section 11 which says no debt may be incurred without levying a tax. So you do not have the ability to pay off the bonds without a vote of the people for a levy outside the 10-mills.

The Uniform Rule is receiving the most attention presently. Park Investment is a common word in Ohio. It started first in about 1961 as an action by the Park Investment Co. in Cuyahoga County against the Board of Tax Appeals. The contention of Park Investment was that commercial property in Cuyahoga County was assessed at a higher percentage of its market value than other classes of property. This contention was supported by a study of sales that had been made in Cuyahoga County over the years. The contention arose out of different interpretations of Chapter 5713, which deals with assessing real property and Chapter 5715 , dealing with authority of county boards of revision and the supervisory authority of the Board of Tax Appeals. The county is the unit for assessing real property, with the exception of one very brief period in our history, 1913-1914. The county auditor is the assessor, by statute. In 1925 we adopted the McDonald Act which requires the assessing every six years, rather than the previous decennial appraisal. And since 1947, with the Yoder Act, the statute says not only once in every six years but once in every six-year period because you could not, in the larger counties, actually meet the statutory requirements of viewing and appraising and making physical inspection of every parcel of property, listing that property and getting it on the tax list, in a single year.

Mr. Carson - So you can have a three-year assessment program?

Mr. Ducey - Yes. The Attorney General has ruled, however, that you cannot have continuous appraisal in Ohio. Some years ago, Summit and Lorain counties talked about a continuous appraisal program, and the Attorney General said, in a 1950

opinion, that you may not have continuous appraisal. The auditor is charged with the duty of appraising property, and the Board of Tax Appeals simply is the agency to prescribe the rules. After the auditor has assessed, and the county board of revision has reviewed, as the final act in the assessment process, the Board of Tax Appeals has before it annually an abstract of the real property by four major classes. Not classes established by the Constitution or by statute, but classes established only by the rules of the Board and only for their convenience--they are agricultural, industrial, commercial, and residential property. Down through the years, the Board of Tax Appeals has required each county auditor, at the end of each sexennial reappraisal, to submit what is called a tentative value or a full value abstract. During all this time, the Constitution has presumably required full value assessing. The courts have said this repeatedly; but never in the history of the state except in the early 30s during the depression has property actually been assessed at its full value, and then it happened only because property values dropped faster than the county auditor could reappraise. Back in about 1926, most property was assessed at approximately 75-80%. As late as 1943, the Board of Tax Appeals was using as a base figure, 30% of the 1940 reproduction costs of property as the level from which you are taking off to determine value. The real conflict arises from this thing of assessing property on the one hand and the equalization function of the board on the other. It has been the Board's contention that once the auditor has made the appraisal, by viewing each parcel, and applying to that a uniform percentage of value, it was not the function of the Board of Tax Appeals, when the auditor submits his list of value, to require him to make fundamental changes in that list. Sometimes they do require him to make changes if they feel he has not done his job--for example, if the auditor comes in with his list and doesn't show any new construction, the Board of Tax Appeals would assume that he hadn't done his job properly, and that occurs once in a while.

What the court said in the Park Investment case was that the value of real property was the price it would ordinarily bring in the marketplace between a willing buyer and a willing seller, neither being compelled to buy or sell. So you substitute market value for all the other factors which have been considered in valuing property, such as income-producing ability. The farmer contends, and has contended for some time with a great deal of merit, that the economic value of an acre of land is the ability to produce so many bushels of corn or wheat or soybeans, and that is very different from the market value today. In the first Park Investment case, however, Justice Matthias says that at no point in the Constitution can you find anything about assessing according to the use of the property. It's the value of the property. The court has also looked the other way for many years as far as full value assessing is concerned. So through the years, the Board of Tax Appeals has been attempting to do what we think the court has said with respect to Section 5715.24 of the Revised Code--the annual duty of the Board of Tax Appeals. Parcels of property are assessed by many different individuals and many different appraisal companies throughout Ohio. The board was proceeding to give those counties different percentages depending on what studies showed was the sales-assessment ratio in that county. Now if a county comes in at 80% of value and the ratio the BTA was seeking was 32%, the Board would say to apply 40% to that 80% assessment, and you achieve 32% of true value. It was a mechanical way of shortcutting the process. They could have said to that auditor, you go back home and change the value on each card for each parcel to full value, and then apply 32% to the value, but this was a shortcut way of doing the same thing. Always the BTA had in mind the equalizing of assessments at a uniform percentage of true value.

Mr. Carson - You're talking about the county aggregate, are you not?

Mr. Ducey - That's the only area in which the Board of Tax Appeals has direct authority. In the abstract the only thing the Board sees is the value of land and buildings in the four classes it has established. There is nothing to show the value of an individual parcel of property. The board did not see as its duty requiring an annual change in values, but that's practically what it's come down to now.

Senator Ocasek - The reason I voted for S. B. 455 is because you can't do what the court wants the auditors to do overnight. We have 4½ million parcels in Ohio, and they cannot all be reappraised at the same time. S. B. 455 was designed to permit these judicial decisions to be implemented.

Mr. Ducey - No one quarrels with the court or the interpretation of the Constitution--we all agree that the Constitution requires uniformity. The only question is, how do you achieve it? Here we are talking aboug 88 counties and 88 county auditors with different personnel, some of them highly trained and others not so highly trained. With different amounts of money which is raised locally and deducted from the subdivisions. There is not money or time, as Senator Ocasek has said, to go in and make an actual appraisal of all properties at once. It's hard enough to do it in a six-year period. To do it annually or bring about annual changes, for example in Cuyahoga County where you are talking about 1/2 million parcels, is impossible. Following S. B. 199, of the last session of the General Assembly, the Board was brought into court on a contempt charge but the court held that it was not guilty of contempt because it was following the statute. That is where the BTA is in a bind--the Supreme Court has said that it is a creature of statute and must follow the mandates of the General Assembly. On the one hand, the General Assembly says defer following the Court mandate, and on the other, the Court says you must follow the constitutional rule of uniformity. So the question for the Board is which to follow? Originally the Board filed motions in the Supreme Court for further instructions, feeling that the contempt proceeding was a continuing action. The Board had taken the first step by the adoption of new rules. But that in itself, until it was carried to conclusion, and abstracts filed with the Board, would not relieve the Board of contempt. The Court said this was not an adversary proceeding, and would take no action because there was no case before it. So on August 11 the Board received an abstract from Scioto County and proceeded to approve that abstract under the provisions of S. B. 455 knowing that agricultural property was assessed on its sales-ratio on a different basis from residential, commercial, and industrial. The auditor testified that some portions of his agricultural property had been assessed on the basis of current use, which the legislature had also included in S. B. 455. Now the Park Investment Company has again gone into court claiming the BTA is in contempt. The contention is, do you follow the constitutional provision and require every one to come to current market value for the tax year 1972 and apply 35% which the Board has adopted in its rule as taxable value, or do you follow the provisions of the legislation which would require 13 counties, those appraising effective for the tax year 1972 to come to current market and then apply 35%, and the others would be spread out over the six-year period for reappraisement? Nothing has been done to change the cycle. Now the concern of the BTA is, what are local governments going to do in this interim period? Abstracts should be approved, they are required to be presented to the BTA on the first Monday in August and we are sitting here on the 25th day of August with only one abstract approved. Even if the Court acts with all speed there will be a great delay.

Mr. Carson - Apparently S. B. 455 permits consideration of current use in assessing property. Is there judicial sanction for that?

Mr. Ducey - To the contrary, the Court said, the first Park case, that there is no provision in Ohio's Constitution for assessing property according to its use. There is a long line of decisions, in which the Court has said the same thing--that value means current market value, and that there must be one uniform percentage applied to all property. So the BTA has incorporated this concept in its current rules, which may not be in conflict with the statute. The problem is that the BTA can't follow the statute and at the same time follow the Supreme Court's interpretation of the Constitution.

Mr. Carson - What basic benefit is there to the uniform rule as between counties? Why do we care in Hamilton County whether we are assessed at 40% or 60% of market value, and Cuyahoga assessed at a different percentage, unless you are talking about a state-levied tax?

Mr. Ducey - Because the value - the tax duplicate as it may finally be determined to represent value --is used as the basis for a formula in so many different areas, such as local government debt, and the school foundation payments, and the local government fund. The formula for allocation of the local government fund from the state treasury back to the county, as the distributor of the local government fund within the county, 75% of the fund is allocated on the basis that the value of the municipal corporation duplicate bears to the value of the municipal corporations in the state. Statutes are full of similar allocations.

About tax rates--I think it was mentioned earlier that the 1% limitation is not as restrictive as might be thought. In the Carney case, the Court made clear that the legislature could, if it saw fit, so long as you were assessing at fractional values, change the statute to provide for a different rate limitation.

Mr. Carter - So the 10-mill limitation based on taxable value is a statutory act.

Mr. Ducey - Section 5705.02 defines the 10-mill limitation, and that is the only place it is defined. The 1% limitation of Section 2 of Article XII has been interpreted as being a 10-mill limitation and everyone accepts it that way. But the Court has said that the 1% is 1% of true value and that, if you are going to assess at something less than true value, you can change the 10-mills. By statute now, you may not exceed 50% of true value for taxable value.

I am heartily in favor of the Uniform Rule--I think it is there and everyone understands it. We have all seen the results of Minnesota's experience with classification, and I would not be in favor of emulating that here in Ohio.

Another area you touched on was exemptions. To me, that portion of Section 2 which says that laws may be passed providing for the exemption of some specific things also says "without limiting the power". We had a situation where a religious organization held a tract of land but had no building on it, and the Court held that tract of land to be exempt even though the Constitution says "houses of public worship". The Court said that language was not a limitation on the General Assembly, but merely an enumeration of the areas in which they could pass laws. One case not so long ago in the northern part of the state involved a hospital which had a lot entirely removed from the hospital on which they operated a parking lot, from which they obtained revenues of $16,000 or $20,000 a year, but it was exempt as a charitable

purpose. Exemptions have already reached the level of $5 billion, and that value is not truly indicative of the true value of that property, because once property is removed from the tax list and placed on an exempt list, auditors view it but they tend not to spend much time determining whether or not it has increased in value because they know it is not going on the tax list anyway. They simply carry it at the same value as long as it is used for the exempt purpose. On Table 724 which you have been given you'll see that this year, in one county, 80% of the property is exempt. That table shows the total taxable value and the exempt property, and you can see which counties have much exempt property. In Franklin County it is high, in Greene County it is high because of Wright-Patterson Air Base. In Pike County, the exempt property is so high because of the atomic energy plant. This exempt list does not even include roads, highways, right of way. The Ohio Public Expenditures Council has taken this material and recapped it in an interesting manner to show that, in a 10-year period exemptions rose 74% while taxable value rose 38%. The reason for this is liberalization of the traditional exemption requirements by court cases and also by statute. In one case the Court said that when the Constitution and the statute said the exemption should be for a house used exclusively for public worship, it really meant "primarily." Many cases come up in connection with rest homes and nursing homed. In one case, in order to gain admission, a person had to contribute a large amount of money, something like $20,000 and then there was an annual payment after that. The statute provides that a certain percentage is supposed to be charitable in order to gain exemption. I wonder what the view is of those who make those payments if they were told that they are objects of charity? Another thing is parking. If a charge is made for parking the car and it produces revenue, I do not see how the legislature can say that this is a governmental function. The parking of a private motor vehicle for a fee, regardless of ownership of the property, should be subject to the same tax treatment. In several cases the Court has said that the parking of motor vehicles is a proprietary function. And yet, the parking under the State House, the legislature says this is a governmental function. It's governmental if you park it in a hole in the ground and proprietary if you drive it up a ramp--it doesn't make sense. If you're going to make that provision with respect to exemptions have any meaning, you're going to have to put prohibitions in there. Instead of saying "without limiting the general power" you're going to have to say "no law shall be passed permitting exemptions" if you want any restrictions. You should decide what services are of such value to your community that you want to extend to them the privilege of tax exemption, and then make that stick.

Mr. Carter - I understand that you think the exemptions should be tightened and that you would retain the uniformity rule and not permit classification. How about the 1%?

Mr. Ducey - That limit was adopted by the people back in 1933 and I think every single one of them feels that we have a 10-mill limitation, and as a citizen I would leave that alone.

Mr. Carter - How about true value?

Mr. Ducey - I would also leave that alone. The only problem is how we get to it as quickly as we should.

Mr. Carson - I gather that, with respect to valuation of property, the legislature now thinks that some measure other than value can be applied.

Mr. Ducey - In S. B. 455, the legislature has indicated that property can be assessed according to its current use, which abandons the concept of assessing according to

market or true value, at its highest and best probable use.

Mr. Carson - When we talk about classification, are we talking about tax rates?

Mr. Ducey - No, we are talking about classification of property. We have classification of personal property in Ohio, since the uniform rule applies only to real property. We are unable to set the level of assessment at a different percentage of true value for different types of real property, as is done in Minnesota. With respect to exemptions, at the present time, if ownership of property is in a person or organization that might be entitled to exemption if property used for that purpose, the property may be exempt even though it is being used for another purpose. I would look to the actual use of the property to determine exemptions, and not the ownership. Also, the system of remitting taxes which are a lien on the property when it is acquired by a tax-exempt organization is bad because local government is dependent on those taxes.

Mr. Mansfield - Is that so bad, if the organization was entitled to the exemption from the beginning?

Mr. Ducey - I think it is incumbent on an organization entitled to an exemption to make application immediately, and not wait 10 years and let the taxes accumulate on the property without bothering to claim the exemption. Even governmental agencies--the state and cities--are guilty of acquiring parcels and not filing applications for exemptions.

Mr. Mansfield - How about a hospital which operates a parking lot? Do you think that should not be exempt?

Mr. Ducey - If the parking lot is in conjunction with the hospital and necessary for the use of the hospital, then I think it is entitled to an exemption. But if it is separated, and produces revenue, I do not think even a municipal off-street parking lot should be exempted. Otherwise, you are shifting too much of the burden to others.

Mr. Mansfield - A patient in a hospital may pay $60 a day or so to be there. Does he consider himself an object of charity any more than the patient in a nursing or rest home who has to pay such a substantial fee to get in and stay there?

Mr. Ducey - No, he does not. However, I think that we are always going to have some sort of exemptions for hospitals, particularly if they are publicly-owned or non-profit, because they render a certain amount of charitable services, and we feel that they are necessary for the community. But I do not think this should be extended any farther than necessary. Otherwise, the power of the legislature to grant exemptions, unless you limit it with a constitutional provision, will enable more and more property to be exempt, and we already have a substantial problem in this area, I believe.

Mr. Carson - I would like to pose a question about another aspect of this problem. A family who live down the road from me have been truck farmers all their lives, but the increase in the value of that property because of the encroachment of residential areas nearly has forced them to sell all but a small tract. Is this good policy? I gather you, through the Board of Tax Appeals rules, have some sort of classification system.

Mr. Ducey - That is for identification purposes only--only to give us an idea of the

purposes to which property is being used. The same measure--market value--is supposed to be used to assess all property. I think that if you do give consideration to use of property as opposed to value, it opens up too many problems.

Mr. Carson - It seems to me that there is something wrong about assessing the land at $3,000 an acre because that is what the man could get if he sold it, when he is actually only using it for a purpose which is about $500 an acre.

Mr. Carter - But it's his choice.

Mr. Mansfield - Perhaps it's similar to this: Suppose you own 10 shares of Ohio Edison common. Every day that you don't sell that stock, you buy it. If you don't sell, you've decided to keep it. The same way with that farmer. He wouldn't go out and pay $3,000 an acre, and yet that is really the decision he has made by not selling.

Mr. Carson - But he has lived there for 50 years. Perhaps I am sentimental.

Mr. Ducey - How about a site like the old Deshler hotel site? We had one farmer come to the BTA who was appealing his assessment who was asked the question of whether that site should be assessed as agricultural land if you plant corn on it and he said yes. You know how foolish it is to contend that if you plant a few rows of corn on that site you'd have agricultural property. But talking about value, if you viewed that site, and considered the size of it for a parking lot, you'd say that anyone would be out of his mind to give 1/2 million for that site and expect to recover it from parking fees and yet we know that fighting in the courts in Franklin County right now are two different individuals seeking to pay $2 and 1/2 million for that same corner. And I know of one case where a man has a narrow strip along a road and he has refused an offer of $10,000 an acre, and yet this strip of land is separated from a field where they're raising hogs and corn only by a wire fence that you can step over. That contributes to the value of that man's farm. Presently, there's no ingress or egress, but when the price gets right, there will be.

Mr. Carter - You're asking a fundamental and difficult question about the rights of an individual against the rights of society, and that's the most difficult kind of question to resolve. If you follow that reasoning--assessing the land at $500 instead of $3,000 an acre because the owner chooses to farm on it instead of selling it for development--you are disrupting the orderly use of land by society. Assessing does put pressure on for the proper economic use of the land rather than for what the individual chooses.

Mr. Carson - One problem is that, in the past, in many counties, there has been recognition of use by the assessment process, and, although the Constitution apparently does not permit that, the recent pressure to change is bringing a crunch now to these people.

The chairman thanked Mr. Ducey for his contributions to the committee deliberations.

Representative of the League of Women Voters - In the new Virginia constitution, a provision was inserted permitting a local jurisdiction to reduce an assessment on an individual appeal from market value. This places the burden on the jurisdiction which will lose the tax revenues.

Mr. Glander - I, too, would retain the uniform rule and the 1% limit and the true value concept. But I agree that the exemption problem is becoming a great one, due to legislative action and court interpretation, and probably needs some attention.

Mr. Carson - We do have classification in Ohio with respect to personal property and I wonder why there is such a difference of opinion about classifying real property?

Mr. Glander - We have to go back to the report of the committee headed by Senator Robert A. Taft back in the 30s when the question came up. Insofar as intangibles was concerned, assessing them on the same basis as other property was a farce. They were driven into hiding and they were driven out of the state.

Mr. Carson - Are they being reported now? I have heard that they are not.

Mr. Glander - It's largely a state function now, and I don't agree with the contention that intangibles are escaping tax in Ohio. The process of assessing intangibles has been vastly improved since taken over by the state. The proposals in the Taft report with respect to tangible personal property were in recognition of the competitive situation between Ohio and other states. The percentages chosen for taxing manufacturing and other personal property were chosen in light of that competitive situation. They did something else--by using as the base the depreciated value, you don't guess but you take what's on the books.

Mr. Carter - Do you have any views about the use valuation provision in S. B. 455?

Mr. Glander - I think it was a mistake and has opened up a number of legal questions, but I can understand how it came about. It was done for agricultural purposes. The version of that that passed doesn't require valuation on the basis of use, but just says that the assessor shall take that into account.

In the Park Investment case, the sole criterion of value is market value--what a willing buyer would pay a willing seller. In an earlier case, the American Steel and Wire Co. case, the Supreme Court specified a number of factors and said that these and all other relevant factors must be taken into account in determining the meaning of true value. In a dissenting opinion in the Park Investment case, Justice Gibson said that he thought the Court was making a mistake to tie this only to market value and ignore the earlier opinions saying that "all other relevant factors"should be considered. There is a philosophical conflict between those two decisions. But you can come back to the same place by saying that you arrive at market value by taking into account these other factors.

Mrs. Eriksson - This is truer with respect to commercial and industrial property than agricultural or residential, since it is more difficult in those cases to determine market value on the basis of a willing buyer and a willing seller. There may not be a market for some property.

Mr. Carter - Going back to the farmer problem, the difficulty of it is that a use assessment enables the farmer or a land development company to hold the land for a long period while it appreciates in value and then reap a tremendous profit when it is sold. Is this appropriate?

Mr. Nemeth - Could you have some sort of a good faith test?

Mr. Carter - These have been tried.

Mr. Carson - I think the use to which the property is put may be relevant in determining taxation, because one theory of taxation is that it should be according to the benefits received from the governmental entities collecting the tax--I doubt if the farmer uses the services of the government to the extent of the land developer.

Mr. Carter - But isn't one answer to that problem increasing reliance on the income tax and less reliance on property taxes?

The meeting was adjourned, after agreement that the meeting on September 22 would be devoted to a consideration of Section 5a.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
September 22, 1972

Summary of Meeting

The Finance and Taxation Committee met in House Committee Room 7, at the State House, Columbus, at 9:30 a.m. on Friday, September 22, 1972. Present were Chairman Carson, and Messrs. Guggenheim, Hovey, Mansfield and Wilson, members of the committee, and Mr. Nemeth of the Commission staff.

Mr. Carson announced that the purpose of this meeting was to receive testimony and written statements in regard to Section 5a of Article XII, which prohibits the expenditure of moneys derived from fees and taxes relating to the registration, operation or use of motor vehicles, and motor vehicle fuels, for other than highway or highway-related purposes. Mr. Carson pointed out that this provision was adopted by initiative petition in 1947, and became effective on January 1, 1948.

Present to make oral statements and present written testimony on behalf of their respective groups were Mr. Langdon D. Bell, representing the Ohio Motor Bus Association; Mr. John Paul Jones, representing the Ohio Public Transit Association; and Mr. Merle Paul, representing the County Engineers Association. The committee also received a letter on the subject dated September 14, 1972 from The Honorable J. Phillip Richley, Director of Highways, and a copy of a resolution approved on September 18, 1972 by the Standing Highway Committee of the County Commissioners Association of Ohio. Both the above letter and resolution oppose repeal or modification of Section 5a, in substance on the ground that, in the view of the Director and the County Commissioners Association, there are not sufficient highway-user revenues to support the highway program in the state, either on the state or local level, at the present time.

The committee also received written statements from the Ohio State Automobile Association, the Ohio Contractors Association, the Ohio Public Transit Association and the Ohio Trucking Association. All of these, with the exception of the statement of the Ohio Public Transit Association, oppose modification or repeal of Section 5a, and are referred to later in this summary.

Mr. Bell, at the outset of his presentation, stated that the Ohio Motor Bus Association, which represents about 50 companies constituting the majority of privately owned inter-city bus lines in the state, opposes any change in Section 5a because, in its view, the provision (1) is more valid and applicable today than it was in 1947 and (2) any amendment of this constitutional restriction would have an adverse effect upon the inter-city bus industry and the public it serves. Mr. Bell said that the basis of constitutional provisions is that they embody something so fundamental and enduring "that they should not be subject to the elasticity of a legislative body--all too ready to respond to the popular, albeit fickle, whims of their constituents." Mr. Bell pointed out that presently available highway-user revenues are inadequate, as evidenced by a proposed two cents per gallon increase in the fuel tax (in S. B. 561). He expressed the fear that the diversion of any part of highway-user revenues would necessitate even further increases in fuel and licensing taxes, which would result in substantial curtailment in what is the only available public transportation in many parts of the state, and seriously jeopardize the existence of the inter-city bus industry in Ohio. In answer to a question by Mr. Carson as to whether he would object if Section 5a were amended to permit subsidies to the inter-city bus industry, Mr. Bell said that although he would like to see some subsidy--somehow--he did not believe Section 5a should be touched.

In response to a question by Mr. Hovey as to whether he meant that if $50 million dollars, which is the equivalent of one cent of the present gasoline tax, were diverted from highway purposes, there would be no more inter-city bus transportation in the state, Mr. Bell said that "once the seal is broken" it is impossible to measure the effect upon the transportation industry of the state--particularly the segment of it which he represents.

In response to a question by Mr. Mansfield as to the financial condition of most of the members of his Association, Mr. Bell said that the inter-city bus industry could not afford to pay a penny more to replace diverted funds as, at the present time, it would cease operations were it not for charter revenues, which are used to subsidize money-losing scheduled routes, none of which can be dropped without approval by the P. U. C. O., which has refused several such requests in the past.

The next speaker was Mr. John Paul Jones. He stated that the Ohio Public Transit Association represents 22 of the approximately 66 bus-operating public transit corporations in the state. He said that his Association finds no fault with the highway-funding programs of the past, which were a creditable example of government responding to a public demand. However, he said, the Association does suggest that this funding process may now be obsolete. The public has new concerns now, he said--like the "energy crisis", the pollution problem, and traffic congestion. He said that problems such as vehicular congestion, or the problems of those who are too young, too old or too poor to own automobiles, could be alleviated by attractive and modern mass transportation systems. He stated that his Association believes that taxes related to the automobile are, in reality, taxes related to transportation, and that government should be free to consider the entire subject of transportation as a single public function, and be free to use those funds to meet public needs, as determined by responsible administrative bodies, and that the inflexible limitation imposed by Section 5a hinders the administration of a sound transportation policy in Ohio. He pointed out that many who are involved in the automobile industry now advocate the use of federal highway trust funds for public transit purposes. To be successful, public transit needs a source of tax revenue, he said, just as personal transportation needs such a source. The Ohio Public Transit Association believes that transportation tax revenues are a logical source--more so than real estate or income taxes. Public ownership is not the solution, he suggested. The real need is for tax support to meet transit operating expenses, he said. He concluded that the rigidity of present Section 5a will lead to serious transportation, environmental, and social problems in the future.

Mr. Hovey asked how Mr. Jones would suggest using $50 million, for example, if it were made available to public transit in Ohio from a source like a one-cent gasoline tax. Mr. Jones answered that it should be distributed on the basis of a formula such as the number of miles covered or the number of passengers served, for capital purposes, to enable the systems to qualify for two-thirds federal matching funds.

The last speaker was Mr. Merle Paul. He stated that the County Engineers Association opposes any change in Section 5a. He pointed out that this section was originally passed by about a 5:3 ratio. He also pointed out that according to a 1970 survey in Ohio, nearly 25,000 of the approximately 29,000 miles of roads in the county road systems were found to be substandard. The estimated cost of replacing them or improving them to standard would be $2,125 billion. In the system, there are 3,470 weak bridges and 4,780 narrow bridges, which would cost $324 million to replace or upgrade. The same survey estimated the total cost of replacing or upgrading to standard all county, township and municipal roads at $2.874 billion.

He summarized the opposition of his Association to the repeal or modification of Section 5a as follows: (1) the county engineers are deeply concerned over any proposal which would lower presently inadequate revenues for maintaining and improving substandard roads and structurally deficient or narrow bridges on the county systems; (2) they view as inconsistent a proposal for a two-cent increase in the gasoline tax while highway-user revenues are being diverted to other purposes at the same time; (3) they note that there has been substantial approval of "non-diversion" by the voters of Ohio, and that there appears to be little change in this sentiment; (4) they believe that present revenues are inadequate to upgrade Ohio's present highway system and provide safer highways and meet the increased costs of federal regulations for safety and mobility.

At the conclusion of the scheduled presentations, Mr. Hovey asked to make a statement. He emphasized that he was speaking as a member of the Commission and not as a member of the Administration. He said that, given the principles on which most of the members of the Commission operate, there is every reason why existing Section 5a should be deleted from the Constitution.

First, we are all devoted to the principle that the Constitution is just that, and not a piece of legislation, he said. We are also aware that the intent and effect of Section 5a is to incorporate a series of basically legislative decisions into the Constitution. Second, he continued, the basic notion of Section 5a--and of some other sections of the Constitution--is that of "earmarking," and constitutional "earmarking" inevitably has the very undesirable effect of causing the legislative body to be unable to consider priorities for expenditures based on needs as they see them at the time. This has two effects: (1) it puts a "floor" under spending, creating a situation where money is spent merely because it exists and because it can be used for no other purpose, and thus results in an inevitable, continuing flow of funds which is, basically, never examined. This principle is undesirable for any purpose, including highways; (2)--and equally undesirable--it tends to create a "ceiling," because when a fund such as this is created, no one gives consideration to the possibility of using General Revenue Fund revenue for the purpose of creating an additional highway program. Third, Mr. Hovey said, the exclusion of mass transit from the utilization of gasoline taxes makes very little economic sense. For example, when a highway is strained because of heavy traffic, one alternative is to build one or more additional lanes on that highway. This is a valid alternative under Section 5a, as would the building of another road such as a beltway be a valid alternative. Another equally valid alternative, in some situations, he emphasized, is to divert traffic to mass transit--either bus or rail. That is not a valid alternative under Section 5a. Yet, any one of the three methods would create additional usable highway capacity from the standpoint of the highway user.

In addition, Mr. Hovey said, Section 5a does not recognize that there are significant externalities associated with highway transportation. For example, as a practical matter, the use of a highway creates certain costs for adjacent landowners and the public at large--pollution being one example. Yet, the regulation or alleviation of such pollution is prevented from being financed by highway-user revenues under Section 5a, notwithstanding the fact that fixed sources of pollution can be, and in fact are, the subject of substantial fees to finance a regulatory system, he said.

The foregoing, Mr. Hovey continued, are three good reasons why Section 5a should not be in the Constitution. However, he said, recognizing that it is not sitting as a constitutional convention, the Commission has proceeded in the past on the basis of recommending changes in the Constitution on an incremental basis, which changes would make it possible for the state to do through legislation some things which it cannot now do, or to stop doing things which it is now compelled to do. Yet, there is no indication, he said, that the General Assembly would use the authority to divert any part of existing highway-user revenues to purposes other than highways, considering the present level of the highway program, even if it had the authority to do so as the result of the removal of Section 5a. Also, there would be a problem on the composition of the program.that the General Assembly might adopt. One approach would be to subsidize capital and operating costs /of mass transit systems/. Another approach would be to subsidize the receiver of services rather than the supplier, as is the case with several present welfare reform proposals, and a third approach would be to make cars more expensive in relation to mass transit by imposing a so-called "entrance tax", which would penalize anyone who brings a car into the downtown area of the city roughly in proportion as he penalizes fellow citizens by the additional congestion and pollution and the like. Another issue would be the definition of the area or region which is to provide a subsidy, if there is to be one.

Mr. Hovey noted that he was not advocating any particular solution, but wished merely to point out that when the General Assembly established the Ohio Department of Transportation, it authorized a study of Ohio's transportation needs, which will take at least a year to complete. Therefore, whatever the Commission or the voters may do with Section 5a now, the General Assembly is unlikely to do anything with mass transit during the next year. Given these circumstances, and the fact that any change in Section 5a will receive the opposition evident during the present hearing, Mr. Hovey said, he would recommend that the committee by-pass the section now, and take it up again in about a year. Mr. Wilson said that he agreed that a year's moratorium on the discussion of Section 5a might be a good idea. However, he pointed out that the world's oil supply is not without limit, which will make other sources of energy such as electricity or steam inevitable and that we are reaching the saturation point in the number of automobiles. Given these facts, he said, he foresaw the time when a provision such as Section 5a would be superfluous in a constitution. In the meanwhile, he suggested, some necessary flexibility could be introduced into our Constitution by permitting some specified fraction or percentage of highway-user revenues to be "earmarked" for mass transit. However, he said, he would have qualms about removing the restriction of Section 5a from the Constitution entirely at this time because, in his view, such a proposal would not be acceptable to the people.

Mr. Mansfield said that he, too, believed that it would not be untimely to recommend a compromise. However, he would prefer not to be specific. He said that it seemed to him not to be out of order to recommend the simple amendment of Section 5a to include public transportation.

Chairman Carson closed the meeting by stating that he thought the committee's decision on what to do with this section should be made along with the decisions on what to do with the other provisions of Article XII, which decisions should reflect the views of all the members of the committee.

The written statement on behalf of the Ohio State Automobile Association dated September 22, 1972 and submitted by Mr. Thomas M. Phillips, supported the retention of Section 5a without alteration. The statement pointed out that the State of New York adopted a similar constitutional provision in 1957, and that 27 states now have such provisions in their constitutions.

The written statement on behalf of the Ohio Contractors Association, dated September 22, 1972, also advocates the retention of Section 5a without alteration. The Contractors Association recognizes the need for mass transit facilities in heavily congested areas, but believes that there is not the yield in Ohio highway-user revenues to pay for both highways and mass transit systems "from the already empty pot."

The statement of the Ohio Trucking Association dated September 22, 1972 and submitted by Mr. Donald B. Smith, likewise opposes change in Section 5a. The statement concludes (1) that Americans have demonstrated their preference of the automobile as their major mode of transportation; (2) the dispersal of living, working and shopping areas throughout far-flung suburban areas have further restricted the limited potential of rail transit and (3) mass transit programs in any form, wherever they have been attempted, have failed. The Association stated that it considers "senseless, wasteful, and unsound" any proposal to divert highway funds to mass transportation or other government programs.

The next meeting of the committee will be at 9:30 a.m. on October 19, at the Commission office, 20 South Third Street, Columbus.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
October 19, 1972

Summary of Meeting

The Finance and Taxation Committee of the Ohio Constitutional Revision Commission met at 9:30 a.m. on Thursday, October 19, at the Commission office, 20 South Third Street, Columbus. Present were committee members Messrs. Carter, Guggenheim and Wilson; Mr. Nemeth of the Commission staff, and Mr. C. Emory Glander. Chairman Carson was absent, and Mr. Wilson chaired the meeting at Mr. Carson's prior request.

Mr. Wilson stated that the purpose of this meeting was to discuss the doctrine of pre-emption as it has developed in Ohio, and the question of the state's adoption of portions of the federal income tax statute, prospectively. He said that the committee wished to determine whether there was a need for constitutional provisions in these areas.

Mr. Wilson invited Mr. Glander to discuss the pre-emption doctrine with the committee. Mr. Glander pointed out that this doctrine had its beginning in the case of Zielonka v. Carrel, 99 Ohio St. 220 (1919), in which the Supreme Court said that until the state levied a tax, a municipality was free to do so under its home rule power. Later cases extended this concept to cover "the same or similar" taxes, he said, and the doctrine has rested on several grounds over the years, among them the sovereignty of the state and the presumed intent of the General Assembly, particularly its intent to avoid "double taxation." Mr. Glander expressed the view that the doctrine is now so well imbedded in Ohio law that it can be changed only by constitutional amendment or by action of the General Assembly negativing legislative intent, as it did in the recent income tax law. He pointed out that there are at present two constitutional provisions, Article XIII, Section 6 and Article XVIII, Section 13, which give the General Assembly the power to restrict the taxing power of municipalities. The policy question to be decided, he said, is whether the judicial doctrine of restriction by implication should be retained.

At this point, Mr. Carter referred to a staff memorandum the group had before it, which suggested that a constitutional amendment in regard to pre-emption could (1) declare that the state does not pre-empt a tax source unless it is specifically so provided in the legislation; (2) prohibit a municipal corporation from levying any tax unless specifically authorized by the General Assembly; (3) require the General Assembly to declare its intention to pre-empt or not to pre-empt in every tax levy law; (4) declare that the state does pre-empt a tax source unless the General Assembly specifically negates its intention to do so in the law; or (5) embody some other possible variations.

Mr. Glander pointed out that the adoption of alternative (2) would, in effect, repeal the home-rule taxing power. This, it was generally agreed, would be an undesirable result.

Mr. Carter asked Mr. Glander's opinion on alternative (3). Mr. Glander said he would have no quarrel with it, because it's simply done and avoids litigation. It would leave the status quo on past taxes, and it would not validate municipal ordinances which have been held invalid in the past, he said.

Mr. Wilson said that both alternatives (2) and (4) "pretty well dig into the home rule provisions", and he would prefer to see them left alone. After further discussion by the committee, Mr. Wilson asked that the staff prepare possible

constitutional provisions revolving around alternatives (1) and (3), for the committee's consideration at the next meeting. Mr. Glander suggested that such provisions might be added to existing sections of the Constitution which authorize the General Assembly to limit the taxing power of municipalities, since these sections would not be repealed.

Mr. Wilson said that he, for one, would like to see a constitutional change in the area of pre-emption, since he believed that questions of tax burden and tax selection should be part of the legislative process and, at least in the field of taxation, the courts should not have to decide what the legislature meant. Mr. Carter agreed.

Then, the committee turned to a discussion of the problem of state laws which authorize the adoption of provisions of the federal income tax law prospectively. It was pointed out that several states now have specific constitutional provisions authorizing this to avoid the challenge that such state laws amount to an unconstitutional delegation of the state's legislative power to Congress. Mr. Glander stated that the state statutes authorizing the adoption of federal tax laws prospectively have been adopted for purposes of simplicity. After some discussion, the staff was asked to prepare possible constitutional language on this subject for consideration at the next meeting. Mr. Guggenheim raised the question of whether such a provision should also specifically refer to federal rules and regulations, or whether these would be included by implication. He said he would rather omit such a reference if it wasn't necessary.

The next meeting of the committee was set for 9:30 a.m., Thursday, November 16, 1972 at the Commission office, 20 South Third Street, Columbus.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
November 16, 1972

Summary of Meeting

Present at a meeting of the committee on November 16 in the Commission offices were Chairman Carson and committee members Carter and Wilson. Mr. John Gotherman of the Ohio Municipal League and Mr. Emory Glander were also present, as were staff members Nemeth and Eriksson.

Mr. Gotherman was invited to discuss the indirect or constitutional debt limit with the committee.

Mr. Gotherman: What I want to discuss with you in an important limitation of how municipalities may plan and execute their capital programs. As you know, a series of statutory limitations on municipal debt relate permissible debt to a percentage of the tax duplicate, as set forth in the memo you have been given. Municipalities do not have any real problems with the statutory debt limitations because the debt is not going to be paid from taxes, to the extent that there's other revenues available to pay the operating costs and the debt service, it's not counted against them in their debt limitation. We are not concerned with those limits, which have been imposed by the General Assembly under the two constitutional provisions giving the General Assembly the right to regulate and control the method by which municipalities incur debt. The indirect debt limitation is based upon merely a series of constitutional provisions and a court case or two. Section 11 of Article XII prohibits the incurring of debt unless provision is made for the levying of taxes to repay the debt and to pay the interest. Section 2, Article XII imposes the general tax limitation and the Supreme Court in the case of Portsmouth v. Kountz construed these provisions together. as an implied ten mill or one per cent debt limitation. The debt limitation has some characteristics which I thought I would mention. For example, it doesn't apply to voted debt, it applies only to unvoted debt. It applies only to general obligation bonds which are payable from taxes. It does not have application to the revenue bonds or to mortgage revenue bonds which are not pledging the full faith and credit or pledging taxes of the municipality. It is measured by tax millage and not by a percentage of tax duplicate. It's an overlapping limitation. All the unvoted debt of the county, the municipality, the township and the schools, to the extent that it may have unvoted debt, must be included. Wherever you might place your pencil point down in Ohio you would have to consider the debt of all those overlapping political subdivisions. There is no relationship between the inside millage of cities or villages and counties and the indirect debt limitation and by and large it's pretty much of a theoretical limitation in the sense that municipalities and counties, to my knowledge, are not greatly using property taxes to actually retire debt. They're using general obligation bonds which are payable from revenues which perhaps pledge property taxes but in actuality are being paid by income tax revenue, to meet debt payments. So the problem that we have is that we have a theoretical limitation that actually none or very little of the millage is being utilized to actually pay debt and it is unlikely--it would take some kind of tremendous catastrophe to require much of the property tax millage to be used to pay debt. Yet under the doctrine of the case law you are limited to ten mills in terms of your debt service. Many times a municipality that isn't particularly large will incur debt which involves a fair amount of millage theoretically. Actually it is going to be paid for out of income tax or more likely some kind of revenues, but that may foreclose the county, for example, on a much larger territorial basis from having the ability to incur debt which, again, won't be paid out of the property tax but will be paid out of revenues from a water or sewer system but are general obligation bonds. Obviously there are some advantages to using general obligation bonds which are payable out of revenues rather than just

pure revenue bonds or mortgage revenue bonds in the sense that general obligations are more secure. The bondholders are not going to exact the same interest rates. The interest rate will be lower in the case of general obligation bonds, so we think there are good reasons to permit the utilization of general obligation bonds which are payable out of the revenues. Unfortunately, though, the so-called indirect debt limitation really serves no useful purpose that I can see in providing for a debt limitation. Article XIII, Section 6 and Article XVIII, Section 13, give the General Assembly the right to regulate in a rather complete fashion the debt that powers of the municipality, and the General Assembly also has that power for other political subdivisions. The indirect debt limitation, we think, only serves to block needed capital programs. When the Portsmouth case was decided with property taxes being the only taxes available perhaps it did make some sense, but today, utility revenues, income taxes and other nonproperty tax sources are utilized to actually repay debt. So we would view the indirect debt limitation as perhaps a mistake or a relic of the past that should be eliminated. I suppose it could be done in a series of ways and some of them are listed in the memorandum. The proposition suggested by Professor Smart, however, prohibiting the use of the inside millage for debt, would create a crisis of a magnitude which we haven't seen for some time. We would suggest one of two ways: in section 11 there is a reference to annual tax levies and perhaps that language could be deleted and language could be inserted to simply permit the pledging of any kind of revenue rather than taxes and particularly taxes other than property taxes to support that; but I think even if you did that you would still have to add a sentence that would be to the effect that the limitation on taxes that may be levied on property without a vote of the electors under section 2 could not be construed as imposing a limitation on the debt of the state or political subdivisions, because once you have this doctrine being announced by the courts, it must be negated in the amendment that is designed to do that. We think that would be an appropriate way to do it.

The other method of doing it would perhaps be more helpful, really, from the standpoint of political subdivisions. It would perhaps provide some additional flexibility. We'd rather see it but it would be a little more controversial perhaps, and that would be to simply amend section 2 of Article XII to place property taxes levied for debt purposes outside of the ten mill limitation. In other words, do not subject debt levies to the ten mill limitation but either there or elsewhere, and probably right there provide the authority in the direction of the General Assembly to regulate the amount of indebtedness. Now we found that we can work with the General Assembly as times change and abilities of governmental units change to finance debt, the General Assembly has not been inflexible. This would, I would hope, assure the citizenry that this is not a blank check for cities and counties to incur any amount of debt but rather it would be implemented by the General Assembly in terms of a more meaningful and perhaps a helpful limitation rather than something as artificial as this indirect debt limit. It would provide some additional ability and would provide a different kind of pledge to the bonds and probably make them more secure.

Mr. Carson - and school districts?

Mr. Gotherman - Well, I hadn't really thought about school districts. I think that's something that you would have to decide whether or not you would go to school districts. School districts by statute usually have to go to a vote for their bond issues so I'm not so sure that you need include them. They have not really had any trouble. When you get right down to it, I think the school districts have a saleable product that everybody seems to want to buy, in terms of education for children and bond issues have not been a great problem with them. At least, I think the approval rate

for school levies is higher than for municipal levies. Municipal income taxes, for example, have less than a 50% approval rate since their inception, and I'm sure the school bond issues are far above the 50% level.

Mr. Carter - Is there anyone who has heard anyone in favor of this indirect debt limit?

Mr. Gotherman - I haven't.

Mr. Carter - Then it seems to me that the thrust of our attention should be given as to what changes might be made to accomplish that objective.

Mr. Carson - Let me ask this so that I understand Section 11. Section 11 has been interpreted to require the levying of taxes on property?

Mr. Gotherman - If you take Section 11 and Section 2 together in Portsmouth v. Kountz the court held if you must levy taxes and if you're limited to ten mills without a vote, then obviously you must be limited to ten mills for debt purposes, unless you have a vote of the electors. They didn't consider other taxes.

Mr. Carson -So it's not possible under Portsmouth v. Kountz for a municipality to issue bonds as we've done in some of our state bonds, pledging revenues other than property taxes.

