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CHAIRMAN SCHROEDER: I think we can get under way. At this time, let me indicate, we shall have a presentation of three ideas in the area of local government, after which we shall open this up in recognition of participatory democracy to your questions. We want you to think of them, maybe jot them down. If there is something that has not been answered by you or some specific help that the Constitutional Revision Commission might give to you, write the question out or the request out or the fact out, or whatever it is, you want to put down with your name and address, leave it on the table directly outside where we have our books, and we'll try to answer your desires in that way.

I shall give further announcements regarding your conduct over the noon hour at the conclusion of the three principal addresses. I say that now so you won't be worried about starvation out here in the hinterlands of greater Columbus.

As I was thinking about this, I had three ideas that came to my mind. I hope that we can find in Ohio the vision and the commitment of those men who sat in Philadelphia in 1787 and put together the ordinance for the Northwest Territory. I thought they were pretty good leaders and I

constantly cite them to my law class. They took something about which they had full responsibility and created a type of government which had never been instituted before, and they dealt with the wilderness of nature in a very intelligent way.

You and I are called upon in 1971 to deal with the chaos of man, but the problem is still the same: to found a government which will meet the challenge.

The second idea that came to me, as I sit in, after 55 years on spaceship Earth and smell, like my good hound dog, Art, the winds of change which are blowing, I detect an odor and I want to share it with you, and if you don't smell it, please see your otolaryngologist at the earliest convenient time. And this odor I smell is not representative democracy,which my friend Jeff Fordham talked about, but participatory democracy. And, ladies and gentlemen, if you don't feel that this isn't making a change in all human institutions, as I say, see your otolaryngologist.

Participatory democracy. And it can come to grips with man's problems at the local level. We can't hop a plane to the capital in Washington every weekend to participate but let me tell you, they can find the city hall and they can call me on the telephone as their city councilman. Participatory democracy, the second idea, is a

distinctly local problem.

Third, the real problems of man are not going to be solved in Columbus, and for the state legislators here, I wish to apologize for that statement. They're not going to be solved in Washington. The real problems of man are going to be solved at the local level. Air pollution, water pollution, justice pollution, educational pollution. So, what we are talking about here today really is the future of the human race in the State of Ohio.

To guide us on this, first, "Home Rule Today," John Gotherman, of the Ohio Municipal League. His credentials are in writing on your sheet there, and they're all true, and there's a lot more about him that's true.

John, come up here and share with us.

MR. GOTHERMAN: Thank you very much.

It is difficult to talk about home rule in Ohio under any circumstances, and then to follow Dean Fordham, believe me, I really have my work cut out. On top of that, I think we're going to shortcut our formal presentations -- at least I intend to -- so that you will have some time to ask questions as you go.

Everyone has, as you probably have, their own concept about what home rule is and what it means. And I guess it means something different almost to everyone that you talk to. But I suppose, from a legal point of view,

when we are talking about municipal home rule in Ohio, we are talking about Article 18 of the Constitution, and, in the case of counties, we are talking about Sections 1, 3 and 4 of Article 10 of the Constitution. So, from a legal point of view, that's what we are dealing with in Ohio.

From a political scientist point of view, I suppose we are dealing with that broad concept of making decisions and doing things as close as possible to the people.

So, I want to explore very briefly municipal home rule with you from these two points of view, and I think, in order to do that, in order to set the stage, and particularly I would hope that the Constitutional Revision Commission, the people that are going to make decisions, will review what happened in Ohio prior to home rule, because I really don't think you can understand particularly well the existing laws that we have, the existing structure and, as Dean Fordham called it, a dichotomy that we have, unless you understand what happened before this existing structure that we're dealing with.

In Ohio's early jurisprudence, certainly, the controlling principle was that municipalities were simply creatures of state government. They were, in fact, not creatures so much of the state government generally as the state legislature. The legislature individually chartered

them. It individually provided for the form of government of the city. They individually provided for the powers and duties and functions of the city so you could well imagine what municipal government might have looked like in those days when the general assembly changed politically, I am sure, from time to time, when city hall changed politically from time to time. I am sure there was no great degree of constancy to local government and neighboring communities, communities that had basically the same problems need not necessarily find themselves with the same powers and duties.

It is with this kind of a background that we, I think, entered the so-called home rule. The Constitution of 1851 did attempt to provide for the organization of cities and villages by general law rather than special act. I think it was obvious that the intentions of the drafters of the Constitution of 1851 and the people who voted for that Constitution were interested in preventing the abuses and the inequities that developed under the special act procedures that existed previous to that time. However, as general assemblies go -- and I think even the members of the general assembly that are here today will not take offense at this, because if you worked with the state legislature at all you know that there is nothing that a very intelligent and a very energetic general assembly can't do. And they found their way around, quite frankly, the

problem of the requirement in the Constitution that municipal affairs be treated by general law, and they created classes and grades of cities so that, in the end, most of the major cities had their own class, had their own grade and, in fact, we were right back -- right back to the very beginning with special acts.

In 1902, however, two supreme court decisions did basically say, rather than emphatically say, that the present, the then existing arrangements for the government and the organization of municipalities were not - were not within the meaning of general laws but, in fact, did constitute special acts. And so we had a prospective announcement that all the law, all the law governing municipalities, all the procedural matters and the structure of government would be invalid under the Ohio Constitution. Fortunately, they announced this in advance so that the governor could call a special session of the general assembly, which he did. It didn't take them too long.

It wasn't a question of an interim budget or interim local government act at that time. They did pass an act, Senate Bill 1 of that particular special session, and, basically, the act in 1902 is Title 7 of the Revised Code, as you find it today. Now, certainly, it has been changed extensively. Many new chapters perhaps have been added. Some have been deleted. But, basically, the

framework of the law that governs not chartered municipalities, those that have not adopted a charter, would be the same as enacted in 1902 as a result of the court decision that outlawed all the existing law at that time as special acts of the general assembly.

In 1912, as we all know, there was a constitutional convention. The delegates to that convention were concerned about the relationships between local government and state government. They were concerned, I think, from reading the proceedings of that convention, of the meddling into internal affairs of municipalities by the general assembly through the special acts system which did not in any way produce uniform procedures for municipalities and the interference in local affairs by means of classifications and cities or villages.

Up to that point in history, municipalities in Ohio -- and I think most other states in the nation -- were considered, as I said before, creatures of the state, and they had only those powers that are announced in a very common rule known to all students of law that have gone to our modern law schools dealing with municipalities, of Judge Dillon's rule. And Dillon's rule applied in Ohio. It provided that municipalities possessed only those powers expressly given by statute, those powers necessarily implied or incident to the powers granted and powers

essential to the purposes of the corporation, not simply convenient but indispensable, a very narrow, narrow line of authority for municipalities.

Counties today. As far as I know, there are no charter counties that have any additional home rule powers, so counties today operate under this kind of a rule, basically, Dillon's Rule. I think those of you who are county officials spend a great deal of time in Columbus trying to convince the general assembly that the ditch supervisor's salary ought to be a little more than what it is now. Municipalities basically found themselves in this same position prior to the Constitution of 1912.

I think that the delegates of the convention were attracted toward a doctrine giving local officials the primary responsibility, not exclusive, but the primary responsibility for conduct of local affairs. After rather arduous debates, the home rule amendment, Article 18, that I am dealing with, was approved. There was dissent but there wasn't too much dissent as it finally evolved because the vote was 95 to 8. Professor Knight, that Dean Fordham mentioned earlier, I think, generally summarized the general purposes.

As the drafters of the amendment viewed Article 18, first of all, it was to allow municipalities to choose a form of government by the adoption of a charter. More than

half of the cities have done that, almost all of the major cities, with the exception of Canton and Parma are the only two over a hundred thousand that do not have charters, have done that, and very few villages, although many of the larger villages, villages that are beginning to have problems of a small city have adopted charters.

Secondly, to give municipalities the right to carry up municipal powers without the need for legislative action by the state. I think that's clear. That's fundamental as to what one of the intentions was. I think, to a great extent, it has been successful.

However, there was very little follow-up to the constitutional convention and the statutes that existed, pre-dated the constitutional convention, were not repealed, were not reworked and, therefore, all those old statutes have been interpreted in light of the constitutional provision, and I wonder why we spend so much time even in municipalities in going to the general assembly and trying to get laws passed, modified or repealed. I suppose that to this extent the purpose was overstated by Professor Knight.

And, thirdly, to facilitate the ownership of municipal utilities, which was the big thing back then. We all accept that as being very common today now, but at that time, it was a very important problem and certainly was one

of the major aims of the constitutional convention.

The constitutional amendment, Article 18, was adopted by the people in 1912 and that year became the landmark year in municipal government in Ohio.

I want to very briefly outline the content of the home rule amendments to you. Quite frankly, there have been many court decisions that have interpreted the various provisions of the constitution on home rule, not always consistently. Consequently, home rule in Ohio has from time to time taken some rather surprising turns of direction. However, sometimes those directions have been reversed. Those of you who are lawyers here realize that very little is stated in the constitution in this quite general language but most of the meaning of the constitutional home rule provisions have been supplied by court decisions.

First of all, the constitution does classify cities and villages with five thousand being the dividing line, and that's the only classification permitted, other than whether or not they have charters. This has been recognized by the courts.

The constitution also provides that the general assembly provide for the incorporation of municipalities and for the government of municipalities. Therefore, we have the general statutory form of government for cities and villages that have not adopted charters.

It also provides for so-called additional laws. These are so-called optional plans, alternative forms of government, and the general assembly has provided three that have not been widely used, and perhaps that was one of the less useful tools provided in the home rule amendment. Most cities have chosen to adopt a charter rather than go to an optional point of government. They are the commission plan, the city manager plan, which has been used more than any other of the optional forms, and the federal or a so-called variation of the strong mayor option.

The constitution provides for the adoption of a charter. Charter is the method available to urban citizens to free themselves from the control of the state legislature over certain matters, not all matters. Form and structure of government may be conducted by a charter. Procedural matters may be varied under a charter from what they are under general laws for nonchartered municipalities, and so additional flexibility pertaining to taxation and debt may be covered in charters.

I am not going to touch upon this in any great detail at all. I will ignore it as much as I can, because our next speaker is going to cover that topic and I think he is far better capable and qualified than I to get into the nitty-gritty details of taxation, finance, under charters and under home rule provisions.

Theoretically, as Dean Fordham has told you, charters provide no additional power. There is no additional home rule power that municipalities have by the adoption of a charter. I think many of you who are municipal attorneys, however, would tend to think, "Well, that may be true but the courts have not always construed liberally home rule powers for nonchartered municipalities, when perhaps they have been a little more friendly where they could hinge their decision upon a provision of a municipal charter." And while the theory, I think, is correctly stated by Dean Fordham, perhaps the prejudice of the courts has leaned the other way to grant some degree of additional power to charter cities.