Mrs. Eriksson - Some cities do pledge income tax to the bonds, but because they're general obligation bonds they give the bondholder the right to draw on all the tax sources of the municipality, which includes the property tax. In other words they don't accept the income tax as a substitution for the fact that property taxes might be required.

Mr. Gotherman - We can't convince bond counsel that a city can say that we're going to set aside a certain percentage of the income tax and we're not going to pledge property taxes at all and therefore the indirect debt limitation shall not apply. Bond counsel will not buy that argument in view of the court decision.

Mr. Wilson - Some municipalities can borrow from the bank certain amounts for up to five years as a temporary financing measure. We expect to pay that note off out of our income tax or other taxes without going to bonding.

Mr. Gotherman - The City of Columbus has paid a lot of their debt off from income tax money, but the pledge includes property taxes. And these are general obligation bonds and therefore they could sell City Hall, the police cruisers and everything else to recover the bond proceeds if necessary.

Mr. Carson - Let me ask somebody to explain to me why if the City of Cincinnati issued and could sell bonds pledging income tax revenues, earnings tax revenues, admissions tax revenues, whatever else they have but specifically excluding revenues from property taxes that could not be done. Is that correct?

Mr. Gotherman - The limitation is based on property taxes. Regardless of what tax you pledge, all the tax money of a city on a general obligation bond, is available to pay the debt if necessary, and all the assets of the city would also be available. As far as I know, we've never had an issue that has pledged the income tax as opposed to the property tax, in the ordinance itself. Now it is my understanding from talking with bond counsel that they seem to agree on this that there is very great

doubt in their mind that they would not approve an issue if it were beyond the indirect debt limit. They would not rely on an income tax, nor would they rely on revenues.

Mr. Carter - I would like to suggest that one thing we ought to look at is simply to repeal Section 11. What would be the effect of repealing Section 11, just eliminating that? If you read Section 11, it says "No bonded indebtedness of the state or any political subdivisions thereof..."Now the state we're not concerned about too much because we have covered that elsewhere. And as for political subdivisions it seems that you have a very good restraint on the cities from the market place. In other words if the bonds are not soundly conceived, etc. the people are not going to buy the bonds. I wonder if you need, as a practical matter, a constitutional statement that they must do what Section 11 says. And I would like to start with the idea of just eliminating Section 11. Now if there are arguments for keeping Section 11 in then I think we are looking at the possibilities for amending Section 11 and a number of things occur to me, one of which you had already stated. I think there are some others. One would be to eliminate the phrase "or any political subdivisions thereof". In other words make this a state matter rather than a local matter where the problem arises. Also suggested is the one that you had mentioned--broadening the scope of taxation by explicitly stating that other revenues can be used for the purpose of retirement of the bonds. Those are all that I have thought of but I'd like to take a look at eliminating it, and I wonder what the problems would be if we just eliminated it.

Mr. Gotherman - Just as an offhand reaction--in order to be sure that we have negated the preemption doctrine I think we still need a statement that Section 2 doesn't imply some kind of a limitation upon the tax.

Mr. Carter - Doesn't the limitation of 11 do that?

Mr. Gotherman - I'm not so sure that the court wouldn't still read a limitation into Section 2 even if Section 11 were repealed. I'm afraid that the court wouldn't look at the logic of the Portsmouth case and say that you can't have debt which is going to be paid out of taxes. Now whether they would broaden that scope to include other taxes than property taxes I don't know. I'm not sure that we would accomplish that by simply eliminating Section 11. Perhaps, but it would probably take a case to determine it. It would probably take a Supreme Court decision.

Mrs. Eriksson - Mr. Gibbon said to this committee originally that Section 11 does provide a guarantee to bondholders that local government subdivision bonds will be repaid, and his comment at that time was that he would be happy to see Section 11 repealed but he felt it should then be replaced by legislation doing much the same thing, that is requiring political subdivisions to guarantee their bonds.

Mr. Carter - Fine. I would buy that.

Mr. Carson - Well, let me try something else. It seems to me that when we wrote Section 1 of Article VIII we felt it desirable to add a specific provision requiring when debt was created that also a procedure for repaying it be established, in the legislature. It seems to me that there is some comfort in having the Constitution say if units of local government create debt in the legislation creating it, they ought to say how they're going to pay it. It would seem to me that one possibility that's attractive to me is to keep Section 11, revise it so that it's clear that any type of tax revenues or other revenues of the municipality can be used to create

debt or pay back debt, and with an additional provision making it clear that the ten mill limit is not operative with respect to debt, I mean with respect to an indirect debt limit. I think that's probably what Section 11 was intended to say that you don't create debt unless you create the method of repaying it.

Mr. Carter - Would you be willing to leave it up to the legislature as to how that should be prescribed?

Mr. Carson - Yes, I think so and in fact I think was the theory of our Constitution now because the legislature has been given the authority to regulate the amount of debt that a municipality could have and I certainly agree with that.

Mr. Wilson - If the public is somewhat leery about open-handed debt, and if we knock out this section which deals with provisions on debt, I'm afraid it may be defeated, that it might be better to broaden that base of repayment to include and ~~and~~ all revenues.

Mr. Carson - The other thing that I like about it is that it makes it a little bit consistent with our Article VIII position. We felt it desirable there to put it in the Constitution.

Mr. Carter - I don't disagree with that approach. Shouldn't we then think in terms of Section 11 in view of what we've already done in Article VIII, assuming that it is adopted, and restrict this to political subdivisions?

Mr. Carson - I think we must. Otherwise, we have this conflict.

Mr. Carter - And the second thing is that I think we surely ought to eliminate this sinking fund on the same basis as we have done it in Article VIII as being an anachronism so then I think we would focus in on what would be appropriate for political subdivisions.

Mr. Wilson - I can go along with this. We can make it broad enough that they can do whatever they want. You pointed out about the saleability of the bonds, and nobody is going to buy them if they aren't going to be retired anyhow. The market will control. We don't need to go into too many specifics in there, just grant them the authority.

Mr. Carter - Are you suggesting then, the two of you, that perhaps what we ought to do is state in Section 11 that the political subdivision shall make provision for the repayment of debt as provided by law? In other words, to throw the burden to the General Assembly then to prescribe how it shall be done but still have an affirmative statement in the Constitution that it shall be done?

Mr. Carson - That the legislation creating the debt shall provide for its payment in accordance with law, something like that.

Mr. Gotherman - As to municipalities, it would be simply compounding one more constitutional provision about debt. We have two already. Unless there is some need to guarantee the ability of the General Assembly to regulate county debt or school debt or township debt which I wouldn't think would be because they don't have the home rule provisions which might negate some of these powers, I don't think you're going to need to state it again. It's already in the Constitution twice. And as to other subdivisions, I don't think it must be stated. And every time you state it

there is a chance that that statement will somehow result in a limitation that we all didn't anticipate.

Mr. Carter - Are you saying that you would just as soon eliminate Section 11 then?

Mr. Gotherman - The elimination of Section 11 doesn't bother me too much but I would think there's no need to refer to the power of the General Assembly to regulate debt, because it's already clearly given to them.

Mr. Carter - It is a good point.

Mr. Gotherman - And every time you add it you take the chance that perhaps you change what we think is the power to incur debt now.

Mr. Carter - Section 13 says laws may be passed and I think what you are suggesting is that laws shall be passed. Is that correct? Section 6 of Article XIII says the General Assembly shall provide for the organization of cities, incorporated villages and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power. That's what you were talking about. Now then Section 13 of Article XVIII says "laws may be passed to limit the power of municipalities to levy taxes and incur debts and may require reports from municipalities of their financial condition in a form as may be provided and may provide for the examination of books, etc.

Mr. Carson - This gives the legislature the right to limit the taxing power of municipalities and other units.

Mr. Carter - This does. And also what they can do in the way of debt.

Mr. Carson - I was talking about something a little bit different, and that was retaining the kernal of Section 11 but revise it substantially and in Section 11 merely say that when the City of Fincinnati issues bonds the resolution adopted by city council shall provide for the method of repayment.

Mr. Carter - I see. Yes, that is a little different.

Mr. Carson - Which is consistent with what we've done with respect to state debt.

Mr. Gotherman - I think the crux is to provide a method of repaying the debt, whatever that might be.

Mr. Carson - Is there any other way?

Mr. Gotherman - I suppose the statute could be passed which provides automatically for certain provisions in the local ordinance. I suppose that's one way.

Mr. Carter - We want to make it clear that we want to get rid of the indirect debt limit, and to do it explicitly would be perhaps worth doing.

Mr. Carson - Let me ask you this. John mentioned a second alternative and that is to specifically provide that debt service is not within the ten mill limit at all. Isn't that right? That's another approach, he said, but it is possible.

Mr. Gotherman - I think every one would agree that it would be most difficult to pass any kind of amendment that seemed to do away with the sacred ten mill limit

in Ohio. But here is an opportunity to do something that does liberalize it a little bit in an area where it causes trouble sometimes, and at the same time to direct the General Assembly to provide how localities should provide for debt repayment, and there's no reason why they couldn't provide limitations that would be as effective to guard against unreasonable open-end tax levies, by municipalities and counties. It would probably take the approach of exempting debt which is not going to be paid out of taxes, except as a guarantee. I would think that there's an opportunity to provide some flexibility for debt.

Mr. Carson - Practically, would this be a real help, John?

Mr. Gotherman - I think it could be. In the major cities of Ohio there are some measures that are not popular-you can never have them voted-which need to be done, which state what government would want, which the federal government encourages and perhaps could be handled in a way that perhaps even property tax money could be used to pay them, and yet it should not be open-ended. It should be subject to control. But whether that control should be a constitutionally dictated amount or whether it should be flexible so that as circumstances change the General Assembly can decide what it is. For example, there are a couple of cities in Ohio that under their charters--see you have another possibility which I haven't discussed--you can have a charter municipality which has a different indirect debt limit than the ten mill or the 1% because of a charter provision giving the right to levy taxes for all purposes and it could be less than ten mills or it could be much greater, and we have at least one or two that have open-ended permission for whatever debt is necessary and can be levied without a vote of the people. In those cases there have not been any unreasonable tax rates accrued because you have this authority in the General Assembly to limit debt. Moreover, it's subject to the control of the council and subject to the power of the people to remove the council. You could go one step further even and ~~give~~ perhaps state some direction to the General Assembly to regulate the amount that may be involved, but not attempt it in the Constitution. It ought to be flexible enough to change as the times change and as the needs are articulated to the state's legislative body. I would think that would be of considerable help. It's a little more controversial, obviously, because there is the possibility that there would be additional taxes, but not a whole great amount of risk. This wouldn't be like repealing the 10 mill limitation. It would be restricted and would be subject to the control of the General Assembly and it probably would be possible to devise limitations that would be helpful and permit the incurring of debt that is needed. I cannot give you a specific example because I really haven't thought about it that much but I am sure that it would be helpful and it would be used. I am sure it would be drafted very carefully. The bondholders do not want counties or municipalities overburdened with taxes for debt because that really impairs their ability to meet debt payments.

Mr. Carson - We haven't made any decision in this committee on Article XII, the ten mill limit or anything else up to this point. If we should decide to leave the 10 mill limit the way it is, my only observation is that this is tinkering with it.

Mr. Gotherman - It might be a way of solving the problem if in fact the last two or three years is going to be indicative of what happens to school bond issues which I think probably won't be, but if it is of course it would be a way to get at that problem too. It wouldn't be limited strictly in its application to municipalities and counties, you could expand it to schools. I think the main difference is that the schools use the property tax to pay debt. Municipalities and counties do sometimes but it is most unusual to rely on the property tax. You need that for operating,

and you know that if you use it, you are in trouble there. So they usually use revenues of utilities, different user fees, and municipalities utilize the income tax.

Mr. Carson - That's really the thrust of my question about your second proposal. I understand that municipalities use most of their inside millage for operating purposes.

Mr. Gotherman - You might permit them to actually utilize some of that millage. It would certainly give the General Assembly the ability to do with the suggested constitutional debt limitation what they do with the statutory debt limits and that is to say "Well, if you're not going to really use property taxes, then the limitations we devise will not include them in the computation. You're going to pay it off out of water or sewer revenues if you're going to pay it out of other taxes, other fees, other charges, why we'll just define that not to be debt within the meaning of the limitations that we're able to construct ourselves." I think that for that reason it would be more flexible, and would last a longer period of time, hopefully, than any attempt to put a rigid limitation in the Constitution. And I think it would allow us some initiative in how we could arrange to finance capital projects in the future.

Mr. Carson - Mayor Wilson do you have any observations?

Mr. Wilson - No, I don't care how we get at it other than to basically free up other revenues for debt retirement. The wording should be explicit enough that indicates what we're trying to do.

Mr. Carter - I would like to ask bond counsel if we eliminated Section 11 would that solve the indirect debt limit problem?

Mr. Carson - Mr. Gibbon said that wouldn't do it.

Mrs. Eriksson - He and Mr. Cortese both said that. Both said also that you really needed to make clear that the ten mills is not applied to debt service, in addition to whatever might be done to Section 11. Now that could of course possibly be done other than by amending Section 2. That is to say it would be possible to do it in Section 11 or in another section.

Mr. Carson - I don't think we have talked with them about appropriately amending Section 11 in the way we discussed. Have we?

Mrs. Eriksson - Not specifically, no.

Mr. Carson - Mr. Gibbon talked about repealing Section 11 when he was here--repealing it with an affirmative statement that the Section 2 10 mill limit does not apply.

Mr. Gotherman - Was there a comment about what an exception to the 10 mill limitation would mean in terms of the degree of the security of the bonds? It seems to me that you would be shifting from the more limited basis to a more general tax pledge, if you went to excepting the debt levies from the 10 mill limitation. It may well have some impact with the bond buyer. I think that's something out of my area of expertise, but they might have some comments as to what result that would have, in terms of interest rates and security to the bondholder. These legal provisions can affect the interest rates by small amounts but those small amounts are translated into substantial dollars. To the extent that we can, we ought to get the tax moneys going into

principal rather than interest.

Mr. Carson - We haven't had any definitive suggestions, have we, from bond counsel?

Mrs. Eriksson - I have had conversation with Mr. Cortese and I'm sure that we would be happy to make some specific suggestions if the committee would like.

Mr. Carter - I think it would be helpful to have it as an input that we would focus in on.

Mr. Carson - If we revise Section 11 to delineate the indirect question clearly but to retain some semblance of a requisite that municipalities must make provision for paying their debt would any change be required in the other two sections in Article XIII and Article XVIII?

Mrs. Eriksson - No, but at some point there might be consideration given to consolidating those two sections because they are repetitious to some extent. One idea would be to make an intersectional reference so that whatever we do by way of new language does not, as John has pointed out, reiterate the power of the General Assembly to regulate debt but merely refer to the other sections, so that we're not creating a new power. If we word that language carefully enough we would not be creating any conflict, or problems with those sections. If we're careful only to make a specific constitutional limitation that must be incorporated in any General Assembly regulation of debt.

Mr. Carter - Would it make sense to take this Article XVIII, Section 13 and transfer it to here and put it in context with the rewriting of 11 and tackle them both at the same time?

Mrs. Eriksson - I'm not sure that it's appropriate to do the entire content of those other two sections in Article XII.

Mr. Carter - Just Section 13 of Article XVIII.

Mr. Gotherman - Section 6 of Article XIII refers to finances and Section 13 of Article XVIII talks about audits, financial reports as well as taxes.

Mr. Carter - Section 6 of Article XIII says it shall provide for the organization of cities, etc. so I don't think that one you could transfer. Section 13 is talking about the limits on the powers of municipalities to levy taxes and the financial reports, etc. So it would seem to me that it might make some sense to tackle Section 13 of Article XVIII in context with this Section 11 and write one that goes into Article XII that deals with the entire matter.

Mrs. Eriksson - There were two problems with that. One is that Article XVIII deals with municipal corporations. The other problem is that then we are putting more specific debt language in Article XII which presumably will deal only with taxes.

Mr. Carter - Good point.

Mrs. Eriksson - It almost might be better to eliminate Section 11 of Article XII and incorporate whatever new language is decided on in Section 13.

Mr. Carter - Yes, O.K.

Mr. Carson - Section 6 of Article XIII doesn't seem to me to blend well with the subject of that article, which is corporations.

Mrs. Eriksson - No, it doesn't and that's because of the history of the section. In 1851, it was practically all there was in the Constitution about municipal corporations, and they put it in Article XIII with other corporate provisions.

Mr. Carter - In other words, what you're suggesting, Nolan, is that we put it all in Article XVIII then.

Mr. Carson - It would make sense to me. If we should eliminate the reference to the State of Ohio from Section 11 as we're talking there would be no need to have it in Article XII.

Mr. Carter - Then we would have the financial debt problems and taxation problems relating to cities under the section on cities and all in one place, which, in the sense of having a well-organized comprehensive constitution, makes sense.

Mr. Carson - I guess though this Article XVIII is municipal corporations and this would be broader than that, would it not?

Mrs. Eriksson - Well, that depends upon your view as to whether you really need to deal with political subdivisions other than cities. I think it would be clear that the General Assembly has the power to regulate county, township and school district debt in any fashion it wishes to.

Mr. Carter - They're just instrumentalities of the state.

Mr. Carson - It would be delightful if we could make one section out of three, rather than have these things spaced all over the Constitution.

Mrs. Eriksson - I do not know of any reason why Section 6 of Article XIII could not be simply repealed, and whatever additional language, such as assessments, could easily be added to the Article XVIII section.

Mr. Carson - I think it would be a good idea if the staff could try to combine these three with the ideas that we have suggested here this morning and see if it can logically fall in place in one section. It would also be helpful if you could coordinate with bond counsel and get their thoughts about the language. I think when we do this we want to be obviously very sure that we're not going to impede the borrowing power.

Mr. Carter - If we are going to have an exception to the 10 mill limit, it should be here rather than monkeying around with Section 2.

Mr. Gotherman - This will be helpful even without changing the 10 mill limit. It would negate the indirect debt limitation, which doesn't have anything to do with taxes, really. It doesn't change the taxing powers at all. The taxing powers would stay where they are. It simply deals with the question of the legal ability of the cities and counties primarily to incur debt. You could do it in several ways. One way would be to actually get into the ability to levy taxes, and that would accomplish about the same thing. If it's not included within the ten mill limitation then of course the indirect debt limitation would not be applied. But the other method, I think, would be satisfactory.

Carson - John, let me ask this. Would you, since you are well qualified in this area, like to put together a little memorandum for us on your second point? I think we would be particularly interested in the affirmative effects it would have.

Mr. Carter - It would be very helpful to us when we write up the rationale for this too.

Mr. Gotherman - I don't see where the indirect limit serves a useful purpose. If it were a meaningful limitation I'm sure there would be someone coming in and suggesting that it be retained.

Mr. Carter - What it does is to force the cities into revenue bonds and they pay higher interest.

Mr. Gotherman - I would just have the feeling that once we get into a constitutional provision that all three bond counsel would want to comment on it. Occasionally they get together.

Mr. Gotherman - I appreciate the opportunity to come over and talk to you today and if there's any way we can help, let us know. We'll also be interested in the taxation problem.

Mr. Carson - John, are there any other sections which are of special interest to you?

Mr. Gotherman - We're interested in the preemption doctrine. For example, in Ohio if we had a 100% value we would be talking about an indirect debt limit that would be 150% more than what it is now and we have 35%, so we have a 3.5 milllimitation so we're interested in the same problems that everyone else is.

Mr. Carter - That's a section 2 problem too.

Mr. Gotherman - The one area which has been sort of a thorn from time to time,and I'm not so sure it's a legal problem so much as an excuse that members of the General Assembly will use in order not to do something,is the problem of provision that says the state may not assume the indebtedness of a local subdivision. This does curtail the arrangements and the relationships between cities and the police and fire pensions. Accrued liability which is one of those things that really happened, and it wasn't anyone's fault, and the alternative solutions were narrowed considerably when the state simply took itself out of getting involved because of that provision in the Constitution. Now it may not be correct but it would have been helpful to us to modify that so we know for sure about bonded indebtedness, for example. There are a lot of things that are going to involve the working relationship between cities and counties and state government and they're going to have to work together under contracts and financial arrangements in the future and it seems to me that that kind of limitation really is an artificial thing-again a relic of the past.

Mr. Carter - That's an Article VIII problem.

Mr. Gotherman - Yes, I think we may have missed that one already. That's the only other area that comes in mind. I think that flexibility should be the name of the game in light of the changing role of cities and counties in state government. Constitutional provisions tend to impede rather than to assist. We would just like to see as many of those impediments removed as is feasible in the light of the politics of the situation.

Mr. Carter - Would it be appropriate to ask John to stay if we're going to talk about preemption then.

Mr. Carson - Sure, it would be great.

Mr. Gotherman - I'll just sit in, then.

Mr. Carson - Jack, since you and Dick were here when the committee discussed preemption and I wasn't, I wonder if I can ask you to take over this part of the discussion.

Mr. Wilson - Basically, it revolved around the second paragraph in this little memo we have here, whether the General Assembly should be required to do it or state whether they do or don't. We didn't reach any conclusions but merely discussed these possibilities and how preemption could be handled. I don't think we could write a provision that precludes preemption, because the state legislature has that right, and I don't see how we could ever word it to prevent preemption.

Mr. Carter - Basically, if I can add to what Jack has said, at the last meeting the staff had suggested five alternatives, and we narrowed it down to the two and asked the staff to give us some specific language on the two alternatives that we felt were appropriate, and that's this Group 1 and Group 2.

Mr. Carson - Not 3?

Mr. Nemeth - They were listed as points one and three in the previous memorandum but 1 and 3 have now become 1 and 2 in this one. Alternative A in Group 1 (H.B. 946, 103rd G. A.) is something which has already been by the General Assembly. It's the one provision that's cited in Mr. Glander's 1960 article as an attempt to handle this problem by general legislation, and I set it out here just so that we could focus on it again. It may not be one that you would want to consider, but at least it has some historical and perhaps some practical value. I think Ann has some reservations about the particular language here, but maybe it would be better if I let her explain that.

Mrs. Eriksson - Well, I have some reservations about putting the word "preempt" in the Constitution--for one reason because it can mean more things than just taxation and because it is more a term of art. It means something to those people who know what you are talking about, but I would prefer to write it a different way in the Constitution so that we're not using that expression.

Mr. Wilson - The word "precludes" accomplishes or means roughly the same thing, doesn't it?

Mr. Gotherman - One of them, I can't recall which, I think it was the franchise tax, uses the "limitation of power" and prohibition language. One thing strikes me as being a problem: I don't think you want to put in the Constitution a provision that would seem to say the General Assembly makes its decision "one time", would you? If the law levying the tax provides for it then, query, an amendment which provides different later, is that a part of the law which levied the tax? It seems to me that we would not be happy with a constitutional provision that says that we couldn't change preemption--if a tax were preempted--that we couldn't go back and say times have changed and it's now appropriate to have more than one--

Mrs. Eriksson - I would think that as long as you're enacting a law, you could always

amend it. I don't think that would be a problem. Mr. Glander, will you please join us at the table, because I'm sure you're going to have some comments and we'd very much like to get them.

Mr. Glander - Thank you. What I guess you're suggesting, John, is that if it is provided that the original law declare an attempt to preclude,whether or not there could be a subsequent statutory amendment that could reverse it?

Mr. Gotherman - Right.

Mr. Glander: I think it's an arguable situation that should be avoided.

Mr. Wilson - Maybe we could insert the words "or amending" in there, somewhere.

Mr. Glander - I don't think you can escape the use of the word "levying" entirely.

Mr. Gotherman - It might be phrased in terms that the imposition of a tax does or does not limit or impair the ability of municipalities to levy the same or a similar tax.

Mr. Glander - What you've done is substitute "imposition" for "levy" but the "levy" of a tax has pretty significant meaning.

Mrs. Eriksson - And it continues. You don't just levy it once.The tax continues to be levied as long as the law is on the books.

Mr. Glander - That's right.

Mrs. Eriksson - So if you can repeal it, I don't see why you couldn't amend it.

Mr. Glander - Yes, I think that's right. I think you could put some language in there which would negate the fear you have, John.

Mr. Cotherman - My concern is more with the word "law" than with "levy."

Mr. Glander - Oh "Statute" wouldn't help you there, would it?

Mrs. Eriksson - In other words, (A) in Group I, which simply says "The levy of a tax . . ." would perhaps, in your mind, John, be a better way of saying it, rather than talking about a law levying a tax.

Mr. Carter - My preference is for Group I (B).

Mr. Carson - I don't like "field of taxation". It's kind of broad.

Mr. Carter - Group I (C) solves that problem. How would you react to (C)?

Mr. Carson - Well, we restrict this to municipal taxes. Is it necessary to do that?

Mr. Glander- That's the area in which the issue has always arisen.

Mr. Carson - I know, but thirty years from now--

Mr. Nemeth - --- the Constitution would have to be amended again.

Mrs. Eriksson - Not if the General Assembly gave other units of government the general power to tax--

Mr. Glander- --which it could do now by statute.

Mrs. Eriksson - They could do that. We haven't thought of that.

Mr. Carter - What you're suggesting instead of "municipal tax" is "tax by a political subdivision" or something of that sort. That's an excellent point.

Mr. Glander - (C) has "same or similar"--maybe the others do, too--and I think those should go together. There's a lot of case law built up on "similar".

Mr. Carter - The way that would read then is "The levying of a state tax does not preclude the levying of the same or a similar tax by a political subdivision. . ."

Mr. Glander - I would say ". . .a municipality or other political subdivision . . ."

Mrs. Eriksson - Perhaps " . . . or other political subdivision authorized by law to levy the tax". Otherwise, the provision might appear to give them the power to levy a tax they can't now.

Mr. Carter - ". . . or other political subdivision authorized by law to levy the tax..."

Mrs. Eriksson - Or ". . . such tax or taxes,"

Mr. Wilson - I'm not sure I like the change. "Other political subdivisions" are subdivisions of the state, anyhow. The conflict is between the state and municipalities.

Mrs. Eriksson - But the General Assembly could conceivably authorize other political subdivisions to levy taxes, generally.

Mr. Carter - And this is relevant in view of what the Local Government Committee is talking about.

Mr. Glander - We start out with the proposition that no political subdivision has any taxing power unless it is specifically authorized to levy. Why do we need to negate preemption? Having been authorized to levy tax " A ", they could not levy tax "B" without specific legislative authorization, anyhow. Even if the state is already in the field, the minute the state authorizes them to levy tax "B", there is no preemption question left. So I'm not sure, as (Mr. Wilson) may be right that you better stick with municipalities on this one.

Mr. Gotherman - And I'm not sure the language is broad enough. I'm not sure what the General Assembly is going to do to counties, regional governments or anybody else in terms of taxing power. I feel relatively comfortable that with no constitutional provision the General Assembly can say that the power of a region, for example, to levy a tax in no way impairs the power of a municipality to levy a tax, but if we have a constitutional provision referring to a "state tax," query, is a regional tax a "state tax"? If it isn't, and we have a negation of preemption for state taxes, do we have the <u>reverse</u> implied for county or regional taxes which may come down the road in the future? In other words, it isn't a simple matter of negating preemption by state taxes--unless we consider all taxes except municipal taxes to be state taxes.

Mr. Wilson - I'll go along with that--change the wording to read: "The levying of a state tax or tax by any other political subdivision authorized to levy such a tax, does not preclude the levying of the same or a similar municipal tax . . ."

Mr. Gotherman - I think you'd get the problem--if the county were to levy a tax, without a provision in the Constitution the General Assembly can say that doesn't affect any municipal taxes. For example, in the sales tax law, they could say that the levy of a state sales tax or a county sales tax does not limit the power of municipalities to impose sales taxes. With a provision in the Constitution that talks about a "state tax", is the county sales tax a "state tax"?

Mr. Wilson - There would be nothing wrong with the wording if you'd put "state authorized" in there.

Mr. Nemeth - What if it isn't collected for the benefit of the state or disbursed by the state?

Mr. Gotherman: In a broad sense it is. The federal government looks at all of us as being part of the state. As a political scientist, it depends on where you start from--whether you look from the bottom up or the top down.

Mrs. Eriksson - And, of course, the General Assembly could also authorize municipalities to levy taxes, as well as prohibit them.

Mr. Glander - But, of course, under the home rule power, they have full power to levy any tax, if not prohibited.

Mrs. Eriksson - --if not prohibited. But the expression in Article XIII--

Mr. Glander - Article XIII, Section 6?

Mr. Gotherman - There is a question in my mind whether that authorizes preemption. It doesn't say "prohibit".

Mrs. Eriksson - It says ". . . restrict their power of taxation." Maybe they could not authorize. Maybe they could only restrict.

Mr. Glander - Under Article XIII, Section 6, you mean? They don't need to authorize. The cities already have that power.

Mrs. Eriksson - I know they don't need to--but could they?

Mr. Glander - Where do you contemplate putting this provision?

Mrs. Eriksson - I think Article XII, State taxation.

Mr. Carson - Going back to "municipal" Can't a county adopt a charter and assume taxing powers?

Mrs. Eriksson - Right.

Mr. Carson - Is this language broad enough?

Mr. Glander - It may not be.

Mr. Carter - On that basis, we would have: "The levying of a state-authorized tax does not preclude the levying of the same or a similar tax by a municipality, or other political subdivision authorized by law to levy such taxes. . ." That doesn't quite cover it either. Just say "authorized to levy such taxes".

Mr. Carter - So, we would change Group 1 (C), by adding "authorized" after "state", crossing out "municipal" and then after "tax" we would add the phrase "by a municipality or other political subdivision authorized to levy such taxes," and then continue.

Mr. Wilson - We have to insert the word "authorized" between "state" and "tax" in the second line, also.

Mr. Carter - Right. Or ". . . unless the law imposing such tax ". Isn't there a clear antecedent?

Mr. Glander - I think that's right.

Mrs. Eriksson - Rather than saying "a political subdivision authorized", what about "a political subdivision which has authority to levy"? "Authorized" still sounds like someone has to take action to give them the authority.

Mr. Carter - Good catch.

Mr. Nemeth- What problems might we have with using "political subdivision" here, while using "governmental entities" elsewhere in proposed Article VIII?

Mrs. Eriksson - I'm not sure we wouldn't want to confine this to political subdivisions, because generally if you're given the power to tax, you are defined as a political subdivision by law.

Mr. Gotherman- And if you're granted the power to tax, preemption is no problem.

Mr. Glander - That's right.

Mr. Carter - How about using "governmental" instead of "political"?

Mr. Glander - It's a more apt term but "political subdivision" has acquired a definite meaning.

Mr. Carter - In other words, a "political subdivision" doesn't necessarily have to have elections?

Mrs. Eriksson - No, for example, special authorities.

Mr. Carter - Why don't we go with what we've got, subject to research.

Mrs. Eriksson - Yes, and go back and review why we used "governmental entities" in the first place.

Mr. Gotherman - There must be a way of saying this without talking about "the law imposing". It must be possible to talk about "the law" without talking about "the law imposing".

Mrs. Eriksson - Perhaps we can use the word "levy" again.

Mr. Carter - Or just say "unless the levy".

Mr. Gotherman - Or "unless the law specifically so provides", or "the general law . . ." To get away from the question of whether you have to do it once , . .

Mr. Carter - Yes. Just delete that "imposing such tax", or "imposing the state-authorized tax". I like that. That would get away from your (Gotherman's) point of a specific statute.

Mr. Carson - I think this might be interpreted to mean that the legislature could pass a general statute which says that any time it passes a taxing statute, it shall preempt all local taxes.

Mr. Carter - Yes, it could.

Mr. Carson - But, it seems to me, we're suggesting they ought to make a decision tax by tax, rather than on a general basis.

Mr. Carter - Yes, it's a question.

Mr. Glander - That's the intention of this--I think this has to be on a situation by situation basis.

Mr. Gotherman - I see what Mr. Carter's point is. Maybe my concern is not realistic, that a court would say that it would apply only to the specific law that was passed.

Mr. Glander - I'd like to suggest this involves two approaches. The first decision you have to make is whether you want to adopt the approach which puts an affirmative duty on the legislature, or take the approach we now have that there is a preemption unless the legislature negates it. I think I would prefer to put the burden on the General Assembly.

Mr. Carson - If this approach were adopted, and the state enacted a tax, the legal problem would become "What is a similar tax?" But I see no way we can eliminate that.

Mr. Wilson - I see another semantics problem in here. The word that bothers me is "such", where we have "has the authority to levy such a tax" or "has the authority to levy such taxes". Suppose the state passes a certain tax, saying nothing about preemption, but no political subdivision has the authority to pass that certain tax at the time the state does. Are political subdivisions then precluded? Why don't we just strike the word "such", and just say "which has the authority to levy taxes". The word "such" pins it back to the state. If we eliminated the word "such", then this provision would work, regardless of what tax field the state might get into.

Mr. Carter - I don't see any reason why we shouldn't eliminate it. Does anyone have any objections?

Mr. Gotherman - I think this may open up the possibility that a political subdivision could impose a tax it could not otherwise impose--by implication.

Mr. Gotherman - Maybe something like "The levying of a tax by the state or its political

subdivisions and other public entities", if you want to get into that, and whatever else we may have to pick up, sounds better to me, because then we'd be talking about all taxes, whether they're by the state or not. For example, you might have the argument that a city can't levy a tax if the county in which it is located levies it, if the county is granted the right to levy the tax by statute or by the Constitution.

Mrs. Eriksson - And if you have "state-authorized", some would argue that you're only talking about taxes which the state authorizes someone else to levy, not taxes which the state levies.

Mr. Glander - The thing that bothers me there is that nobody except a municipality can levy a tax unless authorized by the state.

Mr. Carter - Aren't we saying "The levying of a tax by the state and its political subdivisions does not preclude the levying of the same or a similar tax by a municipality or other political subdivision which has authority to levy taxes, unless the law specifically so provides". Your worry is about "authorized"?

Mr. Gotherman -What I'm really concerned about is whether "authorized" picks up taxes not levied by state government itself.

Mr. Carter - Wouldn't this solve the problem?

Mr. Gotherman - Well, yes.

Mr. Glander - I'll tell you what I'd go along with. I'd say "The levy of a tax by the state or by any of its political subdivisions duly authorized . . ." If you put that phrase in, I would have no quarrel.

Mr. Gotherman - O.K., sure. I see your concern that that might again be granting general powers, not to municipalities, but to counties and townships.

Mr. Glander - Right.

Mr. Carson - Could we go back. I'm still on "such". Let me ask a question. Can a village impose a tax only if it is specifically authorized by statute?

Mr. Glander - Villages are municipalities.

Mr. Carson - With total power to tax unless prohibited.

Mr. Glander - Right.

Mr. Gotherman - But the legislature could restrict them.

Mr. Carson - I guess my only question is whether by taking out "such", this provision might be interpreted to mean the legislature no longer has that power to restrict.

Mr. Wilson - I think that was Emory's point.

Mr. Carter - How about this way: " . . . by a municipality or other political subdivision having taxing powers. . ."?

Mr. Gotherman - I don't think that "such" creates a problem.

Mr. Wilson - It's a "chicken and egg" thing with me.

Mr. Gotherman - You'd have to say "the same or a similar tax" unless you say "such". "Such" is a little different than what we're talking about.

Mr. Glander - Unless you say "such" means "the same or similar". But why not use the same words?

Mr. Wilson - We've already said "same or similar" above. The point is that you might not have the authority to levy "such" a tax--

Mr. Gotherman - --at the moment.

Mrs. Eriksson - It's a problem of how you conceive of "authority", isn't it? We're looking at it as your right to enact an ordinance if you want to, and you're looking at it as the actual existence of the ordinance.

Mr. Wilson - Well, I'm looking at it as the creation of a new tax base by the state--like a tax on blondes. At the moment they levy that we political subdivisions don't have the authority to levy such a tax. After the General Assembly passes it, then we could unless they preclude it.

Mr. Gotherman - It would take a new concept to make that a problem, because except for cities and counties which have some powers of cities, nobody is going to levy any taxes without the General Assembly's approval, and then preemption is not really a problem. The problem is only going to be in the case of those who have home rule powers of taxation. So I would think that unless you actually had the tax involved, you wouldn't have any problem.

Mr. Wilson - This just bothers me a little bit.

Mr. Carter - From the point of view of grammar and logic, why don't we just delete that phrase "which has authority to levy such taxes", because it's clear without it. It would then read: "The levying of a tax by the state or its political subdivisions duly authorized does not preclude the levying of the same or similar tax by a municipality or other political subdivision unless the law specifically so provides." It's redundant. Just cross off that phrase.

Mr. Wilson - You're getting closer to my point.

Mr. Glander - Why, I think I'd go along with that.

Mr. Gotherman - I do feel that you still have the problem that the word "state" is not a word of art. If you're in Washington, youconsider all taxes to be state taxes. If you're in Ohio, you consider Statehouse taxes to be state taxes. So I think you need some more precise language to explain what taxes you're talking about.

Mr. Glander - Do you want to say "The levying of a tax by the General Assembly"?

Mr. Wilson - No. That would preclude those voted in by <u>any</u> state legislature.

Mr. Gotherman - I think "The levy of a tax by the state or any of its political subdivisions authorized to levy taxes does not preclude . . ." or "duly authorized"--either one.

Mr. Glander - That's all right.

Mr. Gotherman - That way we negate county preemption, which could come some day, even without legislation being in effect.

Mrs. Eriksson - The problem you raised, John, about the law imposing the tax might be solved by saying ". . .unless the General Assembly declares its intention to preclude . . ." or ". . .unless the General Assembly or other tax-levying jurisdiction declares its intention to preclude . . .", rather than talking about the law levying or imposing the tax.

Mr. Gotherman - Well, I'm inclined to think "unless the law specifically so provides", and then if you don't want to let the General Assembly preempt carte blanche add a sentence which says that the General Assembly shall not declare its intention to preempt or preclude taxation in more than one field at a time. Don't try to put everything in one sentence--use two sentences if necessary.

Mr. Carson - I hate to get away from the basic concept that the General Assembly should decide whether it preempts at the time it adopts a tax law.

Mr. Carter - How about changing "the" to "each": ". . . unless each law specifically so provides."? Or ". . . each such law . . ."?

Mr. Gotherman - ". . . unless each tax law . . ."?

Mr. Carter - Yes. Nolan's back to the point that they ought to make a judgment every time they have a law.

Mr. Carson - That we shouldn't have a general law which is a preemption law.

Mr. Gotherman - When you combine "law" and "imposing", you get back to the problem we discussed before , which is that the legislation which authorizes the issuance of bonds has to provide for the levy of the tax and I believe that "law imposing" could be construed merely to include the act that imposed the tax.

Mr. Carson - And you're concerned about the later amendments?

Mr. Gotherman - Yes.

Mrs. Eriksson - Well, I'm not concerned about that. My view would be that the General Assembly could amend the law, but I'm not sure John is satisfied.

Mr. Glander - Well, that problem's solved if you strike out "imposing the tax" and substitute "such law" or "each law"--

Mr. Gotherman - --or "each tax law".

Mr. Carson - I'd like someone to read the whole thing to me.

Mr. Carter - "The levying of a tax by the state or its political subdivisions--

Mr. Wilson - ". . . or any of its political subdivisions . . ." May be less than unanimous.

Mr. Carter - ". . . or any of its political subdivisions . . ." I still have the phrase duly authorized" in here --

Mr. Glander - I think you've got to have that in.

Mr. Carter - ". . . does not preclude the levying of the same or a similar tax by a municipality or other political subdivision unless each such tax specifically so provides". That's I think where we stand at the moment.

Mrs. Eriksson - I would have problems with "each such tax law" because I think we've discussed two groups of tax laws, now.

Mr. Wilson - You're right--state tax law and political subdivision tax law.

Mr. Carter - Yes--

Mrs. Eriksson - You can argue that municipalities don't enact laws, but if you're talking about a political subdivision which has derived its power from the state law--

Mr. Carter - Yes--

Mr. Glander - Your concern is what "each such tax law" refers to.

Mr. Carter - This is maybe where we ought to get into "the General Assembly".

Mrs. Eriksson - Yes. ". . . unless the General Assembly . . ."

Mr. Carter - Nolan would like to have in there that they have to direct their attention to each action, and I think that's a valid point.

Mr. Gotherman - No one else really passes a law, do they?

Mrs. Eriksson - No.

Mr. Glander - Let me make a suggestion. Go back to the beginning, "The levying of a tax by the state . . ."Why don't we say, "The levying of a tax by the General Assembly or any of its political subdivisions", and then go down to the bottom, ". . . unless the General Assembly. . ."

Mr. Carter - Couldn't we just stop in the first part at "The levying of a tax by the General Assembly"?

Mr. Nemeth - We couldn't use "of its" any more. It would have to be "political subdivision of the state".

Mr. Gotherman - Or "political subdivision".

Mr. Carter - Maybe we've gone about as far in drafting as we can. Maybe we should ask the staff to do some drafts to critique at the next meeting. This is very hard for a committee to do.

Mrs. Eriksson - I think we have an idea--enough to get started all right.

Mr. Gotherman - I will say this preemption doctrine is fairly tricky, and unless it can be properly handled in the Constitution, those of us who have to live with it would feel more comfortable without it being in the Constitution. If it's not done properly, we'd much prefer to see it as it is now. If we can persuade anybody to eliminate it by statute now we can eliminate it by statute. Any constitutional provision at all may preclude the elimination of the preemption doctrine by statute.

Mr. Carson - Can we leave the drafting to the staff, then?

Mr. Carter - And maybe they can get a draft to Emory and John to get their input, and hopefully to have it up for action at the next meeting of the committee.

Mrs. Eriksson - Yes.

Mr. Carson - Section 2 is an extremely important part of our tax structure. I don't think there's a way that we can get a change in the 10 mill limit adopted in the state of Ohio, and even though logically you can say it doesn't make any sense at that level anyway it just seems to me that a proposal to change it might be harmful to the rest of the things we are trying to do. We've had some very interesting discussions on uniformity and I think we've had some pretty well informed people tell us that we can get along with uniformity the way it is. On exemptions, the General Assembly has the power to limit them, and I think the problem there is that the General Assembly has gone farther than the Constitution.

Mr. Wilson - In more recent years it has been more liberal than the Constitution intended.

Mr. Carter - What other sections do we have? The income tax of course we ought to take a look at again and the inheritance tax section, and there are several things you can do to the income tax that requires the return of half the money. It would seem to me at the least that that needs some clarification. There are legal problems in it and if we decide to keep it, it should be polished up so that people know what it really means.

Mr. Wilson - You'll get around to my word pretty soon--strengthen the section by providing that taxes on income or taxes measured by income are income taxes and not franchise taxes or anything else.

Mr. Carter - There are five things we could act on: the indirect debt limit, the income tax issue, the adoption of federal tax laws, the earmarking section, and preemption.

Mr. Carson - I think also we have the question of repealing the section authorizing excise and franchise taxes.

Mr. Carter - Yes. That was a fairly routine matter. The legislature already has the authority to impose them and the sections are needless.

Mr. Carson - If we should consider this last thing we were talking about, reference to the federal laws, where would that go? Would that go in the income tax provision?

Mrs. Eriksson - In my opinion, yes, as long as you're going to restrict it to income tax

Mr. Glander - I don't believe it's needed the way the estate tax is written.