Charter adoption, as I am sure you all know, is a two-step procedure. First you have the determination of whether or not a charter commission will be chosen. At that time that question is put on the ballot. Fifteen people are elected on a nonpartisan basis. And if the proposition, the issue of choosing a charter commission carried, why then, the commission elected has one year to propose a charter back to the people for their approval or rejection.

Charters once adopted can be amended and can, in fact, be repealed or abrogated.

Section 3 of the constitution is the real heart

of the home rule amendment, as I'm sure most of you are aware. It is divided basically into two clauses, two separate parts, although it is not clear as to whether or not the drafters of the constitution intended these clauses to be separately interpreted, but they have been so over the years, and I am not going to go into an elaborate explanation of the cases because I think that we really don't have time to do that. But, basically, we have the section of the constitution and Section 3, the part that deals with all powers of local self-government. This means that Dillon's rule is nonapplicable to Ohio.

It is not necessary to look to the statutes for express or implied powers, the powers, that is, of local self-government. Then all municipalities possess it whether they are cities or villages or whether or not they have a charter.

Some matters are of broader concern, obviously, than local self-government, and this is the dichotomy that Dean Fordham suggested is not entirely logical. I would simply suggest that I don't know of any arrangement which is foolproof.

Due process and equal protection of the law are terms that have survived the constitutions of the nation and states quite well. They have been flexible. They have been broadly interpreted in light of the social changes and

the times, and I suggest that this is one of those kinds of sections in a constitution that changes. What might have been of local concern fifty years ago may not be today, and I see nothing wrong with that kind of a concept being set forth in the constitution. It does not attempt to be everlasting and finally decisive of the issues.

Annexations, for example, are not. It would be nice if municipalities could write their own annexation laws, but the courts, I think properly, have held this is not a matter of local concern. This is a matter that is broader than a municipality. Waste water treatment, pollution control laws, obviously, where they affect other subdivisions are not matters of local concern. I think that the list will grow as the years go by and I think it is a very workable dichotomy myself.

Section 3, Article 18, also grants police power to municipalities. The police power granted to municipalities is independent of any statutory grant. The State of Ohio and the municipalities may exercise police power concurrently in the same area. However, if there is a conflict, the exercise of police power by the municipalities fails and is invalid and the state statute prevails.

I think that we could perhaps cover some of the other areas, but I see our good presiding officer, who can talk a lot louder than I, has gotten to his feet and, for

that reason, I am going to try to handle the remaining part of Article 18, which is the police power section, in question and answer periods that hopefully will follow if we can squeeze the time out for you.

I appreciate your attention for this part of the presentation. Thank you very much.

(Applause.)

CHAIRMAN SCHROEDER: Thank you very much, John. We had an agreement, you see, that this would occur: that I would stand up at the right time.

Municipal tax and debt limits. Dollars are tools by which we achieve and fashion society, and local self-government is no exception. Very important tools.

Richard K. Desmond, Squire, Sanders & Dempsey, and I warrant his credentials as printed on your form.

MR. DESMOND: My subject smells, too. It smells green and it's money.

I want to invert the order and deal first, though, with the existing debt limits of the constitution. Those applicable to municipal corporations directly are found in Article 18, Section 13, and Article 13, Section 6. There are indirect limits imposed by Article 12, Section 2, and Article 8, Section 6.

I think, first, we have to define what we mean by "debt." And some of this is not constitutional; it is

case-made law. We, obviously, would include even ourselves within the phrase debt, something for which you pledged your general credit; that is, general obligation-type financing. In this state, the forms of that are called bonds or bond anticipation notes.

In addition to the general type of debt, we find that there are special debts. These have taken the form of what Dean Fordham mentioned earlier: mortgage revenue bond financing under Article 18, Section 12, or home rule revenue bonds under Article 18, Section 3, the home rule amendment that John Gotherman talked about.

This type of financing, although it is debt, it is special debt and it is called special debt because special sources of revenue are pledged for the payment of the principal and the interest of the special debt. The holder of the debt does not have a claim against the general assets and the general credit of the municipal corporation. Instead, he must look solely to the special source of moneys for the payment of the interest on his obligations and, of course, the repayment of the loan that he has made. These sources, obviously, are such as water utility revenues, sewer utility revenues, the revenues derived from parking meters and off-street parking lots and other sources which have come into being in later types of financing.

Unfortunately, our Ohio Supreme Court also at one

point was treating the contracts which were awarded by a municipal corporation as a debt and forcing the municipal corporations to adhere to the statutory format of competitive bidding. In the last nine months, our Ohio Supreme Court has turned around and, without acknowledging the error which they had committed back in the 1920's, has now determined that a charter municipal corporation may follow its own charter procedure or charter-authorized procedure for the letting and awarding of contracts in a dollar limit.

You notice I said charter municipalities, because, under the opinion in the Levers versus Canton, it is quite probable that a different result would occur with respect to a statutory planned municipal corporation.

There are two debt limitations imposed. One is a direct debt limit; the other is an indirect debt limit. Let me deal first with the direct.

The direct debt limitations, by and large, are found in Chapter 133 of the Ohio Revised Code. They are imposed by the general assembly pursuant to Article 13, Section 6, and Article 18, Section 13. Those debt limits currently for Ohio municipal corporations are for general obligation debt, all types, nonexempt, ten percent of the assessed valuation; for unvoted nonexempt debt, three and a half percent, except if you are a charter city -- Notice a statutory distinction between village and city, authorized,

as John mentioned earlier, because of the constitutional recognition of the difference -- charter city with a tax rate limitation included in its charter, five percent for unvoted nonexempt debt. This debt limitation is obviously applicable only to its general obligation debt.