Mr. Carson - I hate to go to the full Commission with only a part of a section. We have Section 8 which says "Laws may be passed providing for the taxation of income 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 not exceeding $3,000 may be exempt from such taxation."

Mr. Carter - We could just delete that last phrase.

Mr. Nemeth - That may be construed as withdrawing authorization to make any exemption.

Mr. Carson - We could say "exemptions may be provided by law." Generally the committee thought that the $3,000 figure should go by the boards. But it would seem to me that it would make sense to put this new provision right there.

Mr. Carter - Why don't we have that drawn up for the committee, then?

Mr. Carson - I think that is a good approach. Was there anything else in Section 8 that we had discussed that needed changing? Is there anything we can do today with respect to direction to Section 9? First of all, do you want to retain the 50%? I suppose you could say the Constitution could leave this to the legislature but I would doubt very much whether we're going to get that through the legislature. So assuming the 50% formula stays in the next problem or question is what does income tax mean and what does inheritance tax mean? Is the franchise tax measured by income? Is it an income tax?

Mr. Carter - It is not. Isn't that the court decision?

Mr. Glander - Well, there is some authority, but not in this particular area on the fact that there is a difference between a tax upon income and the tax measured by income. If you would want to send back to local governments half of the franchise tax measured by income, the language should say so.

Mr. Wilson - That's my motion. It's difficult to know how to approach this. The legislature has successfully gotten around the provision anyhow, either through calling it income tax or franchise tax or by saying that money you've been getting out of other funds is now going to be called income tax money and the actual net increase in revenues to municipalities of the state because of a state income tax being in existence is practically nonexistent. We get $17,000 more a year but only because they increased the local government fund amount from $36,000,000 to $48,000,000.

Mr. Gotherman - I think local governments would really be more interested in a maintenance of effort provision by the state. This constitutional provision does have the benefit of making sure the state maintains some effort. They may get around it from time to time but they can't completely eliminate the assistance to local governments, so it does have a maintenance of effort aspect even though it doesn't mean anything right not.

Mr. Wilson - If the provision had said that of any new revenue received by the state, 50% shall be returned, it would have done what I think it should have done.

Mr. Carson - I know that the state can avoid the problem by either returning this money directly and not giving local governments other moneys that they have been given in the past, or by calling other moneys they give them returns under this

provision. But I must say that I had always thought that this provision was intended to include the franchise tax measured by income. It says income tax and I think that is an income tax.

Mr. Wilson - Many of us also thought that it meant new revenues. That part of the argument probably won't hold water but I agree with you that the corporate franchise tax is an income tax, regardless of what kind of a name you want to give it.

Mr. Carter - Is earmarking in the public interest?

Mr. Wilson - This preemption doctrine that we have here made it in the public interest. If we had a free rein here in Ohio for municipalities and local governments to tax what they want to tax, this wouldn't have meant so much, but since we are highly limited in what kind of revenues we can evolve for local government because of preemption, this thing meant a lot to us.

Mr. Carter - In other words, what you're saying is that the preemption change, if adopted, makes you feel a lot better. At least we have taken the courts out of it.

Mr. Gotherman - But unless you take the General Assembly out of it then I don't think many local government officials and school officials would feel particularly comfortable without this constitutional maintenance of effort required by the state to local governments. After all if they have total ability to say to you "NO" which they do now and I would suppose in future constitutions, then should they not have some obligation to provide support? I think the issue is whether or not there is a constitutional obligation of the General Assembly who can say "NO" to you to help you. I think that's more the issue than whether or not it's in the public interest to have to live with the provisions. Maybe it's just another way of phrasing it, but it seems to me from a local government point of view, that is the issue. I would even think that schools would be somewhat concerned about it.

Mr. Wilson - The concept that gave rise to federal revenue sharing to my mind is applicable here. The federal government dictates things to be done on the state and local level, and they should provide money.

Mr. Carson - The section reads ". . . shall be returned to the counties, school districts, city, village or township in which said income or inheritance tax originates or to any of the same, as may be provided by law."

Mr. Glander - Which gives the General Assembly some power to control which political subdivisions receive the 50% but not the use of it.

Mr. Gotherman - If this were eliminated, we might even get back to where we were before the income tax. Local government, including schools, saying that the state is decreasing its support, not it's 40, 30, 20, 15%. This kind of a limitation, now that we have the income tax, does provide some solace to people in local government and schools.

Mr. Carson - I personally would like the committee to consider adding taxes measured by income. If the legislature had adopted a straight corporate income tax, there isn't any question that it would have come under this. Now what they did was to amend the franchise tax law which is a tax on a license to do business and by this language has, in my view, circumvented what is now in the Constitution.

Mr. Carter - Wouldn't it mean that they just slide funds around?

Mr. Wilson - It might, but they might have to give us a little bit more.

Mr. Gotherman - I doubt if cities would get more,

Mr. Carter - I would have no objection to doing that.

Mr. Gotherman - Some day it might have an impact on how much state government helps local governments financially.

Mr. Wilson - Let's just project inflation way way in the future and the growth of the economy to the point where total collections of income tax, corporate, individual and state reach a tremendous amount if they are fixed in dollar amount returning to certain areas which they have been up until this last session of the legislature, on a dollar amount, rather than a percentage amount they might have to increase that dollar amount to comply with the provisions.

Mr. Carson - Has there been any problem about the interpretation of inheritance taxes?

Mr. Glander - I'm glad you mentioned that. No, except that we now have an estate tax which is a little different animal than the inheritance tax. I think that some language needs to be changed in that section dealing with the allocation of the inheritance or estate tax, you can say. Technically an inheritance tax is upon the recipient, whereas an estate tax is upon the whole estate. So that language needs to be cleaned up.

Mr. Carter - Could we use "death taxes"?

Mr. Glander - The trouble with that is that it's a little too general. I think that we ought to get into estate taxes. I think that needs to be put in there. Switch or leave it in the alternative, which I think I would do.

Mr. Carson - How about the last part of Section 9? Is there a problem in designating counties, school districts, cities, villages, townships?

Mr. Wilson - The General Assembly could give it all to schools or give it all to counties. There's no guarantee that they would have to distribute to all of them or more than one.

Mr. Carson - Maybe the problem is the language "in which the income or inheritance tax originates".

Mr. Gotherman - I think a lot of people exaggerate the importance of that problem, because an income can originate where you live, where you earn it.

Mrs. Eriksson - Might it not be better to take it out? And simply require that the tax be returned to those same political subdivisions, as may be provided by law?

Mr. Carson - Where we have uncertainties, it seems to be a good idea to try to eliminate them. I had thought there was one here. Are there any other local subdivisions that should or should not be in here?

Mr. Carter - It is restrictive. Should we try to add under regional governments, that type of thing, which might be funded through the state collection of revenues?

Mrs. Eriksson - The more you add, the more you dilute within the required 50%, but you can argue, of course, that out of the other 50% the General Assembly could provide for the regional governments.

Mr. Gotherman - These mentioned are general purpose districts. Anything else you have is a special purpose district, including regions as I understand them, although that is not really clear.

Mrs. Eriksson - "Political subdivision" would mean a great deal more than already in the section.

Mr. Carson - But we don't have a term that we have been using that means that we cover just these.

Mrs. Eriksson - I don't know of any other term unless you wanted to devise a term like general purpose local governmental units.

Mr. Carter - Perhaps we can reach decisions on the income tax section and then we can add the local government earmarking and then that leaves us really only Section 2.

Mr. Wilson - When the legislative members of this committee are present, we may have some divergence of opinion.

Mr. Nemeth - The Park Investment case has stirred some more ripples, of course, on uniformity and the Farm Bureau Federation, I think, has already announced that it intends to go to the General Assembly with a proposal for a constitutional amendment regarding the classification of property.

Mr. Carson - Before we get too far on Section 9, could we prepare a draft or revision of Section 9 which would maintain the 50% turn back, that provision. It would include taxes measured by income. The language needed to cover the franchise tax problem.

Mr. Glander - Mr. Chairman, there's another section that refers specifically to inheritance taxes. That ought to include estate taxes.

Mrs. Eriksson - Yes, and that's Section 7 and that also would raise the question of whether you want to change that $20,000 figure.

Mr. Carter - By the same principle that dollars should not be in the Constitution, we should eliminate it and permit the General Assembly to determine exemptions.

Mr. Carson - We need that because of the graduation. I would move that we do the same thing with the exemption as we did with the other.

Mr. Carter - It seems to me we have a draft of a whole Article XII, except Section 2.

Mr. Carson - I think 7 will stay with any needed changes and this refers to taxation by the state so we may not have the inheritance tax vs. the estate tax problem, in Section 7.

Mrs. Eriksson - It also uses the word "inheritance" though.

Mr. Carter. Getting back to Section 2, I recall and Mr. Glander, I'd like to refer to you on this, there was some discussion about how we could improve the language

without really changing a great deal of substance on this question of exemptions. I remember the discussion on this, without limiting the general power and I can't remember what the point was.

Mr. Glander - "Without limiting the general power" was interpreted in the Denison case. What was said really, in effect, was that the legislature has power to exempt property subject to certain general limitations in the Constitution, that is, subject to the equal protection provisions of the Constitution. That could be clarified, but whether you're going to come out with language to mean anything more than you have, I don't know.

Mr. Carson - I think we should be concerned about the broadening of the exemptions that apply. The legislature has taken it beyond the bounds originally thought of.

Mr. Glander - And even the categories of property that may be exempted here as mentioned in the Constitution, the statutes which implement them are varied in character, and there are some statutes of exemption that don't fit in anyway.

Mr. Carson - On the exemption issue I think this is one case where the Constitution gives broad power to the legislature and they have used it.

Mrs. Eriksson - The committee has never had anyone before it in favor of classification.

Mr. Carson - No, we had somebody on the other side.

Mrs. Eriksson - You might want to ask some proponents of classification to present testimony because this would complete the package.

Mr. Carter - We've given them all the opportunities.

Mr. Nemeth - There are few classification statutes in other states. The only one I can put my finger on is Hawaii. Even those states which do not have a uniformity rule or whose uniformity rule has been liberally interpreted have stayed away from actually enacting classification.

Mr. Carson - I was rather persuaded on uniformity by looking at the material that the staff sent us on Minnesota - pages of sections creating classifications, and they wish they had never gotten involved in it.

Mrs. Eriksson - Several other states either have or are in the process of amending their constitutions to permit classification, so there must be some good experiences as well as bad.

Mr. Gotherman - I think a current question about classification would be classification of not just the traditional categories but what about deteriorated property?

Mr. Glander - The Supreme Court in the Park Investment case knocked out the legislation to take into account current use of property. I heard someone on the radio say that it was going to raise the real estate valuations of farm property some 22%. That's not true state-wide. Some land adjoining growing municipalities will be increased.

Mr. Gotherman - I think that we would want to argue rather strongly against use as the standard because of deteriorated housing or a parking lot at Broad and High.

The cities' land acquires more value than farm land. Once you get into that, I think that we would look at it closely in terms of getting more emphasis on land.

Mr. Carson - Why don't we have the Farm Bureau come to our next meeting? Maybe John would like to come back.

Mr. Carter - Well, they have been invited to appear, have they not?

Mrs. Eriksson - I don't recall. We have never invited anyone to speak specifically on classification.

Mr. Carson - Well, let me ask this. Something less than authority to classify would permit the legislature to use either or both current use or true value. Is that anything the committee would want to consider?

Mr. Gotherman - Isn't that an oversimplification of the problem though? The problem is that the farmers want current use. In the farms, great, but what about in the cities? We were quite pleased to see that part of that statute declared unconstitutional.

Mr. Glander - That was the source of the amendment that was put in.

Mr. Carson - You mean that the statute that was passed in Ohio would have required taking vacant land into account? I thought that the statute specified agricultural use.

Mr. Glander - The decision went back to the test that has been talked about in all the Park Investment cases, and that is valuation standard of true value and they equated that with market value. The market value of land would depend upon where it is.

Mr. Carter - And I am inclined to the view that the public interest is better served having that test, although I admit it works a hardship on many individuals, the old farmer who is living out his years on a farm. It really is a touchy question.

Mr. Nemeth - I think we did send out some material on site-value taxation.

Mr. Glander - Out in California there are some irrigation districts which can establish areas for different treatment.

Mr. Nemeth - It's not unusual to find park lands or forest lands classified as separate classifications of real property. There are several states which classify agricultural property as such, even though they don't have a comprehensive classification statute. This permits the legislature by law then to define what agricultural land is and also permits the legislature to specify the conditions under which farm land is entitled to the tax breaks. It may have to be used as agricultural land for a period of 5 or 7 years before it qualifies. If it falls into that classification and is not used as agricultural land for the requisite period of time then the owner becomes liable for higher taxes, going back over all the period he has held this land.

Mr. Carson - One thing that has worried me about this whole subject--you always have the case of the farmer who is permitted to be taxed on current use on the outskirts of a city, one day he has a windfall and the price he is paid is based on current market, not on use.

Mr. Carson - John would say that this sounds O.K. but doesn't this really deter development?

Mr. Gotherman - Farmer Jones, or a slum landlord, or just a corporation, why should we encourage them to speculate on increased value in the future? Why should we permit land which under market conditions would be developed if it were treated equally with other property to be taxed differently? So that the best use of the land will be made under market conditions, rather then encouraging the farmer to sit there and have a few potato crops and a corn crop and then wait until he can get the most for it. Why give him a government subsidy to do this?

Mr. Wilson - You mentioned slums. There should be some way of reducing taxes if a guy improves his property and increasing taxes if he doesn't.

Mr. Gotherman - So that he can't afford to sit there. Once you get into classification it seems to me that it will deal with both those problems. Whether the General Assembly can do it is a highly speculative matter.

Mr. Carter - This is a very complex problem. I would not really want to take the responsibility even after a couple of months of study of tackling this issue.

Mr. Wilson - This is one area which as you say, we could put an awful lot of time on, and we might come up with something.

Mr. Carter - I think it is something for the full committee, at least more members of it, to get into, as you suggested, Nolan.

Mr. Wilson - I'm not real happy with it. If we can come up with a better way of doing things for the public welfare we ought to explore them even if it means a longer period of time in this particular area. That's what we're here for.

Mr. Gotherman - I am inclined to think that local governmental officials would probably suggest some constitutional guidelines in this area to be sure that the General Assembly looked at the problem of land speculation, and the problem of deterioration, not only the problem of agriculture and the problem of business.

Mr. Carter - That's hard to do in a constitution.

Mr. Gotherman - It seems to me that this is one where uniformity protects to a certain extent. It seems to me that by eliminating uniformity you're opening up the possibility of making Cleveland even a worse place to live. I think that in that area we have a number of municipal officials who would have an overriding interest in constitutional provisions, feeling that this is an area where the General Assembly might really abuse - not really be able to come to grips in the sense that they could with other legislation because of tremendous large economic forces at play, of members elected to the General Assembly. If uniformity is touched then I think that the school officials and the city officials and county officials perhaps will have some concern about the ability of the General Assembly to handle a blank check as to how it will classify. There may be room for constitutional guidelines, in classification of whatever they decide to do.

Mr. Wilson - Uniformity, we say, is complex and I'm going to throw out something here that I mentioned before. It doesn't necessarily have a great bearing on this but in general it does. I can live with a classification based upon zoning, if we

had uniform zoning laws. It would give the local governments a good tool to guide developments of the communities in the direction they wanted to go. You could zone something in a certain way, if that is the way you want your city to grow, integrate your master plan of that particular area with that particular type of development. If you could zone and mesh your tax law with your zoning. But we don't have uniform zoning anywhere in the state. Each area devises its own. It's another approach and zoning boards would be much better attended than they are now, because in essence they would be setting taxes. It would be a way to get things done.

Mr. Carson - The next Commission meeting is on December 15?

Mr. Carter - Yes.

Mr. Carson - We could certainly have a report from this committee.

The committee adjourned until Thursday evening, December 14, and Friday morning, December 15.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
December 14 and 15, 1972

Summary of Meeting

The Finance and Taxation Committee met at 6:30 p.m. on December 14, 1972 at the Athletic Club in Columbus, and at 9:30 a.m. on December 15, 1972 at the Commission office, 20 South Third Street.

Present at the December 14 meeting were Chairman Carson and committee members Senator Ocasek and Messrs. Carter and Guggenheim. Also present were Mr. John Reimers, of the Ohio Chamber of Commerce, Mrs. Ann Eriksson, Director, and Mr. Nemeth of the Commission staff. The foregoing were also present at the December 15 meeting, which was also attended by Mr. John Gotherman and Mr. C. Emory Glander.

On December 14, the Committee discussed Sections 7, 8, and 9 of Article XII. Mr. Carson stated that in regard to Section 7, which authorizes the imposition of taxes on the right to receive, or to succeed to, estates, the Committee had two general objectives in mind: to make sure that (1) the section specifically authorized the imposition of estate taxes and (2) that the reference to a specific dollar amount which may be exempted from taxation is deleted, while the authorization to grant exemptions is continued. The Committee also wants to preserve the graduation of taxes permitted by the present section, he indicated. The Committee then discussed the advisability of including a provision authorizing the adoption of sections of the Federal estate tax law prospectively as, for example, is now done by statute in Section 5731.01 (E) of the Revised Code. A final decision regarding Section 7 was deferred until the meeting on December 15.

Then the committee turned its attention to Section 8 of Article XII, which authorizes the imposition of an income tax. Mr. Carson pointed out that, as with the estate tax, one of the Committee's objectives here is to remove reference to a specific dollar amount which may be exempted, while permitting exemptions to be set by law. Senator Ocasek pointed out that the Senate had just passed an amendment which would have the same effect. The Senate amendment, of which the Committee had a copy, just replaced the words "not exceeding three thousand dollars", now in Section 8, with "as provided by law." Mr. Carter said he liked that approach because of its simplicity. The other Committee members present agreed. However, Mr. Carson said the Committee should consider including in this section not only "taxation of incomes" but also "taxation measured by income." He said this would be logical particularly in view of the fact that the Committee was considering the addition of a provision at the end of this section reading: "Laws imposing taxes on or measured by income may adopt by reference provisions of the statutes of the United States as they then exist or thereafter may be changed." Mr. Carter suggested that it may be more appropriate to propose this as a separate provision which would state that 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 would cover all types of taxes. After some discussion, it was agreed that the Committee would propose such a provision as a separate section, possibly a new Section 10. A final decision regarding Section 8 was deferred until the meeting of December 15.

The Committee then discussed Section 9 of Article XII, which contains the 50% turnback requirement on income and inheritance taxes. The draft proposed for discussion would have (1) specified that both inheritance and estate taxes were subject to the requirement, (2) included any tax measured by income in the requirement, and

(3) continued the requirement that all taxes subject to this section be returned to counties, school districts, cities, villages or townships, or any of them. However, it would have deleted the requirement that any such taxes be returned to the unit in which they originated. Mr. Carter stated that the Committee had decided at the last meeting to delete this requirement because there are so many instances in which it is difficult to determine where a certain tax revenue originated. Mr. Carson said he would prefer that the committee reconsider its position on this. Mr. Guggenheim said he couldn't see how any proposal which removed the origination requirement would have a chance of getting through the legislature. Senator Ocasek said that although he thought the 50% figure was arbitrary, he shared Mr. Guggenheim's view. After considerable discussion, Mr. Carter suggested that the Committee propose only two amendments to this section: (1) a change of "centum" to "cent" and (2) the insertion of "or estate" following the word "inheritance." He said that requiring the return of 50% "of any taxes measured by income", as the Committee originally thought of recommending, . would be a very difficult thing to do, as for example, trying to attribute certain corporate income to designated counties or other local governmental units. Mr. Carson said that from a constitutional point of view, it didn't seem sensible to require the distribution of an income tax and not require the distribution of a tax measured by income. It was agreed that the Committee would study this provision further before deciding on a proposal.

The Committee then returned to a discussion of Section 8, providing for the taxation of incomes and exemptions therefrom. After discussion, Mr. Carter suggested that the Committee consider the following as a possible proposal: "Laws may be passed for the taxation of incomes, and 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. Mr. Carson asked whether the provision should refer to "exemptions and exclusions." Mrs. Eriksson said she thought "exemptions" can be interpreted to encompass "exclusions", certainly as long as there is no reference to "a part of each annual income." It was agreed that this seemed a better proposal than the one the Committee had discussed earlier in the meeting, particularly because of the absence of the above-quoted phrase, which may pose problems of definition.

The Committee then took up Section 7 again. By the end of the discussion, the following language had evolved: "Laws may be passed providing for the taxation of estates or of the right to receive, or to succeed to, estates and such taxation may be uniform or it may be graduated based on the value of the estate, inheritance or succession. Such tax may 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." The phrase "based on the value of the estate, inheritance, or succession" was suggested by Mr. Carson.

At the December 15 meeting the Committee took up the indirect debt limit again. The staff had prepared the following draft for discussion:

> "Section 11. No bonded indebtedness of ~~the state, or~~ any political subdivision ~~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~~ FULL AND TIMELY PAYMENT OF THE PRINCIPAL OF AND INTEREST ON SUCH DEBT. THE GENERAL ASSEMBLY SHALL, BY LAW, REGULATE THE MEANS OF

PROVIDING FOR SUCH PAYMENT. THE LIMITATION ON UNVOTED PROPERTY TAXES IN SECTION 2 OF ARTICLE XII OF THIS CONSTITUTION DOES NOT APPLY TO BONDED INDEBTEDNESS OF A POLITICAL SUBDIVISION UNLESS A SPECIFIC PROPERTY TAX LEVY IS PLEDGED TO THE PAYMENT OF THE PRINCIPAL OF OR INTEREST ON SUCH DEBT.

"BONDED INDEBTEDNESS," FOR PURPOSES OF THIS SECTION, MEANS GENERAL OBLIGATIONS OF A POLITICAL SUBDIVISION FOR WHICH THE FAITH, CREDIT, AND TAXING POWER OF THE SUBDIVISION ARE PLEDGED."

At the outset, Mrs. Eriksson indicated that the reference to the state had been struck from this section because the Committee felt that its proposed Article VIII adequately covered the question of the issuance of general obligation bonds by the state. The ensuing discussion of the whole proposal brought to light several technical problems relating principally to the question of the effect of the removal of the reference to taxation on the interest rates of bonds issued under a constitutional provision such as the above. It was agreed that these problems needed further study before the Committee is in a position to make a recommendation in regard to the indirect debt limit.

The Committee then reviewed its discussion of December 14. Mr. Carter stated that one thing the Committee had decided was to propose a separate section permitting the adoption by reference of provisions of Federal tax law. Mr. Carter then read Section 7, relating to estate or inheritance taxes, as the Committee had developed it on December 14. Mr. Glander suggested that people today are accustomed to referring to "rates of taxation", and Mr. Carter then suggested a change in the first sentence, so that it would read in part: ". . . and the rates of such taxation may be uniform or may be graduated . . ." This change was agreed to. The same change was made in the second phrase of the first sentence of the draft proposal on Section 8 relating to income taxation. This phrase would read: ". . . and the rates of such taxation may be either uniform or graduated,. . ."

Mr. Carson pointed out that the Committee had not come to a conclusion on Section 9. He again expressed concern over the fact that, since the provision as it now exists does not say anything about "taxes measured by income", it is possible to avoid the operation of this section simply by the manner in which a tax law is worded, as, for example, the new corporate franchise tax law. He suggested that from a constitutional point of view it may be more appropriate either to repeal this section or to distinguish between corporate and individual income, so as to make it unnecessary to try to avoid the operation of the section. Mr. Glander suggested that the Committee should consider the practical effects of including corporate income or franchise taxes under the turnback provision. Such effects may include (1) the levy of new taxes at the state level (2) the transfer of some state governmental functions back to local governments and (3) the reduction of revenues distributed to local governments by the state. Another problem which could be a complication, he pointed out, is that the basis on which a corporation pays taxes may change from one year to the next, i.e., in one year a corporation may pay on an income basis, and in the next year on a capital stock valuation basis, because its income was down but it had a lot of capital investment. As it is now, the taxes in the first instance stay in the state treasury while in the second instance they are allocated. Mr. Carter said he could see how, with carry-backs and carry-forwards, there could be considerable complications if, in addition, a part of such

taxes would have to be returned to local governments. Mr. Carson said that perhaps the Committee could clarify this provision by limiting the turn-back requirement to personal income, but he wasn't yet sure why such a limitation was necessary. Mr. Carter summarized the options available to the Committee as being: (1) to do nothing on the definition of income tax, (2) to include taxes on corporations or (3) to make it clear that the section refers to individual income taxes only. Also to be resolved is the question of origination, he said.

Mr. Carson said that he, for one, couldn't vote for a provision which would remove the origination requirement. He said he thought it would be well for the committee to consider a few more drafts on this point which would clarify it, however, and this was agreed to.

Mr. Reimers pointed out that the Committee may also want to keep in mind that there are a number of types of corporations which are not subject to the corporate franchise tax--such as banks, insurance companies, and utilities--but that these pay other types of taxes.

The next Committee meeting was set for Friday, January 26, at 9:30 a.m. At that time, the Committee will vote on a number of recommendations to be presented to the Commission that afternoon. These include recommendations of no change in present Sections 1, 4, 5 and 12 of Article XII; the recommendation of the repeal of Section 10, and recommendations for the adoption of revised Sections 7 and 8 as worked out on December 14-15. In addition, the Committee will vote on recommending two new sections, one authorizing the adoption of provisions of Federal tax law prospectively, and the other negating the Ohio doctrine of preemption by implication.

The Committee determined to hold for further consideration Sections 2, 5a, 9 and 11 of Article XII.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
December 15, 1972

Discussion of the Indirect Debt Limit
at the Committee Meeting
on December 15, 1972

Carson - We've gotten comments from Joe Cortese, have we?

Eriksson - Yes. His version is different from the one I did originally in some respects, and yet I think it's really essentially aiming to do the same thing. I discussed his version over the phone with him yesterday, and we made some changes in it. Neither my version nor his is exactly what the Committee had talked about at the last meeting. I had concluded, after getting down to it, that what the Committee wanted to do could not precisely be done in that fashion. Joe reached the same conclusion. His version, however, has some features which would solve some of the problems that mine wouldn't.

What each of you have before you is the present Section 11, then the version of Section 11 (dated December 14) which I prepared and you received in the mail, and then the long version, prepared by Joe Cortese.

If you'll recall, the problem with present Section 11 is that it requires that when bonded indebtedness of the state or a political subdivision is issued, the legislation providing for that indebtedness must make provision for levying and collecting payment by taxation. This, of course, has always been construed to apply to general obligations and does not apply to revenue bonds. This provision, when taken in conjunction with Section 2 of Article XII, which limits unvoted taxes to 1% of true value of property--by statute, to 10 mills--has meant what is known as an "indirect debt limit"for political subdivisions. It does not have anything to do with the state, really, because the state has pretty much unlimited power to tax and does not rely upon the property tax. But the ten mill limit on property taxation--which traditionally has been the only way political subdivisions had of levying and collecting taxes--has been construed as a limit on the amount of debt which could be issued, even though the debt is actually going to be repaid from other sources. That's a brief summary of what this is about.

The Committee has agreed to take the reference to the state out of Section 11, because it feels that the state is sufficiently covered under the provisions of the proposed Article VIII.

But, in regard to political subdivisions, this section does offer a guarantee of repayment, and bond counsel were not willing to recommend an outright repeal of this section, because they feel that would affect the marketability of bonds. They did feel, however, that perhaps something could be done to take bonded indebtedness outside the "indirect debt limit."

However, Committee discussion led to the feeling that no one wanted to remove the ten-mill limitation from Section 2. But, I think, you don't really have a removal of the "indirect debt limit" unless you're specific about saying that the limit does not apply to bonded indebtedness. So my effort and Mr. Cortese's effort have been to remove the limit in such a fashion that it would be fairly clear that a levy could not be made outside the limit except under the most unusual of circumstances. In other words, we have tried to include in here (Mr. Cortese's version) all the possible sources of revenue, and indicate that a political subdivision was

required to use all of these other sources of revenue before they could levy outside the ten-mill limit. This would include any sources budgeted for repayment of the debt, such as, for example, a portion of an income tax.

Carson - Then there could be a levy outside the ten-mill limit without a vote?

Eriksson - Yes, under the circumstance that everything else which was to be devoted to the repayment of those bonds had been devoted to those bonds.

Gotherman - It would be pretty much what the circumstances are today, except that instead of coming outside the ten-mill limit it comes inside, and takes away part of the inside millage.

Carter - It's an exception to the ten-mill limit, that's what it is.

Eriksson - It is an exception. The way the "indirect debt limit" operates now, for example, an overlapping political subdivision such as a county cannot issue its bonds if any of the political subdivisions which the county overlaps has used up all its available inside millage. Mr. Cortese seems to feel that it is apparently the counties which suffer most because of this possibility.

Carson - May I interrupt? Joe Cortese's problem is that your draft doesn't offer a good enough guarantee?

Eriksson - Well, my idea was to remove any reference to taxation, from Section 11, and to simply say that there shall be a guarantee of repayment. He felt that this was not sufficient.

There is also a problem with the definition of "bonded indebtedness". I felt that a definition was needed, especially because of the removal of the reference to taxation in my draft. Without a definition, a court might say the section also applies to revenue bonds. Joe says that the bond statutes often use the terminology "faith, credit and revenues". But if we put something like that in here, we might again be leading to an interpretation that we were including revenue bonds. He felt it was better to leave reference to taxation in; and he has, as you will note, put the words "general obligation" before the words "bonded indebtedness" in that third version.

Now, as you recall, at the last meeting, we had considerable discussion about what the word "legislation" means in Section 11--whether this meant an ordinance or what it means. His proposal would get away from that entirely, by not pinpointing the time of making the guarantee of repayment at the time of the issuance of the bonds, but simply saying that as long as any general obligation bonds of a political subdivision are outstanding, the subdivision must make provision for paying them back. This avoids the question of what "legislation" you're talking about, or having to spell out in the Constitution the specific provisions which would have to be put either into the bonds or into the ordinance.

Gotherman - Doesn't that also make things more flexible in the sense that it eliminates the impairment of the obligation of contract if you try to change the tax structure after the bonds are issued?

Eriksson - Yes. Now on my copy of Joe Cortese's version, I have some numbers I want to explain to you. We've just talked about (1). (2) indicates that he retains the reference to taxation, but then, as indicated by (3), he adds a reference to other sources, namely special assessments or income from the facility to be financed. (4) indicates a provision similar to the one we have put in proposed Article VIII--

Gotherman - And is also provided for by statute, as I recall--

Eriksson - Yes, I'm sure, but it's not in the present Section 11. This is the kind of thing bond counsel like to put in, because they feel it makes the bonds much more secure. It's the same idea we put in Section 1 of Article VIII. The first phrase of the sentence marked (5) is an effort to negate the effect of the ten-mill limitation, and the next part ((6), (7) is crucial, because it says that you can levy outside the ten-mill limitation for unvoted bonded indebtedness, but only to the extent that the special assessments and the net operating income, or other sources required to be used therefor or budgeted therefor, are insufficient. The key to this is that this requirement could be a requirement made by the General Assembly or it could be the requirement in an ordinance that moneys be set aside from, say, an income tax. It could be the "earmarking" of any tax sources, not necessarily property tax sources. The phrase marked (7) is in parentheses because I question the necessity of being so specific in a Constitution. We're back to the problem of running the risk of excluding something every time we make a list. Joe recognizes the problem, and would have no objection to taking that language out. On the other hand, he feels that if you leave that language in, it will help to "sell" the section because you've made it very clear what kind of revenues are traditionally used to pay off bonds. It's a question of draftsmanship, whether you want to put it in the Constitution or whether it's better to write comments to the section.

Now, ". . . budgeted therefor" is in here because I thought ". . . required to be used therefor" was too restrictive--that it might mean they could go outside the ten-mill limit and levy a tax even though they had money available and had budgeted it, but decided at the last minute they'd rather use it for something else.

Carson - Under the proposal, could the General Assembly pass a law saying that political subdivisions could issue unvoted general obligation debt and need not budget any sources for repayment except real property taxes?

Eriksson - Yes. The General Assembly probably could do that, and that may be the real danger in removing the ten-mill limit. I think, however, that it's much more likely to be the other way around.

Gotherman - I agree with Ann. Such legislation is more likely to be restrictive.

Carson - One of our jobs, though, is to find holes that other people might find--

Gotherman - I think one thing we should keep in mind is that many cities have charter provisions covering debt. It wouldn't be just the statutes. We have a couple of cities that have unlimited taxation for debt now, by charter, but that's rather rare. Usually, the charter will limit the ability to incur debt, although perhaps not as strictly as the constitutional limitation.

Gotherman - I hope we will have some more time to work on this draft. I know that Joe feels his original draft needed some additional discussion and refinement, of which this draft is the first refinement. Some of the things in this draft may perhaps be provided for by statute, if that should be the policy of the Commission. I do think that this is the best way to do it and the correct way to do it. There may be other ways, but they would have some risk involved. This way, there would be none, as I see it, to the quality of the bonds.

Carson - As I see it, we are "removing the lid" from the ten-mill limit, and that could be blown out of proportion.

Gotherman - I don't think it's "removing the lid"--it's modification under controlled circumstances. If there is some modification of the ten-mill limit, it seems to me it would be easier to control in the debt area than any other area. The General Assembly has had a rather good "track record" in doing it.

Carter - I'm 100% in sympathy with what'd being attempted here, but I have a hard time understanding this language myself. There ought to be a better way of doing this. This is almost a complicated statute.

Gotherman - But it's not an unreasonable constitutional provision. This is a fairly complicated area.

Carson - What concerns me is that someone who is opposed to the approach we're talking about could conjure up the worst possible situation where, with the legislature's authority, municipalities and other political subdivisions could issue an inordinate amount of debt, and avoid the ten-mill limit because they didn't have enough sources of income to pay it. I wonder whether a change is necessary, and if it is necessary, whether we can sell it.

Eriksson - I'm not sure that it could work that way from a practical viewpoint, because I think that such vast amounts of bonds would have to be secured by something, that is, I don't believe any bond buyer would buy the bonds except those which appeared to have some revenues applicable to them.

Carson - Except that they have millage to back them up.

Gotherman - Certainly, it would be possible to set up "straw men" if someone wanted to do it. So I think it's a policy question as to whether or not you want to trust to the more likely possibility that there will be some limitations placed on it--that those who set up unreasonable examples will not be taken seriously and believed--and go ahead with it, or try again to do the other.

Carter - I'm trying to really comprehend what this might mean. Are we in essence giving the legislature the authority to give non-charter cities rights that charter cities already have?

Gotherman - What they may have, if they choose to do so. But the proposal would also affect most of the charter cities.

Carter - In other words, it would give the legislature the power to give municipalities the same freedom generally that only a few charter cities have now.

Gotherman - That's right.

Eriksson - Now, of course, the basic question is whether you want to go with any kind of modification of the ten-mill limit and then, if you do, whether there is any other way to write it so that it would be more restrictive, so that no one could, in fact, say that they could forget all other revenues and go to unvoted property tax.

Carter - Our first objective was to do away with the indirect debt limit. We've done that, as far as I can see. Now we're on a new plateau, which is the question of an exception to the ten-mill limit.

Eriksson - But that really is the indirect debt limit.

Carter - Well you could eliminate the indirect debt limit just by this last sentence.

Eriksson - Well, I'm not sure--

Carter - --if you state it explicitly?

Eriksson But what are we doing when we eliminate the indirect debt limit?

Carter - We'd be in a position of selling bonds that are supported by the revenues stated in the bond issue, without necessarily relying on the property tax--like the income tax, and so forth.

Eriksson - Well, if we're going to get into pledging specific sources of taxation, then I think you'd have to describe those somehow. In a way, you're coming back to the possibility I talked about earlier, that there might be some way of writing in here that the General Assembly shall require the political subdivision to levy another kind of tax or to put to the voters an increase in, for example, an income tax.

Gotherman - I'm inclined to think that there are some alternatives that are somewhere in between, and that we just need some additional time to work with those people who are going to approve the bond issues. I think it would be appropriate to try some other alternatives. This may be the best alternative, but there may be other alternatives in between that would accomplish the overall goal and perhaps shorten the provision to some extent.

Carson - How long do you think this additional "drawing board time" would take?

Gotherman - I would think a month, anyway, don't you think?

Eriksson - I'm not sure just what I might suggest. How do you think it might be approached?

Gotherman - I'd have to talk to Joe. I sort of like your approach. There may be some way to limit it to those issues planned out of other revenues, and just absolutely prohibit the possibility of a planned property tax levy, but allow for the theoretical possibility that it may be necessary to levy a property tax because the other revenues that were pledged and planned were insufficient. I'm not sure we can't accomplish that. We accomplished it in a rather lengthy statute. I'm not sure it can't be provided for in a constitution.

Eriksson - In other words, write it more restrictive.

Gotherman - Right.

Carson - I would like to ask Ann and John to see what they can come up with. I'd like to see if there isn't some way we can protect the ten-mill limit, unless we want to attack it specifically. Upon this point, I have the feeling, we are leaning toward leaving the ten-mill limit in Section 2.

Gotherman - You have to actually provide for the ultimate possibility of a levy outside the limit, or else you haven't avoided the ten-mill limitation, and if you haven't done that you haven't negated the "indirect debt limit", in bond counsel's view. While you have to provide for it, you can control the circumstances in great detail, so that it would be most unlikely that it would ever happen.

Carson - Tell us again, to make sure we understand, why you have to provide for this.

Gotherman - First, with language that requires that you have taxes levied, and as long as you have this property tax limitation, there is a fair chance the courts will not accept a substitute. Second, and perhaps more important, an absence of such a provision might change the quality of the bonds.

Eriksson - I think perhaps you could exclude the property tax, and in that case I don't think a court would say the property tax limit is the limit. But in my thinking, I wouldn't want to exclude a political subdivision from using its "inside" millage if it wants to. But you can't talk about "inside" and "outside" millage in the Constitution very well because the allocation of that "inside" millage is statutory.

Carter - Ann, couldn't we just strike the sentence beginning "Levies for the payment of the principal . . ." It's this sentence that bothers me the most. Wouldn't we do it pretty well, then?

Eriksson - No. As a matter of fact, Joe Cortese thinks the last sentence is redundant, but he said it expresses the thought clearly and once again makes very clear that the General Assembly has control over the debt. But just saying that Section 2 doesn't constitute a debt limit--

Gotherman - This would mean if you had a situation where you had to use property taxes, but you were in excess of ten mills, you'd have to say you couldn't use property taxes, and that would lower the quality of the bond.

Carter - That's another question--

Gotherman - But it's all tied together.

Carter - I have a problem with that. It seems to me the bond buyers should take some risks. The way it is now, the people are asked to accept the issuance of debt which they have nothing to say about but which they are on the hook for through property taxes.

Eriksson - They'd be on the hook for it if they used the income tax, too.

Carter - I have no objection to that.

Gotherman - They do elect their councilmen--they do have something to say about it. Further, I feel a provision could be drafted so that they're on the hook only under very severe circumstances, such as a catastrophe in the economy of the community.

Carter - Let's project what you're talking about. Supposing a town issues $10 million in bonds backed by an income tax, and then the big industry in town closes. Under this proposal, property taxes would have to skyrocket.

Gotherman - They may have to.

Carter - They would have to--it's mandatory. Now, it does provide protection for bondholders, and presumably you could sell the bonds at a lower rate with this kind of protection. But I'm not sure it's fair to ask the citizens of a community to accept this risk when they have nothing to say about it.

Carson - I think the answer to that is that there is a ten-mill limit in Section 2 and I, for one, think the voters would not permit us to take that out.

Gotherman - I'm not so convinced that the people would not modify it to some extent--they are not that "hung up" on traditional methods of finance, as the last election demonstrates.

Carter - I guess I have the same difficulty as Nolan. With a provision like the last sentence in the long draft, why couldn't a city issue bonds pledging something other than property tax?

Guggenheim - You want to authorize ths issuance of general obligation bonds backed by something other than property taxes? Why don't you just say that?

Eriksson - Because then they won't be general obligation bonds, because general obligations theoretically encompass all forms of taxation.

Gotherman - The problem would be with the quality of the bonds and the interest rate.

Carter - But our objective is to do what Dick is talking about.

Gotherman - And I'm not sure we can't further limit this. A month or six weeks should enable another draft which looks different than this, I would think.

Carson - I suggest we think a little bit harder about totally protecting the ten-mill limit, instead of putting more limitations in the draft, because otherwise this thing may not get out of here.

Gotherman - Well, it's clear that the people who are interested in this do not want the quality of the bonds affected, because that would mean increasing taxes. I think that if we can't accomplish what we want to to the satisfaction of the Commission, it will have to face the policy issue. But we may be able to reach the point that the chance of an extra property tax levy is so dim that it would take some kind of misrepresentation, practically, to necessitate an extra levy. I feel confident, however, that you could talk to any number of people who will tell you that if a provision would affect the quality of the bonds, we are not interested, or we will take the problem to another forum to work with it.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
January 26, 1973

Summary of Meeting

The Finance and Taxation Committee met at 9:30 a.m. on Friday, January 26, 1973, at the Commission office, 41 South High Street, Columbus.

Present were Chairman Carson and committee members Messrs. Carter, Guggenheim, and Mansfield, Director Eriksson, and Mr. Nemeth of the Commission staff. Also present were Mr. C. Emory Glander, a former Tax Commissioners of Ohio, Mr. Lawrence Miller of the Department of Taxation, and Mr. Jack Reimers of the Ohio Chamber of Commerce.

The main item of discussion at this meeting was the draft of the committee report to the Commission on portions of Article XII. This draftt, which was prepared by the staff on the basis of decisions reached at the last committee meeting, covered the following sections of the Article:

Section	Subject
Section 1	Poll tax
Section 4	Revenue
Section 5	Levying of taxes, and application
Section 7	Inheritance tax
Section 8	Income tax
Section 10	Excise and franchise taxes; mineral production tax
Section 12	Excise tax on sale or purchase of food prohibited, when

It also contained two new provisions, one modifying the Ohio doctrine of preemption by implication and the other permitting the state to adopt portions of federal tax law prospectively.

The draft contained the recommendation that there be no changes in present Sections 1 and 5, but did recommend the adoption of a new Section 3 consolidating the provisions of present Sections 7, 8, 10 and 12, with some modifications. The proposed Section 3 would also contain the provisions on preemption and adoption of federal tax laws. (Section 3 is presently vacant). The draft also recommended the amendment of present Section 4.

The proposed Section 3, as submitted to the committee at the beginning of the meeting for discussion, read as shown below. Parallel sections of present Article XII, where there are such sections, are shown to the right of the corresponding division of the proposed section.