And I have used the phrase "nonexempt debt." The reason: the general assembly, in its wisdom, has seen fit to exclude from the direct debt limit a number of various types of obligations such as those which can be paid from surplus earnings of water or sewer utility, surplus earnings of recreational facilities, surplus earnings of off-street parking facilities, voting machine and other varying types.

The indirect debt limit. Let me deal first with the difficult concept. Article 12, Section 2. Article 12, Section 2, of the constitution, says "thou shalt not tax without a vote of the people or pursuant to a charter provision in excess of one percent of the true value of property." One percent is ten mills. Thus the infamous ten-mill limitation. This ten-mill limitation means that the amount of taxes levied on a particular piece of property by all of the overlapping subdivision must not exceed ten mills.

Visualize, if you can, standing on a piece of ground and looking up through the township, the board of education, the county and the municipal corporation. Those taxes imposed by those subdivisions without a vote of the

people must not exceed ten mills.

There are other indirect limitations, such as the requirement of the constitution that the tax upon real estate be at a uniform rate. This causes tremendous problems with the configuration of political subdivisions in Ohio where the school district is not an arm of the municipal corporation but instead the school district encompasses an area beyond the municipal corporation, and some municipal corporations are split into as many as three different school districts. The result, if you think about it, on the ten-mill limitation is atrocious. It means that before a school district can be enlarged in Ohio, it must first take a look and see what other overlapping political subdivisions its' going to pick up, because it may find that, when it looks, it will find the mandated share of another political overlapping political subdivision which it would pick up in the annexation would preclude the school district from levying its share of the ten-mill limitation. So that, in essence, the desire to enlarge school districts has been frustrated by the imposition of the ten-mill limitation.

In addition, the personal tangible property has had various exceptions made to it and there has been a consistent decline in the value of personal tangible property with respect to overlapping, the overlapping subdivisions in Ohio.

Another indirect limitation which has been imposed by the constitution is a requirement that the financing and issuance of debt can only be made for a proper municipal public purpose. Public purpose has been a very difficult thing to define, and this is what has sent municipal corporations back to the general assembly from time to time, thinking that if there was a statutory provision which said, "This is a proper public purpose," that then they were safe in issuing debt for that purpose.

The proper public purpose has caused difficulties with a number of varying types of financing. The classic case, of course, is the bomb shelter case out of southwestern Ohio in which the Ohio Supreme Court, because of failure to state in the voted bond issue a proper public purpose, invalidated the election on the bonds.

There is also a further indirect limitation imposed by Article 8, Section 6, of the constitution. This is the provision of the constitution that prevents a municipal corporation from lending its assistance to private corporations. However, over the years this has had a very devious interpretation by the court. They have held that even borrowing money at a cheaper rate consisted of lending assistance to private corporations, in violation of this provision.

There has been some clarification of the section

in recent years. The courts have finally acknowledged that the lending of a credit and assistance by one political subdivision to another does not violate this provision of the constitution. These decisions have now gone both directions; that is, the larger political subdivision, i.e., the county, lending its credit to the municipal corporation and the municipal corporation lending its credit to the larger, the county.

I should also point out, however, that there is a concept in the Ohio case law which says that this provision of the constitution is violated if public moneys are diverted and have to be restored from tax moneys. The problem, of course, comes up in those cases where the municipal corporation has a source of non-tax revenues which it would like to devote to special debt financing, and if it tries to do so in a fashion which removes that money from the general operations of the municipal corporation, then it is required to restore them from tax moneys. There is case law to the effect that this may constitute a violation of the Article 8, Section 6, provision.

I'd like to turn, if I may, to the limits imposed by the Ohio Constitution upon taxation by Ohio municipal corporations. This is a rather difficult concept to deal with. The problem is that you have to start with trying to say, "Well, what is taxation?" Taxation takes many

different forms and, as Dean Fordham indicated this morning, in the traditional sense it meant the tax that was imposed upon your house, i.e., a property tax.

Well, in Ohio, we do have a property tax. It is imposed upon three classifications of property. First is real property, which includes structures which are affixed to the real property and become fixtures. It is imposed upon personal tangible property and upon public utility property. These three together constitute what we would call the assessed valuation of a municipal corporation.

The problem I have mentioned earlier with Article 12, Section 2, is again applicable. However, under the authority granted by the two constitutional sections I have mentioned earlier, the general assembly has adopted what is called a budget procedure which is set forth in Chapter 5705 of the Ohio Revised Code. Under this budget procedure, the general assembly has said that the ten-mill unvoted tax that is available to all of the overlapping political subdivisions will be divided among those overlapping subdivisions in a proration of two-thirds of the taxes levied without a vote of the people during the five years that the 15-mill constitutional limitation was in effect, i.e., 1928 to 1932. Thus the ten mills are split on a historical basis which may have absolutely no relevance to the varying needs of the political subdivisions today.

For instance, look around. Think. In your communities, how many municipal corporations did not exist from 1928 to 1932? Well, if they were able to elbow the township out of existence either one way or another, they may have gotten the township's share of that mandated share, but that's a pretty small cut of the pie. There is no relevance in the distribution of the ten mills among those overlapping subdivisions to the needs of those overlapping subdivisions today.

Annexation. I dealt somewhat earlier with annexation and I dealt with it in the concept of the school district. Well, the same thing is true with the municipal corporation. It may find it is unable to annex territory simply because the effect upon their share of the ten-mill limitation would be disastrous.

I know of one instance where a municipal corporation had 3.8 mills of the ten-mill limitation. If it enlarged its boundaries and tried to serve the regional-type concept, it would have picked up a school district which would have forced it to reduce its mandated shares by two mills. It couldn't afford to annex. Result: A very small municipal corporation grew up next door. Once in existence, under our current constitutional format, there is no way of it to disappear without its concurrence.

In addition to that, our Ohio Supreme Court has

said that if a municipal corporation which is in the utility business earns excess earnings from one of the utilities that it is operating, that those excess earnings become a tax. And the general assembly can tell the municipal corporation what it may or may not do with those excess earnings. So long as it is breaking even, it, the municipal corporation, has the power under Article 18, Section 4, to use those utility earnings as it will, but once its earnings become excessive, they become a tax and are controlled by the general assembly.

Under the provisions of Article 18, Section 3, the home rule amendment, our Ohio courts have said municipal corporations have the power to levy an income tax for the purpose of producing additional revenues. Fine. Great. This brings me to the last item, preempt, before I get the hook. The problem is that our Ohio courts have evolved a doctrine of preemption in which they have held that the general assembly can at any time, with respect to any form of municipal taxation, preempt or restrict it by enactment of legislation at the state level. As a result, any time that a municipal corporation has the power to tax, that power can be taken away entirely or partially by the general assembly enactment.

As an example, I point you to the inability of a municipal corporation to increase its income tax above one

percent unless it submits that question to the electors of the municipal corporation and receives a satisfactory affirmative vote. This is an example of a restriction on the power of the municipal corporation to enact a tax.

An example of a preemption doctrine is the application of a municipal income tax to a brokerage firm operating in your community. Because the state imposes a tax upon the income of a brokerage firm which goes into the state coffers, a municipal corporation may not impose its tax upon that type of organization.

I want to comment that in many cases, a municipal corporation does have the power and has the ability to impose upon itself by its charter restrictions on both debt limits and taxation which are much more restrictive than those which are imposed by the general assembly through its constitutional powers.

Thank you.

(Applause.)

CHAIRMAN SCHROEDER: Thank you very much, Mr. Desmond.

And, finally, the incorporated municipality: should it be preserved?

Professor Howard Fink, College of Law, Ohio State University, and his credentials are warrantable, although I am auspicious of them, being a law professor myself, you see.

Howard, come on over, give us the word.

PROFESSOR FINK: My topic fell somewhere between what we were discussing in this segment and what we will discuss right after lunch, but I'll say it nonetheless.

We meet today in a lovely building located in the City of Columbus, Ohio, as you well know. According to a recent article in the Wall Street Journal, the average family in Columbus has a disposable income of some eleven thousand dollars. However, if you travel west for about two miles, you will come to another Ohio city in which, according to the same article in the Wall Street Journal, the average family has a disposable income of some twenty-three thousand dollars.

A visitor would find this suburban city faced with almost none of the problems which beset the major cities of our state. There is no poverty, no slums, no closed-fence recreation facilities, no eroding tax base. Similar incorporated municipalities surround every one of our major cities, and the disparities I have referred to are typical.

I ascribe the root cause of this phenomenal situation to the notion that municipal incorporation, the concept of municipal incorporation has been traced by Dean Fordham to royal charters granted to boroughs in 15th century England, giving these boroughs a great deal of autonomy in the conduct of their affairs. Traditionally,

incorporated municipalities exercise such police power functions as zoning, housing code and building code enforcement, as well as providing services such as fire protection. Additionally, and most importantly, as we have just been told, the incorporated municipality has the power to raise and spend revenue.

Significant under Ohio law, again as we have just heard, as well as the law of most states, once a municipality is incorporated, its borders are frozen. It cannot, without its consent, be taken over by another incorporated municipality.

Using a combination of zoning, housing and building code controls, suburban municipalities have created conditions making it economically unfeasible to build housing for any but upper-income families. Minimum lot sizes are mandated; public housing is prohibited. Expensive building techniques are made necessary by building and housing codes, all within the power of the municipal corporation.

Until recently precluded from doing so, real estate and development interests and the conduct of private property owners exacerbated this pattern of discrimination by refusing to rent to, sell to, or even show housing to those members of minority groups who could afford the price. Again, until very recently, the Federal government contributed to the pattern that I am describing through the

Veterans Administration and the Federal Housing Administration, which encouraged lending institutions to preserve existing neighborhood racial patterns in making housing loans.

Thus the separation of our so-called suburban cities from neighboring central cities was largely accomplished through the medium of government.

The result has been disaster for our central cities, coupled with indifference from the majority of our citizens who today live outside the boundaries of our central city. The central cities have been faced with an influx of poor non-whites displaced by technological innovation and racial hostility pouring into this midst. The central cities have been unable to meet the phenomenal needs for social services that these displaced minorities have.

While their buildings age, the central cities are faced with the loss of the wealth of their middle-class inhabitants who are steadily moving out. The suburbanite becomes a parasite upon the central city, not contributing its fair share for the value its residents derive from the central city: fire and policeprotection at their place of work; water purification and milk inspection for the metropolitan area; the cultural and recreational facilities which are used by suburbanite and central city dweller alike.

When a suburban city does furnish services for its

inhabitants, this is at the expense of efficiency, duplicating services that could be furnished much more economically on an area-wide basis. To the extent that they have their own government and management workers, this draws on the limited pool of talent available for government administration.

This fragmentation does not always mean that the small incorporated city or village is always wealthy. Quite the contrary. One of the greatest causes of the pollution of our waterways is the small city or village that cannot or will not provide sewage treatment for the refuse that dumps into our rivers and streams and which end up in Lake Erie.

All of this is pretty well known but up to now, I do not believe that we have sufficiently focused that the stringent concept of incorporation is the real culprit. What law has fostered, law should be able to undo.