Proposed Section 3	Parallel Section of Present Article XII
A. LAWS MAY BE PASSED PROVIDING FOR THE TAXATION OF ESTATES OR OF THE RIGHT TO RECEIVE, OR SUCCEED TO, 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 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.
B. LAWS MAY BE PASSED PROVIDING FOR 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 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 not exceeding three thousand dollars may be exempt from such taxation.
C. 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: 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 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 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.
D. THE LEVYING OF A TAX BY THE STATE DOES NOT PRECLUDE THE LEVYING OF THE SAME OR A SIMILAR TAX BY A MUNICIPAL CORPORATION OR OTHER POLITICAL SUBDIVISION DULY AUTHORIZED, UNLESS THE LAW IMPOSING THE TAX BY THE STATE, OR AN AMENDMENT THEREOF, SPECIFICALLY SO PROVIDES.	None
E. LAWS IMPOSING TAXES MAY ADOPT BY REFERENCE PROVISIONS OF THE STATUTES OF THE UNITED STATES AS THEY THEN EXIST OR THEREAFTER MAY BE CHANGED.	None

The proposed Section 4 read as shown in the left column below. For comparison, present Section 4 in shown in the right column.

Proposed Section 4	Present Section 4
The General Assembly shall provide for raising revenue, sufficient to defray the expense of the State-STATE, for each year, and also a sufficient sum to pay the PRINCIPAL AND interest DUE on the State STATE debt.	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.

Mr. Carson opened the discussion of the draft. He first noted that the committee had decided to retain Section 1 of Article XII, which prohibits a poll tax, without any change. He noted that a poll tax provision had been in the Ohio Constitution, in one form or another, since 1802. He further noted that the original intent of this section was apparently to prevent the practice of requiring of male citizens to work so many hours or days per year on the roads in the road districts in which they happened to reside, or to contribute a sum of money to the road fund in lieu of labor. He said that the committee was aware that the removal of this section from the Constitution would probably not result in the resumption of the practice which it was once intended to prevent, but that poll taxes are associated in the minds of most people today with the abridgement of the right to vote. He said the committee was aware that under present-day constitutional interpretation and federal law, the payment of a poll tax as a precondition to the right to vote is barred, so that the removal of this section would not affect anyone's right to vote. Nevertheless, he continued, the committee feels that this section should be retained as an added protection for the people of this state. Further, he said, the committee believes that a poll tax for whatever purpose should be discouraged.

Mr. Carson next turned to a consideration of the proposed Section 3. He noted that it had been his intent to have this section drawn up in such a manner that Division (A) of it would contain all those sections of the Constitution which either authorize or prohibit the imposition of specific types of taxes. The draft as presented contained these provisions in three divisions of the proposed Section 3, namely Divisions (A), (B), and (C). Mr. Carson therefore proposed the following changes: placing a colon after the phrase "laws may be passed providing for " which begins Division (A) of Section 3. The rest of Division (A) would then become Division (A) (1), what was shown on the draft as Division (B) would become Division (A) (2), and what was shown on the draft as Division (C) would become Division (A) (3). The new preemption section, shown on the draft as Division (D) would become Division (B), and the new provision on the adoption of federal tax laws, which was shown on the draft as Division (E), would become Division (C), he said. Mr. Carson said that, in his opinion, this arrangement would make the Constitution more concise, and avoid the needless repetition of the phrase "laws may be passed providing for" in Division (A) of the section. Following discussion, this proposed change in the format of the new Section 3 was agreed to by the other committee members present.

Mr. Carson then asked whether there were any other comments about this section. Mr. Guggenheim asked whether the use of the phrase "the taxation of estates", in Division (A) (1), would be sufficient to assure that the tax permitted by this section would not be imposed on the estates of living persons. He suggested that perhaps the phrase "the taxation of decedents' estates" would be appropriate. Mr.

Carson said that that would be a well understood term, and after discussion, the insertion of the word "decedents' " was agreed to. At the same time the word "such" was inserted before the word "estates" in the third line of the draft.

Mr. Carson then asked for further comment on the draft. Mr. Mansfield said that he thought that the preemption doctrine had served Ohio well, preventing local governments from imposing any number of taxes at will. He said that he did not see a need for a constitutional provision on the doctrine of preemption, but if there is to be such a provision, he said, he would prefer to see "the shoe put on the other foot" from that which would be the case with the committee proposal, that is, that he would prefer a provision which would raise the presumption that the General Assembly intended to preempt if it did not state the contrary in a tax law. With this reservation, he suggested that the committee consider the insertion of the phrase "an identical or similar tax" in place of the phrase "the same or similar tax" in the preemption section contained in the draft. He said that this phrase would be more accurate, since a political subdivision could not levy the same tax as was already being levied by the state, although it might levy an identical tax. After some discussion, this language change was generally agreed to.

Mr. Carson invited Mr. Glander to join the discussion on this point, and Mr. Glander stated that he, too, was of the opinion that no provision regarding preemption was necessary in the Constitution. He said that he had espoused this view for a long time. If the committee nevertheless determined to recommend a provision which would negate any preemption by implication, he said, he would approve the committee's draft provision on this subject to accomplish that purpose, although he had a question as to whether such a provision would be interpreted to be prospective only, or whether the General Assembly would be required to examine the entire body of tax law to determine the continued validity of each tax provision.

Mr. Carson said that he did not believe that the latter point presented much of an obstacle, and that the General Assembly would have to examine existing laws anyway, and enact some new ones, as the result of constitutional amendments which might result from the work of this Commission. A vote was called for, and the committee members present, with the exception of Mr. Mansfield, voted to recommend the preemption section in the draft to the Commission, with the language changes which had been agreed on at this meeting.

There were no more comments on Section 3. The committee then proceeded to a consideration of Section 4 in the draft. Mr. Carson stated that the committee had concluded to recommend the retention of this section in the Constitution, with certain amendments, to make it more complete and logical. The main substantive change, he said, was the addition of a reference to the principal of the state debt in this section, which at the present time refers only to the payment of interest. The committee also wanted to make clear, he continued, that the requirement of this section that the principal and interest on the state debt be paid refers only to that portion of the debt for which provision has to be made in a particular fiscal year. Mr. Mansfield suggested the removal of the word "the" before "principal" to emphasize the latter point. For this purpose also, Mr. Carson suggested the insertion of the words "as they become" before the word "do", so that the last phrase of this section would read "to pay principal and interest as they become due on the state debt". These changes were agreed to by the committee members present. There were no comments on Section 5 of Article XII, in which the committee recommends no change.

At this point, Mr. Carson noted that the committee has yet to make recommendations on Section 2, 5a, 9, and 11 of Article XII, and he gave the following outline of the structure of Article XII as it would look when the committee had completed its work: Section 1, the poll tax provision, would remain unchanged; Section 2 containing the ten-mill limitation, the uniform rule, and the exemptions, would remain in its present position whether or not the committee decided to recommend amendments to it; 3 would be a new Section 3, as discussed previously at this meeting; Section 4 regarding the raising of revenue and the paying of principal and interest on state debt, would retain its present position but would be amended as discussed previously; Section 5, on the levying of taxes and their application, would retain its present position and would remain unchanged; Section 5a, relating to motor vehicle and highway revenues, would become Section 6, since present Section 6, which refers to debt for internal improvements, would be repealed in accordance with the recommendations of the Commission on Article VIII; the substance of present Section 7, relating to inheritance and estate taxes, would be transferred into the new Section 3, and present Section 9, relating to the apportionment of income, estate and inheritance taxes, would become new Section 7; present Section 11, which forms part of what is commonly called "the indirect debt limit" would become the new Section 8, if it is retained in Article XII. Whatever other changes the committee might recommend in present Section 11, Mr. Carson said, there seems to be general agreement that reference to the state should be removed from the section, since the proposed Article VIII would completely cover the question of how the state could incur debt. If this reference is removed, there would be no reason to retain the section in Article XII, which refers to the state, and this section would then perhaps more appropriately be located in another part of the Constitution, he concluded. The committee members present discussed the proposed arrangement of Article XII, and agreed with it.

The committee then turned to a discussion of those sections of Article XII which it had not yet disposed of, namely Sections 2, 5a, 9 and 11. Mr. Carson said that, in regard to Section 2, the only question raised in the committee lately is the question of the classification of agricultural property. There seems to be no sentiment for substantial change in this section, he noted. Further, he said, since the General Assembly is now dealing with that problem in H. J. R. No. 13, he did not think the committee should now take a position on the question of classification of agricultural property, but that this matter should be left to the General Assembly entirely. Mr. Carter agreed.

In regard to Section 5a, Mr. Carson said that the committee had received statements and testimony in regard to it last summer, and that it was evident that whatever change the committee might recommend there would be strong opposition to it on the part of some, while others would favor a modification of the section. He said he did not think the committee could, in good conscience, ignore the section. He listed four alternatives in regard to it: (1) not to touch it--for which there would probably be considerable sentiment, at least outside the committee, (2) recommend the repeal of the section--which would to some degree disregard the forces which were instrumental in having the section adopted in the first place, and the fact that it was passed by initiative petition, (3) recommend that the intent of the section be kept in the Constitution, but permit the General Assembly to make exceptions, perhaps by special majority vote or (4) recommend that the scope of the section be broadened to permit the use of moneys collected pursuant to it for certain constitutionally specified purposes.

In regard to the third alternative listed above, Mr. Carson said the committee might add at the beginning of the section: "except as may be otherwise provided by law passed with the concurrence of 3/5 of the members elected to each house of the General Assembly". He noted that at one time the committee had discussed the possibility of requiring only a simple majority vote, but it seemed to him in retrospect that if the committee wanted to recommend the third alternative, perhaps it ought to require an extraordinary majority, so that a pretty clear need for varying the present priorities would have to be shown.

In regard to the fourth alternative, he suggested that the committee might consider adding the following language to the end of present Section 5a: "provided that the General Assembly may, by law passed with the concurrence of three-fifths of the members elected to each house, authorize expenditures of moneys so derived for purposes of planning, designing, acquiring, constructing and operating publicly owned systems for urban, rural and interurban transportation of passengers in this state." Mr. Carson said that this alternative would do several things. First, it would make clear that any such transportation system would have to be owned and operated by a governmental agency; second, it would include provisions for acquiring and operating equipment, and the construction of the facilities; third, it would include urban, rural, and interurban systems. He said that the phrase "mass transit" infers only urban mass transportation, and that we would be short sighted is we saw this as the only problem. Mr. Nemeth reported that the Department of Taxation was now preparing statistical material, at the staff's request, which would give in-depth information on Section 5a funds, and that this material is expected to be available in the near future. The committee agreed to keep this section under advisement.

Then, the committee discussed the present status of its deliberations on Section 9, regarding the 50% turnback of income, inheritance and estate taxes. Mr. Carson said that one of the things which the committee wished to determine would be the scope and effect of a provision which would require the return of a portion not only of taxes applied directly to income, but also a portion of taxes measured by income, such as the new corporate franchise tax. He said that there seemed to be strong sentiment on the committee for retaining the basic concept of the turnback. Mr. Nemeth reported that the Department of Taxation, also at the staff's request, was preparing a statement on the question of the turnback of the corporate franchise tax, and that this statement also would be available in the near future. The committee agreed to hold this section under advisement.

In regard to Section 11, Mr. Nemeth reported that the staff work on this section was proceeding.

The next committee meeting was set for 10:00 a.m., Monday, February 19, 1973 at the Commission offices. Mr. Carson indicated that another meeting might be called before that date to give the committee an additional opportunity to discuss the remaining problems in connection with Article XII.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
February 10, 1973

Summary of Meeting

The Finance and Taxation Committee met at 10:00 a.m., on Saturday, February 10, 1973 at the Queen City Club in Cincinnati. Present were Chairman Carson and Committee members Messrs. Bartunek and Carter, Senator Dennis and Messrs. Guggenheim, Mansfield, and Wilson. Also present were Director Eriksson and Mr. Nemeth of the Commission staff. Also present was the Honorable Robert J. Kosydar, Tax Commissioner of Ohio, who had been invited by the Committee to give his views on Section 9 of Article XII, which contains the so-called "turn-back requirement" regarding income and inheritance taxes. Besides Section 9, the Committee again discussed the doctrine of preemption, concerning which it had already made a recommendation in Part 1 of its report on Article XII, and Sections 2, 5a and 11 of Article XII, concerning which, along with Section 9 of the article, it had yet to make recommendations.

At Mr. Carson's request, Mrs. Eriksson opened the discussion of the preemption question. The principal substantive change from the preemption section previously recommended and the draft which the Committee had before it at this meeting was that the last sentence of the draft provided that if the General Assembly did not state in a tax law that it intended to preempt a field of taxation, then the presumption would arise that it did so intend.

Mrs. Eriksson - We note there the expression "municipal corporations and other authorized political subdivisions" is the same language that's in the draft that was previously approved by the Committee. Municipal corporations are the only political subdivisions at the present time which have any inherent power, that is any power derived from the Constitution to levy taxes. The preemption doctrine therefore presently really only applies to municipal corporations because no other political subdivisions derive any right to levy taxes from the Constitution. But the expression "other authorized political subdivisions" is intended to cover either places where the county might adopt a charter and therefore acquire certain home rule powers from the Constitution, or other political subdivisions which might acquire some home rule powers from the Constitution in the future but presently do not have them, of the General Assembly might at some point in the future grant some political subdivisions powers to levy taxes other than specific taxes, so that expression is the same as in the other draft. Then "from levying an identical or similar tax"--that expression is also the same as in the previous draft. Then we go on to say "to permit one or more political subdivisions to levy such a tax", so that the General Assembly would be obliged according to this to levy such a tax", so that the General Assembly would be obliged according to this either to preclude the levy or specifically to permit the levy. In the case of the so-called permissive taxes, the General Assembly has permitted some political subdivisions to "piggy back" on existing state taxes. The last sentence would then state the present law, that if the General Assembly does not state its intentions in the legislation, then political subdivisions, including municipal corporations, are precluded from levying the tax that the General Assembly has levied.

Mr. Mansfield again indicated his own view that he did not feel that any provision on preemption was needed in the Constitution, but that if there was a provision, it ought to indicate that if the General Assembly did not state an intent to preempt in a law, then the presumption arises that the General Assembly did intend to preempt. He said that he believed it was the position of Mr. Emory Glander, a former Tax Commissioner, and now tax counsel to the Ohio Chamber of Commerce, that no constitutional provision was needed on the subject. Mr. Mansfield also indicated

that he had spoken with several people connected with the Ohio Chamber who also felt there should be no change from the present situation.

Mr. Carson then stated: At each of the meetings where this was discussed and where this policy was being developed there were representatives of the Ohio Chamber present, so this was not something that was ever done in a smoke-filled room with the doors locked, which this Committee does not ever do. There was never one indication in all that time that we were taking some drastic action that was going to affect a lot of business and industry around the state, particularly on something that is a clarification aspect, I think we feel. It appeared, however, that the desire of members of the Chamber apparently was not to put an affirmative statement in, such as we had written that if there's no mention in the legislation there would be no preemption, and so I got the idea of coming back to this Committee with perhaps a compromise of the two principles which the Committee decided on in October, one that we require the legislature to make a determination and two, that if they don't, there is preemption. That's what this draft is about. This seems to me to be a type of compromise between the two principles that we had discussed and agreed on before. I hope that we don't feel so strongly about this that we allow it to interfere with the other more important things that this Committee is doing and the Commission is doing. That's my feeling about the importance of this section.

Except for Mr. Mansfield, the Committee members present generally agreed that the recommendations should contain a provision on preemption, and the discussion centered on how the provision could be worded, but no decision was reached, and the Committee agreed to take up the "turnback" provision of Section 9 next, and return to the preemption question later.

Mr. Carson - We turn now to Section 9, as you know, provides that no less than 50% 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. This Committee has discussed this section from time to time and discussed the desirability or advisability of trying to clarify it, amend it, or perhaps to leave it alone. One of the questions that I had raised or a concern I had expressed about this section, personally, was that it was my feeling that probably when this was put into the Constitution, the people who drafted it and the people who voted on it supposed that it would cover any kind of tax which was measured by income, and yet we find that when the franchise tax was amended, it was adopted in such a way and has been construed apparently so that, since it is a tax measured by income and not directly on income, there's a feeling that Section 9 need not be complied with with respect to those collections. I think we've also discussed as to whether or not there's any need for clarifying the met hod of return or the allocation among the local governments mentioned in this section, and I think the Committee has concluded that probably, because of the presence of the words "as provided by law", there may well not be any need to clarify that. Is that a pretty good summary of where we stand, Ann?

Mr. Mansfield - We also discussed inserting in the second line, that estate taxes as well as inheritance taxes are covered by this section.

Mr. Carson - Yes. We have suggested the amendment of present Section 7, which is the section authorizing inheritance taxes and graduation thereof, to include estate taxes, to make it clear that an estate tax is possible, and Mr. Mansfield is suggesting that if we do that, it might be desirable to amend Section 9 to make the

same technical change. Mr. Kosydar, may I ask you for your comments?

Mr. Kosydar - We've prepared a statement setting forth our views. Let me informally discuss it, and answer any questions on our views on this, afterwards. Basically, our position on Section 9 is that we should not extend this to include franchise taxes and, in fact, perhaps the reverse should be true--that the language requiring a 50% turnback should be eliminated. Our position is based on several factors. One of the key factors, we feel, is the role of government. This provision was put in back in 1929, when we had what we feel was a completely different set of circumstances than our society is in today, and provisions such as these tend to weaken state government in comparison to local government, and yet we should be working in conjunction with each other. We feel that more and more requirements will be placed on state government to solve some of the problems that we are now facing--I think the school financing cases are perhaps a prime example of where the state will be invested with more responsibility for solving problems. And yet provisions like Section 9 restrict the revenue sources of the state and that level of government, and really make it a very difficult task to solve the problems the state is faced with and which are being imposed upon it by the courts in that context. We also think that the turnback runs basically contra to what the state government should really be doing. The location of industry and the location of particular groups has made some counties more wealthy, others less wealthy, and in terms of a state government enacting certain taxes, the state government and that group which is enacting and assuming the responsibility for the passage of the tax, namely the state legislature, should also have with it the responsibility and duty of seeing how program, and where the money for programs, will go. Many of these problems tend to cross city lines and tend to cross county lines, and yet we use these kinds of measurements in terms of where the funds will return. We feel that this makes for a very difficult situation. It doesn't solve the problems with which the state must deal and on which the state must work. We pose the question in regard to the franchise tax, whether the implementation of the "turnback rule' would be feasible. We think that would be very, very difficult in terms of administration from the point of view of the tax department, and also in terms of compliance by industry. We cite examples such as Sohio, which makes its tax reports out of its headquarters in Cleveland, and yet it has facilities all through the state, and I think this happens to most industries that operate in more than one location, and which is what all of the major industries are doing. It would require very difficult computation by them, whether we use the two factors or three factors, in terms of where the allocation of the funds would be. And we think that this would make an almost impossible task for any state agency attempting to require compliance by industry. I think one of the features of a good tax is the fact that compliance costs and administration costs are kept reasonably low. We feel that the "turnback rule" creates problems for us. We feel these problems would be insurmountable if this is extended to franchise taxes. With respect to the personal income tax, it was a little bit easier to have a reallocation formula drafted. But even there we are presented with some difficulties because we talk in terms of a county attribution of the income, yet we hope we're complying with the Constitution as it reads, because the Constitution indicates "where the tax originates," and the designation or the formula that we've devised is by the county to which the income can be "attributed." Now, we're attributing to the county of residence. It could be perhaps interpreted as the county of employment. These create some really difficult problems to which we really don't know the answer at the present time under this language. We were very careful in the drafting of the franchise tax to maintain that it is still a franchise tax. Simply, to be very frank about it, we wanted to avoid the impact of Section 9. We wanted the state to have the right to determine

where the funds, the new revenue, will go and not be impaired by the limitations of that language. I think I have pretty well stated these kinds of points in the statement, or in the text. Some of the other points we would like to raise is the fact that if you extend the turnback requirement to franchise tax, it would make for a very unpredictable source of revenue. If local governments rely on the net income of a particular industry, this will fluctuate from year to year. You even that out somewhat when you have it on a statewide basis. You can have, for instance, a steel company located within a particular county or a particular area. Some of the steel companies had low profit years for the past year. The tax revenue to be derived from the local government would then be subject to this kind of cycle within the corporate profit year. You even that out more when you take into account all the industries within a particular state. The other point we also raise is the fact that, as presently structured, the franchise tax is considered state revenue in the general revenue fund, and we estimate that $150 million would be lost to the state if the "turnback rule" were applied. Basically, in summary, we feel that the turnback rule should not be applied to the franchise tax--in fact we feel the turnback rule should be eliminated from the Constitution.

There is one question I would like to advise the Committee on. If you notice Section 9 has the word "inheritance", and Ohio has an estate tax right now. We are allocating the estate tax money back to the local governments. The question could be raised, in fact, whether or not that is the same kind of tax and whether or not it should be allocated back. We hope that the courts would say it should be allocated back, but these are the kinds of questions that are raised. In terms of revenue, we frequently do get calls from some of the smaller communities inquiring when a certain estate is going to be processed and finalized. They are dependent on that in their forecasting of expenditures. I think it would be a basically poor tax policy to extend the "turnback" further, and we would strongly urge that it be eliminated.

Mr. Wilson - Are you basically opposed to federal revenue sharing then?

Mr. Kosydar - No, we're not opposed to federal revenue sharing, but perhaps it might make more sense if we had a system of tax credits. Federal revenue sharing is a funny thing--the money goes to Washington and then it's sent back to the states. It might be preferable if one were given credit, for example, on state income tax on some kind of formula, and the money were allowed to remain here originally.

Mr. Wilson - It's better for it to remain locally rather than go to the state.

Mr. Kosydar - But the state is the one enacting the tax in the first instance. It's the one assuming the responsibility of the advantages or disadvantages of enacting the tax. It's a state level policy decision that is being made, our point there being that the state also should have the right to determine what programs will be funded by that revenue.

Senator Dennis - Is there any litigation now pending to determine whether the distributions for school purposes, for tax relief, for the local government fund, etc., constituting compliance with this "turn-back"?

Mr. Kosydar - There isn't at the present time. We don't have any indicating that there will be any litigation, but I would think any litigation would be premature at this point because the first computation is on June 30--the computation indicating how much should go back less the amount of credits for the school foundation

money, the 10% rollback, and the homestead. That point I think would be the time for litigation if litigation were to occur.

Senator Dennis - This money is going back now. The expenditure is already mandated except for the local government fund or some areas of that sort. The question that occurred to me is does sending the money back with it already being determined how the money is to be spent in local political subdivisions, constitute compliance?

Mr. Kosydar - We believe it does. We don't know of any litigation on the point.

Mr. Carter - I happen to be one that agrees with what you're saying. I think earmarking generally is a very poor policy. I happen to agree also that this business of earmarking corporate franchise taxes would be a nightmare. But I do not as a practical matter feel that it would be at all feasible to go before the voters and say that you want to remove the 50% going back to local government.

Mr. Kosydar - Right.

Mr. Carter - It would be a horrible nightmare and a miscarriage of justice, I think. We have Marathon Oil in Findlay, Ohio, for example. If all their taxes went back to Findlay, it would greatly increase Findlay's income, but as you point out, corporate profits go up and down. I personally am opposed to including the franchise tax, but I despair of the possibility of removing earmarking generally.

Mr. Mansfield - Bob, on the income tax, with the Sohio example used, how do you do this on the income tax now? Do you require Sohio or a similarly situated taxpayer to provide you with some kind of an allocation made by the company as to where the income emanates?

Mr. Kosydar - No, the only thing we require is the address which indicates to us the county of the employee.

Mr. Mansfield - I am speaking of the corporate income tax.

Mr. Kosydar - No, we don't have any requirement there since it is not subject to the "turnback".

Mr. Mansfield - The other question I wanted to raise--

Mr. Carson - It's computed on the business of the company in the state as a whole.

Mr. Kosydar - Right. Now we have an apportionment formula for determining what portion of the total income is income in Ohio.

Mr. Mansfield - If I understand what you're saying, and maybe I don't, are you saying that the corporate income tax is not amenable to this Section 9?

Mr. Kosydar - Since it's a franchise tax .

Mr. Mansfield - All right. And how does that come about? The other question is, and perhaps this is being discussed by the Local Government Committee, I don't know, but suppose we develop some general, fairly widespread metropolitan government system in this state, would this section in any way impede that kind of development?

Mr. Kosydar - Offhand, I wouldn't think so, but I'm not quite sure.

Mrs. Eriksson - Could I comment on that? This section specifies certain local governments, which of course would not include multi-county or a regional government of some type. On the other hand, there is certainly nothing preventing the General Assembly from providing the same kind of benefits for whatever type of local government it wants to. In other words, the local government fund could provide moneys for a regional government just as easily as it can for cities and counties, if the General Assembly wanted to. This section would not stop them from doing that, but it would not require them to do it.

Mr. Mansfield - Meaning specifically the naming of counties, school districts, villages or townships does not preclude the legislature from including other units.

Mrs. Eriksson - Yes, because the legislature does provide funds for other purposes other than for these specific units, anyway.

Mr. Carson - I trust that the county wouldn't be disbanded as a unit in a regional government. If the county units still remain, that county as a part of regional government would have to get a certain amount of money.

Mrs. Eriksson - The way this presently reads it is interpreted that although the county is the basic unit provided for in H. B. 475, that would not necessarily have to be the case. The way this is presently worded, the General Assembly can pick out any of these units.

Mr. Carson - All I was trying to say was that if you have a regional government that includes two counties, so long as the county government is still in existence--

Mrs. Eriksson - And if counties generally were reimbursed through this section, then it would apply to both counties. But what I'm saying is that it would not prevent the General Assembly from including regional governments in the local government fund regardless of this section, because they can provide moneys from their own half of the income tax.

Mr. Mansfield - Completely apart from this.

Mrs. Eriksson - Yes.

Mr. Kosydar - I think there are some practical matters of concern here. The units enumerated in Section 9 are broken down into three levels--a county, which encompasses all of the state; the school districts, which encompass all of the state; and the third is city, village or township, which encompass all of the state. With regional governments, they would encompass only portions, and I think you would have to maintain the county as an element in this provision so there could be distribution back. Now, a formula might have to be developed, if you have regional governments, and the money goes back to three counties comprising a region, for example, they would have to determine how it goes back to that regional government unit.

Mrs. Eriksson - But what I'm saying is that the General Assembly can take other money and provide funds for the regional government if it wants to.

Mr. Kosydar - Yes, but as a practical matter, it's difficult for that to come about. There are always so many demands on the legislature for funds.

Mrs. Eriksson - Yes, of course. But this wouldn't prevent them from doing it.

Mr. Kosydar - Right.

Mr. Carson - Well, as I understand Mr. Kosydar's points--first of all he is suggesting that from an over-all policy standpoint he thinks it desirable if this section could be repealed from the Constitution; secondly, if it should not be repealed, he thinks it would be very difficult, compliance-wise and policy-wise, to include taxes measured by income or the franchise tax in this section; third, he indicates that there is a little bit of fuzziness with the word "originates" and also because there is no reference to "estate taxes".

Mr. Kosydar - Right. One of the points when we were talking about the turnback provision--I think any business type tax produces the same kind of difficulty. Of course, the franchise is our main business tax in Ohio, but if we had an unincorporated business tax it could produce the same kind of problem in connection with a business located in more than one county.

Mr. Carson - My own view is that I wouldn't think that this Commission or the legislature, if they put this on the ballot, would have a prayer of getting it repealed. I imagine there would be a ground swell of sentiment from the Municipal League, etc. against this sort of a deletion.

Mr. Guggenheim - If the 50% were repealed, how would local governments get their money?

Mr. Carson - It doesn't mean they wouldn't be getting the money from the state.

Mr. Kosydar: That's correct. I don't think it would change in terms of the revenue that's being returned or funding of programs. What we're doing now in compliance with the turnback of the personal income tax is that we're taking credit for school foundation money, etc. in programs which had either already been in operation or in new programs. But basically we're taking credit for existing programs.

Mr. Bartunek - Some of these could be considered by some to be spurious and not really be "turnbacks"?

Mr. Kosydar - That's true, that's very true.

Mr. Mansfield - I would like to simply raise the question that this group give further consideration to Mr. Kosydar's recommendation, and perhaps to review our decision not to recommend any change. I agree with the philosophy that it's not the way to run a state.

Mr. Carter - He also points out, Bruce, that many times you take the lead in bringing this kind of initiative to a head, even though you lose the first time around you make progress toward the eventual goal. So the fact that you lose doesn't mean that you have lost the war.

Mr. Mansfield - I agree on this point with everything that Mr. Kosydar has said. It just seems to me that if I agree then I'm not being true to my own convictions if I don't recommend it be eliminated.

Mr. Carter - Why don't you make a motion?

Mr. Mansfield moved that the recommendations be amended to state that Section 9 be eliminated. The motion was seconded.

Mr. Wilson - Going back, Bruce and I served on the Governor's Task Force on Tax Reform, and and at the time this point came up about sharing the corporate income tax, we were told that it was legal to call this rose a tulip and thereby not be subject to this section of the Constitution. I objected strenuously then to the attempt to dilute the new money. In terms of my interpretation of the Constitution, half of this new money would come back to local governments. As you have pointed out, you have taken credit for school foundation money, you have taken credit for what used to be sales tax money going to the Local Government Fund and you've done everything possible to retain all this money in Columbus. Now, I'm not objecting to the fact that the State of Ohio needs money to operate, but this tie-in with the preemption doctrine has prevented local municipalities from going into tax fields which they might want to go into. Local communities are hamstrung. They have no way of getting money or of raising revenues on their own. They are looking to the state for handouts, if you will,for additional moneys to operate local government. In many cities in the State of Ohio we are not in a good financial position today. So it is our belief--or our hope at least--that this income tax money would constitute new money that would come back at least half to municipalities. You talk about losing money. It's difficult for me to see how you can lose something you never had. But at the same time, there are bound to be difficulties with compliance on a corporate basis. Granted it might be more cumbersome than for an individual who lives in just one town who works there and files his return there, but look at Sohio, which owns filling stations throughout the State of Ohio. They not only have to break down their real property for taxation by counties, but the taxing districts within them, where the real property is. There are about 4,000 taxing districts in the State of Ohio. If they can break down property for taxation in all those taxing districts, there certainly must be some formula for alloting the income. If you get the money back to the counties, we will fight it within the county. I am not only opposed to eliminating the 50% turnback, I am in favor of including more in it. I think a way can be found to do it, just as with federal revenue sharing. I saw this as a Mayor and member of the Ohio Municipal League. I think the state used subterfuge to get around what I believe is a clear provision of the Constitution in order to keep money for itself that the Constitution says should go back to political subdivisions.

Mr. Bartunek - I was also shocked at what was done. Is the Municipal League doing anything to challenge the law?

Mr. Wilson - Well, the rug was pulled out from under us slightly when they changed the local government fund to a percentage basis rather than a fixed amount as it has been for some time. Moneys from both the income tax and the corporate franchise tax go into this, so we don't have quite as strong a leg to stand on as we might have. It used to be that the state put $24 million a year into the Local Government Fund, then that was increased to $36 million. Then they added $12 million. Then, last session, it seemed that the $48 million would be about 3.5% of the income tax and corporate franchise tax collections, so they made the Local Government Fund on that percentage of those tax collections, rather than a fixed amount, and return that to political subdivisions in the form of the Local Government Fund so for the first time we have

a chance to participate in the rise and growth of the state tax structure.

Mr. Bartunek - It seems to me, if we were writing the Constitution from scratch, that the best thing to do is to give the state certain sources of revenue, and the state would keep that money, and then give municipalities other sources of revenue which they could use for their own needs. As it is, the cities have to come begging to the state legislature for a dollar here and a dollar there and I do not think that is a good way to do it. It's been done now, but I think we waste time and money and collection effort by doing it this way.

Mr. Carson - Let me ask Mr. Mansfield a question regarding the two positions he has stated this morning--the one on preemption and the other on the repeal of this section- .

Mr. Mansfield - You're reading my mind, Nolan. Let me go to the overall problem first. I think I would agree with Joe if we had this thing to start all over again the ideal thing would be to create a situation where the state raises the revenue it needs and the local governments raise the revenue they need. I think what Joe was saying was that if he was drafting the original Constitution, he would make sure local governments had plenty of areas to go in, and I think I would agree with that fundamentally. Now to get specific, have I been inconsistent in advocating the presumption of preemption on the one hand and the elimination of this on the other? I don't think so. I have a feeling that part of the reason for adoption of Section 9 in 1929 or 1930 or whenever it was, was because of the apparent unwillingness of local governments to pass taxing legislation, and they were "passing the ball to Calhoun," and I think that federal revenue sharing has come about for somewhat the same reasons. State legislatures have been more reluctant than Congress to adopt taxing laws, and therefore you get into a dilemma where it's much easier for a state to get back money through a revenue sharing process than it is to have the legislature face up to the need and go ahead and enact unpopular tax legislation. But local governments ought to have the gumption to raise their own money so long as they have the authority to do it. So if we eliminate this provision, it does not preclude the legislature from authorizing local governments to tax in any field, nor does my proposal on preemption preclude the legislature from authorizing local governments to tax in any field.

Mr. Wilson - Would you retain the 10-mill limitation? Is that consistent?

Mansfield - Indeed I would. I believe, although you are closer to this than I am, Jack, that local governments, because they are closer to the voters, are simply more reluctant to face up to the need for money and enact the necessary laws to get it.

Mr. Wilson - There's no way to pass a law any more in Ohio.

Mr. Bartunek - Of course, there is also the problem of industries in Ohio, if you have a lot of different systems of taxation. They need to have some kind of consistency.

Mr. Wilson - I would have no particular objections to the handcuffs that are placed on us with respect to our ability to raise money if we could mandate the state to return more to us.

Mr. Mansfield - I'm not for restricting local governments at all.

Mr. Wilson - But you're throwing us on the mercy of the state legislature.

Mr. Mansfield - That's right.

Mr. Carter - Isn't that where it belongs?

Mr. Wilson - It hasn't proven out that way in Ohio, because we have nowhere to go.

Mr. Carson - If Section 9 is repealed, the legislature could prohibit the local governments from any tax for any purpose except the property tax. Is that correct?

Mr. Mansfield - That's probably correct, and that's probably one of the arguments used when this was adopted.

Mr. Carson - Are there any other comments on Bruce's motion?

Mr. Guggenheim - I hate to muddy the waters now, but certainly the estate tax is very uneven between communities, and I am thinking of the court decisions with respect to schools that say each child should have the same amount of money for education. Is this true across the board under this provision? We have a situation such as Evendale with very heavy industry and no population, so the result is quite inequitable.

Mr. Mansfield - Yes, and this inequity is highlighted in the utility tax--the property tax. You take counties along the river with a lot of heavy industry and power plants and they have gold-plated schools. They really don't need the money sometimes. This is grossly unfair and inequitable. While I am a dissenter among my own group, some of the utilities like this situation because if they are located in a sparsely settled county such as Jefferson or Belmont, the tax rate is considerably less, and therefore they save money.

Mr. Bartunek - On the other hand, it is a burden on the communities that have the factories because they have all the dirt and pollution resulting from them.

Mr. Carson - Just to bring you up to date, Bob, one of the criticisms leveled against this section is that the inheritance tax is so undertain and sporadic--you might have a wealthy citizen in a small community die one year, and this results in a windfall for the community. It's hard to predict.

Mr. Kosydar - You'd be surprised how often we get calls from communities, wanting to know when an estate will be finalized because they are counting on spending that money.

Mr. Wilson - In my 13 years of experience, our inheritance tax ranged from a low of $3,500 to a high of $94,000 in one year. But, if you want to provide for the overall leveling of services on the basis of total wealth, you really have a tiger by the tail.

Mr. Bartunek - I don't agree with that, anyway. People should be able to have services they want if they can pay for them.

Mr. Guggenheim - I agree with Bruce's principle, but what worries me is that they've taken away nearly all the powers of local government to raise money from taxes, and they have to come to the state. They have the wage tax and the property tax, but even that is subject to the 10-mill limitation. So what authority would you want to give the city?

Mr. Mansfield - This has to come from the General Assembly rather than some arbitrary provision such as Section 9 of Article XII.

Senator Dennis - If the question is the repeal of Section 9, I just want to point out that I don't see any problem with meeting that requirement, since we have all the present state aid provisions--the local government fund, school foundation payments, homestead exemption--which go to local government, and as long as the present policies continue, I don't see any problem.

Mr. Kosydar - According to our information, no county will get more money.

Mr. Bartunek - But doesn't the Constitution really mean that if the state imposes an income tax, half of it is to be returned to political subdivisions in addition to what they otherwise get? That is my interpretation.

Mr. Mansfield - But where do you get that out of it? It doesn't say anything about "in addition to."

Mr. Bartunek - That's the way I read it.

Mr. Wilson - That's the way the state legislature reads it, or they wouldn't try to call an income tax a franchise tax.

Mr. Mansfield - I read it the same way, but I don't read it as precluding the state legislature from taking away what they were already giving.

Mr. Kosydar - I sometimes think that we tend to think of the school foundation formula as being there all the time, but that's a decision on an appropriation that the state legislature makes every two years, and it is not protected by the Constitution. I don't think our position is inconsistent with the language of the Constitution.

Mr. Bartunek - There is room for reasonable minds to differ.

Mrs. Eriksson - Both Sections 8 and 9 were added to the Constitution in 1912, but at that time, the distribution section did not include counties or school districts and at that time, also there was no school foundation fund. Counties and school districts were added to the section in 1929, at which time there was still no school foundation fund in Ohio. It would seem that there was concern that school districts needed money which was subsequently provided through another source.

Mr. Carson - Shall we take a straw vote which will not be binding because we will not make a final decision until our meeting on February 19, but which will give us an indication of the direction we are taking?

Mr. Mansfield - I'm not at all sure from Mr. Bartunek's statments whether he and I agree on what the motion is.

Mr. Carson - The motion is whether Section 9 should be repealed.
There were 3 votes in favor of repealing Section 9 and 4 against.

Senator Dennis - There is a second aspect, whether the 50% payback should be applicable to the corporation franchise tax.

Mr. Wilson moved and Mr. Mansfield seconded to include the corporation franchise tax in the section.

One voted in favor of the motion and the rest against.

Mr. Carson - Is there any desire to clean up the section? One problem is whether we should include "estate" tax with inheritance tax, so that it will not be in conflict with our prior proposal for Section 3. Mr. Kosydar, what are your views on this question?

Mr, Kosydar - We would strongly urge that that be included for clarification.

Mr. Carter so moved and Mr. Mansfield seconded. All were in favor.

Mr. Carson - Another question Mr. Kosydar raised was on the question of origination. He indicated they are walking a tight line in interpreting this as place of residence.

Mr. Kosydar - The term "origination" is a difficult term in the income tax. Is it where you work? If you have a traveling salesman and he travels all through the state, how do you determine origination? Some method of indicating where the money should be returned other than the way the language reads would be preferable.

Mr. Mansfield - Would you have any objection to eliminating the origination test?

Mr. Kosydar - To state the principle of the turnback but eliminate the place of origination test? Yes, that would be preferable.

Mr. Carson - This would mean it could all go to one county if the legislature so desires.

Mr. Mansfield - We might also add "or other political subdivision".

Mr. Carson - We have several questions. The first one, the elimination of the origination test, so that the legislature could, if it wished, withhold all return of money from one county and give it to another county.

Mr. Kosydar - I think that such a proposal would have to be read in conjunction with equal protection. But, for example, there might be a pollution problem in one area of the state that needs to be taken care of, and you might want to return some of the money for such a program, and it would give the General Assembly the latitude to solve the problems as they arise.

Mr. Bartunek - Our discussion was to revoke the idea of jurisdiction of origin. My thought was that that would be then defined by the legislature, and not take all the money from Cuyahoga County and give it to Vinton.

Mrs. Eriksson - I don't believe the General Assembly could do that, anyway, without violating the equal protection clause of the Constitution and the uniformity provision, which, in effect, prevents special acts, providing it is a law of general application. However, I believe you could do what Mr, Kosydar suggests--devise a program of some type, which would have the effect of channeling the money into one or a few counties.

Mr. Carson - The question is, should we delete the origination language?

Mr. Mansfield - I thought Mr, Kosydar might suggest a clarification of the term "origination".

Mr. Kosydar - No.

Mr. Carter moved that the language relating to origination be deleted. Mr. Mansfield offered an amendment to the motion to add "or other political subdivisions."

Mr. Bartunek - Does this constitute a problem administratively?

Mr. Kosydar - Yes. The way the bill was drafted, we used the county of residence as the point of return, but we have some question whether this complies with that language. If you live in one county and work in another . . .

Mr. Carson - But that's a different problem; that's a problem of clarifying what "originates" means. Do we want to change what the law now says which is that 1/2 the tax that comes from Cuyahoga County must go back to Cuyahoga County.

Mr. Mansfield - Has Mr. Kosydar given any thought to any substitute language that might clarify this point without eliminating the concept? If I vote to eliminate the language, I would only do so if I saw in the offing some language which would solve his problem without eliminating the benefits of this section, whatever they may be, to the sources.

Mr. Kosydar - No, we really haven't done any work on other language.

Mr. Carter - Isn't residence used generally, both in state and in the federal tax?

Mr. Kosydar - Yes, but others don't have the same problems we have with language like this.

Mr. Carson - I would assume that, with enough words, we could clarify this. Residence of a decedent, for example, would be his domicile. The motion is to delete the language refering to point of origin from Section 9.

The motion was defeated.

Mr. Carson - The next topic is whether to clarify origination.

Mr. Wilson - Most cities tax income where it is earned, but the state income tax is based on point of residence.

Mr. Carson - Mr. Kosydar, is your plan to return it to the county of residence?

Mr. Kosydar - Yes. We believe that complies with the philosophy of this section, although someone could perhaps make a case that this means where it is earned. However, we would prefer to leave it alone.

Mr. Guggenehim - I would want to think that one over, before I wrote place of residence in the Constitution. If a person earns his income in Cincinnati, but lives outside the city and that tax money is returned to his place of residence, I think that's a drain on the central city.

Mr. Kosydar - Of course, we're not talking about taking away from Cincinnati any of the money from its own income or wage tax, which is levied on everyone who works in Cincinnati regardless of where he lives. We are talking only about the state income tax.

Mr. Carson - All we're talking about is where the state tax gets allocated.

Mr. Mansfield - If we're going to change this, perhaps we should give some thought to the word "collected" as opposed to "imposed."

Mr. Bartunek - I think we should leave it the way it is.

Mr. Kosydar - I think we would be compounding the problems by making any further changes.

Mr. Mansfield - If the day comes when the state collects the city income taxes, they would come under this too, and the cities would be deprived of that revenue unless that word "collected" is changed.

Mr. Wilson - We're being deprived now in relation to where the money is earned.

Mr. Carson - If you do anything other than apply the place of residence to an individual, a lot of individuals will have to allocate their income among various counties.

Mr. Kosydar - That's the same problem that you have with a variety of types of property--tangible, intangible, real estate. The problems we were noting with respect to the franchise tax and allocation are the very problems you would have if you changed the basis of the allocation from residence to place earned.

Mr. Wilson - In view of that, should we add "place of residence"?

Mr. Kosydar - I would prefer to leave it alone. We would run into a problem of nonresidents, in that case. In the present law, we have a computation for nonresidents which allocates the money to the place earned, based on the number of days working, etc. We would argue that the words "as may be provided by law" grants to the legislature the right to determine, under reasonable circumstances, how it originates which we have done in the present law.

(All agreed)

Mr. Carson - The next question is whether we should add "or other political subdivisions."

Mr. Mansfield so moved.

Mrs. Eriksson - The term "political subdivision" would include more than just the subdivisions listed here, at least as that term is defined in the Code from time to time. It is not defined in the Constitution.

(There was general agreement not to expand the list of recipients of the income tax).

Mr. Carson - All the votes taken today are tentative, and we will take final action on February 19.

This afternoon we will discuss Section 5a, the earmarking of highway user taxes to highway use. Several ideas for changing that section have been expressed. Do you think you wish to comment on proposals to change that section?

Mr. Kosydar - No, I don't believe I would comment on that section at this time. I have personal views that I would not want to be interpreted as administration policy.

In the afternoon, the Committee returned to a discussion of the preemption question.

Mr. Carter - On this preemption question--whether the provision should be "directory" or "mandatory"--you could make it mandatory if you simply added a phrase of some sort or another that without such statement the law was null and void. That would clearly make it mandatory.

Mr. Bartunek - Isn't that what you're doing with your last sentence?

Mr. Mansfield - It's what we're trying to do but it would be simpler to say that if the legislature doesn't do what it's expected to do, in the first sentence--

Mr. Bartunek - I think a court or a legislature would prefer to have something concrete, rather than knocking it out.

Mrs. Eriksson - If you have that sentence there and the legislature fails to do something it seems to me that you can assume the legislature knew that the sentence was there and the failure to do something was an approval of the effect of that sentence.

Mr. Wilson - The same thing would be true if you eliminate that sentence. If the General Assembly knows that the first sentence exists and they do not say one way or the other, they're doing so deliberately with the idea of trying to make it an "illegal" law.

Mr. Wilson - What Dick is working for is elimination of the last sentence/ and the insertion of something at the very beginning. In other words, forewarning the General Assembly ahead of time that if they do not do this, then it's an "illegal" law.

Mr. Bartunek - If they don't, the tax fails and then the immediate problem is not resolved, and the new revenue is not made available.

Mr. Carter - To me it's very basic. I think that the legislature should make that determination as a matter of public policy.

Mr. Bartunek - Everyone here agrees with you, but the question is what will happen if they don't, either by inadvertence or purposefulness.

Mr. Wilson - Isn't that true of anything that we've already got in the Constitution? Aren't there ways that the General Assembly could deliberately or through some inadvertence not comply with the Constitution?

Mrs. Eriksson - Yes, there are a number of elements of what are essentially bill drafting or law-making features, some of which have been held by the Supreme Court to be mandatory and some of which are only directory.

Mr. Wilson - I think that we are in agreement that the General Assembly should state clearly when they do or do not. It's just a matter of the verbiage.

Mr. Mansfield - I agree with you if this language is broad enough to permit a presumption of preemption.

Mr. Wilson - I think the legislature should state whether they do or not. The problem right now is how to get the language to cover what happens if they don't.

Mr. Mansfield - Well, even recognizing that some of my colleagues will want to take issue, in order to get the show on the road, I would be perfectly willing personally to accept this language with the deletion of that one clause I mentioned earlier. It is a little cumbersome. In fact, I don't quite understand the ramifications. If you took that one clause out then, speaking personally, I would go along with it.

Mr. Wilson - I understood Ann's explanation of why it is in there, but I am afraid that it might be termed ambiguous.

Mrs. Eriksson - I think it's arguable as to whether it's necessary to put it in there.

Mr. Mansfield - I think it would create--and I shouldn't speak this way because I have never served as a legislator--but Max, don't you think there's some possibility that that clause could create a lot of problems for the legislature, trying to decide what to say about what's to be permitted?

Mr. Bartunek - The purpose is to make them make a definitive judgment, whether the tax will keep the municipalities out or not.

Mr. Mansfield - My suggestion was to simply eliminate everything after "tax" on the fourth line. If that would help us to get along with the show, I'd make that motion. As I understand it, this would leave us free to say no.

Mr. Wilson - Mr. Chairman, we just now had a motion from Mr. Mansfield in this preemption wordage that there be inserted a period after the word "tax" in the fourth line and to delete "or permit one or more political subdivisions to levy such a tax."

The motion was seconded.

A show of hands resulted in a vote of 5 in favor of the motion. None voted NO.

Mr. Bartunek moved that the preemption language be accepted as amended.

Mr. Carson - The only change from Ann's draft is the deletion of that clause?

Mr. Bartunek - Right.

Mr. Carter - I think that's a reasonable compromise.

Mr. Mansfield - I second Joe's motion, again on the assumption that we have all agreed that when this comes to the Commission we would have a chance to say no.

Senator Dennis - I'll second the motion.

Mr. Wilson - Six voted for the motion - opposed one.

Senator Dennis - Does this pretty well adopt the present case law?

Mr. Mansfield - Max, if you leave the last sentence in, yes.

Mr. Carter - All we've really done is encourage the legislature to make a definitive statement. Let's all reserve - we're going to take final action on this as a committee at a later meeting. Nolan's idea was to have discussion today and take formal action on Monday, the 19th.

Mr. Bartunek - Why don't we take a straw vote and see how many would go for the "not" in there?

Mr. Carson - May I have the privilege of explaining my reasons? I don't think it makes any difference. However, we are going to get flak by the bushel if we put a "not" in here, and I don't think it's that much of value to be shot down.

Mr. Mansfield - I would suggest, Nolan, that we just go ahead and take whatever action the committee deems proper on Monday, the 19th, and let these people know that they have the privilege of appearing at the next Commission meeting.

At the conclusion of the preemption question, Mr. Carson turned the discussion to Section 2.

Mr. Carson - Is it appropriate now to get into Section 2? This is one of the things we're supposed to make a recommendation on. Section 2 is a very complicated section which includes the ten-mill limit on municipalities, the uniformity requirement with respect to land and improvements, and the clause permitting the Assembly to create exemptions from taxes. The Committee from time to time has talked about this thing and looked into the question of uniformity to some extent and have been given a lot of material by the staff on the desirability of permitting classification of real estate, and the soundings I've taken from this Committee at recent meetings is that those who were there are not inclined to amend Section 2 at all. I'd like to feel out the Committee to see if anybody has any desire to do anything to Section 2.

On the ten-mill limit question obviously there are a couple of approaches: one would be to increase the mills. Or you could take out the 1% entirely, or you could leave out the 1% or ten-mill limit and the governing bodies of the municipalities could impose any tax they want without a vote of the people, I think it's been said to this Committee and I think it is a reasonably good observation that how is 15 mills today any better than 10 mills because the average rate around the state is 43, I think, so it wouldn't significantly change the situation. On the question of classification, we've had a number of people talk to us. One problem of classification is that it usually results, at least it did in Minnesota, in an inumerable number of classifications. It has created quite a body of law just providing various classes at which property is taxed.

Mr. Wilson - Didn't the legislature open the door here a bit when they are considering land to be taxed as agricultural land? They're establishing a class, which to me is classification.

Senator Dennis - The section is already applicable to forest lands, isn't it?

Mrs. Eriksson - It referred only to exemption of forest lands, and what they're doing is writing into this section something which would be a different classification for valuation, not an exemption.

Mr. Bartunek - This is similar to the bill we passed last time exempting farm land and golf courses. Wasn't there a bill passed and then it was declared unconstitutional?

Mrs. Eriksson - There was a current use provision written into a bill last session.

Mr. Wilson - Once they do that they open up a Pandora's box.

Senator Dennis - Did they include golf courses?

Mrs. Eriksson - I believe that was a separate bill.

Senator Dennis - The golf courses may have been added in the House.

Mrs. Eriksson - I don't know about that. There was a separate bill which was a sort of green belt kind of bill, but recreational use is not included in this as it passed the House.

Mr. Carson - What is now passed would be a constitutional amendment?

Mrs. Eriksson - Yes.

Mr. Carter - I'm personally opposed to changing this Section 2 of Article XII. I respect the legislature and the people of Ohio voting on this change in Article II, but I personally would be opposed to giving it any more recognition, through the Commission.

Mr. Bartunek - Well, of course they already have changed uniformity because of the homestead.

Mr. Carter - Yes, but I mean any more than has been done. I think it is very dangerous. What do you think about having a full system of classification?

Mr. Wilson - If you could get a uniform method of classification. One thing I have in mind would be classification by zoning. But that suggests a uniform statewide zoning which we don't have now. If zoned for a certain purpose then it should bear a certain tax levy. It might not be the purpose right now.

Mr. Bartunek - Zoning might not always reflect the highest and best use.

Mr. Wilson - In theory it would make for better land utilization, better planning for better living within the area. It might be worth considering. We had a master plan adopted last December in Piqua. A lot of areas don't have one and some have a lot of conflict when they do have it. As far as overall classification, then again you have an arbitrary decision by somebody which somebody else won't agree with.

Mr. Mansfield - Nolan, is there any way, any mechanism, by which we could in effect shelve this without creating any inferences that we're either opposed or in favor of what the legislature is working on?

Mr. Carson - While the legislature is considering this specific amendment, I'm not sure at all that it is appropriate for us to even comment on it.

Mr. Mansfield - All I was suggesting was that if we came in with the recommendation that it not be changed, then willy nilly we're taking a position, against what the legislature is considering.

Senator Dennis - Are we now considering the ten-mill limitation?

Mr. Carson - Yes, the three questions. The farm bill does not amend Section 2.

Mrs. Eriksson - It's possible to note that it does specifically say notwithstanding the provisions of Section 2 of Article XII. It was intended to be an exception to uniformity.

Mr. Bartunek - Why is this in Article II and not in Article XII?

Mr. Carter - It's a rather neat way of ducking the question.

Mr. Bartunek - Is there some way we can defer action on this section without appearing to make a judgment either way, for or against?

Mr. Carson - I think we can handle H.J.R 13. We have to worry about the comments to support whatever this Committee does. I have discussed it with Ann and Dick Carter and I don't think there's any problem in protecting our position. With respect to not taking action on Section 2, Joe, this Committee is at the end of its rope here. If we want to open this thing up, then we'll keep the Committee in existence, but we have nothing else to do.

Mr. Bartunek - Then what is your recommendation?

Mr. Carson - I recommend we make no change. I'll give you my reasons. One is on the ten-mill limit. The question here is whether the people vote in local government on tax levies. It would make no sense just to increase it to 15 or 20. So the question is do you want to take away the right of the people to vote? We've done that on debt, Article VIII, but for me this is a little different situation. I think it's one thing for the people in my township to vote on a 2i kind of amendment, that $759 million bond issue that covered pages and pages. It's another for them to vote on a local school levy, where the school is down the road. So I think retention of the right of the people to vote on the local levies is justifiable. On the question of uniformity, I must say I'm very much in sympathy with this farm proposal. I've seen real inequities there personally. I think there is something to be said for this. I'm sure there are others, but that's been the most apparent one to me, and I'm just afraid that if you open up this it's going to be a Pandora's box, and we'll have a huge body of law like the internal revenue code set up here having different pieces of property valued differently. I think it would be a detriment to the tax structure of local governments.

On the third question of the exemptions, the problem we've been told, and I personally believe is that the exemption situation in Ohio has gone way out of hand. Hundreds of millions of dollars are now exempt. But we've been told in this Committee that the problem is not the constitutional provision. It's just that the legislature has extended it so broadly. With all these things in mind, I in my own mind feel that I would let it alone.

Mr. Carter - I've given this thing a lot of thought myself and have reached the same conclusion as Nolan, for slightly different reasons. There is little to be gained by monkeying with it.

Mr. Wilson - I would like to see the ten-mill limitation removed, if only for those local things, feeling that pressure can be brought to bear more easily on local legislators than it can on state, and we should give the local legislative authorities to go ahead and tax any way they see fit. If the people don't agree with them, they are soon turned out of office. I don't think we would get it passed, from a political standpoint, the amending of the ten-mill limitation. As far as the exemption question is concerned, the thought I've had on that would be some language, somehow, somewhere to require a periodic review of these. For example, churches have branched off in various directions now and are getting by without taxation on something that should be taxed. I am talking about ownership of commercial property. Whether we could require a review say every ten years with the thought in mind that maybe in view of today's circumstances these exemptions as opposed to when they were originally put in there maybe the legislature would reduce some of them. It might not be feasible or desirable but it would be one way to keep these exemptions from piling up. Have somebody review, I don't care who.

Mr. Nemeth - In some states they do it now.

Mr. Wilson - Do you have any idea of whether this has worked in other states?

Mr. Nemeth - I don't know, but I think we could quite easily find out whether it's working or not.

Mr. Bartunek - Something like whether the Constitution should be amended every 20 years.

Mr. Carter - You would have to call on the legislature to do it and they would want to duck it.

Mr. Wilson - Unless you make it an inherent job of the county auditors to do it.

Mr. Carson - The legislature can now do this, can't it? Jack's point is do you want to mandate them to do it?

Mr. Wilson - I'm not sure yet whether they should or not. I'm just thinking of a way to keep this from going along until everything will be exempt except my house. There has been some thought by church people that churches should pay something, maybe not the real estate taxes but a payment in lieu of taxes for services rendered.

Mr. Carter - That still could be a legislative matter.

Mr. Wilson - It could be. My point is that in putting exemptions in the Constitution, they never do anything to end them.

Mr. Carson - Anybody else have any thoughts on this?

Mr. Mansfield - I agree with you and Dick. I don't think we ought to touch them. On the other hand I wouldn't like to have our not touching them be construed as being in favor or against Am. H.J.R. 13.

Mr. Carter - I think it could be explicitly stated in the comments.

Mr. Mansfield - Perhaps so, Dick.

Mr. Carson - The reason we haven't discussed this farm problem here in the Committee is because it is before the Legislature. We sort of decided that they've got the problem before them right now.

Mr. Carter - They preempted our field.

Mr. Carson - How about you, Dick? Have you any comments?

Mr. Guggenheim - I'm not prepared to talk to it right now, but my impression from some of the testimony was that the exemption situation is pretty inequitable and needed cleaning up. We did have quite a bit of discussion of that at one point, and I came away with the distinct impression, but I don't remember the details.

Mr. Mansfield - Our job, Nolan, as I see it, is really not to try to correct in our judgment what we think the Legislature has done in the past and while we may disagree with the extent of the exemptions that the legislature has permitted, I don't think that's our job.

Mr. Wilson - Well, I do think it's our job to control these things in the future. Granted what is past is past, but even if we don't change the past we can give direction to the Legislature in the future.

Mr. Mansfield - But here again, Jack, apparently you and I may disagree on the extent to which the Legislature should have freedom to act, and I guess I'm one of those who thinks that by and large the Legislature ought to have pretty broad powers.

Mr. Wilson - I like to prod them once in awhile to do something, but I see your point. The Constitution should not be creating laws.

Mr. Mansfield - Whether we like it or not we elect these people and if we don't like them, we can kick them out.

Mr. Wilson - I'm not really strong on this. But I consider abuses have resulted from what is in our Constitution, I think something should be done to prevent them.

Mr. Guggenheim - This provision in the Constitution doesn't offer any abuses.

Mr. Bartunek - This does permit abuse, because it permits the Legislature to make exemptions.

Mr. Guggenheim - I wouldn't be for eliminating all exemptions.

Mr. Carter - This doesn't exempt anything.

Mr. Wilson - Bruce is right. My objection is the way it has been handled in the past. If we can get something in the Constitution to prevent what has happened from happening again--

Mr. Mansfield - I think they're in the wrong forum.

Mr. Guggenheim - The attacks we heard were on specific exemptions?

Mr. Mansfield - Yes, but I think the ten-mill limitation is totally unrealistic.

Mr. Carson - It used to be 15, and in the Depression it was lowered to 10.

Mr. Guggenheim - You'd like to eliminate that entirely, Jack, would you?

Mr. Mansfield - I think we all do.

Mr. Wilson - I don't think we can ever sell that.

Mr. Nemeth - Before anyone makes a motion on Section 2 perhaps we should say something about this little memorandum you have in front of you on the Minnesota tax-base sharing plan. The cover memorandum is attached to a memorandum prepared by the Legislative Service Commission on the Minnesota plan. Its essence is that 40% of the increase in the nonresidential property valuation or base is assigned to the region encompassed by the plan. It doesn't necessarily have to cover the whole state. In Minnesota right now, it covers a metropolitan area, the Minneapolis-St. Paul area, and two different tax rates are applied to the local portion and to the assigned portion of the property--one rate is assigned to all residential property, all of which remains on the local tax base, and the nonassigned portion of the nonresidential property which is also part of the tax base, and another rate is assigned according to a formula, which I think it set out by law, to that portion which is assigned to that area covered by the plan. This on its face would be unworkable in Ohio as we have Section 2 of Article XII today. There are two tax rates which apply. The uniformity rule is deliberately abrogated to that extent. If the Committee should find any merit in the Minnesota approach, then we would have to do something with Section 2, or else--and this would not necessarily be a constitutional problem--major modification would have to be made in the Minnesota approach to make it work here.

Mr. Wilson - When you talk about area wide or regional tax rates how to you decide what the region is?

Mr. Nemeth - It's created by the Minnesota legislature.

Mr. Carter - Is the thrust of your comment, Julius, that our Constitution prevents us from distributing taxes collected on a statewide basis back to schools, for example--that is the coming thing with the Supreme Court decision that everyone anticipates.

Mr. Nemeth - I think the answer to that would have to be no. I would also say that there is nothing in Serrano, which is the original school case, or any of the other cases that have come down since, which necessarily requires the property tax to be used as a base. The end result may well be a shift away from the property tax for financing schools.

Mr. Carson - This does apply to the real property tax base?

Mr. Nemeth - Yes, the Minnesota plan does.

Mrs. Eriksson - It would violate uniformity because there would be different tax rates within the same taxing district on the same property.

Mr. Wilson - What is the reason for this?

Mrs. Eriksson - They are applying a local rate and a regional rate and they are attempting to distribute the increase in value of commercial and industrial property

over the region rather than having the increase only in the taxing district in which it exists. They apply two different rates, a local and a region rate, and it may be different rates on one piece of property in a single taxing district, because part of that money is put in a pot and distributed.

Mr. Wilson - What they're doing is nullifying the windfall effect that some local community may have from a large plant.

Mr. Guggenheim - This is quite complicated..

Mrs. Eriksson - It's complicated and we only bring it to your attention because there's some legislative interest in it.

Mr. Carson - Doesn't it tend toward increasing the burden of the property tax?

Mr. Carter - It's a "share the wealth" program.

Mrs. Eriksson - You can have different rates now. Minnesota has no constitutional provision against classification. Now, whether or not there's any millage, whether increases in taxes have to be voted, I don't know. It may well be that they aren't faced with that problem.

Mr. Carson - It says that different tax rates are applied to local residential and the assigned portion to nonresidential.

Mrs. Eriksson - I don't know whether they have to be voted taxes or not.

Mr. Nemeth - Local taxes are voted on, but I'm not sure that the rate on the assigned portion is voted on.

Mr. Carson - Theoretically, I would disagree philosophically that anything like this, a plan like this, ought to be restricted just to industrial property. My house is in a township, and I give part of my tax to the City of Cincinnati where I work.

Mr. Bartunek - And do you advocate that?

Mr. Carson - No, I don't, but I'm trying to say that I don't think this holds together.

Mr. Wilson - This is the reverse. They would tax new industrial property in Cincinnati and then send part of the new revenue back to your home, because there would be more people living in your home area who are going to work in the new plant.

Mr. Carter - That can still be done under uniformity. Not precisely the way they're doing it, but --

Mrs. Eriksson - No, only if the state by some form of taxation other than property taxation manages to distribute as the corporate franchise tax is distributed.

Mr. Carter - Cannot the state levy a property tax?

Mrs. Eriksson - The state couldn't go over the ten mills any more than anyone else could without a vote of the people.

Mr. Guggenheim - Is this not related to the regional concept?

Mr. Bartunek - I take it from the silent acclamation that Section 2 will not change.

Mr. Carter - Is there any sentiment for changing it?

Mr. Wilson - I don't think it's necessary.

Mr. Bartunek - I believe that some time in the future you are going to see some of these exemptions eliminated.

Mr. Carson - I'd like to suggest that in our comments we recognize this, saying that testimony indicates that the Legislature has perhaps carried the exemption situation farther than the intent was.

Mr. Mansfield - I have no objection to that, and then something like "in spite of all the testimony, we think this is a legislative function." At least call their attention to the fact that we have been made aware.

Mr. Carter - I was going to make a motion that we leave it the way it is.

Mr. Carson - I don't believe that's necessary.

Then the Committee took up Section 5a.

Mr. Nemeth - On 5a, you have a new total sheet before you that was just prepared by the Tax Department.

Mr. Carson - $544,000,000 in fiscal 1972, from all the taxes covered by 5a? What percentage of the total revenue?

Mrs. Eriksson - About $3 billion.

Mr. Carter - Nolan, I think your excellent summary of the alternatives on 5a would be helpful at this point.

Mr. Carson - One alternative is to leave it earmarked just the way it is. Another alternative is to provide that the General Assembly by a 3/5 vote of each house could pass a law which could convert moneys from this earmarking to whatever use they felt desirable. The 3/5 vote is on the basis that in 1947 the people did adopt this on initiative petition and maybe the legislature shouldn't disturb it lightly, but maybe we should write something for the future. Another possibility is to repeal the section entirely so that there's no earmarking. A fourth approach is to amend it so that other specific uses of gasoline tax could be added in addition to those here.

Any change we would make will be met with a great deal of opposition--the truckers, the gasoline industry, the automobile clubs--and today I don't feel that any diversion is called for, but 10 years down the road, there could still be some bigger and better use for this money than concrete.

Mr. Wilson - Eventually the whole state will be covered with concrete, and I think the time to consider this is not after but before. As another alternative, could we suggest that a portion of the increase be released for other transportation services? It's a compromise that might not be thoroughly disliked by both sides.

Mr. Carson - The only thing about that, Jack, is that it sounds like a mandate that we think ought to be. I don't think today it should be. I think we ought to finish our highway system.

Mr. Bartunek - When this section was adopted, the federal government had 90% participation. Imagine what our situation would be if we weren't getting federal moneys for highways. I don't know about the rest of the state, but Cleveland is woefully far behind in its system, obviously because it costs so much per mile to acquire properties. The highways are almost obsolete before they are in.

Mr. Wilson - The Federal Government is considering using part of federal highway tax funds for other purposes. Shouldn't we think about it in Ohio?

Mr. Bartunek - I don't think so. I feel we have not done the job even with extra help that was not contemplated in 1947. You're talking about mass transportation, and it's a fine dream. But Shaker Heights, for instance, was created and went bankrupt because of the way it was laid out around a superbly fine public transportation system. Because of the school system and the rapid transit system, property values tended to be much higher there. Now, today, the Shaker Rapid is losing money, and it is geared to an entire community, so people are still driving their cars. So it's how far you want to go and say, "O.K. Joe Bartunek, you can't drive your car because you're polluting the atmosphere, taking up parking space, taking up space that would get thousands of people downtown."

Mr. Wilson - They can tell you how many people you put in an elevator. Why can't they tell you how many cars should be on a highway?

Mr. Mansfield - In theory, when you have the highway built, you may not need all the money for construction, but you would need it for maintenance.

Mr. Carter - But again, I think this should be a legislative matter.

Mr. Carson - In the whole Constitution, this is the only example where any tax has to be devoted to a specific purpose. It was passed when we had no super-highway in the state of Ohio, and there was probably good reason for it at the time.

Mr. Carter - Would you be in favor of taking it out?

Mr. Carson - No.

Mr. Guggenheim - But it really is a legislative matter. If we need the money for highways, the Legislature is perfectly capable of deciding to give all this and more to highways. But I think almost everybody is against tagging specific funds in the Constitution.

Mr. Wilson - But at the moment, I'm afraid we can't do too much about it.

Mr. Mansfield - Dick, I like your approach of commenting that we feel that this is not a good constitutional approach but nevertheless not recommending any changes.

Mr. Wilson - This may be a good comment on a number of things where we recommend no action.

Mr. Carter - Does anyone feel differently?

Mr. Carson - I feel differently, and I've said so before. Here is this huge amount of money, and it offends me that the Legislature does not have the power to choose between $544 million for highways and some kids who need milk. I just don't think it's right. I don't think there's anything sacred about my paying tax on a tank of gas, and the tax having to be used only for highways. We have all kinds of taxes. I have been trying to suggest to you a ground for leaving the intent in there, but permitting the Legislature somehow to tap it. Sometime in the future, they may find a better priority for it.

Mr. Bartunek - I would guess that the reason highway money is "locked up" is not to insure that they spend $600 million or whatever on highways, but to insure that they don't enact some additional taxes for other purposes, as they've done to cigarettes and liquor. Is that too far out? What I'm saying is that everytime they increase the gasoline tax, that money has got to be used for highway purposes. If they were free to increase the gasoline tax, and use it say for welfare, or a place for human beings to live decently, I think that gasoline would come in the same category with liquor and cigarettes which are more or less non-essentials. I would guess that that's why they put it in.

Mr. Carson - To the extent of every new highway they put in, it's going to cause more people to have more automobiles.

Mr. Bartunek - And if you're going to believe the published reports, we're facing a serious energy crisis not only electricity and gas but gasoline as well. The State of Ohio was thinking of putting in gasoline rationing.

Mr. Mansfield - I think you'll be getting liquified natural gas. I was about to say about what you did. If we have a shortage of gasoline in this country two things are going to happen--one, the use of smaller cars and two, they won't let you drive downtown because of the lack of ability to get gasoline.

Mr. Guggenheim - They could use this money for public transportation.

Mr. Mansfield - Sure, that's right, and this gets back to what Jack said a little bit earlier, that we can't really foretell what's going to happen. But coming back to Joe's point, when you realize that roughly somewhere between 60 and 80% of the world's known oil reserves are in the Middle East--

Mr. Guggenheim - I don't think we can lay this out in the Constitution. Personally, I hope we're going to get a substitute for oil one of these days.

Mr. Mansfield - We may, but it's not here now.

Mr. Carson - Let me read this. If I had my choice this is what I would recommend: At the beginning of that section, we just add the words, "except as may otherwise be provided by law passed with the concurrence of 3/5 of the members elected to each House of the G.A." (that's the kind of language we used in Article VIII), and carry on with the section. It really means that the Legislature can do what they want with it if they have the 3/5 vote of each House.

Mr. Mansfield - I have no objection to that. I think it demonstrates concern and it offers a solution. If they want to accept it, it's fine.

Mr. Wilson - Maybe their thoughts have changed.

Mr. Mansfield - At least give them a chance.

Mr. Carson - I would have no objection to 2/3 being necessary to pass it.

Mr. Bartunek - I would be willing to think about it.

Mrs. Eriksson - Emergency legislation has 2/3.

Mr. Carson - People voted for this. I like the 2/3 idea.

Mr. Carter - I'd go for 2/3.

Mr. Bartunek - But people voted for all amendments.

Mr. Carson - But this is a rather recent one, Joe, 1947.

Mr. Bartunek - You should be consistent and say 3/5.

Mr. Nemeth - I think this would have another merit. It wouldn't touch any of the other language, and it might be less likely to stir up opposition.

Mr. Carter - I kind of like the idea of it being on an emergency basis.

(Everyone agreed on a 2/3 vote requirement.)

Finally, the Committee discussed the "indirect debt limit."

Mr. Carson - The only thing we have left to do is this indirect debt limit. Section 11 of the Constitution provides that no bonded indebtedness of any political subdivision of the state shall be incurred unless in the legislation creating indebtedness provision is made for levying and collecting annually by taxation an amount sufficient to pay interest on the bonds. The courts, in construing Section 11, have read the 10-mill limitation of Section 2 into it, and have evolved the doctrine that if a local municipality wishes to issue debt--even though it is going to finance that debt by some tax other than a property tax and they don't think they'll ever need tax revenues to pay

the indebtedness on the bonds, nevertheless that debt cannot be issued, if it's a full faith and credit bond, unless it is so voted by the people, on the basis that conceivably money outside the 10-mill limit--property tax outside the 10-mill limit--might be involved. Am I correct in this, Ann?

Mrs. Eriksson - Essentially, yes.

Mr. Bartunek - This does not apply to the revenue bonds?

Mrs. Eriksson - No.

Mr. Bartunek - General obligation bonds paid in Cleveland for improvements to the municipal light company.

Mrs. Eriksson - If they're general obligation bonds, then they do fall within this indirect debt limit, which is the basis for the desire to change it.

Mr. Carson - Going back briefly, we were told a year and a half ago that it would be a great help to all local governments if we could eliminate this indirect debt limit problem and enable municipalities to issue bonds without a vote of the people in those cases where property taxes would rarely be used. We asked for help in drafting a new Section 11, and we got the draft about two months ago and found that the way it was written , in fact would permit money outside the ten-mill limit to be used to pay the debt service. Hence the 10-mill limit was not preserved. Up to that point this committee had been talking about not touching the 10-mill limit, and because of possible voter reaction, we certainly didn't want to do it indirectly. We asked for a new draft, but have not received one yet.

Mrs. Eriksson - And we did not come up with anything ourselves.

Mr. Carter - I am persuaded that it is an impossibility to do what everyone would like to do. There's a dilemma. If municipalities want to issue general obligation bonds so that they can get a lower rate of interest, their recourse is to the property tax, and if you have recourse to the property tax, you either have a ten-mill limit or you don't. And you've got to state it, so I don't think it can be done, to tell you the truth.

Mrs. Eriksson - Essentially, you're correct. The other aspect to it would be to still call them general obligation bonds and eliminate the reference to the property tax--and there's still no reason why you couldn't do this--but bond counsel says that is not as good a bond.

Mr. Carter - That's the only answer and what we should come up with. On the basis of logic, you can have a hybrid bond like the state has, where in essence certain revenues are pledged. They wouldn't have to be strictly revenue bonds for each specific project. For example, you could pay for your power plant in Cleveland by pledging the income tax as a source of repayment.

Mrs. Eriksson - Of course many cities do use the income tax.

Mr. Carter - Then they are no longer general obligation bonds. I think it is appropriate to discuss this somewhat.

Mr. Carson - Under section 2 could they issue bonds which pledge all the revenues of a city other than property taxes?

Mrs. Eriksson - They are not general obligation bonds, then.

Mr. Carson - Could they issue such a bond?

Mrs. Eriksson - Yes, and they do. They do issue bonds which in fact pledge income tax revenues. And they don't have to have a vote of the people, as long as the income tax is sufficient to cover it. But bond counsel will not give the same kind of guarantee for those bonds as they will for the G.O. bonds.

Mr. Carter - So, I see no escape from the crunch that we're in. For G.O. bonds, we either remove the ten-mill limitation or we keep it.

Mr. Wilson - When you get right down to it, from a practical stand point, there is no such thing as a pure revenue bond. Granted, it may say that on the face of it. But we issue revenue bonds, for example, to build a sewage treatment plant based on the assumption that we've going to pay it out of revenues, but we know very well that if those revenues decrease, we're going to take over that sewage plant and pay for it out of general revenues.

Mr. Mansfield - That is in essence what Hovey said about the state.

Mrs. Eriksson - Essentially, this is why you are paying higher interest rates, because of this possible risk.

Mr. Wilson - But if we had the right to call them all general obligation bonds and still get away from the ten-mill limitation--

Mr. Mansfield - I think really they're talking price, and I don't think that we ought to be concerned whether a city has to pay another half a per cent or not. If we want to do it, then we should face up to it and say this is a repeal of the ten-mill limitation.

Mr. Carter - Well, you can make the removal if you choose to do so.

Mr. Carson - It seems to me that if we open that 10-mill limit for this purpose, a municipality could open it as far as it wanted. If we aren't willing to let them do that, then I think we better leave the whole 10-mill limit alone and move on to something else.

Mr. Wilson - This is a hard thing to understand. For instance, in Illinois where they don't have this limitation--

Mr. Carter - I can envision circumstances--let's take the City of Piqua--where, for example, General Motors builds a new plant, and for that purpose the City of Piqua issues G.O. bonds to finance new sewer lines, without a vote. Three years later, GM decides the plant is inefficient and closes it, and the city has got the whole burden of carrying those bonds. Theoretically, let's assume the plant brought 10,000 people to Piqua, and as the income tax went up, it was possible to finance these out of income tax. These

people move away and then the whole burden falls back on the remaining property there. his may be a far-fetched case, but I have some problems with taxing the local people without their permission.

Mr. Wilson - We have something that is very close to that, although I don't think there's any danger of their leaving. The new General Vocational Technical College is located about a mile from town and we have to get out there with services by September of 1974. It's going to mean the expenditure of funds that we don't have. We're in this bind right now getting the money for what we have to do. I would hate to see a sewerage charge assessed against the people who already paid for their sewer charge.

Mr. Carter - Well, you might say that my logic leads you to the position that you shouldn't do anything. The question is who bears the risk and what rate are the people willing to pay? It seems to me that the point Bruce made just before he left is if I were a property owner in that city, I think I'd much rather pay a half of a percent more and not face this kind of risk. I started out thinking we're going to change this indirect debt limit, we're going to get rid of it--but now I'm not so sure that maybe the courts weren't right, as I think about it.

Mr. Carson - Our early impression was that we can perhaps make it clear that our intent on Section 2 was to provide it doesn't constitute a debt limit, but that doesn't do the job. Ann, do you know anyway out of it?

Mrs. Eriksson - No, I believe that the effort of bond counsel will be try to write an even more restricted section than was presented before so that the condition under which you would have to go to the property tax would be so remote as to practically eliminate the possibility. However, I don't think that they're going to come up with anything which will eliminate the possibility altogether. And anything that we could come up with would not be as secure a bond, I am sure, from their point of view.

Mr. Carson - I presume that one thing that we could do would be to but put a "little Article VIII" in here.

Mr. Carter - In other words, replace the 10 mills by a more realistic figure?

Mr. Carson - So that they would have some debt authority without going to the people.

Mr. Wilson - You mean getting around this ten-mill limitation?

Mr. Carson - It means they would have a limit on the debt service that they could pay.

Mrs. Eriksson - Would you be applying this to all political subdivisions? Because then in effect you would be removing the authority of the G,A. to determine debt limits for political subdivisions.

Mr. Carson - Well, I suppose you could say, "subject to the authority of the G.A. to provide otherwise."

Mr. Carter - In what Nolan is suggesting, what is interesting is that instead of having a debt limit that is determined by the 10-mill limit, you set up another debt limit.

Mr. Bartunek - That crossed my mind, but only very briefly. We did that in the other debt limitation, but that was a known quality. Here we're tinkering with too many other areas.

Mr. Carson - You might be able to do something. We used revenue there. Here, you could relate it to a tax base, which would be more relative to the subject we're concerned with.

Mr. Carter - Would you have a conflict if you established the debt limit on the basis of 40 mills--I'm just picking that figure out of the air--And yet you have a ten-mill limit on the amount of taxes which can be imposed without a vote of the people. You would have an impossibility there. I guess what we'd be saying is that you could exceed the 10-mill limit if necessary, to pay debt without a vote of the people, and be back in the same box we're in right now.

Mr. Bartunek - But the people have not been reluctant to go over the ten-mill limit when the local community could show a need, and now to say we're going to give more freedom, when the people have not, generally speaking, turned down until very recently--

Mr. Carter - Schools?

Mr. Bartunek - Right.

Mr. Carter - Your argument being that the local people have the authority to exceed the 10-mill limit and have done so without reluctance.

Mr. Bartunek - Right. I feel that. It's a different situation than the overall state program.

Mr. Carson - I think it is too, Joe. I'm not really advocating anything like this, but we've been thinking about the problem, and we've been trying to help those who seem to show a need.

Mr. Wilson - A lot of times people have to be convinced three or four times that the need is there before a school issue will pass. Taking my own case now, knowing that a sewer line has to be out there for expansion, I would not be at all reluctant to put our city in debt for that expansion. But going to the people for something like this, or some other thing that might be needed for expansion, to tax themselves, might be awfully difficult to sell.

Mr. Carter - That's exactly why the whole thing came up.

Mrs. Eriksson - When you say put your city in debt, now what do you have in mind?

Mr. Wilson: Well, it's extending streets, putting in sewer lines, water lines, hiring more policemen and firemen. I would be willing to go beyond what now constitutes the limit of this authority--the unvoted 10-mill limit--to get this done.

Mr. Carter - What Joe is saying is that you ought to be willing to sell your case to the people.

Mr. Bartunek - It's harder to sell something like that, especially where it is a school that doesn't produce any revenue.

Mr. Carter - The alternative then is to sell revenue bonds.

Mr. Carson - Let's think out loud on this for a second. Let's say that we include a provision similar to Article VIII which would say "notwithstanding any other provision of this Constitution any municipality may, without submitting the question to the electorate, incur general obligation debt provided that the debt service payments in any year shall not exceed 1 % of ...."

Mrs. Eriksson - Does this mean to give an additional ten mills?

Mr. Carson - Another 1% for the purpose of capital improvements only.

Mrs. Eriksson - So instead of protecting the 10-mill limit, you are adding an additional 10 mills for debt, for capital improvements.

Mr. Wilson - For example, we go in debt $800,000 to build a new fire station.

Mr. Carson - It wouldn't necessarily be an additional 10 mills, because inside millage would have to be applied to the debt first.

Mrs. Eriksson - Well, if you provided that, then you're back almost to where we are now, because if, in fact, a city does go over its debt limit, it has to use inside millage for this purpose, which means that it has to go to the people for operating money.

Mr. Carter - It's an intriguing possibility, rather than tinkering with the ten-mill limit, which can be used for anything, to have--

Mrs. Eriksson - Then how would anybody ever know how much debt it could issue?

Mr. Carter - Well, we could do it the same way we did the state debt.

Mr. Carson - I'm not sure we would. I was just exploring.

Mrs. Eriksson - If you didn't have that--making them use the inside millage--and simply consider it an additional ten mills, then it could be figured as we put in Article VIII. I mean, the debt limit could be a computable figure.

Mr. Carter - What we'd be saying is that a city council would have the authority to incur debt requiring up to 10 mills for capital improvements, without a vote of the people.

Mrs. Eriksson - I wonder how much ten mills would amount to. Or would you put it in at 1%?

Mr. Carter - 1%.

Mr. Carson - That would be a lot of debt for a big town.

Mr. Nemeth - It might have the indirect effect of improving assessment procedures, if

these result in a higher debt limit.

Mr. Carter - I think that's worthy of some consideration.

Mr. Wilson - Are we getting afield from constitutional reform? Maybe the Constitution should say that the debt limit shall be decided by the legislature, period.

Mr. Carson - We should say here "except as the legislature may otherwise provide", so that the G.A. could cut it down.

Mr. Wilson - Again, we're getting local law into the state Constitution.

Mr. Bartunek - You're doing by indirection that which you can't do by direction--fooling around with the 10-mill limitation.

Mr. Carter - For a specific purpose, capital improvements.

Mr. Nemeth - Maybe such a provision doesn't belong in Article XII.

Mrs. Eriksson - If I understand it, I think we can certainly draft something like that.

Mr. Nemeth - And I think we could easily come up with an exact figuring of what this would mean. There are statistics available. We could just about tell every municipality in the state, on the basis of present valuations, what this would mean to them.

Mr. Carson - I guess the point here would be, if they now have outstanding debt, like in Article VIII, we could make existing debt service apply against the authority. We could even write it so that the G.A. could authorize cities to levy 10 mills. We're not mandating anything.

Mrs. Eriksson - power to permit the levy of 10 mills additional.

Mr. Carter - Ann, as I recall we had some discussion about whether this applies to charter cities, and if the charter provides that the administration can incur debt without a vote of the people, then this doesn't apply to charter cities.

Mrs. Eriksson - No, because charter cities under Section 2 can have charter provisions providing for greater millage up to what limits their charters provide. I believe there aren't any cities which don't have a charter limit, and some of them have a lower limit than the 10 mills, but some do have a greater limit.

Mr. Carter - It might be of interest to find out what their experience has been.

Mr. Carson - The people have already given them the authority to issue bonds.

Mr. Carter - By the way they adopted a charter.So what we're saying is that what we're proposing to do is to give noncharter cities some of the prerogatives that charter cities have.

Mr. Carson - One other suggestion I have is a local option kind of thing.

Mr. Carter - In other words, have local people vote on this thing, without adopting a full charter?

Mr. Carson - Yes.

Mr. Carter - "as prescribed by law", again. All we would do is authorize the legislature to authorize it. I think that might make a lot of sense, because it puts the burden back on the local people to vote on this kind of a policy.

Mr. Carson - I'm not sure our committee ought to be doing that.

Mr. Carter - That puts it back into local government, except that we're involved in it.

Mr. Nemeth - What we could do is leave this alone until Local Government decides what to do with it, and then recommend the repeal of this section at the same time they decide what they're going to go with.

Mr. Carter - In other words, what you're picturing is that we don't come up with any kind of recommendations for change at this point, but in the comment recognize the problem and indicate some of the things that could be done but that they should be done in context with the Local Government Committee.

Mr. Nemeth - Right.

Mr. Carson - Let me ask you this. Is there any reason why we need Section 11 in here? Is there a possibility of repealing Section 11? That's where we started.

Mr. Nemeth - The problem with that is that I think Section 11 has been interpreted as a guarantee to the bondholders. We've been told that.

Mrs. Eriksson - Mr. Gibbon did originally. When we got into the discussions with Joe Cortese, he too felt that Section 11 does operate as a guarantee and that it should probably not be repealed.

Mr. Carson - What is says is that "no debt of a local government shall be created unless the ordinance they pass makes provision". That's all it says. All I'm saying is, won't bonds continue to have this provision in anyway, because you probably couldn't sell them unless the ordinance creates such a provision. I'm confounded as to why this gives bondholders any kind of satisfaction.

Mrs. Eriksson - I think that probably bondholders don't even know whether this is here or not. All it does is give bond counsel a provision which they can point to in the Constitution and say it's there--their position was that if you repeal it you would be weakening Ohio local government bonds.

Mr. Wilson - Bond counsel would say the Constitution requires this, and this city ordinance complies with the provision.

Mrs. Eriksson - I don't think we can point to any specific interest rate that would go up as a result of removing it. It's in there because a lot of local governments were once defaulting on their bonds.

Mr. Carson - What choices do we have? I would say there's little we should worry about doing here.

Mrs. Eriksson - I think probably by the 19th we could have something further.

Mr. Bartunek - I don't think we should change it if those most concerned are unable to create language.

Mr. Carson - Our problem is that we are trying to get the Article XII package ready for the Legislature, and I hate to leave an open question on Article XII.

The Committee agreed to continue its discussion on Section 9, and the other sections discussed at this meeting, at its next meeting on February 19.

STATEMENT OF ROBERT J. KOSYDAR, OHIO TAX COMMISSIONER

PREPARED FOR THE CONSTITUTIONAL REVISION COMMISSION

FEBRUARY 10, 1973

As it was adopted in 1930, Section 9 of Article XII of the Ohio Constitution requires that at least half of the proceeds of any state income or inheritance tax be returned to the local jurisdiction of origin. This Commission now has before it a proposal to extend this requirement to the corporation franchise tax.

It is my personal belief and also the position of the current Administration that such an action would represent a step backward in state tax policy. Several reasons for this are elaborated below, but they center upon (a) the need to strengthen state government so that state problems can be dealt with more effectively and (b) the virtual impossibility of corporations to comply with the proposed amendment. It would be far more appropriate to consider removing the requirement that half of personal income tax collections be distributed on a where-originated basis than to consider extending this provision to other taxes.