In the first place, we have seen today some attempts to remove powers from the incorporated municipality and exercise them on a statewide or area-wide basis. Thus air and water pollution are combatted by state agencies or by special government units.

But the concept of the incorporated municipality hampers sufficient solutions. It often needs the creation of still more local government, adding to the thousands

that already exist within the State of Ohio.

I believe we should address our discussion of constitutional reform to these questions.

First, as I read the Ohio Constitution, nothing in it prevents the legislative abolition of incorporated municipalities or the changing of their present boundaries. Article 13, Section 6, states: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws." That's all it says.

In Berry against the City of Columbus, a 1922 decision, the Supreme Court held that this provision was not impaired by the home rule provisions of Article 18. In fact, Ohio's incorporation and annexation laws are entirely contained in the Revised Code, not the constitution, and so are subject to change without constitutional amendment.

One way out of our problems of fragmentation may be to follow the example of states like Minnesota and adopt legislation which would allow a state board to deal with questions of annexation in a corporation. I would advocate that this board be given the power to compel annexation of smaller cities by major cities when this is shown to be in the best interests of regional development.

If the concept of home rule cuts in the direction of more fragmentation of governmental service, I'm opposed to the home rule. I say, I doubt that it does that.

However, I do not read the provisions of Article 18, dealing with home rule, as Mr. Gotherman has explained it, as removing -- to prevent the state from removing zoning power or other powers from the incorporation and municipalities. These are police powers, and general laws passed by the state legislature supersede police power legislation of charter cities. If this is not entirely clear from a reading of the constitution, then I suggest that we should amend the constitution to make it entirely clear.

But I hasten to point out this would not be enough, really taking away some powers from the central cities. A proliferation of more state agencies because the plethora of incorporated municipalities are not properly handling their affairs is not an ideal, even desirable solution, but the worst function of the incorporated municipality, beyond its misuse of the police power, is that it causes the maldistribution of governmental resources. To the extent that taxing power is given to the incorporated municipality, the revenue at its disposal depends on a combination of its tax effort, plus the fortuitous existence of taxable sources within its boundaries. Of course, these taxable sources are not evenly distributed. One city may have a large business enterprise within its midst. Whatever its needs, the city can hoard the revenue garnered from this business. Another city may have a surplus of need but

a dearth of tax sources. Inevitably, no two municipal corporations have equal resources, either actual or per capita. Some are tax rich. Some are tax poor.

Now, I cannot hope that a constitutional referendum would directly change the condition which I have alluded to, and I suspect you don't believe that either. Abolish the cities. Imagine the outcry! People cling to known ways no matter how illogical. They do this out of mixed motivation: some sentiment, some fear, some selfishness. But whether direct change is feasible or not, indirectly, I believe change is coming. I believe that recent legal developments, some of which Dean Fordham told us about, presaged the eventual demise of the municipal corporation as an effective unit of local government.

In the Serrano case which Dean Fordham described, first the California Supreme Court held that a system which raises money for its schools based on local property taxes, and which does not take into account the inbred disparity of wealth among school districts, violates the equal protection clause of the United States Constitution. While the case leaves many questions left to be answered, its thrust is unmistakable.

Another upheaval may be caused by the Federal District Court's decision in the Detroit school case, Badly against Milliken, which indicated that it may be proper to

remedy school segregation by looking beyond the borders of the school district and forming a metropolitan district at the order of the district court encompassing the entire metropolitan area.

Assuming these cases stand up on appeal, their logical implication can be foreseen. Will it be long before the argument is made that municipal corporations which raise money exactly as school districts in California do, and also foster racial segregation in the same way, are themselves unconstitutional? Even today some courts have struck down the entire zoning codes, or parts thereof, of municipal corporations for the same reason, by excluding the city, they violate equal protection.

It may be that before too long the courts will have entirely gutted the powers of municipal corporations to function in any significant way, so that in our time we may see them having the powers that a neighborhood would have today.

The question is: Will we wait for the piecemeal and erratic process of the courts, or will we look at reality and see that the incorporated municipality has outlived its successfulness? Will we build a rational system of government, or will we wait until further decay of our central cities leads to disaster? I believe that the job can be done today; that we can create a system of

government or units appropriate in size and powers to the tasks we ask them to perform. Thus a water pollution or sanitary unit would cover a wide area. A local council would cover a narrower area. These local councils could keep government close to the people. Even neighborhood councils could be envisioned, but there would be a single source of revenue: state taxation. The revenue could be distributed to the various governmental units by the state government, taking into account the fact that the need in one place may not be as great as the need in another, just as today, federal tax might is collected on a uniform basis but spent where the need for this money is shown.

Many problems and questions would remain to be worked out, but the question before us is: Can we shirk from the task of building a logical and fair system of local government?

(Applause.)

CHAIRMAN SCHROEDER: Thank you very much, Howard.

Now, while you're collecting your questions, I have a very important announcement, most important announcement of the day: how you're to be fed. We have classified you. I have scrutinized this carefully. The classification is reasonable and constitutional. It is not on the basis of sex, age, ethnic origin, religious, race or marital status. It is on the time that you made your registration.

When we filled up Room C and D, we could not take any more. Now, you will know how you have been classified by looking at your name label. If you can't see your label, you might ask a friend. If you have no friend, I suggest after the meeting you stop in the men's room or women's room and look in the mirror. You either have an X or you have no X. If you have an X, you have been excommunicated, not from spiritual food but from physical food in Room C and D. You may, however, be excommunicated from C and D and go into the public dining room in the very near vicinity of C and D.

As I look about I see that there are several revolutionists in the crowd who will not like this establishment's procedure at all. Those who do not wish to participate in any of this can go outside the building, walk eastwards, swim across the Olentangy River and go in MacDonald's on High Street. If you do that, be back by 1:45 because we want to get started prompty.

Now, the way to get to C and D or the public dining room here is outside, turn to the left, turn to the left again, walk straight past where you got your coffee way to the end of the building, and you come to an end, and then you go to the right to C and D or to the left to the public dining room, and I'm sure that you will be able to find it, using your nose as your guide.

Now, we have an opportunity for questions. We

would like you to speak your name and maybe, you know, an identification or something, if you desire, and ask any question you want. The statute of immunity is in full operation and no repercussions can come forth.

State your name and your question.

MR. WESTENBURGER: Bob Westenburger, president, council, Rocky River.

Professor Fink, I am very distressed. Your proposal about the state legislature distributing this money brings me back to this local government fund. Nobody has ever been able to come up to anything that resembles a formula for distributing that money, so how are they going to distribute all the taxes?

CHAIRMAN SCHROEDER: I think most of us heard that. Brother Fink, would you like to take a crack at it?

PROFESSOR FINK: Well, I said at the end of my talk, many questions are left to be answered. But I think that through the pressure of the courts, we're going to have to find answers to these questions.

Up until a year ago, I suppose, if someone said, How will it be possible for school district expenditures to be equalized? You got one city that has a population of tremendous wealth, another city that's quite poor. The state gives a minimal subsidy. How can you or why should you equalize this revenue?

Well, our moral qualms about this may be settled for us by the courts before too much longer. I think that the trend is clear. Now, under the pressure of the courts, things have been done that none of us might have envisioned ten or fifteen years ago. I suspect in the next fifteen or twenty years we will find organization of government that we don't conceive of now. I believe it can be done.

Do you think it is inconceivable that money can be allocated in the way that, say, the Federal government allocates money? good or bad? Do you think it can be collected on a uniform basis and allocated according to need? I don't think that is logically impossible.

CHAIRMAN SCHROEDER: All right. Next question. Yes, sir.

MR. TOOMEY: I'm Jim Toomey, the city attorney in Whitehall.

My question is with reference to the state law on wage-hour being imposed on contracts made by charter cities for local improvements. I direct that to either John or Dick.

MR. GOTHERMAN: I think the question goes as to why, as the charter municipalities may be exempt from prevailing wage laws where non-charter municipalities are not. This gets into one of those areas. You know, quite often legislators will say, and others will say, that home rule

presents obstacles to progress, and I think, as Professor Fink said, in the area of police power. If there is a conflict between the local provision of an ordinance or option, the state law prevails.

Prevailing wage laws may well be police powers. They may be under another article of the constitution dealing with the welfare of employees, and I think the Supreme Court decision in Youngstown, which held that charter cities are exempted because they have their own civil service procedures from the prevailing wage law, is very weak. In fact, Youngstown had a charter which simply adopted the state law by reference, as I recall, at the time that decision was decided.

So it may well be that if you ever put that back that the Supreme Court will look in its decision and decide perhaps there was no logic to the decision. That was a very early decision, as I recall, and I think there may be reason to doubt the permanency of that claim of a distinction of dichotomy. I don't think it really exists.

CHAIRMAN SCHROEDER: Thank you. Next question. Yes, sir.

MR. FRISCO: I'm Lou Frisco, with the Department of Urban Affairs, legal researcher.

I'd like to ask John Gotherman if he feels that zoning is one of the police powers that may preempt the

local powers of home rule.

MR. GOTHERMAN: Gee, I think, obviously, zoning, subdivision regulation, traffic laws, taxicab regulation, whatever they are, are police powers, in municipalities. And the state may occupy the same field as long as there is not a conflict. If there is a conflict, the local ordinance fails and the state statute prevails.

In the area of zoning and other exercise of the police power, the general assembly has had its problems over the years. It won't enact laws which are not general laws within the meaning of the constitution. The constitution provides only in the case of conflict with general laws.

This means -- and I think the courts have clearly held, at least in a couple decisions, the police -- the state itself must actually be engaged in a substantive exercise of the police power. To simply say that municipalities may not zone restaurants or may not zone this or may not do that is not an exercise of the police power of the state but is an attempt to interfere, meddle, limit, perhaps, at the behest of some special interest group, is, I think, the rationale behind the constitutional provision.

Therefore, a statute that simply says you can't do something or you must do it in a particular way, but does not really exercise any police power by the State of Ohio, is not a general law and is invalid. However, if the

state wanted to adopt a massive zoning ordinance law for the whole state, I suppose they could, and that would probably be valid and might well invalidate all local zoning regulation.

The state government simply has to do a bona fide honest job of exercising police power under the home rule power. It is not stymied, not prevented from taking action.

MR. DESMOND: John, I think you should distinguish between the substantive portion of the exercise of the zoning power and the procedure for the adopting of zoning regulations. The former is police power. The second is procedural and in a charter municipality may be controlled by a charter procedure.

MR. GOTHERMAN: Right. That's true.

CHAIRMAN SCHROEDER: Thank you. Next question. Yes, sir.

MR. LOWEY: Ed Lowey, Ohio Chamber of Commerce.

Any one of the panelists might want to try this one. Where do you see the possibility of a mandatory home rule charter on a regional basis for regional government for areas of certain population brackets, that is, above a hundred thousand or above seventy-five thousand? Would that have any possibility of standing the test under Ohio law, or might it have some real problems aside from the fact that it would be today very difficult to get through the

general assembly?