The Role of State Government

There is a tradition in Ohio of tending to assume that all problems are local problems, and that the state government's role should be kept very small. The proposal to return franchise tax collections to places of origin is a manifestation of this tendency. Such proposals tend to deny the legitimacy of state government involvement and to suggest that distribution of

government expenditures should coincide with the distribution of private wealth and income. Actually, a good many public service needs are more intense in areas where private wealth and income are relatively low. State-raised revenues should be available for allocation among state programs on a rational basis; to distribute tax collections back to places of origin would only exacerbate existing fiscal problems.

In recognition of the growing complexity of the world and the tendency for problems to extend beyond local boundaries as population increases and becomes more mobile, the prestigious Advisory Commission on Intergovernmental Relations has strongly urged in many of its reports that the state fiscal systems be strengthened. If the state government is kept relatively weak and denied the resources necessary to cope with state-level problems, the alternatives are few: (a) allow the problems to go without attention, or (b) turn to the federal government for help. Both these routes have been followed extensively in the past. It is our position, as well as the position of the Advisory Commission, that development of meaningful state government is a preferable course of action.

The extent of state involvement in meeting public service needs is likely to continue to grow, not to decrease. As one outstanding example of this, consider the situation of public school financing. If the Rodriguez case is upheld by the U. S. Supreme Court, the present method of financing schools would be invalidated. Any feasible response to this situation would certainly require more, not less, state money. Moreover, some who have looked at the Robinson case in New Jersey have suggested that the same conclusion--that public education must be funded by a uniform state tax--appears very possible for Ohio. It is worth noting that the problem on which all the many

recent school finance cases turn is the uneven distribution of private fiscal capacity--and that the turnback provision you have before you now would only serve to make the situation worse.

Having made these general observations, I would now like to consider a few of the points in somewhat more detail.

Some Specific Problems

Is the turnback requirement needed?--This constitutional provision was adopted at a time when state services played a relatively small role in overall government services in Ohio. Tax receipts for state purposes were $41 million in 1934, for example, while receipts for local purposes totaled $250 million--over six times as much. It is, perhaps, significant that even at a time when local government clearly predominated, framers of Article XII, Section 9, required only a 50% turnback, rather than some higher percentage.

Forty years of economic growth, urbanization, and social change have brought problems which were not dreamed of in the 1930's--problems which require statewide attention and statewide resources. The framers of the constitutional amendment knew little of equalizing school foundation funds, state welfare expenditures, environmental costs, and some of the other problems that now confront us.

Furthermore, the spirit, and perhaps even the letter, of Article XII, Section 9, is presently being met for all state revenues when various programs which return such revenues to localities are considered. State revenues, after all, are not expended totally in Columbus; they are returned to schools, hospitals, mental institutions, etc., all across the state.

Should revenues be distributed on the basis of private wealth?--The 50% turnback provision would limit a major function of state government: the

marshalling of resources from wealthy areas of the state to help provide services in the less wealthy areas. At a time when Serrano-type decisions are striking down systems of public school finance in many states because they discriminate against low-wealth areas, it seems inappropriate to be considering a proposal that would contribute even further to keeping wealthy areas wealthy and poor areas poor.

Some examples may help to illustrate this problem. Using the Battelle formula (explained later) for determining corporate tax turnback by county, and making some simplifying assumptions about applying the Battelle data directly to the present Ohio tax, the following conclusions result:

(a) The average per capita yield of the 50% turnback for the entire state would be roughly $15.00.

(b) The wealthier urban counties would tend to have per capita yields higher than average--e.g., $18.00 for Cuyahoga, $17.00 for Hamilton, $19.00 for Montgomery.

(c) The small, poor, rural counties would be almost entirely left out when the allocations are made. Adams and Brown counties would receive about $2.00 per capita; Meigs would get about $3.00.

Would implementation of a franchise tax turnback be feasible?--Determination of the origination of corporation franchise tax is an exceedingly difficult task. It may not even be possible to develop a really meaningful attribution formula. Certainly it is incorrect to attribute corporate tax to the county or locality in which it is paid. This often reflects little more than the physical location of the tax department of a corporation's Ohio operations. Sohio's tax returns, for example, are filed from Cleveland headquarters, even though the company's operations are widely scattered.

Using a formula such as the one contained in the 1968 report prepared by the Battelle Memorial Institute for the Select Committee on Tax Revision of the Ohio House of Representatives is also an insufficient solution. That formula allocates corporate income only on the basis of the property and payroll of each corporation in each county; the traditional third factors--sales--could not be used due to inavailability of data. This allocation may be criticized as being discriminatory because it tends to favor large metropolitan counties which may draw a high proportion of their work force from neighboring counties and receive corporate tax receipts based upon all those commuting workers under the payroll allocation factor.

A three-factor formula, incorporating sales by county, would be superior to the two-factor formula as it would provide more balance to the distributions. Only in this way, for example, could sales of General Motors products be reflected in the county allocations for counties not having GM plants. However, most corporations do not keep records on sales by county, and would find such a requirement extremely burdensome. Compliance would, in many instances, be almost impossible.

The compliance problems facing individual corporations, even allowing for the simpler two-factor rather than the three-factor formula, would be enormous. A major canon of sound fiscal policy is that taxes should not cause undue compliance problems. The proposed change would mean that each corporation subject to the Ohio tax would be required to annually make a determination of what portion of its profits was earned in each one of the state's 88 counties. This would be not only a formidable task, but a prohibitively expensive one. Nor would the administrative problems facing the state be simple.

In short, imposition of the turnback requirement for the corporate franchise tax would present the very problems the 109th General Assembly wisely avoided when it rejected a proposal to have state-mandated county income taxes.

Would corporate franchise tax be a predictable local revenue source?--The revenue received by a county from year to year would be extremely unstable. Particularly in small counties (but even in some larger ones) receipts would be dependent on the fortunes of relatively few corporations. A bad profit year might produce little revenue (or, conceivably, no revenue) for some counties. This problem is substantially lessened under the present Ohio corporation franchise tax since the ups and downs of individual companies tend to even out over the entire state economy. Moreover, the present set-up allows the state government to distribute revenues back to localities on a more rational basis than origin.

What would the state revenue loss be?--Revenue loss to the state's General Revenue Fund and Local Government Fund in FY 1974, would be roughly $150 million. A loss of this magnitude would require either an increase in state taxes or a substantial reduction in state services.

Constitutional Revision Commission
Finance and Taxation Committee
February 19, 1973

Summary of Meeting

The Finance and Taxation Committee met at 10:00 a.m. on Monday, February 19, in Parlor 11 of the Neil House Hotel in Columbus. Present were Chairman Carson, Committee members Bartunek, Carter, Mansfield and Wilson, Director Eriksson and Mr. Nemeth of the Commission staff. The following discussion took place.

Mr. Carson - This Committee is charged with two functions--one, to review the provisions of Article VIII on which we have already made a report to the full Commission and this has been referred to the Legislature for their consideration. In the last few months we have been dealing with Article XII, and with taxation, and last month the Committee made a partial recommendation on Article XII and included in that recommendation a new suggested provision dealing with preemption, which some of you I know are concerned with. That recommendation rests with the full Commission as of now. Four sections of Article XII, specifically -Section 2, Section 5a, Section 9 and Section 11 -have not yet been recommended or submitted to the full Commission, and it is the contemplation of the Committee that those four sections would be considered today, and if final action is taken, the report on them would be made to the full Commission at its meeting this afternoon. With the permission of the Committee, I wonder if we may not approach the preemption question first, because it's already before the Commission and we're certainly going to have to approach it this afternoon. I might say that whatever action this Committee takes today, there will be a 1:30 meeting of the full Commission this afternoon, and everybody is invited by Mr. Carter to give any comments there that they may wish.

At the January meeting, this Committee recommended to the full Commission that the following provision be added as Section 3 (B) of Article XII: "The levying of a tax by the state does not preclude the levying of an identical or similar tax by a municipal corporation or other political subdivision duly authorized unless the law imposing the tax by the state or an amendment thereof specifically so provides." That's what's pending before the full Commission. At a meeting on February 10 in Cincinnati, this Committee considered the preemption question again and considered but took no action on a different version, namely: "Every law imposing a tax enacted after the effective date of this section shall state whether or not the General Assembly intends to preclude municipal corporations and other authorized political subdivisions from levying an identical or similar tax. Failure of the General Assembly to so state shall preclude the levying of an identical or similar tax by any municipal corporation or other political subdivision." The three aspects of this later version that has been considered by the Committee are these: first, it was pointed out that in our earlier version the Legislature would be required to review and take some action on every state tax law that had been heretofore passed, and there was a lot of concern that perhaps this might cause some difficulty, so this later version was intended to eliminate that necessity with respect to laws already on the books. The second part of this new version would be to require the General Assembly whenever it passed a tax in the future, to state whether or not it intends to permit or not to permit municipal corporations to impose a similar or identical tax. As I am sure you all know, the Constitution has for many years provided that although there are home rule powers, the Legislature is specifically permitted to withhold the power of taxation from municipalities if it wishes to do so. The preemption problem has come in cases where the legislature hasn't said what it intends and the Court has inferred preemption, in a long line of cases. This Committee, I think, had proposed this kind of language with the feeling that since we are looking at the Constitution, and since the preemption issue which has caused all this litigation through the years has occurred by reason of the fact that there is a constitutional deficiency, perhaps there would be a way that

we could cure it so that the courts wouldn't have to be resorted to in the future for this sort of thing. The last sentence was put in this new version on the basis that we're concerned that even though the Legislature is mandated to indicate clearly what it intends, if it shouldn't do that it would be contended, in the absence of this sentence, that the tax law was unconstitutional, and the tax was an illegal levy. So that's where we stand, and I guess to make it clear, we have voted in this Committee on the first proposal, which is now before the Commission. There has been no vote taken on the second version. I would be glad to have comments from anyone here who wishes to express a view on the preemption issue as a whole--on either version--or on anything else you think we ought to do.

Mr. Mansfield - Is it important to indicate that the vote was not unanimous? You've said we have voted on the first version but not the second, and I simply wanted the gentlemen to appreciate that while the Committee voted in favor of it and did present it to the full Commission, the vote in the Committee was not unanimous.

Mr. Gotherman - Perhaps it would be fair if I go first since I'm the one that's responsible for this. I'm John Gotherman, counsel for the Ohio Municipal League, and I don't apologize for having increased your mail. It simply shows you that there is interest in the preemption doctrine. In dealing with the preemption doctrine, I think, we're dealing with the central nervous system of a very complex principle. Practically speaking, the preemption doctrine has been with us long enough, I think, for those people who represent business and other kinds of taxpayers and those who represent tax-imposing bodies fully to understand what the implications of the doctrine are. Practically, it has little impact upon the operation of municipalities today because we do have areas which are not preempted and we utilize them to a great extent. The General Assembly as recently as last year has indicated that the enacting of a state income tax and a corporate franchise tax did not prempt the levy of a municipal income tax, so I think that the preemption doctrine is firmly in hand, rather easy to work with from the standpoint of those people who are dealing with it, and not more than a principle at this point in time.

I suppose that the language which you sent to the Commission would normally represent what most municipal officials would feel should be done, but we did not support the language as I recall and I attended several sessions. So for that reason I don't feel that municipalities are asking for the inclusion of proposed Section 3 (B). I doubt very much if any would oppose it, but I really don't think that we're asking for it. We are also opposed and would oppose what is described as a tentative agreement on the language which is proposed to be substituted for the Section 3 (B) which is now before the Commission. Let me just go over the language with you and give what I feel is an accurate statement of the impact of that language--I'm not discussing the merits of the words, but the merits of the idea that is behind it.

The first sentence is well intended, if it is to require the General Assembly to face this issue. Practically, if they face it only prospectively, I suppose we're not talking about facing issues. I think the problem in the old language was the fact that it dealt with amendments, so therefore they did not have to face it any time there is legislation introduced. But I think the first sentence is fairly straightforward in the sense that it's to indicate they should fact the issues. But I don't see why we need such a confrontation with every bill that's introduced which somehow affects taxation. I think that there's no need to bring about through the Constitution a confrontation between those who do not want to pay more taxes and those who have the power to tax, in every piece of legislation that is before the General Assembly.

The second sentence, while well intended, simply does this: it implants in the Constitution the preemption doctrine, not as an implied doctrine by the courts, but as a mandated doctrine of the Constitution itself. Now, I understand the concern which this Committee has had with regard to the courts making policy in the State of Ohio. But the big argument on policy has not been whether or not there will be preemption. The courts have pretty well said that. I can't think of any cases where the courts have not said that there would be preemption. The arguments in the litigation have been solely whether or not it's the same or a similar tax, and that's what everyone of those cases would be about if you go back and read them. Now I ask you to read the language, as proposed, and to simply ask yourself the question: Have we prevented litigation on this question?" The language that is proposed is "the identical or similar tax" so there will not be any decrease in litigation. The only change will be this under the constitutional provision: the Court would be given a mandate to preclude a municipality from levying a tax, if it's the same or similar tax, so the Court would inquire only into whether it's the same or similar tax, and it would not inquire into the basic public policy of whether the law should preclude a municipality. The doctrine of preemption, as we know, is a court-made doctrine and the Court has applied it in a fluctuating manner in this sense, and I don't mean this is a derogatory sense. It has looked at the implications of extending or not extending the preemption doctrine, and we really feel that it hasn't done a bad job in terms of extending or not extending it. So we're not really dealing in an area which is unsettled law in Ohio. I think Emory Glander is really viewed as the expert by those people who pay taxes and by those people who impose taxes, and I think we both agree that there is no unsettlement of the law in the state on preemption. Basically, that's where we stand.

I know this Committee told me rather pointedly about two months ago that it was not interested in getting involved in even the theoretical possibility that a tax would be levied without a vote of the people that was somehow over the ten-mill limitation--that was on the "indirect debt limit" problem. The Committee was telling me at that point, and I can agree with it, that it was not interested in including a provision that would bring down the entire package because it had a very good chance of being controversial. That was a theoretical thing, as to whether or not there would be property taxes levied under the circumstances we were discussing. Gentlemen, I would say to you simply that there is nothing theoretical about the controversy in this. The provision that you have suggested as Section 3 (B) is controversial, and the proposed alternative to 3 (B) is equally if not more controversial. In all candor, I would simply suggest to you that it would be much more appropriate to constitutional revision if the area where the law is not unsettled could simply be left where it is and not included in the Constitution, either to negate or to implant the so-called preemption doctrine. I appreciate your willingness to read my telegrams and to listen to my testimony and if you have any questions I'd be happy to answer them.

Mr. Carson - I have one, John. Maybe you'll go over this again because you lost me on it. If, as you say, the law is settled on the last sentence, why does it disturb you if it's put in the Constitution?

Mr. Gotherman - I'm going to be very candid about this. The law is settled but the Constitution would not continue the law in the same manner.The Constitution would be a direct mandate, and that would mean that we would have eliminated one issue that's been before the Court in every case that has involved preemption. The issue that is predominant is whether or not it is the same or a similar tax, but the real issue

behind the preemption doctrine is whether or not there should be a determination made by the Court whether municipalities or counties or whatever political subdivision might be involved--right now it's only municipalities--should be permitted to levy a tax. Chief Justice O'Neill in a most recent case, The East Ohio Gas Co. v. Akron, came right out and said what all of us have known and what Emory has been saying for years--that the doctrine expresses the Court's idea that it doesn't like double taxation. That's really all the rationale behind it and Chief Justice O'Neill said that the Court was going to continue that rationale because there is a considerable body of law behind it and because it's worked very well. I don't think he said that the doctrine requires the General Assembly to examine the situation occasionally, but what he did say in the case was this: There was an argument made that the sales tax, which is a tax measured by gross income, might well preempt the municipal income tax. I think that what the Chief Justice said there was "Don't raise that kind of a question with us, because there the circumstances are different. We would have to consider the policy matters which are involved in bankrupting 350 municipalities." I've read that into it. You can't find it exactly stated in these words, but I think it's in the decision. Now, this constitutional amendment would say to the Court that it cannot engage in--that the constitutional provision in a few simple words has created the possibility that the sales tax could preempt the municipal income tax, and the only question for the Court is whether it's the same or a similar tax. The Court might employ the same kind of logic as it has all along on that issue, and perhaps the policy would continue pretty much unfettered, but it does change the law. A constitutional mandate, as opposed to a court-made policy which some of us criticize, would change from day to day.

Mr. Bartunek - Mr. Gotherman, how would you feel if the language in the last sentence were changed so that failure to state would permit the levy of an identical or similar tax? Some of us were looking toward expanding the area where cities and municipalities could act. Would that be a different view?

Mr. Gotherman - Let me be candid with this group. Quite obviously the proposed Section 3 (B) would negate the preemption doctrine--it would turn it around. There would be no reason in the world for representatives of cities and villages in Ohio to be against that, except that we would have confrontations. I think they would occur in every session and with every bill on taxation. Quite frankly, it may not be desirable to have a constant battle, for lack of a better word, on the preemption doctrine. I think that it's much more desirable simply not to deal with it. I would respect this Committee's and the Commission's decision to try to review the Constitution in those areas where it is needed with as little controversy as possible, and we would support the position of the Commission on that.

Mr. Carter - Let's assume we drop the second sentence for a moment, and just simply mandate the Legislature to take a position. You would still have the same reservation, then.

Mr. Gotherman - I think so as to the controversy on the amendment--

Mr. Carson - I don't want the record to get distorted. I don't think that this Committee has ever inferred that we're afraid of controversy. I think what we've said is that we are not interested in recommending an amendment to the Constitution which we are concerned has absolutely no chance of passing. We are going to have controversy in Article VIII, I don't think there's any question. We're not avoiding controversy but we don't want to suggest that the General Assembly pass a useless resolution that

we're convinced the people will not pass.

Mr. Gotherman - All I would say is that if the one we talked about previously falls into that category, this one must certainly fall within that category. That would be just my own personal opinion. We would suggest that it not be dealt with because it isn't that pressing a problem on the day-to-day scene. If it is dealt with, obviously we would have some preferences, and our preference would be not to have the last sentence of the proposed change. It is that sentence that strikes the central nervous system of the municipality. It changes the preemption doctrine from something which is considered to be not particularly desirable to something worse than that.

Mr. Carson - I wonder if I might have the privilege of having a copy of the memorandum you sent out to your members, John. I have been trying to answer all these letters.

Gotherman - O.K.

Mr. Wilson - I apologize, but one of the few meetings I have missed was the January meeting. In order to make my position clear and let you know how I feel about this, I think any language we come up with here may be just moving the burden around a little bit on preemption. The ultimate solution, as far as I am personally concerned, would be to eliminate preemption. It's an inherent problem only in Ohio and a few other states. Most other states permit double taxation as such, and I think that our courts have been wrong in implying that the general public of Ohio is objecting to double taxation simply because the courts feel that way. So, had I been present at the January meeting, the language I would have suggested that no law imposing a tax after the effective date of this section shall preclude municipal corporations and other political subdivisions from levying identical or similar tax. Now, I don't know that this would have any more chance of getting through the Legislature than what we might propose here, but at least I think it is a solution to the problem and not a modification of it.

Mr. Carter - Does it not still leave the question that John alluded to of "a similar tax"?

Mr. Wilson - It eliminates the possibility even if it is a similar tax.

Mr. Mansfield - In view of what Mayor Wilson has said, John, would you object to his language as just stated?

Mr. Gotherman - I think the answer to Mayor Wilson's question would be the same answer that I gave Mr. Carter, and that is that it would be second choice as far as we're concerned. Perhaps that would be better than the language that would actually create confrontation. It would not do that. But, I think our first choice would be to deal with it in the General Assembly. We don't have to have constitutional revision to negate preemption. We can do it by legislative act.

Mr. Carson - Who's next?

Mr. Burkhart - I'm John Burkhart, Chief Counsel of the Law Department of the City of Toledo, and I'm also a second vice president of the Ohio Municipal League. We're a little concerned, too, about preemption being written into the Constitution, and I don't wish to reiterate what Mr. Gotherman has said except to say that he has stated

our position fairly well. The City of Toledo goes back, I guess, to the first big case on preemption of taxation--the Angell v. Toledo case--where the Supreme Court in 1950 determined that Toledo's income tax was not preempted by the state Constitution, and that the ordinance was a legal expression of the power of home rule. Since that time we have been back in court on various occasions, and like everyone else we win some and we lose some, but in the overall 23 years since the Angell case I think the courts in the long run have done a pretty good job of determining whether municipal taxation was a similar or same tax in determining whether or not preemption should apply, and we can see that if the language were changed to what was submitted at your meeting a week ago, our big efforts in the future would be to come to Columbus and work like the devil to make sure that the General Assembly would put some language in there that would not preempt us. That would probably be the big effort, instead of towards the merits of the bill, and we think we would be better off to leave these decisions of preemption up to the courts.

Mr. Carson - Are there any questions of Mr. Burkhart? Thank you for coming down and giving us your views. Who is next?

Steve Nemeth - My name is Steve Nemeth, and I'm Assistant Secretary of Republic Steel Corporation. I appear here this morning as Chairman of the Taxation and Public Expenditures Committee of the Ohio Chamber of Commerce.

First of all, the Ohio Chamber gives general support to the Ohio Constitutional Revision Commission approach to constitutional revision. We appear here, however, in opposition to any attempt to nullify the preemption doctrine and also any attempt to codify that preemption doctrine, because we think it's unnecessary and wrong in concept. Some of our reasons are that we don't believe there's any need for increasing local taxing powers and increasing legislative revenues without authorization and legislative guidelines; and that the nullification of preemption would pose dangers of a hodge-podge of local taxes and monstrous taxpayer compliance problems. We have this at the present time up in the Cuyahoga County area. In fact, in the interstate area, we now have reached the point where Congress is interesting itself in uniform guidelines among the states, and I think the nullification of preemption would run opposite to what is really the trend today. So we believe that this nullification of constitutional preemption is unnecessary, and the proposed provision as drafted originally or as now suggested will create more problems than there are problems to be resolved. If you wish further elaboration, I have several gentlemen with me who are members of the Ohio Chamber taxation committee and who would like to present different aspects of this problem. I have with me Wayne Scheider, Manager Tax Administration of Owens-Corning Fiberglas Corp. and Leon Sachleben, Director of Taxes of the Hobart Manufacturing Company of Troy, as well as Emory Glander who is tax counsel for the Ohio Chamber and former Ohio Tax Commissioner. If you have the time, each of us would like to make a presentation in this area.

Before these gentlemen, may I make a brief statement of what happens when there are no legislative guidelines permitting the enactment of local taxes? I think the classic example has to do with the growth of municipal income taxes in Ohio. As stated by the previous witness, it first started in 1946 in Toledo and has grown to the point where there are now over 350 municipalities in the state of Ohio that now levy the income tax. Cuyahoga County is the classic example of what has happened without guidelines. In 1967, Cleveland enacted a half per cent tax which provided 25% reciprocity sharing. This triggered the "bedroom communities" to also enact a tax so that they could share in that revenue. Then the tax went up to one per cent,

and further cities came in to get their piece of the action. Then, as Cleveland's needs increased, it decided to repeal the reciprocity sharing so that it would not have to give away 25% of the income tax revenue to the "bedroom communities." This created such a confrontation that we now have in the Cuyahoga County area the administration of taxes split into several groups. For example, the Central Collection Agency is administered by the City of Cleveland and collects tax for the city of Cleveland as well as 23 suburban communities. The Regional Income Tax Administration, popularly known as "Rita," now collects tax for 42 communities, and then we have several cities who do their own collecting--such as Parma, Brook Park, and Rocky River.

Here is the problem that the taxpayer runs into--business and particularly the individual: We now have in the Cuyahoga County area taxes that range from one half per cent to one per cent; some give 100% tax credit for tax paid where it is earned, some give 50%, 75%, 80% or 90%. Since we have different administrations--all under the same or similar ordinances--we have different forms and different reporting periods. Take the situation of an individual who would move from a "Rita" community to a central collection agency community and change jobs in that same period. I defy him to know where he is to report his tax and when he is to report it. Now, this statement is not intended to be in opposition to income taxes, because we realize what a vital part that is in the financing of cities. Business in Cleveland mounted big support for enactment of the income tax. We're not opposed to local taxes and we are not opposed to the municipal income tax. I simply cite this as an example of what will happen when taxes come into being without legislative guidelines. So our argument here in terms of preemption is not in opposition to local subdivisions levying taxes, and it's not questioning the needs of the local subdivisions. What we suggest is that if the preemption doctrine is not nullified--if no language is inserted into the Constitution--and local subdivisions can demonstrate their need as they have done in the past, then through thoughtful legislative consideration certain authorizations are made and certain guidelines are permitted. In many instances, business has been in the forefront in supporting that kind of move.

Mr. Mansfield - May I ask a question? All of the confusion that you have just described is really irrelevant to the question before this Committee, isn't it, in the sense that whether the preemption doctrine is codified in the Constitution or not wouldn't make any difference in the confusion?

Mr. S. Nemeth - I think, Mr. Mansfield, it's an example of what would happen if you nullified the preemption doctrine, because if that doctrine is nullified in constitutional language, then this opens up to municipalities the levying of sales taxes and gross receipts taxes, on public utilities as well as the general public. In some states there are privileged earnings taxes which might be levied on top of the existing municipal income tax. Municipalities could move into the estate tax field--any field at all would be open to them.

Mr. Mansfield - What bothers me a little bit--are you suggesting by implication that somehow the legislature of the Constitution should set guidelines so that there is some uniformity of local taxation?

Mr S. Nemeth - No, I'm suggesting that the Constitution not attempt to codify a judicial doctrine that has been established over a 50 year period, and that the Legislature itself presently has the authority to authorize the levying of other taxes, even a double tax--I'm not sure that that's the proper word--without any need for language in the Constitution, as for example a piggy-back sales tax.

Mr. Mansfield - I have difficulty, however, in understanding how your argument about the confusion on the income tax really becomes relevant to the issue before this Committee.

S.
Mr./Nemeth - I think this becomes relevant if this Commission were to recommend language to nullify the preemption doctrine. That which has happened and I attempted to describe in the Cuyahoga County area with municipal income taxes could then happen anywhere in the state, on any tax, because there would be no central body setting guidelines.

Mr. Mansfield - It could happen too, Mr. Nemeth, in any case where the legislature under any of these suggested provisions says specifically that the tax passed by the Legislature is not intended to preempt an identical or similar tax by local governments.

S.
Mr./Nemeth - It could, except at the time the Legislature is considering the legislation there's opportunity for all interested parties to appear and discuss administrative problems of compliance and to suggest certain guidelines.

Mr. Mansfield - I don't know the answer to this one, and perhaps I ought to, but when the state enacted the state income tax and specifically protected the municipalities' power to enact an income tax, while there may have been an opportunity as you suggest, the Legislature did not take advantage of any such opportunity to try to resolve some of the peripheral questions, did it?

S.
Mr./Nemeth - Mr. Mansfield, I was deeply involved in that whole legislative session. Business supported the language that would not preempt the municipal income tax. And with all of the problems that were involved in that tax package, that was not the opportune time to set guidelines in the area of municipal income tax. Perhaps some time in the future--and I think some of this might occur not at the urging of business but at the urging of some of the municipalities.

Mr. Mansfield - I agree. I'm not really disagreeing with anything you say, but I'm questioning the relevancy of your argument on this particular issue.

S.
Mr./Nemeth - Let me restate it again: Language to nullify would permit that which has occurred in the Cuyahoga County area in any area of the state with respect to any tax that municipalities might seek to levy.

Mr. Mansfield - So, the converse language is to put the burden the other way?

S.
Mr./Nemeth - Well, I think the other language would mandate the General Assembly to deal with whether or not the taxes preempted would cause municipalities to have to come down to Columbus, and the record shows that whenever the municipalities thought there was need for additional revenue, they came down and made their case. I think it was in 1967--and one of our speakers will address himself to that--that the General Assembly did authorize the levy of taxes to produce the revenue necessary to maintain local governments.

Mr. Carson - Are there any other questions of Mr. Nemeth?

There were no further questions of Mr. Nemeth, and Mr. Carson then called for the next witness.

Mr. Sheider - I am Manager of Tax Administration, Owens-Corning Fiberglas Corp. I am appearing in opposition to that section of the proposed change in Article XII which deals with the doctrine of preemption. I do not believe that the doctrine of preemption should be modified by a constitutional provision which can broaden local taxing powers. When the needs have been demonstrated, the Legislature has responded to these needs, and the responsiveness of the Legislature was shown in 1967 when they permitted the passage of H. B. 919, which enabled the counties to levy several permissive taxes for local revenue. Among those was a one half per cent sales and use tax, a $5 motor vehicle fee, the utility service fee and a real property transfer fee at the local level. In the same year municipalities and townships were authorized to levy the hotel and motel lodging tax. I think that the growth of the Local Government Fund further demonstrates the responsiveness of the Legislature to meet local needs. In 1969 the Local Government Fund was $24 million. The fund was increased to $34 million in 1970, $36 million in 1971, $43 million in 1972 and $52.2 million in 1973. In 1972 the amount of the Local Government Fund was also fixed as a percentage of the personal income tax, the sales and use tax, and the franchise tax. This percentage method provides for continuing growth in the Local Government Fund. It is estimated that the amount for 1974 will be $53.5 million and $59 million by 1975. There have been numerous bills passed to ease the restrictions on local government taxing powers. I believe the responsiveness of the Legislature to demonstrated needs for local revenue and local taxing powers indicates that it is not necessary to change or codify the existing doctrine by constitutional revision. I want to thank you for the opportunity to present my comments.

Mr. Carson - Are there questions of Mr. Sheider?

Mr. Bartunek - I understood from your remarks that you consider this proposal as a broadening. As I read it or understand it, and I could be wrong, it's not a broadening but rather a statement in the Constitution of what the courts have apparently said the law of Ohio is, excepting the last sentence.

Mr. Sheider - I think the ultimate language will determine whether it's a broadening or not.

Mr. Bartunek - As I understand it, the courts have stated that they will examine each tax law, that they will find each such law to be a precluding of additional taxes by municipalities unless it is stated by the Legislature that the law is not to be precluding. Is that correct?

Mr. Sheider - Are you referring to some of the language that has been drafted or to judicial doctrine?

Mr. Bartunek - Where do you see it broadened?

Mr. Sheider - There was some language in one of the early drafts, and I believe it is the one that is before the Commission right now.

Mr. Bartunek - What the Commission is now considering is whether the Legislature should be required to say whether or not it does preclude. At the present time, if the Legislature doesn't say anything it does preclude, and if it does say something it says that it does not preclude. It is the codification which has been objected to by Mr. Gotherman and Mr. Nemeth.

Mr. Mansfield - I think there's still some difference of opinion, Joe, as to what language you're talking about. The language that we recommended to the Commission was a broadening. The language which we discussed and agreed upon unofficially last week was a restriction.

Mr. Bartunek - I apologize. The only argument of Mr. Gotherman's that I found persuasive was that every time a tax law would be enacted there would be a confrontation between the Legislature and municipalities as to whether it would or would not preclude.

Mr. Sheider - I think this confrontation will probably occur if something does become a part of the Constitution. It's got to be addressed by the Legislature on every tax bill, and there will be proponents and opponents on every bill.

Mr. Carson - Any other questions?

There being no other questions of Mr. Sheider, the Committee heard the next witness.

Mr. Sachleben - I am Assistant Controller and Manager of Taxes, Hobart Manufacturing Company, Troy. I'm also a member of the Ohio Chamber's Taxation and Public Expenditures Committee, as well as Mr. Sheider's Subcommittee on International Business Tax Problems. I'd like to add a few more comments in this area of consideration being given to modification of the preemption doctrine in the state. I think my comments are going to add more fire to the discussion, in that we feel there is a potential broadening of the ability of municipalities and lesser taxing jurisdictions to have more and more powers to broaden their tax base through this modification. Certainly, my comments are directed toward the effort not to do that. We feel that we should not broaden those powers.

Mr. Mansfield - Which version are you talking about?

Mr. Sachleben - Let me address myself to the first version--that's the one that's presently pending before the Commission--that one I feel does broaden the powers of the local authorities. I'd like to give you these comments, and point out that Hobart's operations are spread out throughout the country. We are qualified to do business in all states as well as the District of Columbia, and through these widespread activities we're subjected to a broad range of state and local taxes that are present today in the nation. We've been faced constantly with a never-ending rise in the workload and cost, not only before the tax is assessed but also for the increased administrative burdens which must be borne in the filing and reporting requirements. In the last five years, our company's tax department has increased from a modest two man staff to one with six fully committed staff members. It has tripled in size in the last five years. Much of this increase is directly attributable to the growing proliferation of tax laws at the local, state, county, city and lower jurisdictional levels. As I'm sure you know, there are now over 350 municipalities in the state of Ohio which levy income taxes on individuals and businesses. An increase in city income tax levies has occurred in more recent years. Approximately five years ago, permission was granted to counties to levy piggy-back sales taxes. We now have 30 counties in the state which have levied such taxes. The state of Ohio, of course, is not unique in this area. All other states in the nation have increased the tax costs to individuals and businesses either through new tax levies or higher and higher tax rates. Without limitations provided by controls such as the preemption

doctrine, we can only expect to see a very undesirable growth of more and more varieties of taxes levied by an ever-increasing number of taxing jurisdictions below the state level. I feel that we must recognize that the administrative burden of compliance can become so great that the theory of self-assessment could, if it has not already, deteriorate to such a point that the basic voluntary payment concept which has been inherent for many years in our national, state and local tax picture could be very seriously endangered. The lack or loss of control through lack of preemption are apparent in a number of other states, for example Alabama and Louisiana. City sales and use tax provisions in Alabama, for example, involve 240 different assessing areas, including police jurisdictions in most of the cities. Control by geographical areas to meet the compliance requirements is virtually impossible. Tax computations involving application of varying rates among the various jurisdictions, ranging from one quarter of one per cent to a full one per cent, also adds heavily to the compliance burden. Similar provisions in Louisiana, with overlapping rules and 90 cities and overlapping parishes, result in extremely difficult compliance problems. Conditions such as those in Ohio with its growth pattern in local tax levies and those unwieldy and insurmountable problems in areas like Alabama and Louisiana continue to develop and expand. With the present elements of control in the hands of our legislators, clerks and state administrators, what can we really expect in Ohio other than very undesirable results if controls through the preemption doctrine are relaxed, modified or abandoned? My major point is that we must maintain that control through the preemption doctrine. We would like to see it stay the way it is--judicial doctrine that has been established for many, many years--and not be disturbed through constitutional changes.

Mr. Carson - Thank you, Mr. Sachleben.

Mr. Mansfield - I would only comment to Mr. Sachleben that, rightly or wrongly, I have the same feeling about all of his testimony about conflicting tax jurisdictions and administrative overlaps. This kind of thing really has nothing to do with the issue before us, except as a provision of the Constitution, whatever it might be, could be said to encourage the enactment of additional taxes. Otherwise it seems to me that it's a pretty indirect connection for argument.

There being no questions of Mr. Sachleben, the Committee heard the next witness.

Mr. Glander - I hesitate to ask the indulgence of this Committee, but I do want to express my deep appreciation for your courtesy to me throughout your deliberations. Also, I want to summarize, in a little different way. It's been my understanding that one of the functions of this Committee has been to comb through the Ohio Constitution, and among other things to recommend the removal therefrom of provisions which are obsolete or unnecessary, and there are instances in which this Committee and other Committees of the Commission have done that very thing. By the same token, and using the same philosophy, I should like to suggest that this Committee and any other Committee should not put into the Constitution things which are unnecessary, or not needed. My point has been from the beginning that nothing is needed in the Constitution on this subject of preemption. I will briefly restate my views on that subject. I have yet to hear any real reason for putting something in the Constitution except the general feeling that does exist, I suppose in some minds, that this is an area of uncertainty. In my judgment it is not an area of uncertainty. The preemption doctrine was first enunciated over a half century ago, in 1919 to be exact, in the famous case of Zielonka v. Carrel, and in all of that 50 and more years there has never been a time when a case involving preemption has been before the Supreme Court of Ohio, when it wavered in the slightest upon the viability of the doctrine of preemption. It has applied it or not applied it as the facts in the particular case

warranted, but it has never wavered from support of this doctrine. And as a matter of fact, there are no current situations I know of, of any significance, that should make this a real issue for the Constitution or for this Committee. Now, if it is the purpose of this Committee to negate or to reverse the doctrine to say just the reverse of what the Supreme Court has said in all these years, then what you have already recommended to the Commission obviously will do that, because that is the express language of that provision. So the real policy question is, do you as a Committee feel that you should substitute your judgment over the Supreme Court of Ohio over this past half century, for some reason which has never been explained or disclosed? If you do, then you have a policy question that you are submitting to the people of Ohio, and I have a strong feeling that the people of Ohio may not support you. I am using blunt terms, but I want to make my position perfectly clear. Now, when it comes to the alternative proposal, which I guess you considered Saturday--this is a softer provision than the one you recommended. And certainly the last sentence of this suggested alternative is simply a restatement of the preemption doctrine. But the first sentence involves a policy consideration which I strongly direct your attention to. And that is whether or not at the time the State of Ohio is considering, let's say a value added tax or maybe some overall gross receipts tax, you want to expand an open invitation to every political subdivision in the State of Ohio to say "Come on boys and let's get into the act. You've got this opportunity, and now's the time to speak up, if you want to be heard." I have the strong conviction that with the trend in state and local taxation in this country, and with the increasing burdens that it is presenting--and it is a burden not only to business but to individual taxpayers who are increasingly concerned--there should not be this kind of a constitutional provision and there should not be this kind of an open invitation. I respect your views but I disagree with what you've already recommended to the General Assembly.

Mr. Wilson - I don't think we have actually recommended it to the General Assembly as yet. As a point of clarification, how prevalent is the preemption doctrine among the other 49 states?

Mr. Glander - I can't answer that question. I've never fully really examined it. I do know this--that in the great bulk of the states local governments do not have powers of taxation unless there is some specific authorization by the General Assembly. Pennsylvania was a good example of that a few years ago. It's the home rule power that brought this issue into being, and municipalities have full power of taxation except to the point that the General Assembly regulates them and, by the way, coming back to Bruce's question of some time ago, we already have some guidelines. When the municipal income tax was adopted in the 40's, the General Assembly did lay down some guidelines regulating municipal income taxation pursuant to the provisions of the Constitution. No county can levy such a tax, no township, no school district, no sewer district, no other political subdivision--unless it is authorized by law.

Mr. Mansfield - Emory, you had stated that you didn't know the number of states in which the preemption doctrine existed, but is it not a fact that no more than four or five of the 50 states have a home rule provision in their respective constitutions?

Mr. Glander - I think it is very few.

Mr. Carson - Mr. Glander, in one of your statements you were asking this Committee whether it wanted to interpose its judgment over that of the Supreme Court of Ohio, which has certainly disposed of the preemption question over the years. I might say that I don't think we had an intent to do that. But there have been those who have

said that the preemption doctrine should be changed.

Mr. Glander - There have also been those who have said that it was not necessary for the Supreme Court to enunciate the doctrine. In the case in which it was announced it was obiter dictum. But this begs the question. The point is that we have had it.

Mr. Carson - We understand that. I just wanted to make clear that there have been writers in the field who think it is wrong.

Mr. Glander - There are those who have taken that position, including Jefferson Fordham, the former dean of the law school at O. S. U., who is quite interested in the field of municipal law and local government law.

Mr. Carson - Are there any more questions of Mr. Glander? Thank you, Mr. Glander. Are there any other people who would like to make a statement on preemption, or just to indicate that they are here?

David Julian - I am Executive Secretary of the Wholesale Beer Distributors Association and this is my first time to monitor your deliberations. I am not a tax expert and I'm not wholly familiar with the subject, but I've been trying to learn, so I hope that my remarks are not out of line. It appears to me that, were the preemption doctrine disturbed, our industry could possibly be taxed four times. As you know, there is a federal excise tax of $9 a barrel; there is a state excise tax of roughly $.36 a case; there's sales tax on beer; and it would appear to me that this proposal would provide an opportunity of taxing beer at local levels, and we submit that we're taxed enough. We do know that in states where the beer tax is high, consumption is low. Whether consumption is low because taxes are high or taxes high because consumption is low, we're not sure, but we think it's because the tax is high. There is also the possibility of states enacting what we call "the Oregon ordinance," which would tax nonreturnable containers in an attempt to solve part of the solid waste problem. We don't have any proposals before the Legislature as of 11 o'clock this morning that I am aware of, but we could have tomorrow or the next day, and then it would appear that there would be a problem at the local level on that sort of taxation, which we are concerned about also. So, again, it just appears to me that this could be a problem for our industry.

Mr. Carson - Are there any questions of Mr. Julian? If not, we thank you very much, and we will take your views under consideration. Anybody else in the room on the preemption question?

I'd like to make a statement for those of you who are here, so that you know that this Committee tentatively decided about a year and a half ago that preemption was an area that we would like to do some study in. You should also know that in August 1972 we decided that we thought that this was an area where we should give some attention to see if a constitutional provision could cure the constant litigation. In August 1972, the staff of the Commission drafted a series of 6 or 8 different provisions, different ideas, specific language. In September 1972, those were considered and in October 1972, we spent the whole meeting dealing with nothing but preemption and selected two alternatives of these 8 different drafts, without any final decision. In November and December of 1972 we again considered preemption, and at the November meeting we spent an hour just "word working" on the language. What I'm trying to tell you is that this it not something that has been just lightly

considered and dredged up at the last minute. The provision that we reached tentative agreement on is a combination of two of the drafts that were put together earlier. I wanted you to know, although you may have thought this occurred just recently, that we've been giving a lot of public attention to it for a year and a half.

I would urge anybody who is interested in what this Commission and this Committee has done to ask to be on the mailing list, and we will be glad to mail you our materials so that we can have the benefit of your views, hopefully earlier, because one of the difficulties here is that we had no idea of concern from the Municipal League, or from the Ohio Chamber or anybody else until just about 30 days ago.

Mr. Mansfield - May I make an effort, Nolan, to correct that a little bit?

Mr. Carson - Surely.

Mr. Mansfield - This is a point that we discussed not on last Saturday but at the meeting before last Saturday when it seemed to me that the members of this Committee have misinterpreted a letter which was in our material from Mr. Glander, in which Mr. Glander allegedly had taken no position but had simply offered his advice on what certain words meant and so on and so forth. I respectfully submit to you, as I did then, that if you read Mr. Glander's letter carefully he did take a position and said that not only did he not think it was necessary to put anything in the Constitution but that he was opposed to it, and I'm delighted that he came again today and reiterated what he had said in the letter, which I think was not appreciated fully by the members of this Committee.

Mr. Carson - I hope you don't speak for all the members of the Committee, Mr. Mansfield, because I fully knew what Mr. Glander's letter said. I knew what his position was. I don't think there was any misunderstanding.

Mr. Mansfield - There was some talk that Mr. Glander had not taken a position.

Mr. Carson - I think that he took it very clearly: he felt that there was no need for any provision in the Constitution. His law review article states that, and his letter states it in the first paragraph.

Mr. Mansfield - I still think there may be a misunderstanding, Nolan, because in the last paragraph of Mr. Glander's letter that we were talking about, he did in effect say that he was opposed to any change in the preemption doctrine.

Mr. Carson - I agree with you, but I think that what Mr. Glander says doesn't control this Committee. We all clearly knew Mr. Glander's position.

Mr. Mansfield - Then I'm wrong, because I did get the impression that there were some members of this Committee who thought that Mr. Glander had not really taken a position, and that he was simply indicating that if the Committee wanted to put something in the Constitution, he would be inclined to be helpful on the wording.

Mr. Carter - With respect to preemption, there was no question at all. With respect to other matters, I think what you're saying is true.

Mr. Carson - I think we all have felt that Mr. Glander is probably the outstanding expert on preemption, or one of them, certainly in Ohio, and we were fortunate to

have him here to make sure we understood the doctrine. But from the beginning--and the minutes so indicate clearly--we understood that he felt there was no need to put it in the Constitution.

Mr. Mansfield - I'm trying to distinguish between this feeling that nothing was needed in the Constitution as opposed to his feeling that he was opposed, to a change in the preemption doctrine.

Mr. Carson - I think it is understood, Mr. Mansfield. Mr. Glander, would you like to say something?

Mr. Glander - I would like for you to think back to June 17, 1971 when I appeared before the Commission. At any rate, my notes here indicate that I did speak for the Ohio Chamber of Commerce and on this particular subject. I reviewed the preemption doctrine and also said that it isn't necessary to put a provision in the Constitution. I think history has taken care of the problem and it is solved. Now, if you think that both the state and the counties and the school districts and any other units you can think of should all have the right to tax anything they want to, then of course you would have to amend the Constitution. I think that you would find there would be strong opposition to that, and of course I'm expressing that opposition today.

Mr. Carson - As Chairman of this Committee, Emory, I'm sorry that we got into this personality thing because I don't think it is necessary. You've been a lot of help to this Committee, and I don't think there's any misunderstanding of your position.

Mr. Wilson - The only comment I would make is the statement that we are concerned with who makes policy. I think one of the tenets that we had here--and the reason why we're considering this--is to make the law-making function of this state a function of the Legislature and not the Supreme Court. Responsibility for making the laws of this state should be that of the Legislature, and to see if we could return this function to them, so that they are the primary architects of our tax laws, rather than the Supreme Court, is the reason why we're giving this so much consideration. It's not a change in policy, but might result in some changes in attitude.

Mr. Bartunek - At least it has come to the attention of 300 plus municipalities.

Mr. Carson - I have a suggestion that I would like to make to the Committee, but I'd like to have anybody say anything he wants first. I would like to suggest, in view of the rather emotional opposition from all sides that this has created--still recognizing that this Committee until two weeks ago, at least, felt that there was a problem here that perhaps should be looked at and plugged, if possible, if it could be done in a proper and helpful way--I shall try to do something about it. Recognizing that the problem of implied preemption arises not under Article XII, but that it arises under Article XVIII, Section 13 and Article XIII, Section 6--where the Legislature is given the power to control the taxing powers of local governments--I'd like to recommend to this Committee that this afternoon, when the Commission meets, we recommend that the proposal now before the Commission together with the other alternatives this Committee had considered and the testimony that's been given, be referred by the Commission to Mrs. Orfirer's Committee on Local Government for their views on this subject before the Commission is asked to take any final action. It seems to me it's a matter of too much importance to bypass the Local Government Committee. I'm not sure they have even gotten into the subject of the taxing powers

of municipalities, and I'm not sure that it would be appropriate for the Commission to act without the views of the Local Government Committee, anyway.

Mr. Bartunek moved to refer the subject of preemption to the Local Government Committee. Mr. Wilson seconded the motion.

Mr. Carter - As I understand it, the recommendation of the Committee would be to drop this particular recommendation as of this point in time.

Mr. Carson - I think we're suggesting that this Committee request the Commission to refer the proposal now before the Commission to the Local Government Committee for its consideration and report back to the Commission. There are two benefits in this: the first is that the Local Government Committee will have to consider this along with the consideration they're going to have to be giving to these two sections that I just mentioned, which are not in our bailiwick; the second is that it would permit this Committee to go out of existence, which is desirable because Committee members have pressures to get on to other areas of study. We have all been put on other committees and we have other work we have to get into, and it would be very helpful to the work of the Commission as a whole if this Committee would not have to stay in existence while the Local Government Committee reconsiders this and brings it back to the Commission. I think it would be more helpful if we could refer it to them and let them come back to the Commission, which will then have the views of both committees.

A voice vote was taken. All voted Aye, except Mr. Mansfield, who did not vote.

Mr. Carson - Mr. Carter, would you want to give your views as to whether it is necessary for the people who are here now to appear before the full Commission this afternoon?

Mr. Carter - It would seem to me, Nolan, that with the recommendation to drop or table this particular part of our package at the present time, there would not really be much need for discussion before the full Commission now. On the other hand, we are always delighted to have guests at the Commission, and to see what they might give us in some other areas as well. They are welcome, but I don't think we'll have much discussion before the full Commission.

Mr. Carson - We'd love to have them.

The Committee then returned to the other items on the agenda.

Mr. Carson - May we go back to our other order of business now? You all have the memorandum prepared by the staff with respect to possible action on Section 2, Section 5a, and Section 9 and Section 11. I wonder if we might take Section 9 first, which appears on page 5 of the memorandum. The Committee is considering today the technical amendment of Section 9 of Article XII, which is the section that requires that 50% of all income and inheritance taxes that may be collected by the State of Ohio be returned to the county, school district, city, village or township in which the income or inheritance tax originates, or to any of the same, as may be provided by law. The Committee had before it this morning a recommendation to amend--merely some technical amendments to this section--so that it would read as follows: "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." The only changes proposed are to change the word "per centum" to "per cent" and to add the word "estate taxes" which are not now mentioned. The reason for the second change is that the legislature here has in fact enacted an estate tax law, which is now in force, to replace the old inheritance tax. We have made some other changes in other parts of Article XII which recognize the estate tax, and we felt that it would be desirable to recognize it also in this section, so that we wouldn't have a possible legal uncertainty as to whether 50% of these moneys would have to be returned to local government. There were other considerations given to making other changes in this section, but as of this moment, at least, the draft does not contemplate any other changes. Are there any comments by members of the Committee on this draft? Any other comment?

Mr. S. Nemeth - We are in full agreement with the changes in Section 9 of Article XII.

Mr. Wilson moved the adoption of the changes proposed in Section 9. Mr. Bartunek seconded the motion. By voice vote, the motion was unanimously adopted.

The Committee then took up Section 11.

Mr. Carson - I'd like to go to Section 11, if we may, gentlemen. Section 11 of Article XII of the present Constitution is a provision which provides that no bonded indebtedness of the state or any political subdivision shall be incurred or renewed unless in the legislation under which the indebtedness is incurred or renewed provision is made for the 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. The Committee has given a great deal of consideration to Section 11 which, as many of you may know, when combined with Section 2 of Article XII, effects a so-called "indirect debt limit" upon local governments in the state of Ohio and creates, as we understand it, some hardship in municipalities in the selling of general obligation bonds which, although the debt service is to be paid from sources other than property taxes, may not be issued without a vote of the people. It has been suggested to us by a number of people that it would be extremely helpful to local governments if we could clarify this so-called "indirect debt limit", in some fashion, perhaps by deleting Section 11 or other means. Language was drafted and submitted to this Committee for consideration which would have solved the problem by recommending a new constitutional provision which would have permitted municipalities to issue bonds--general obligation bonds--and require that the debt service on the bonds would be paid first from all other sources of revenue, and only then, if that wasn't enough, would any levy under the property tax be permitted. As Mr. Gotherman stated earlier, this Committee at that point at least felt that it was not willing to recommend such an invasion of the 1% provision of Section 2, and at our meeting in Cincinnati on February 10 we discussed this subject at some length. It's our present feeling, subject to more legal research being done by the staff and by others, that under the present framework of the Ohio Constitution the Legislature could, if it desired, pass a statute which would permit a municipality to submit to its voters a proposition whereby some limited amount of general obligation debt authority would be granted to the council of that municipality, without having to have a vote of the people each time general obligation bonds were issued. I call this a sort of local option, which we believe the Legislature can now give. I think it is the tentative feeling of the Committee up to this point that if the authority now exists in the Constitution and the Legislature could authorize municipalities to

solve the problem in this way, then we do not feel that an additional constitutional provision is necessary.

So, the action before the Committee this morning is twofold--first, that we recommend a deletion from Section 11 of all reference to the State of Ohio. It presently governs both the State of Ohio and local subdivisions. Since our rather massive revision of Article VIII dealing with the state debt in fact very carefully restricts and covers the state's authority we don't think there's any need to have this any longer in Section 11 of Article XII, so that we would move to delete any reference to the State of Ohio and restrict Section 11 to political subdivisions of the state; second, that we recommend, as we have done with preemption, that this Section 11 question be referred to the Local Government Committee for two reasons. The first reason is that it doesn't belong in Article XII at all and really belongs in Article XVIII, which deals with municipal corporations. We think that whatever action, if any, is taken on Section 11, it ought to be taken out of Article XII and put in its proper place in the Constitution. The second reason is that we have been asked by experts outside this Committee to let them study this a little bit more fully, because this local option suggestion is one of first impression and it needs some research both within the staff and outside, and again this will permit it to be done in a workmanlike way, without having to hold this Committee up from going on to other things. Are there any comments in the room on this disposition of Section 11? John, do you have any comment?

Mr. Gotherman - No, I think that's a satisfactory solution. The suggestion that was made in Cincinnati is one that is brand new to me, and I'm not sure that it is responsive and not sure that it's not responsive. I think bond counsel should look at it very closely before any judgment is made.

Mr. Carter - May I ask John a question? John, it's my impression, after being involved in this for a year or so now, that based upon the present level of assessment or roughly 35% as far as the Constitution is concerned we're talking really about a 30 mill limitation. The problem of the "indirect debt limit" then seems to me to be a legislative matter rather than a constitutional one, up to 30 mills.

Mr. Gotherman - It's a 3.5 mill limitation, rather than a 10-mill limitation. Instead of 1%, it's 35 hundredths of one per cent.

Mr. Carter - What I am saying is that if you have a piece of property valued at $1,000 of true value, which is what the Constitution talks about, our tax assessment procedure values that property at $350.00, and one mill of that would be $3.50, so your..35 is correct; but what I'm suggesting is that the ten-mill limitation that we're talking about is a legislative determination as well, and the legislative determination is based on assessed value. If the Legislature changed the assessment to 100% of true value, and reduced all the rates accordingly, the Constitution would not be a barrier.

Mr. Gotherman - The Constitution is a barrier, but it's based on true value rather than tax value, and that would give everybody a lot of breathing space. But it's very unlikely that we're going to increase true value to 100%. Even the most optimistic city official is not inclined to believe that's going to occur, so we have approached it legislatively to permit the millage to be measured for this purpose on tax value. Bond counsel tells us that this strikes grave constitutional tones, and that's the reason we came to this particular Committee and we'll work with the Local Government Committee.

Mr. Carter - What grave tones does it strike?

Mr. Gotherman - The whole uniform rule problem, and the problem of the equal protection of law for purposes of taxation. We concur with your recommendation.

Mr. Carson - John, I think that we in this Committee would expect to be working with the Local Government Committee to make sure they had all the background and all the information that we have dredged up on both these subjects, so we're not going to abdicate, but we do want to get on to our other committee work.

Mr. Carter - I would like to say, Mr. Chairman, that I would like to have some reference in our Comments, when they're finished, on this question 1% of true value vs. the 10 mills on tax value established by the Legislature. It's something that should be in our research, if you will.

Mr. S. Kemeth - Just one brief comment. As to Section 11, the Ohio Chamber Tax Committee had not seen the draft and hasn't had an opportunity to study it, so for that reason we have no comment to make.

Mr. Carson - Any other comments on the discussion of Section 11? What does the Committee desire?

Mr. Mansfield - I'm not quite clear that I'm aware of the position that you so very ably described. Is our intent simply to refer the whole matter to the Local Government Committee or are we referring it to the Local Government Committee with a recommendation?

Mr. Carson - As I understand what we're recommending--number one, we would recommend specifically that the reference to the State of Ohio be eliminated from Section 11; number two, that the section be located in Article XVIII or some place more appropriate than Article XII; number three, on the question of legislative authority presently to permit local governments to have continuing debt authority, that this be referred to the Local Government Committee along with Section 11 for their review and determination whether it's right or not, with the comment that this Committee feels that if that power is available--

Mr. Mansfield - The reason I raise the question is that I'm not sure what the consequences would be to the authority of the Local Government Committee if the Commission should accept our recommendation and delete the reference to the state. And if the Local Government Committee has to be proscribed in its deliberations by that recommendation, where does that leave the Local Government Committee?

Mr. Carson - Well, it seems to me, first, that the Local Government Committee has no jurisdiction over whether the State of Ohio appears in Section 11 or not. That's our province, not that of the Local Government Committee. I think our recommendation on that should control. Second, I think on where it appears--in XVIII or XII--perhaps that's a joint decision.

Mr. Mansfield - Well, I guess my only point is that perhaps our recommendation to delete the reference to the state ought to have some qualification, namely that this is what we're recommending on the assumption that nothing else is done with the section except move it.

Mr. Bartunek - I'm going to move Mr. Carson's three point statement. Mr. Wilson seconded the motion .

Mr. Mansfield - I feel that I can't vote because I don't understand it.

Mr. Carson - Let me go back over it again. It seems to me that we're going to definitively recommend that the word "state" be taken out of Section 11; secondly we recommend that Section 11 be placed in an appropriate place somewhere else in the Constitution, probably in Section XVIII--we're going to make a definitive recommendation about that, and on having it referred to the Local Government Committee to decide where it can go in Article XVIII. Thirdly, I think we're going to recommend, and I hope we do, that the decision on what to do with the substantive question of the "indirect debt limit" raised by Section 11 be referred to the Local Government Committee for their view and ask them to consider, if they will, our suggestion on our feeling that there is perhaps now a mechanism where this can be solved without a constitutional amendment.

Mr. Wilson - To solve Bruce's dilemma--perhaps we could do it by mechanical means by making three separate recommendations to the Commission. Would that take care of you, Bruce?

Mr. Mansfield - No, not really. If the motion is simply to refer it to the Local Government Committee and then wait until that Committee makes its recommendations, then we could at that time, depending on what the recommendations were, make whatever recommendations we saw fit, including the one to eliminate the state, if it were still there. It seems to me that would be more appropriate.

Mr. Bartunek - As I understand it, in removing the words "the state or" from the first line of the present Constitution, we're just recognizing that our other debt limitation provisions do not require any reference to the state in Section 11, so for that purpose that's a clarification amendment. I really don't care what the Local Government Committee thinks about that. That's within our province and not for them to concern themselves with. But these other two problems of what section it should go into and whether or not this presents a worthwhile limitation, those are within their prerogative. That's my position.

Mr. Carter - Is it your concern, Bruce, that we might end up with a question on the ballot at two different times? I don't think we would, because remember the Legislature has to deal with this question before it gets on the ballot.

Mr. Bartunek - Based on experience, neither the Legislature nor this Commission is very well attuned to the wishes of the Court in putting this on the ballot.

Mr. Carson - Those in favor of the motion please signify by saying "Aye".
All present voted Aye except Mr. Mansfield, who did not vote.

Then the Committee proceeded to a discussion of Section 5a of Article XII.

Mr. Carson - Now let us go to Section 5a. Section 5a is a provision of the Constitution inserted by initiative petition in 1947, and it provides in substance that no moneys derived from fees, excises or license taxes pertaining to motor vehicles or the use of motor vehicles on public highways or fuel taxes shall be used for any purpose other than the payment of highway obligations, costs of construction of highways, and other highway uses.

The Committee has before it this morning suggestions for amending Section 5a--first, to change the section number, because in revamping Article XII, it would not appear as Section 5a--it sould actually be renumbered Section 6; second, amending it further to provide a rather substantive change at the beginning of the section which would read as follows: "Except as may be otherwise provided by law passed with the concurrence of two-thirds of the members elected to each house of the General Assembly" no moneys derived from highway taxes and fuel taxes, and so on, shall be used except for highways. The effect of this proposal, if this Committee adopts it and if the full Commission should recommend it and it goes on to the voters and is adopted, would be that the legislature--by a substantial majority, that is, two-thirds of each house--could provide that moneys derived from highway taxes and fuel taxes, and so on, could be used for purposes other than highways after such action was taken. Is there anyone in the room who wishes to apeak on this proposal?

Mr. S. Nemeth - The proposal to amend Section 5a to permit highway user funds for purposes not now permitted is outside the purview of the Chamber's tax group, which I represent.

Mr. Phillips - For the benefit of the members of the Committee, I'm associated with the Ohio Automobile Association as their in-house counsel and legislative liaison. I have submitted a statement to this Committee at a prior meeting which I won't review, except to summarize some of the points. I think the important thing here is the fact that the system of earmarking of highway user taxes has proven that it works, and the change that is being proposed would have a tendency to inject an element of uncertainty into an otherwise sound program. This, unlike many elements of the Constitution, is a relatively new provision. The transportation system which the earmarking was designed to improve remains essentially unchanged if one considers the needs represented by that system--I'm talking about the highway transportation system in this state. AAA represents, as might be expected, a large membership which has diverse views in its various segments. And therefore, in an attempt to represent our membership as best we can, we have begun to poll our membership with respect to what we consider the major issues. So, in most of the major cities in Ohio, we have polled our membership on a random basis with regard to the diversion of highway user taxes, and we find that without exception in the major cities in which we have substantial membership, the highway user who is paying these taxes continues to feel as he did in 1947 that the user taxes should be used for the user's benefit. This is an overwhelming majority, and we can provide information on any major city. Therefore, we don't feel on a practical level that this proposal, if presented to the voters, would stand any significant chance of passing. There is a new evolution coming about in the transportation industry, and this is the urban transportation problem. One of the primary moving arguments behind this concept of diversion of highway user taxes is that the most likely benefactor would be urban transportation systems, and this sounds good. However, the fact is that when you start talking about solving urban transportation problems, what you need is not a portion of the funds available for highways but, in fact, a whole new transportation funding system which would reach the level and the size of the highway program when it was started. And, therefore, to split up these user funds--which in their essence have worked for the construction and improvement of the highway system--would in fact simply underfund all of our major transportation programs. We at AAA and our members, we feel, object to the elevation of form over substance by those who would tell us that you get the funds wherever you can and then use them in the best manner you can, without any kind of earmarking. Our membership, largely composed of the older school, feels that when you have a program that is working you should use it until

it has essentially fulfilled its purpose and then consider disposing of it. So, we fall back on the facts, and advocate that highway user taxes should be used for the benefit of the highway user. He's paying his taxes proportionate to his use, and in 1947 he voted in this state to make sure there were funds for this. If you will review the history, prior to that there are cases on record in which highway user funds were misused by various governmental bodies, misused in the sense that they were used for totally unrelated purposes. That's basically our position.

Mr. Carson - Most of us were at the September meeting and you did give us a fine statement of your position. Are there any questions of Mr. Phillips?

Mr. Carter - Implicit in your presentation is that the effect of this would be to divert funds from highway uses to other uses. That's the assumption that you are making. Is it not a fact, however, that what we are in essence doing here is not making that judgment, but merely giving to an extraordinary majority of the Legislature--and quite an extraordinary majority--the opportunity to review this question in 10, 20, 30, 40, 50 years from now, and isn't this an appropriate matter to be handled by the Legislature?

Mr. Phillips - Well, perhaps I didn't make myself clear. The thrust of my comment is that this is a proposal which according to all the information we have will not be supported by the majority of Ohio voters, and the second point is not an assumption that funds will be diverted, but simply that this would inject an element of uncertainty into an otherwise sound program. When we are talking about expenditures the size of the highway program, or any major metropolitan mass transit system, we cannot plan these systems without adequate, sound, and predictable funding; and this element of uncertainty, I feel, would not be a saleable item to the voters of Ohio.

Mr. Carson - Mr. Phillips, I might say that I don't believe anybody on this Committee has made a judgment that there should be diversion. I think it's probably the opposite. We are trying, however, to view the Constitution and see if we can put it in shape for the next two or three generations, and it seemed to us that this is a worthy subject of consideration. Priorities change. If the highway needs should change, we shouldn't be dependent upon going back to the people at that time for a change in the Constitution. This is a capsule of some of the discussion the Committee has had, but I really don't know where the Committee stands this morning, and for Mr. Gotherman's benefit, I want him to know this is a controversial issue. We're not avoiding controversy.

Mr. Mansfield - I take it from what you have said, Mr. Phillips, that you would say, and perhaps you have said, that any constitutional amendment which results from an initiation by the people should be amended or changed or eliminated, as the case may be, in the same fashion, or perhaps you wouldn't go quite that far.

Mr. Phillips - Mr. Mansfield, I would say that it's certainly something to be considered.

Mr. Mansfield - I think Mr. Carson has pretty well expressed the feelings of this Committee, and in addition some of us feel that this was a poor way to appropriate moneys in the beginning. But this is the way the people did it, and one has to assume that that's the way it's to be. We are quite sure, as you are, that any suggestion on our part that this section be eliminated would obviously not be met with favor by the people. On the other hand, we can see no objection to giving the people an opportunity

to put some kind of an "escape clause" into the Constitution, in the event that the circumstances would change to the point where two-thirds of each house believed that some other use of the money might be better from the standpoint of the state.

Mr. Carter - The Legislature, in turn, is responsible to the people of Ohio.

Mr. Mansfield - I think your position is very clear, Mr. Phillips. Just as a matter of interest, you did say that you polled your membership at random--I happen to sit on the Akron AAA Board, and I don't recall that we discussed this, but maybe we were not part of the random sample.

Mr. Carter - Mr. Phillips, was this a written communication? Would you be good enough to supply the Committee with a copy? Obviously, the response depends on the way the question is written.

Mr. Phillips - In responding to that, I would point out that we do have a national organization, and although I will get you the language of the specific questions, we did retain an outside company to do this. The essence of their report is that Triple A members were asked if they favored or opposed restricting gas tax money to highway construction. The response was 64.3% in favor, 16% opposed, and 15.5% no opinion, and 4.1% no answer.

Mr. Carter - Mr. Phillips, if you were to ask me if I am in favor of diverting highway funds to other purposes today, my answer would be "No, I'm not in favor of that." But if you were to ask me if I favor giving this kind of flexibility over a period of many decades to the Legislature to choose priorities as the people indicate, I would say "Yes" to that. I don't think it is the same question.

Mr. Mansfield - I was under the impression, until Mr. Phillips said otherwise, that the poll was taken only in Ohio. That was not the case.

Mr. Phillips - No, it's not. We do have Ohio polls.

Mr. Carter - But not on this specific question.

Mr. Phillips - I think the specific question is "Should highway user taxes be available for nonhighway uses?"

Mr. Carter - That's a very different question.

Mr. Phillips - Then perhaps I could ask what the question is. I have read the proposed amendment--

Mr. Carson - The issue is, should it be possible for the legislature--if, in its view, and by a substantial majority, it feels that those funds or part of them should be used for other purposes--to do so? Or should it be totally prohibited, as is the case today?

Mr. Mansfield - What Mr. Phillips is saying is that he thinks the question is "Should they be totally restricted, and not simply conditionally restricted."

Mr. Carson - Any other questions. Thank you very much, Mr. Phillips. Any other comments?

Mary Hillaker - I am Mary Hillaker of the League of Women Voters. The League prefers not to have this provision in the Constitution at all. You, as a Committee, may in certain instances be willing to stick your neck out, but it doesn't look politically possible.

Mr. Carson - So the League would recommend total repeal of 5a?

Ms. Hillaker - Yes.

Mr. Carson - Any other questions?

Russell Murray - My name is Russell Murray. I am speaking as a private citizen and I would like to ask a question. What is the reason why you need a two-thirds vote for passage of this?

Mr. Carson - Let me express my feeling. Twenty-five years ago, in 1947, the voters enacted this provision by what I think was a very substantial margin. It was done by initiative petition. It was not sent to the voters by the Legislature--mandating this earmarking. I think I agree with Mr. Phillips that it isn't that ancient a provision. My feeling is that although we are trying to write something which creates some flexibility for the future, that today, there should be diversion only when the Legislature is convinced that there is really a greater need, and it shouldn't be done lightly.

Mr. Murray - My trouble with the recommendation is that if you make a legislative necessity of two-thirds, you allow the lobbying which has substantially stopped it on the federal level to take place here. I think that instead of instituting flexibility you are removing it.

Mr. Bartunek - The Legislature by three-fifths could put the whole amendment on the ballot, and also the people by initiative petition could do the same thing.

Mr. Murray - Why do you want to do it now, if they can do it later?

Mr. Phillips - I might respond to that. The initiative is available right now, and I feel that the general populace, if referred to, would not support this amendment.

Mr. Carson - I happen to be one who does not share the view that one-third of both houses are such poor representatives of the people that a lobby group could insure that they would not vote for a diversion. A two-thirds vote is presently required for emergency measures, and I think it is the feeling of this Committee that the two-thirds vote requirement would merely insure that there was a changing priority and one that was badly needed, and that it wouldn't be lightly done. It would not forever foreclose diversion, if the Legislature were convinced that there was a prior need. Are there any other questions?

Mr. William E. Kildow - I am William E. Kildow, Executive Assistant of the Ohio Trucking Association. Has anyone yet attempted to talk with bond counsel to see what such an amendment might do to the future bonding needs of the state for highway purposes?

Mr. Carson - Future or outstanding bonds?

Mr. Kildow - Outstanding and future.

Mr. Carson - Are you familiar with our Article VIII revision? We feel that the full faith and credit of the state with respect to outstanding bonds is fully protected by the very broad savings clause that we have put into Article VIII, so I don't believe that's a concern on this. Ann, is this not your understanding?

Mrs. Eriksson - Yes, it is.

Mr. Carson - I would ask you, Mr. Kildow--we feel that this has been totally protected by what we have recommended before. We certainly wouldn't want to involve the security of the bonds that are outstanding. If you have reason to believe that there is support for the position that it would affect our bonds, you should let us know.

Mr. Kildow - I am not familiar with the bonding provisions, but we have in previous communication with this Committee and with the Commission and discussed the philosophical angle. There is no true solution to that. Maybe newtaxes should be levied rather than "robbing Peter to pay Paul." It's possible that a new Commission will be formed at the time the Constitution is considered again twenty years hence and that may be the time to look at this question.

Mr. Mansfield - Nolan, may I respond on the philosophic level? It seems to me any purchases of bonds do not depend on existing constitutional provisions as security, fully realizing that what the people have done they can undo, irrespective of what bonds may be outstanding at the time, and all the Committee is doing--if it does, and assuming that the Commission accepts the Committee recommendation and if the Legislature sees fit to put the question to the people--all we really are doing is asking the people whether they want to change. I don't quite see how you can ever bind the people to a change in the Constitution irrespective of what may or may not be outstanding.

Mr. Carson - Any other comments in the room?

Mr. Mansfield moved to make the recommendation as described before with the addition in 5a. Mr. Carter seconded. All present voted "Aye" except Mr. Bartunek who voted "No".

Then, the Committee again discussed Section 2.

Mr. Carson - Moving now to the last section, Section 2 of Article XII. Section 2 is the section in the Constitution which imposes the so-called "uniform rule", the 1% limitation on property taxes, and also gives the legislature the power to enact legislation exempting churches, schools and others from taxation in Ohio. The Committee has spent a lot of time and thought on Section 2. We think it is the most important section in Article XII, and perhaps one of the most important in the Constitution. After considering a number of alternatives--and I think there have been some problems which have occurred with respect to Section 2--the Committee has before it today a proposal to recommend to the Commission that no change be made in Section 2. I could talk a half an hour as to the reasons for this, but I'm not sure it's appropriate to go through the discussions we have had on Section 2. Our minutes reflect the various proposals that have been made.

Mr. S. Nemeth - On behalf of the Ohio Chamber of Commerce I would like to express

that we are in full agreement with the Committee's recommendation to make no change in Section 2.

Dr. Cloud - I am Dr. Harry Cloud. I represent the Clark County Taxpayers' Association. I ask three small questions. We want to challenge Section 2, as being unconstitutional. Article I, Section 8 of our Federal Constitution says that all taxes, duties and imposts throughout the entire United States shall be uniform. I know that in 1912 the people voted to give the Legislature the opportunity and the option to adopt either the uniform or the graduated tax. The first question is relating to Section 2 of Article XII which says that all taxes and improvements thereon shall be assessed at their true value in money. We're not able to define true value and are not able to define uniform rule, because as near as we can get to the question of exactly what does the term uniform rule mean--according to the Britanica World Dictionary as near as we could get to, uniform rule and its relation to taxes is that taxes, duties and imposts should be assessed alike in quantity, quality and degree. The second question is the market value is not a true indicator of land worth for tax assessment. Now, market value is a fallacy in itself because market value is a commodity index, it's a price index, and gives no indication at all as to the value of a piece of property. The assessor has a crystal ball and he can assess property at any rate he wants to. Due to the fact that true value is used as a base for a tax system just don't make sense because it's so uncertain. Market value is like stocks and bonds--it goes up and down, it changes every day. It's not a stable base for a tax system. So we've given a lot of thought to this thing, Mr. Chairman, and I'm sorry that we didn't get in on your discussions on this thing in the beginning. We weren't notified and I wasn't on your mailing list but our organization has gone through this thing as carefully as we can. We came up with what we think is a sensible, practical tax system. Here's how we propose to do it: To divide the entire area of a county of a city--the land value--into square feet; divide all the buildings, floor spaces, in the farms, in the cities, subdivisions, villages by the square foot; thirdly, whatever it costs to operate the county or the city, prorate the tax percentage to the square foot. Therefore, if you do that, then you comply perfectly with Section 1 of Article VIII of the Federal Constitution, which says that all taxes, duties and imposts throughout the entire United States shall be uniform. It's certainly obvious--I've been told that our United States Senate has surrendered our constitutional rights to the United Nations. Now, in Miranda v. State of Arizona in 1966 the United States Supreme Court ruled "where rights secured by the Constitution are involved there can be no rule making or legislation which would abrogate those rules." Now somebody is getting rooked in this deal. If the Constitution of the United States is not the Supreme Law of the Land, how can we have two laws when our officials take an obligation to uphold the law they take an oath to support the Constitution of the United States? So these relationships to property taxes are very serious things to the common people. Now, in our group we have no politicians, we have no business men, we're all home owners. We know what our taxes are with this inflation. All of these progressive income taxes, and these welfare costs and all of the taxes are on the middle class, and it's the middle class that's paying the bulk of our taxes. For instances, in our county and our city, the tax ratio of improvements is 4½ to 6 times what it is on land. So, the result is that the little home owner is the one who is being rooked in this deal. He has no voice in these Committee meetings. There's no one to represent him, outside of the elected officials. We go to the elected officials and it doesn't make a bit of difference. Do you know I cannot hire an attorney in this state, in my city, my county, here in Columbus, to represent me to take this issue to the United States Supreme Court? I've paid out money to attorneys here and then they

cop out on me. We've gone on now for several years and this has cost us a lot of money so we came to this organization here, and of course I talked with Mrs. Eriksson, and I didn't know that I was supposed to be on this mailing list in order to get in here when this thing was discussed by your subcommittee. But now you're not going to consider it any more?

Mr. Carson - Dr. Cloud, you did appear twice before this Committee--

Dr. Cloud - But I didn't have my say, sir.

Mr. Carson - I think the position of the Committee is that they have had your material, they have heard you, they do understand the position you espouse, and they also listened to a lot of other people. I think the attitude of the Committee at least up to this point has been that they have felt justified in recommending no change in Section 2. This is just a committee of the full Commission. What we recommend goes to the full Commission. In March, the Chairman of the full Commission will ask anybody who wants to testify for or against this Section 2 recommendation to be heard. Then, whatever the Commission does goes to the Legislature. They have hearings in both houses. You are welcome to testify there, so that there are plenty of opportunities to discuss your proposal in detail all along the line. Thank you, Dr. Cloud.

Dr. Cloud - Thank you, Mr. Chairman.

Mr. Carson - Is Mr. Carroll Hill in the room?

Mr. Hill - I fear I have been negligent in not making myself acquainted with the Committee before this. I'm a member of the Board of Directors of the Robert Schalkenbach Foundation and, as some of you know, we are interested in a change in the property tax structure, shifting the burden from improvements to land. We know that this idea is catching hold across the country. More and more people are becoming familiar with it, are realizing the need for some revision of our property tax system, and so it is my hope that our Foundation will be given an opportunity to be heard at this March meeting, as we haven't had a chance before to do so.

Mr. Carter - Mr. Hill, basically you're talking about shifting the tax more to land and less on improvements.

Mr. Hill - Yes, it was started in Pennsylvania and never carried very far, where it only applies to the municipal portion of the tax take, and we know that the schools got the lion's share of the property tax. We would appreciate the opportunity to make a statement. There are more knowledgeable people than myself to present this to you.

Mr. Carson - Would you give me a little background on your Foundation?

Mr. Hill - It was established by Robert Schalkenbach who was a publisher who was an acquaintance of Henry George, espousing the idea of a single tax. He bequeathed nearly all of his wealth to a foundation for the purpose of advancing this idea of the single tax, more recently referred to as land value taxation. Through the years, we have conducted schools to educate people on some of the inequities of our present property tax, and then more recently we prepared films to show what a change in the property tax system might mean to cities in solving their problems--the inner city, slum areas, and also from the standpoint of trying to guide those urban areas. I'm

a planner for some 45 years, and I have presented programs to the American Institute of Planners, the American Society of Planning Officials and other organizations, and we have noticed that an increasing number of people who are engaged in the profession of planning realize that something of this nature has to be brought about. I would venture that the great majority of the people who are engaged in the planning process today see a need for a comprehensive revision of our property tax system. There are some who say we will have to have a constitutional amendment to permit a graduated tax.

Mr. Carter - It would be helpful if you were to have a written statement.

Mr. Hill - We would be very happy to do this. The Chamber of Commerce of the United States, a number of their committees have endorsed it. There is considerable growing interest.

Mr. Mansfield moved to recommend no change in Section 2. Mr. Wilson seconded the motion. A voice vote was taken and passed unanimously. The motion was adopted.

At the end of the meeting, Mr. Bartunek made the following statement.

Mr. Bartunek - This being the last meeting of our Committee, I pay a tremendous tribute to Nolan Carson for the job he has done. In 25 years of public service I have served on many committees, and never had a chairman who was so courteous and considerate and who gave everybody so much of a chance to be heard.

All the Committee members present joined in expressing the same sentiment. Then Mr. Carson concluded: I can pay the same tribute to the members of this Committee. It's been a real privilege to serve with each one of you. I thank you for what I consider a pretty firm and sound set of recommendations.

The meeting adjourned.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
May 14, 1973

Summary of Meeting

The Finance and Taxation Committee met at the State House in Room 10 on May 14 at 9:30 a.m. Attending were Chairman Carson, Mr. Carter, Mr. Guggenheim, Staff members Eriksson, Nemeth, and Evans. Dr. Cunningham also attended the meeting. Present to speak to the committee were the Honorable J. Phillip Richley, Director of the Dept. of Transportation, and Mr. James Stegmeier, an attorney from the Department.

Mr. Carson: This committee had gone to the Commission with a recommendation that Section 5a of Article XII be amended to permit the spending of 5a (highway user) funds for other purposes by a 2/3 vote of the General Assembly. At the last Commission meeting, a proposal was made by one of the members to amend 5a to permit the legislature to use those funds for any purpose of transportation, and then we received Mr. Richley's call saying he would like to meet with us this a.m. and present a proposal from the Department of Transportation.

Mr. Richley: Thank you, Mr. Carson. I appreciate the opportunity to be here. You all have copies of our letter of May 11, which outlines the position of this administration regarded Section 5a. We have attached suggested language that we would like to recommend, and I think the whole question of diversion is one which is extremely important. There are many facets to the argument, but I think the whole country is moving in the direction of comprehensive transportation, and the need for the simultaneous development of all transportation modes is finally beginning to show through. I think that a great many of us who have been highway oriented over the years have come to realize that highways alone simply can't do the entire job, especially in urban areas.

There has been very good use made of Section 5a money over the years. Since it was adopted, it has done its job well, we have the best highway system in the nation. But in 1973 we are starting to see a very great need for developing other modes of transportation. When I say other modes, I'm talking about all other modes of transportation, including mass transportation and aviation, including water transportation, and other forms of transportation that might surface in the future. We're looking for the flexibility that is required to fund transportation programs. The federal laws are gradually broadening in the direction of use of fed. highway trust fund moneys for other purposes. There has been more flexibility than would have been conceivable five years ago. We need to put funds where we need them in order to carry out efficient transportation planning--we have responsibility under the law as the DOT, to develop planning for all modes of transportation. So we are therefore advocating a not total diversion to the general fund from 5a, we're saying only that the use of those funds--of all transportation funds--ought to be pooled into a fund that would be a transportation general fund to be used for all transportation modes.

The present principal source of funding is the highway tax--but this may not be the case in the future. We're suggesting that funds which are presently collected from other transportation modes, for example the presently nominal gross receipts tax on aviation, be pooled into one general transportation fund for use by the G.A. in providing programs for all transportation purposes. The earmarking for transportation purposes is a logical next step, rather than total diversion or the total removal of all earmarking

provisions. The Governor and the G.A., based on the sound transportation planning process, at that particular time can decide how those funds can be divided or how they should be used among each of the transportation modes as time progresses--we're looking for flexibility and we're looking to broaden the base, we're looking for funds that can develop comprehensive systems, and we're looking for latitude in our ability to develop programs in the future.

Our funding situation is Ohio is at rather low ebb. We are in need of additional highway funds, and our programs are much reduced over what they have been the past ten or twelve years, particularly because we have an outstanding debt service that has to be worked over in the next 6 or 7 years, inflation, and the additional costs of environment protection. We are not advocating the use of highway funds for other modes of transportation because we happen to have the funds--we're talking here about a conceptual idealistic program, which I think makes sense, in spite of the number of $ available. I think we have 2 separate problems to consider. Funding for all modes of transportation, number 1, and number 2, the use of those funds after they have been legislated. The number of $ available today or in the future is something for the G.A. to discuss and decide on--as they see the needs develop. We hope that, by next fall, when the dept. submits its massive plan for transportation in Ohio to the G.A., there will be adequate information on which the G.A. can base its assessment of levels of funding. The conceptual and idealistic position of broadening that base can be done anytime, so that we are ready to carry out the state's programs and meet the state's needs in urban areas of the state, increasingly also in the rural areas, in all transportation modes, and in order also to make ourselves more eligible for the federal funding programs that exist when the time comes.

There are five or six federally funded programs in the highway act which may be passed in the next few weeks, where there is some serious doubt that Ohio can meet the matching share of the money available--for example construction of parking facilities, bus passenger loading areas and shelters, the construction of housing that is required for highway purposes, bicycle paths, equestrian trails, purchase of bus equipment, and rolling stock in public transit. Section 5a funds cannot be used as matching funds for these purposes. So we're not advocating the broadening of the base because we have an excess in funds, we're broadening the base because we have a need to adopt a conceptual position that will allow us to move ahead in the future and tackle the funding problem separately--the level of funding, and the problem for the G.A. to resolve, and when the proper programs are presented--it will be resolved. But in the meantime, the latitude and the flexibility ought to be there to accomplish the purposes intended.

Our draft, which was prepared by our Dept. in conjunction with Squire, Sanders, and Dempsey, is very carefully drawn. It is permissive to the degree that it allows the G.A. to decide how much money ought or ought not to be spent, and there is nothing mandatory about it. The G.A. can at each biennium make its decision, based on the needs of the time. Yet, it doesn't change the distribution formulas that are presently in effect around the state. We think it is an important step forward, and we think it would build a good foundation from which to move in the future. Highway earmarking in 1973 does not meet our needs, and the broadening of that base to transportation earmarking would be more suitable to the kinds of conditions that we have. I want to emphasize again that when you examine the language fully, that we're talking about transportation revenues from all modes of transportation, not just the highway funds that are referred to in Section 5a of Article XII. So it is a broad all-encompassing recommendation, and

one which I think in the long run will make a lot of sense. I'd be glad to answer any questions which you might have in regard to detail, Mr. Chairman.

Mr. Carson: Thank you. I'd like to express out appreciation to you for coming to us with this language.

Mr. Carter: Assuming for a moment that I agree, which I do, with everything that you have said, the question comes up as to whether or not this is a statutory matter rather than a constitutional matter. Our job of course is to be concerned with a constitution that would be in effect for many years to come. I would be curious to know what reasons you have in your mind for feeling that this is proper for the constitution?

Mr. Richley: First of all, the suggestion that we're making is directed only to transportation oriented revenues. Because they are transportation oriented revenues, we feel that they are a use tax or a use revenue of some kind, and by and large, they ought to be used to support that facility from which they were originally gleaned. Section 5a as it exists is a beautiful, perfect example of how earmarked funds can really do a job. By the complete removal of earmarking, what we're going to do is put transportation in a category where it would have to compete for funding with all other governmental functions, including health and education and welfare, and all others. Since these are transportation oriented revenues, transportation collected, as a result of transportation fees, we think that ought to be plowed right back into the system, and justly. Quite generally, almost reaching the point of self-sufficiency, highways in this state were not subsidized by general fund moneys. They were built, paid for, and maintained by fuel taxes, which is a highway revenue. The license taxes are generally funding local govt., highway transportation facilities, although not to the same degree that they would like to see. But it is restricting the use of that income from a particular source which generates the income.

Mr. Carter: And you do not feel that this is an appropriate matter to leave to the legislature?

Mr. Richley: The Constitution in this broad area ought to be that mechanism which would at least broaden the use to include all transportation purposes, and leave the individual decisions on modes and amounts to the general assembly. I would not be in favor of removing completely the restriction and allowing the g.a. to make the entire decision. As one who is in the field of transportation, quite frankly, I believe that the user revenue source ought to be generally protected--I do not mean protected to the nth degree, but protected within a broad framework that can be protected, and under the transportation facility generating the source, primarily a user's type fee, there ought to be some assurance that those funds go back into the same field. It's like water bills or power bills, where you have a kind of utility tax, but those funds that are generated go right back into that same system and are raised or lowered to the degree that you need to develop programs in that particular area. I would hate to see my phone bill income used to subsidize some other source, because telephone bills obviously would skyrocket.

Mr. Carter: Are you trying to say that transportation systems should be funded exclusively from transportation revenues.

Mr. Richley: They can be, if, in the future, proper enactments of new revenues are made by the G.A. I would suggest that that be postponed until we report back to the G.A.

with a statewide transportation plan which we are required to do by law, next fall. The g.a. can then enact whatever legislation they deem necessary to raise additional revenues for additional transportation needs--or to expand existing revenues, but at any rate, whether they are existing revenues, or new ones, they ought to be held within that broad framework and plowed back into that system which helped to generate them. I have another reason for this--we quire strongly feel that transportation--whether we're talking about highways or harbors or aviation facilities or public transit facilities, or whatever--is probably the most important physical activity the community can develop or possess, and we quite jealously like to guard that capacity. A failure of transportation in any given area means an economic handicap to that particular community, so everything we can do as a govt. to build a strong transportation base advanced the economic development of that community. It is so important that I believe that it ought not to compete for funds with other functions of government.

Mr. Carson: Mr. Richley, do you have anything to leave with us on the types of new taxes that would be brought into 5a by this?

Mr. Richley: Existing sources that we have identified on this chart we can leave with you, include the present 7¢ fuel tax, the motor vehicle registration fees--the $10 tag, the highway use tax, the driver's license fees, some minor PUCO fees, highway patrol fines, and an airlines excise tax recently cleared up in the courts, and a minor amount in water license fees. So there are about five fund sources that I am talking about that exist right now. These can either be expanded in the future, or new fund sources could be generated.

Mr. Carson: Which are the ones not now under 5a?

Mr. Richley: Not now under 5a are the water transportation fees, the PUCO, the airline excise tax, and the watercraft license fees.

Mr. Carson: What about these "parking revenues" in the language?

Mr. Richley: These are revenues which are expected in the future as a result of state govt. action. Now there are no such revenues. This would be a new revenue area if the G.A. would feel that the state ought to get into that area. There is the Ohio Underground Parking Facility as you know, and those funds are presently separately enacted and dedicated to those purposes. If you look at the sheet I showed you earlier, identifying some federal programs, Item A is called Construction of Transportation Parking Facilities, and this would be similar to that which exists in Cleveland along the rapid lines. The parking facility is used to park for passengers who take the rapid downtown. A portion of the fare could be used to go back into the transportation funds. There are other such concepts that are going to grow in the U.S., such as fringe parking.

Mr. Carter: Would this prohibit the legal structure of the underground parking garage that you now have? That is a revenue bond concept.

Mr. Richley: The use of those funds is in no way related to 5a, at this time, or under the revised language, because the enactments that developed the commission are independent from the constitution. Those funds are earmarked for debt service anyway.

Mr. Carson: The language draft says: "All moneys derived by the state pursuant to law and enacted by the G.A. from fees, excises, so and so....shall be deposited with the

treasurer of state, and may be expended only for...."

Mr. Richley: The present law concerning the underground commission is not included. The present funds are earmarked, but it's conceivable that those funds would be included in this language in the future if a similar law were enacted in the future. The same is true of the Turnpike and the Ohio Bridge Commissions. The Ohio Bridge Commission operates a couple of bridges across the river.

Mr. Stegmeier: This proposal would protect all existing bonded indebtedness by the schedule. But once those were paid off and free, then the revenues would be subject (all of them) to the provision. The turnpike becomes a free highway when those bonds are paid off. I don't know that that means that the G.A. couldn't issue revenue bonds in the future. But even if the revenues have to be deposited in a general fund, these revenues could be used for the development of transportation facilities and development includes the servicing of the bonds if that were the decision of the G.A. This is simply a depository for these funds. Their use would be regulated by the G.A.

Mr. Carson: We all received your letter of Sept. 14, under the Dept. of Highways--and we find a strong support for 5a without change, on the basis that "until such time as there are more highway user revenues, to provide the public with a well-balanced system, there should be no thought given to other usages."

Mr. Richley: That is true. Since we have become a Dept. of Transportation, and since we have been given authority to develop a comprehensive transportation plan, it is the decision of the governor and this administration, that broadening should now occur--not to the degree that total earmarking should be removed, but simply to the degree that transportation is a broad category, and we still would agree that this is a conceptual change for the future--it doesn't relate to the funding situation which we have--which is worse, if anything. We think there ought to be more funds--for all modes--and that they ought to be able to be used comprehensively. As long as the CRC is looking at the problem of 5a we feel a concern that all of the earmarking provisions would be removed, and we think that that would be catastrophic, therefore we are suggesting earmarking for transportation purposes as making a great deal of sense to us.

Mr. Carson: Do you forsee in the next 5 yrs. that any of the highway user funds would be used for anything other than highway purposes?

Mr. Richley: It is conceivable that within 5 years, that they might be used for other transportation purposes. I don't know how substantial the amounts might be, that would be a matter for the G.A. to decide at that time. The funds that would be put into 5a would be used only for capital improvement type facilities with the exception of highways. In the highway area, the funds would still be used for maintenance and operation, but in the others only for capital imporvements, no operational or maintenance funding. So while we have moved somewhat from the posture of our original letter, we haven't yet abandoned that totally. Highways are still the primary carrier in the state--and will be for a long time. We are still concerned that highways be maintained to the highest degree possible.

Mr. Carter: Why do you drop out the hospitalization of indigent persons?

Mr. Stegmeier: Over the past 15 or 20 years, that amount has generally been a couple hundred thousand a year, and our feeling was that conceptually was a mistake, and that

those funds should not be spelled out that way but borne by the general fund.

Mr. Richley: We don't think it is an appropriate use of either 5a or transportation oriented revenues.

Mrs. Eriksson: I had a minor question--that had to do with the use of the word conveyances. I'm wondering if you are making a distinction between conveyances and vehicles and if so what it is? Are things that run on rails vehicles?

Mr. Richley: I think conveyances in the sense in which the word is used here is simply meant to move by mass transit. No other connotation is meant to be suggested. It is a noun and can be any form of movement--it has no hidden connotation. Any physical form of movement carried on by an element of some kind.

Mrs. Eriksson: Is a railraod car a vehicle?

Mr. Richley: Yes, but it is our strict concern that railroads not be felt to be among the provision of 5a, and specifically in the middle of the page, "for and related to publicly owned (and operated)--and we might insert "or publicly operated" and this is meant to exclude funds in the future for railroads as we know them today. We don't want these to be used by any private or quasi-private railroad corporation.

Mr. Carson: There's no qualification there that would exclude any taxes on publicly operated railroads.

Mr. Richley: The limitation is on funds which are collected by the state and deposited with the treasurer of state.

Mr. Carson: Thank you very much for your time.

Mr. Richley: Mr. Stegmeier and Mr. Bovard will stay for the commission meeting.

Mr. Carson: We have instructions of the commission to reconsider the whole 5a situation, and come back to the commission with either the same recommendation or a revised one. Is there a motion with respect to 5a?

Mr. Carter: I was persuaded at the last Commission meeting about the inadvisability of setting up extraordinary majorities for legislative matters in the constitution. My first preference would be to repeal 5a entirely, but I'm not sure that that is the practical thing to do, as you pointed out at the last commission meeting. I think I would be inclined to go along with the broadening for transportation, but I am not satisfied that I have spent enough time with this draft. I have some concern about broadening the revenues by bringing in other earmarking. But on the other hand, it makes some sense.

Mr. Carson: Are you moving adoption of Mr. Richley's proposal?

Mr. Carter: I'd prefer not to at this point.

Mr. Guggenheim: I am in favor of using the 5a funds for transportation generally--I'm in favor of that principle. I'm not prepared to comment on the exact wording here.

Mr. Carson: We have made a recommendation to the Commission--do we want to change that recommendation? I think we should make that clear.

Mr. Carter: I want to see what the Commission wants to do with this matter before we get into specifics. But I don't have a recommendation or a motion to make other than to submit this material to the Commission for their opinion.

Mr. Guggenheim: I've been persuaded by members of the Commission that perhaps we ought to back off the 2/3 and make these funds available for all forms of transportation.

Mr. Carter: I would make a motion that we submit this to the Commission as an alternative.

Mr. Carson: Without objection, we shall do that.

There was no objection.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Finance and Taxation Committee
May 19, 1971

The following questions are raised for consideration by the committee in connection with Article XII of the Ohio Constitution, relating to Finance and Taxation, and Article VIII of the Ohio Constitution, relating to Public Debt and Public Works.

Article XII: Finance and Taxation

General Issues

1. Should the requirement that all land and improvements thereon be taxed by uniform rule according to true value be retained in the Constitution? If it is not retained, should the Constitution be silent on this point, or should it explicitly permit reasonable classification? Should the "true value" concept be reviewed?

2. Should the one per cent (1%) limitation on the taxation of property contained in Article XII, Section 2 be retained? Should another limitation be substituted, or should there be no limitation expressed in the Constitution, as in the constitutions of a majority of states?

3. Should "earmarking" be retained as a constitutional concept, or should it be prohibited except to the extent necessary to participate in federal programs?

4. Should the Constitution enumerate exemptions from taxation, should it be silent on this point, or should it authorize the legislature to specify exemptions?

5. To what extent should the Constitution circumscribe the inherent power of the state to tax, as to the type of taxes which may be levied and the subjects of taxation?

6. Should the Constitution contain a requirement that the Governor present a budget estimate for the next fiscal period, setting forth all proposed expenditures and anticipated income, as well as a revenue bill, and a bill or bills covering recommendations in the budget for new and additional revenues? Some constitutions treat this question in either their executive or legislative sections, so the committee may wish to consider this question in conjunction with the committees studying those respective sections.

Specific Issues

1. Should the prohibition of a poll tax, contained in Article XII, Section 1 be retained? It is clearly obsolete, since poll taxes are prohibited as a matter of federal constitutional law.

2. Which, if any, of the specific exemptions from taxation contained in Article XII, Section 2 should be retained? The exemption of bonds issued for the World War Compensation Fund, for one is obsolete. Should the authorization contained in Article II, Section 36, to exempt areas devoted exclusively to forestry, be retained? If exemptions are retained, would it not be appropriate to consolidate all of them in a single section of the Constitution?

3. Should the "earmarking" provisions of Article VIII, such as Sections 2e and 2f (relating to capital improvements excluding highways), Article VIII, Section 2g (relating to highways), and Article XII, Section 9 (relating to the apportionment of inheritance and income taxes), in the Constitution? If these provisions are not retained, should the Constitution be silent on this point, should it allow the legislature to designate what taxes shall be "earmarked," or should it forbid "earmarking" except to the extent required to participate in federal programs?

4. Should Article XII, Section 4, relating to the raising of revenue, be deleted from the Constitution as being unnecessary?

5. Should the Constitution contain a specific provision either embodying or negating the doctrine of pre-emption? In this connection, what changes, if any, should be made in Article XII, Section 8, which permits the levying of an income tax, in view of the Supreme Court's interpretation of Article XVIII, Section 13, the source of the pre-emption doctrine?

6. Should the $3,000 exemption authorized in Article XII, Section 8 be deleted from the Constitution as being more properly in the legislative sphere, or should the exemption be clarified and/or modified?

7. Also in connection with the possibility of a state income tax, what changes, if any, should be made in Article XII, Section 9 which requires the apportioning of income and inheritance taxes? Further, should the requirement of apportioning inheritance taxes be retained, in its present form, in any case, since this is a relatively unstable source of income for individual political subdivisions? If this source of revenue is taken from the individual political subdivisions what, if any, alternative source of revenue should be provided for them in the Constitution?

8. What, if any, changes should be made in Article XII, Section 10, in regard to the imposition of taxes on the production of coal, oil, gas, and other minerals, if the uniformity provision of Article XII, Section 2 is retained, to avoid inequities in the taxation of land?

9. What changes, if any, should be made in the Sinking Fund provisions of the Constitution (Article VIII, Sections 7 to 11 and Article XII, Section 11)? Should consideration be given to transferring the functions of the Commissioners to the Treasurer, in view of the fact that the sinking fund concept itself is becoming obsolete?

10. In view of the fact that the power of the state to tax is inherent and extends to all subjects over which its sovereign power extends, is there a need for the Constitution to specify types of taxes which may be levied? (e.g. Inheritance, Article XII, Section 6; Income, Article XII, Section 8; Excise and Franchise, Article XII, Section 10).

11. In view of the fact that the power of the sovereign to tax is inherent and extends to all subjects over which the sovereign power of the state extends, should the Constitution specify possible objects of taxation? (e.g. the production of coal, oil, gas and other minerals, Article XII, Section 10). Further, should the Constitution specify that certain subjects are excluded from taxation? (e.g.

Food for human consumption, when sold or purchased for consumption off the premises where sold, Article XII, Section 12). These matters appear to be more properly in the legislative sphere.

12. Should the provision regarding the manner in which internal improvement may be incurred, now contained in Article XII, Section 6, be transferred to Article VIII? Is there any need for Article XII, Section 6 at all, in view of the provision of Article VIII, Section 3 that no debts shall be created, except the debts specified in Articles I and II?

13. Should consideration be given to the repeal of Article II, Section 1e, prohibiting the use of initiative and referendum to pass a law authorizing classification of property or a single tax, if the "uniform rule" provision of Article XII, Section 2 is deleted from the Constitution?

Article VIII:
Public Debt and Public Works

General Issues

1. Should the Constitution contain a debt ceiling expressed in an absolute dollar amount, or should it contain a formula by which a debt ceiling can be determined so as to better reflect the State's changing wealth and revenues? Should the Constitution provide for a method of exceeding the debt ceiling by a method short of constitutional amendment, either by the action of a special majority of the legislature or by referendum?

2. Should the Constitution provide for a method by which the State may contract a debt by action of the legislature, at least within a given range, or should every proposed debt be subject to referendum?

3. Should the Constitution absolutely prohibit the State, counties, municipalities or townships, from lending their credit to, or becoming joint owners or shareholders of, any business?

4. Should the State be prohibited from assuming the debt of a political subdivision, for any purpose other than those listed in the Constitution?

Specific Issues

1. Should the $750,000 debt limit of Article VIII, Section 1 be repealed? It has already been modified by Article VIII, Section 2i, which permits a debt of up to $759 million at any one time, for public capital improvement purposes.

2. Should the provisions of Article VIII, Section 2 enumerating the purposes for which the State may contract a debt be retained, or should the Constitution be amended to provide that the State may contract a debt for any public purpose which is clearly identified?

3. What changes, if any, are required in Article VIII, Section 3, which provides that no debt shall be created, except the debts specified in Articles I and II?

4. Should the ban against the State and its political subdivisions entering business, or giving credit, contained in Article VIII, Sections 4 and 6 respectively, continue to remain absolute? There has already been a modification of the ban, as in Article VIII, Section 13, relating to industrial development corporations.

5. Should the ban on the assumption by the State of the debt of a political subdivision, contained in Article VIII, Section 5 continue in its present form? Should the Constitution not be more flexible, to allow the State more latitude in handling certain problems which are better handled on a regional or statewide basis, and the solution of which would be facilitated by the assumption, by the State, of certain debts of its political subdivisions?

6. Should not the provisions of Article VIII, Section 6 relating to the insurance of public buildings, and the regulation of insurance companies, be deleted from the Constitution, as being more properly in the legislative sphere? If these provisions are retained in the Constitution, should they not be incorporated in a separate section, as they are clearly misplaced in Article VIII, Section 6?

Ohio Constitutional Revision Commission
Finance and Taxation Committee
June 10, 1971

Research Study No. 4

State Debt Limitation in Ohio, and Some Possible Alternatives

The Ohio Constitution of 1802 contained no limitation on the General Assembly's powers to tax, to incur debt or to grant special privileges and charters. The population of the State increased from 100,000 in 1802 to nearly two million by 1851, and the population increase was accompanied by a rapid spread of transportation systems, including canals, railroads and turnpikes.

In Ohio's Constitution in the Making prepared in 1950 by Lauren A. Glosser for the Ohio Program Commission, Glosser remarks:

> "The General Assembly, with no restrictions on its power to tax, to incur debts or to grant special privileges and charters, was subjected to the opportunism which was the moving force behind the settlement and expansion of the state. The legislature became a trading center for subsidies, monopolies and special privileges. Private laws--laws for the benefit of certain individuals, associations or localities--were the principal legislative concern. In 1851, the last session of the 1802 constitution, the General Assembly passed laws in regard to forty charters for insurance companies, sixty-six charters for plank roads, seventy-four charters for turnpikes and eighty-nine laws in relation to railroads. In the first session under the 1851 constitution only twenty-four private laws were passed on all subjects.
>
> The General Assembly undertook to promote the development of transportation systems in several ways from 1802-1851. First it granted monopolies to companies to build roads, turnpikes and bridges. Later it granted subsidies from tax levies to road and railroad companies and both state and local governments were subscribing to stock issues of these companies. Finally the state was borrowing money for such subsidies and subscriptions and for appropriations for canals. At the end of the half-century, the state was in debt almost twenty million dollars and was paying one million dollars a year in interest, mainly to out-of-state creditors."

It was in this atmosphere that the $750,000 limitation of Article VIII, Section 1 became part of Ohio's Constitution in 1851, at which time, also, were enacted Article VIII, Section 2, which contains authorization to incur debt "to repel invasion, suppress insurrection, defned the state in war, or to redeem the present outstanding indebtedness of the State"; Article VIII, Section 3, which forbids the state to incur a debt except as authorized in Article VIII Sections 1 and 2; Article VIII, Sections 4 and 6, which prohibit the state and municipalities, respectively, from lending their credit or becoming owners of any business; Article VIII, Section 5, which prohibits the State from assuming the debts of various political subdivisions unless the debts were incurred in defense of the State; and Article VIII, Sections 7 through 11, which create the sinking fund to administer the state debt. A realization that these sections spring from a common background would seem to be essential to deciding what, if any, changes are to be made in this constitutional area.

As a result of the present constitutional provisions and except for projects financed by revenue bonds, it is necessary to obtain a constitutional amendment to finance every capital improvement program of the State, or to incur other debt, such as that for veterans' compensation funds. The following is a list of these amendments presently in the Constitution..

Purpose	Year Passed	Original amount (in millions)	Section of Article VIII
World War II compensation fund	1947	$300	2b
State highways	1953	500	2c
Korean conflict compensation	1956	90	2d
Capital improvements	1955	150	2e
Long range public works program	1963	200	2f
Highways	1964	500	2g
Development	1965	290	2h
Capital improvement	1968	759	2i

State Government for Our Times, also known as the 1970 Wilder Report and published by the Stephen H. Wilder Foundation of Cincinnati, makes the follosing analysis and conclusion concerning Section 2i of Article VIII, which contains, by far, the most comprehensive authority for the issuance of bonds ever approved by the voters of this State:

"In 1968, 2i of Article VIII was adopted which had the effect of modifying the $750,000 debt limitation, and also removing the very limited purposes for which the state could borrow money. This amendment provided authority for an outstanding debt of up to $759 million at any time, subject to certain limitations. These included:

1. That the purpose of the debt be for capital improvement, for highways, water pollution control, water management, higher education, technical education, vocational education, juvenile correction, parks and recreation, research and development facilities for highway improvements, mental hygiene and fire training, airports, and other state buildings and structures.

2. That not more than $100 principal amount could be issued in any one year.

3. Not more than $500 million can be outstanding at any one time for highways improvements and related purposes.

4. Not more than $259 million can be issued for the other purposes stated; of this amount, $120 million must be used for water pollution control, $100 million for higher education, vocational education, and juvenile correction, $20 million for parks and recreation, and $19 million for airports, state buildings, and police and fire training facilities. It is important to note that, unlike the provision for highway bonds, these limits apply to the authority to issue bonds. Thus, when any of these purposes has reached its constitutional limit, the legislature has no more bonding authority. With highways, on the other hand, the legislature can authorize more than $500 million, provided it does not have more than $500 million outstanding at any time.

5. Any bond issue has to be paid off within 30 years.

The section also contains certain restrictions concerning the apportionment of funds among the various purposes, as well as general instructions concerning funding the repayment of bonds. It also authorizes the issuance of revenue bonds, not tax-supported, for a number of purposes, without regard to the dollar limitations referred to above.

Thus, the voters have given the legislature virtually unlimited authority to issue bonds for highway improvements, and a substantial authority ($290 million) 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 2."

It must be noted, however, that the $750,000 limitation referred to above, which is actually contained in Article VIII, Section 1, continues to be a limitation in fact, particularly on those expenses "not otherwise provided for." Such expenses are likely to be expenses of an emergency or short-term nature.

The question of state debt limitation is, in reality, a question involving two facets: the state's ability to borrow for the purpose of meeting emergency or short-term debt, and its ability to meet long-term debt, which is incurred primarily for capital improvement purposes. Obviously, the emergency or short-term situation does not lend itself to solution by means of referendum, and fixing a rigid debt ceiling on debts "not otherwise provided for," in a constitution tends to make such a document less flexible than modern conditions may require.. The long-term debt situation is more susceptible to solution by referendum although this is certainly not the only alternative.

The more recently enacted or proposed constitutional provisions from other states and Puerto Rico may be of some value in suggesting changes Ohio may wish to incorporate in its Constitution, in regard to the question of state debt limitation. Some of these amendments or proposals are attached to this memorandum in Appendix form.

Alaska Constitution (Constitution of 1958)

Article IX, Section 8. State Debt. No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the State who vote on the question. The State may, as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.

Section 10. Interim Borrowing. The State and its political subdivisions may borrow money to meet appropriations for any fiscal year, but all debt so contracted shall be paid before the end of the next fiscal year.

Hawaii Constitution (Constitution of 1959)

Article VI, Section 3. Debt Limitations. All bonds and other instruments of indebtedness issued by or on behalf of the state or a political subdivision thereof must be authorized by the legislature, and bonds and other instruments of indebtedness of a political subdivision must also be authorized by its governing body.

Sixty million dollars is established as the limit of the funded debt of the State at any time outstanding and unpaid. Bonds and other instruments of indebtedness in excess of such limit may be issued when authorized by a two-thirds vote of all the members to which each house of the legislature is entitled, provided such excess debt, at the time of authorization, would not cause the total of state indebtedness to exceed a sum equal to fifteen percent of the total of assessed values for tax rate purposes of real property in the State, as determined by the last tax assessment rolls pursuant to law.

Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, and bonds or other instruments of indebtedness to suppress insurrection, to repel invasion, to defend the State in war or to meet emergencies caused by disaster or act of God, may be issued by the State under legislative authorization without regard to any debt limit.

A sum equal to ten percent of the total of the assessed values for tax rate purposes of real property in any political subdivision, as determined by the last tax assessment rolls pursuant to law, is established as the limit of the funded debt of such political subdivision at any time outstanding and unpaid. The aggregate, however, of such debts contracted by any political subdivision during a fiscal year shall not exceed two percent of the total of such assessed values in such political subdivision.

Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, may be issued by any political subdivision under authorization of law and of its governing body, without regard to the limits of debt hereinabove provided.

All bonds or other instruments of indebtedness for a term exceeding one year shall be in serial form maturing in substantially equal annual installments, the first installment to mature not later than five years from the date of the issue of such series, and the last installment not later than thirty-five years from the date of such issue. Interest and principal payments shall be a first charge on the general revenues of the State or political subdivision, as the case may be.

The provisions of this section shall not be applicable to indebtedness incurred under revenue bond statutes by a public enterprise of the State or political subdivision, or by a public corporation, when the only security for such indebtedness is the revenues of such enterprise or public corporation, or to indebtedness incurred under special improvement statutes when the only security for such indebtedness is the properties benefited or improved or the assessments thereon.

Nothing in this section shall prevent the refunding of any indebtedness at any time.

Illinois Constitution (Constitution of 1970)

Article 9, Section 9. State Debt.

(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, "State debt" means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts.

(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

(c) State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.

(d) State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.

(e) State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt.

(f) The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law.

Michigan Constitution (Constitution of 1963)

Article 9, Section 14. State borrowing: short term. To meet obligations incurred pursuant to appropriations for any fiscal year, the legislature may by law authorize the state to issue its full faith and credit notes in which case it shall pledge undedicated revenues to be received within the same fiscal year for the repayment thereof. Such indebtedness in any fiscal year shall not exceed 15 percent of undedicated revenues received by the state during the preceding fiscal year and such debts shall be repaid at the time the revenues so pledged are received, but not later than the end of the same fiscal year.

Convention Comment

This is a new section dealing with the borrowing power of the state. It gives the state greater flexibility in meeting cash crises within the general fund by permitting short-term borrowing in an amount not exceeding 15 per cent of the state's undedicated revenues during the previous fiscal year. Under present circumstances the limitation would permit short-term borrowing of approximately $70 million. The present constitution limits such borrowing to $250,000--an unrealistic figure.

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.

The section provides that any short-term borrowing must be in anticipation of revenues to be received within the same fiscal year which shall be pledged for the payment of such borrowing and must be repaid in full at the time such pledged revenues are received. The purpose of this provision is to prevent the state from borrowing up to its limit and then merely renewing the loan from year to year, thus defeating the purpose for which the section is intended. It is to be noted that even limited borrowing can be done only when authorized by the legislature.

A provision in Sec. 10, Article X, of the present (1908) constitution having to do with borrowing to repal invasion and defend the state in time of war has been deleted because this has become so thoroughly a federal problem. Another sentence in the present section providing state borrowing of $50 million for highway construction has been eliminated because the obligation has been completely liquidated.

Article 9, Section 15. Long term borrowing by state. The state may borrow money for spceific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members elected to and serving in each house, and approved by a majority of the electors voting thereon at any general election. The question submitted to the electors shall state the amount to be borrowed, the specific purpose to which the funds shall be devoted, and the method of repayment.

Convention Comment

This is a new section dealing with long-term borrowing such as we used when we paid bonuses to the veterans of three wars; when we borrowed for hospital construction; and when in the decade of the twenties, we borrowed on full faith and credit for highway construction. The legislature is not empowered to authorize any such borrowing

without the approval of the voters of the state, but this section provides a method that can be used without cluttering up the constitution with amendments authorizing the borrowing, as we have had to do in the past.

The voting will be the same, a two-thirds vote in both houses of the legislature on a bill, but the bill will not be effective unless and until approved by a majority of the people who vote on the proposition. The voting is therefore, the same as that under the present constitution for a constitutional amendment, but it avoids the necessity of amending the constitution.

Pennsylvania Constitution (1968 amendment)

Article 8, Section 7. Commonwealth indebtedness.

(a) No debt shall be incurred by or on behalf of the Commonwealth except by law and in accordance with the provisions of this section.

(1) Debt may be incurred without limit to suppress insurrection, rehabilitate areas affected by man-made or natural disaster, or to implement unissued authority approved by the electors prior to the adoption of this article.

(2) The Governor, State Treasurer and Auditor General, acting jointly, may (i) issue tax anticipation notes having a maturity within the fiscal year of issue and payable exclusively from revenues received in the same fiscal year, and (ii) incur debt for the purpose of refunding other debt, if such refunding debt matures within the term of the original debt.

(3) Debt may be insurred without limit for purposes specifically itemized in the law authorizing such debt, if the question whether the debt shall be incurred has been submitted to the electors and approved by a majority of those voting on the question.

(4) Debt may be incurred without the approval of the electors for capital projects specifically itemized in a capital budget if such debt will not cause the amount of all net debt outstanding to exceed one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years as certified by the Auditor General. For purposes of this subsection, debt outstanding shall not include debts incurred under clauses (1) and (2) (i), or debt incurred under clause (2) (ii) if the original debt would not be so considered, or debt incurred under subsection (3) unless the General Assembly shall so provide in the law authorizing such debt.

(b) All debt incurred for capital projects shall mature within a period not to exceed the estimated useful life of the projects as stated in the authorizing law, and when so stated shall be conclusive. All debt, except indebtedness permitted by clause (2) (i) shall be amortized in substantial and regular amounts, the first of which shall be due prior to the expiration of a period equal to one-tenth the term of the debt.

(c) As used in this section, debt shall mean the issued and outstanding obligations of the Commonwealth and shall include obligations of its agencies or authorities to the extent they are to be repaid from leases, rentals or other charges payable directly or indirectly from revenues of the Commonwealth. Debts shall not include either (1) that portion of obligations to be repaid from charges made to

the public for the use of the capital projects financed, as determined by the Auditor General, or (2) obligations to be repaid from lease rentals or other charges payable by a school district or other local taxing authority, or (3) obligations to be repaid by agencies or authorities created for the joint benefit of the Commonwealth and one or more other State governments.

(d) If sufficient funds are not appropriated for the timely payment of the interest upon and installments of principal of all debt, the State Treasurer shall set apart from the first revenues thereafter received applicable to the appropriate fund a sum sufficient to pay such interest and installments of principal, and shall so apply the money so set apart. The State Treasurer may be required to set aside and apply such revenues at the suit of any holder of Commonwealth obligations.

Puerto Rico Constitution (1961 amendment)

Article VI, Section 2. Power of taxation; power to contract debts.

The power of the Commonwealth of Puerto Rico to impose and collect taxes and to authorize their imposition and collection by municipalities shall be exercised as determined by the Legislative Assembly and shall never be surrendered or suspended. The power of the Commonwealth of Puerto Rico to contract and to authorize the contracting of debts shall be exercised as determined by the Legislative Assembly, but no direct obligations of the Commonwealth for money borrowed directly by the Commonwealth evidenced by bonds or notes for the payment of which the full faith, credit and taxing power of the Commonwealth shall be pledged shall be issued by the Commonwealth if the total of (i) the amount of principal of and interest on such bonds and notes, together with the amount of principal of and interest on all such bonds and notes theretofore issued by the Commonwealth and then outstanding, payable in any fiscal year and (ii) any amounts paid by the Commonwealth in the fiscal year next preceding the then current fiscal year for principal or interest on account of any outstanding obligations evidenced by bonds or notes guaranteed by the Commonwealth, shall exceed 15 percent 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; and no such bonds or notes issued by the Commonwealth for any purpose other than housing facilities shall mature later than 30 years from their date and no bonds or notes issued for housing facilities shall mature later than 40 years from their date; and the Commonwealth shall not guarantee any obligations evidenced by bonds or notes if the total of the amount payable in any fiscal year on account of principal of and interest on all the direct obligations referred to above theretofore issued by the Commonwealth and then outstanding and the amounts referred to in item (ii) above shall exceed 15 percent of the average of the total amount of such annual revenues.

The Legislative Assembly shall fix limitations for the issuance of direct obligations by any of the municipalities of Puerto Rico for money borrowed directly by such municipality evidenced by bonds or notes for the payment of which the full faith, credit and taxing power of such municipality shall be pledged; provided, however, that no such bonds or notes shall be issued by any municipality in an amount which, together with the amount of all such bonds and notes theretofore issued by such municipality and then outstanding, shall exceed the percentage determined by the Legislative Assembly, which shall be not less than five per centum (5%) nor more than ten per centum (10%) of the aggregate tax valuation of the property within such municipality.

The Secretary of the Treasury may be required to apply the available revenues including surplus to the payment of interest on the public debt and the amortization thereof in any case provided for by Section 8 of this Article VI at the suit of any holder of bonds or notes issued in evidence thereof.

Maryland (Proposed Constitution of 1968)

Section 6.06. State Indebtedness. The state shall have the power to incur indebtedness for any public purpose in the manner and upon the terms and conditions that the General Assembly may prescribe by law. Unless the law authorizing the creation of an obligation includes an irrevocable pledge of the full faith and credit of the State, the obligation shall not be considered an indebtednexx of the State and the terms of this section shall not apply. If the law includes such a pledge the obligation shall be secured by the unlimited taxing power of the State and shall be subject to the terms of this section. If at any time the General Assembly shall have failed to appropriate and to make available sufficient funds to provide for the timely payment of the interest and principal then due upon all state indebtedness, it shall be the duty of the comptroller to pay, or to make available for payment, to the holders of such indebtedness upon the first revenues thereafter received applicable to the general funds of the state, a sum equal to such interest and principal. All state indebtedness shall mature within fifteen years from the time when such indebtedness is incurred, except that at the time of authorizing the indebtedness the General Assembly by law may extend the period to not more than twenty-five years by the affirmative vote of three-fifths of all the members of each house.

New York (Proposed Constitution of 1968)

Article X, Section 11.a. No debt, except that specified in section thirteen of this article, shall be contracted by or in behalf of the state, nor shall any power and authorization to contract debt be granted to any of its instrumentalities given responsibilities throughout the state after January first, nineteen hundred sixty-eight for any purpose, unless authorized for capital construction by law enacted by two regular sessions of succeeding terms of the legislature, and unless the amount of debt service on such debt together with the total amount of all other debt services as hereinafter defined, for any fiscal year, shall not, except as provided in subdivision b of this section, exceed twelve percent of the average of the total amount of tax revenues and other revenues received by the state in its general fund in the two preceding fiscal years.

b. The legislature may increase the limitation for debt service set forth in subdivision a hereof, but in no event shall it exceed fifteen percent. No law providing for such increase shall take effect unless submitted to the people at a general or special election and approved by a majority of the electors voting thereon.

c. No such debt shall be contracted by the New York state housing finance agency, or any successor, or by any instrumentality of the state possessing responsibilities throughout the state prior to January first, nineteen hundred sixty-eight for programs and facilities for industry, manufacturing or commerce, unless the debt service on such debt, togeher with the total annual amount of all other debt service as hereinafter defined, in any fiscal year, shall not exceed the percent limitation for debt service applicable to the state.

d. No power and authorization to contract debt shall be granted by the

state after January first, nineteen hundred sixty-nine, to any of its instrumentalities described in subdivision c above except in the manner set forth in subdivision a hereof.

e. For purposes of this article, capital construction shall include but not be limited to the acquisition of real property including the improvement and development thereof; the acquisition, construction, reconstruction, rehabilitation or improvement of facilities, structures, projects, capital equipment or apparatus including the preparation of plans, designs, estimates, surveys, appraisals and incidental expenses rendered necessary therefor, the original furnishings, equipment, machinery or apparatus determined to be needed to furnish and equip such facilities, structures or projects and capital grants or loans therefor.

f. For the purposes of subdivisions a and c of this section debt service shall include the following, but in no event shall such inclusions be counted more than once: (1) the principal of and interest on all bonds then outstanding issued by the state, or by any of the instrumentalities possessing responsibilities throughout the state prior to January first, nineteen hundred sixty-eight for programs and facilities for industry, manufacturing or commerce, or any combination thereof, or given responsibilities throughout the state after such date for any purpose, and payable in any succeeding fiscal year; (2) the principal of and interest on all bonds then outstanding issued by the New York state housing finance agency, or any successor thereto, for the purposes of dwelling accommodations, nursing home accommodations or community development and payable in any succeeding fiscal year; (3) the interest on all notes or obligations, unless capitalized, then outstanding issued in anticipation of the receipt of the proceeds of the sale of bonds by the state, or any of its instrumentalities described in paragraphs (1) and (2) hereof, and payable in any succeeding fiscal year; (4) lawful payments by the state in the preceding fiscal year on account or in anticipation of a default in payment of bonds or other evidences of indebtedness of any instrumentality of the state; (5) all rental payments by the state, or instrumentality thereof, in any succeeding fiscal year, and all rental reserve account payments related thereto, made pursuant to a periodic contract in excess of five years for the construction or acquisition of any facility, structure or project, or for the use or occupancy thereof, in full or part, by the state; (6) all payments by the state, or by any of its instrumentalities, possessing responsibilities throughout the state for any purpose made pursuant to a periodic contract in excess of five years in aid of programs and facilities relating to economic and community development and, (7) all other amounts as provided by law.

g. The total amounts of debt service and revenues required to be ascertained for the purposes of this section shall be determined by the state comptroller, as provided by law, which determination shall be conclusive.

h. No debt described in subdivisions a, c and k hereof shall be issued unless certified by the governor in the manner provided by law.

i. Such debt shall not be contracted for a period longer than the probable useful life of the purpose for which the debt is issued, to be determined by law, which determination shall be conclusive. Such period of probable useful life shall not exceed forty years, except that for any economic and community development purposes, the period shall not exceed fifty years.

j. All such debt, except that specified in subdivision k of this section and section thirteen of this article shall be financed by serial bonds provided

that (1) the principal of all serial bonds issued by the state for the purposes of higher education, transportation, mental and environmental health, recreation or conservation shall be paid in equal annual installments commencing not later than one year after issuance and (2) that the payment of the principal of all serial bonds issued by the state, or any of the instrumentalities described in subdivisions a and c hereof, for any economic and community development purposes shall commence not later than five years after issuance.

k. Notes or obligations may also be issued in anticipation of the receipt of the proceeds of the sale of bonds evidencing such debt theretofore authorized, for the purposes and within the amounts of the bonds so authorized, and shall be payable from the proceeds of the sale of such bonds, or from otherwise available revenues, provided that (1) if the purposes theretofore authorized be for programs and facilities for higher education, transportation, mental and environmental health, recreation or conservation such notes or obligations issued by the state shall be payable not later than two years after issuance and (2) if the purposes be for programs and facilities for residences, urban or community renewal, industry, manufacturing or commerce such notes or obligations issued by the state, or any of the instrumentalities described in subdivisions a and c hereof, shall be payable not later than five years after issuance.

l. The proceeds arising from the creation of all such debts shall be applied only to the purpose specified by the legislature when authorizing it, or for the payment of such debt including any notes or obligations issued in anticipation of the sale of bonds evidencing the debt.

m. Whenever the legislature authorizes the contracting of such debt it may authorize payment prior to maturity in such manner as the authorization may provide.

n. No such debt may be refunded unless the privilege to pay such debt prior to maturity was reserved when it was contracted and unless the debt as refunded be paid in annual installments of principal which shall not be less in amount than the annual installments of principal of the debt so refunded.

Section 12. a. Whenever used in this constitution, economic and community development purposes shall include the renewal and rebuilding of communities, the development of new communities, and programs and facilities to enhance the physical environment, health and social well-being of, and to encourage the expansion of economic opportunity for, the people of the state.

b. The State, any local government and any other public corporation may grant to any person, association or private corporation in any year or periodically by contract, or loan its money for economical and community development purposes, but the proceeds of indebtedness contracted for any such purpose shall be used only for loans for capital construction, as defined in section eleven in this article.

c. Notwithstanding the restrictions on the power of the legislature to enact special laws or any other inconsistent provisions of this constitution, the legislature may enact general or special laws for economic and community development purposes.

Section 13. The state may contract debt in anticipation of the receipt of taxes and revenues, direct or indirect, for the purposes and within the amounts of appropriations theretofore made. Notes or other obligations for the money so borrowed shall be issued as may be provided by law, and shall with the interest thereon be paid from such taxes and revenues within one year from the date of issue.

This document (s) that follows was not published with the original volume. It was inserted into this volume held by the LSC Library. It is related to the topic of this volume, but it is unknown why it was not published with the original volume.

WHO SHALL NOT HOLD OFFICE
Section 5, Article II

The committee proposes the repeal of section 5 of Article II which reads as follows:

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

ADDITIONAL COMMENT:

Some questions were put to the committee and the commission Public Hearing on October 6, 1971, concerning the proposed repeal of section 5 as statutory. Specific inquiry concerned whether removal of the provision disqualifying convicted embezzlers from membership in the General Assembly would affect legislative authority to restrict eligibility.

The committee is of the view that repeal of section 5 would neither restrict nor remove limitations upon the General Assembly in this regard. Section 5 can be viewed as a redundancy in view of Article V, Section 4, 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, Article XV, Section 4 provides:

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

The legislature's authority to enact more restrictive qualifications had been recognized in statutes declaring an ineligible for elector status person convicted of a felony in this state (Revised Code section 2961.01) 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 (Revised Code section 2961.02)

Constitutional Revision Commission
Committee to Study the Legislature
October 19, 1971

VACANCIES

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

COMMENT: Under the Ohio Constitution various majorities are necessary for legislative action on specific matters. Must such provisions call for a specified vote of the members "elected" to each house. None takes into account the filling of vacancies by "appointment," a term used in Section 11. The "appointment" there provided involves action of the members of the house affiliated with the same political party as the person last elected to the vacant seat. The substitution of "election" for "appointment" makes no substantive change in Section 11, calling for collective action by a vote, and does eliminate possible conflict between the section as it stands and eight other constitutional provisions.

Constitutional Revision Commission
Committee to Study the Legislature
October 19, 1971

ORGANIZATION OF EACH HOUSE

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

COMMENT: The sole purpose of the amendment proposed is to add provision for organization of the Senate to the section which now is limited to organization of the House, as prescribed by law. The amendment is one of form not substance. Revised Code sections 101.01 et seq. prescribe the mode of organizing the Senate. No apparent reason exists for singling out the House of Representatives in the section as it now stands.

Constitutional Revision Commission
Committee to Study the Legislature
October 19, 1971

LEGISLATIVE COMPENSATION
Section 31, Article II

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 OR ALLOWANCES shall take effect during ~~their~~ THE term ~~of office~~ FOR WHICH HE WAS ELECTED.

COMMENT: The salary of Ohio legislators, as set by Revised Code section 101.27, 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 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 are, in descending order of compensation, California, New York, Michigan, Florida, Hawaii, and Massachusetts. All of these states provide for expenses allowances in addition to salary.

Under Revised Code section 101.27, 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.

An Ohio Court of Appeals has upheld statutory travel expenses for members of the General Assembly in spite of the prohibition of Section 31 against "allowance or perquisites," under the apparent holding that they constitute part of a legislator's "compensation." State ex rel. Harbage v. Ferguson, 68 Ohio App. 189 (1941), dismissed 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) is part of constitutional compensation. The opinion contains dictum to the effect that reimbursement for "hotel and living expenses" would be unconstitutional.

Several years earlier, State ex rel. Boyd v. Tracy, 128 Ohio St. 242 (1934) 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 there 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.

Legislative compensation has received widespread attention of commentators upon American state legislatures and proponents of constitutional revision have called for removal of outdated compensation restrictions contained in legislative articles. Acknowledging that traditionally American state legislature have been composed of "citizen legislators," the Committee on Legislative Processes and Procedures of the National Legislative Conference nevertheless called for increases in legislative compensation and expenses, observing in its final report of 1961, Recommendation No. 4:

> "From the viewpoint of good public service, and in light of the increasing amounts of time that legislators must devote to their duties both during and between sessions, their compensation in most states is now much too low. Likewise the pay of legislative leaders, faced with even greater demands on their time in most jurisdictions is notably out of line. Flat salaries rather than a per diem allowance should be paid. Salary and reimbursement of necessary expenses should be provided in amounts sufficient to permit and encourage competent persons to undertake growingly important and time-consuming legislative duties. Actual amounts of salary and expense money should be provided by statute rather than specified in the constitution."

Comments to the latest edition of the Model State Constitution deplore freezing salary and compensation details in constitutional provisions and reflect virtual unanimity on this point in the literature of constitutional revision. Such an obstacle is fortunately absent from the Ohio Constitution. Section 4.07 of the Model State Constitution, like the Constitutions of Hawaii (Art. III, sec. 10), Illinois (Art. IV, sec. 11), Maine (Art. IV, Part Third, sec. 7), New York (Art. III, sec. 6), California (Art. 4, sec. 4) and Virginia (Art. IV, sec. 5) would provide that legislators receive salary and allowances as designated by law.

The proposed amendment of section 31 removes the obsolete prohibition against "allowance" and the archaic and ambiguous restriction on "perquisites". The removal of restrictions on "payment of postage" conforms the law to practice.

The revised section would permit allowances but prohibit their unrestricted use by requiring such allowances to meet a "reasonable and necessary" test. The term "salary" replaces "compensation" because ofthe Supreme Court's characterization of mileage as compensation under the uncertain rationale of Harbage v. Ferguson and its holding that "room and board" constitutes compensation in Boyd v. Tracy. "Salary" is a less ambiguous term. Additional payments in the form of allowances for travel or other outlays would be related to expenses incurred. The prohibition against change during term has been reworded to take into account the differing term in House and Senate.