MR. GOTHERMAN: That is what I think Professor Fink was saying. I think his topic was misnamed. He was not suggesting really that cities shouldn't exist. He was suggesting they should exist on a different scale.

I think home rule can equally exist on a different scale. It is authorized by charter for counties. It could be authorized for a regional government. I think Dean Fordham dealt with this. If you were sufficiently clear in defining power, you could grant basically home rule powers.

If you recall, the urban service authority's amendment of a few years ago basically permitted this, permitted a regional government to adopt a charter and specify its own power, specify general purpose government to have been a very limited purpose government. I see no reason why.--

MR. LOWEY: Is the court permissive? Mandatory?

MR. GOTHERMAN: I don't think you can make people do things. You know, if someone thinks there is a magic wand to wave, I don't see how you can say to people in Springfield or Piqua or Sidney and Cleveland that they'll have to do the same thing. If you have lived in different parts of this state, you realize that problems are not the same. There is no reason to try to make them do the same thing, and I think it is unrealistic to think that is politically acceptable now or in the future.

MR. LOWEY: Aren't your comments dependent upon a constitutional amendment?

MR. GOTHERMAN: Yes. Urban services authority was a proposed amendment to the constitution. I think it could work if it were passed.

CHAIRMAN SCHROEDER: Next question. Yes, sir.

MR. DAY: Robert Day, city manager, Lockland, Ohio.

Professor Fink stated that large municipalities can operate more efficiently than smaller municipalities. It has been my experience, as you grow larger, the more it costs. I'd like to have him give me an example where a larger municipality can operate with more efficiency.

PROFESSOR FINK: I think that you are right in saying that there are certain functions that work best on a small scale and certain functions that work best on a wider scale, and I think that's what I was saying.

Rather than say that a city should have all functions and operate on the same areal scale, it may be that, say, air pollution can't be controlled in one city. How could you control air pollution in Columbus and allow air pollution to go on in Whitehall or various other suburbs around Columbus? So the logical distribution of power there is beyond the borders of what we would call a city. There are some things the city is too large to do, any city that we have is too large to do.

I think we should focus on function rather than on the accidental size of cities that have no logical or even very good historical basis, that have just grown up, grown up for ridiculous reasons, as was pointed out here, because of an absurd limitation on debt limitation of how many different kinds of local governments can govern a particular spot. Well, that can be changed. And once that's changed, then you look to see -- well, it is not logical, say, to have 16 governments dealing with the same area. Maybe four governments should deal with the same area.

I agree with you. Increasing size, therefore -- And that's the question I have about county home rule; that merely putting something on a county-wide basis won't necessarily make it more efficient. We have got to put those functions which should be on an area-wide basis in a government having those powers. Some functions might be on a neighborhood or a much smaller basis; and I would say that that could be done. It is conceivable to do that.

CHAIRMAN SCHROEDER: Another question. Yes, sir.

MR. WALLACE: I'm William Wallace, the mayor of Silver Lake, suburb of Akron, and I would like to ask Professor Fink if he would think his objective can be realized through a council of government.

PROFESSOR FINK: Well, I think that many of these objectives that I have talked about can be reached in various

ways. One is for the state to take over a function that is a police power. Second is for a change in the borders of the city, either through a state board or through providing for different annexation laws by statute. The third is, as you suggest, of getting existing governments to work together on particular problems.

I think that can work, but you have to look at the overall powers that these cities have. Some of them don't have enough power to deal with the problem in a wide enough basis. Even if you put together four villages that had limited revenue and limited scope in area to deal with the problem, you wouldn't necessarily have a solution to that problem.

But I agree with you that, short of the kind of widespread solution that I advocate, a council of government would be a step along the way.

VOICE FROM THE FLOOR: Could it be possible that we could give the county, as soon as possible, more of these powers on the wide-scale basis and if this doesn't work, go beyond that? I think the counties right now need this power to help the smaller communities.

PROFESSOR FINK: In some states, it's worked. They provide for a so-called metro form of government.

VOICE FROM THE FLOOR: I am not going to get into that.

PROFESSOR FINK: Where the city and county is merged. Another way, of course, is distributing power from the city to the county. That's fine except that the counties are just as arbitrarily drawn historically as the cities are. In some cases they cut across the river, dividing them, let's say, people on the one side of the river in one county. Or the county line itself provides an illogical line. To some extent the county could help if it was given wider powers, I certainly agree, but the arbitrary boundary of the county will affect the optimal solution to some problems but is a step along the way again. Wider powers for the county is certainly in the right direction.

CHAIRMAN SCHROEDER: We have a chance for one more now, time for one more. Yes, sir.

MR. MORRIS: Morris, mayor of Lima, and I'd like to direct this to Richard Desmond: That on the indirect tax limitation which the constitution said was assessed against the true value, what's the problem then that we have that it is assessed on tax value?

CHAIRMAN SCHROEDER: Dick, why don't you repeat that? I think some of the folks didn't hear it.

MR. DESMOND: He picked up in my comments the fact that I said that the constitutional limitation in Article 12, Section 2, is based upon the true value of property; and he is making reference to the fact that the actual assessed

valuation of the municipal corporation is a percentage of true value, which is not one hundred percent, and he is asking the question whether or not it would be possible to actually levy based upon true value.

The answer is: under the statutes as they exist today, no, because in Chapter 5705 -- and I want to guess 5705.02, there is a statutory ten-mill limitation superimposed upon the constitutional ten-mill limitation and that statutory ten-mill limitation is measured by assessed valuation and not by true value.

The question is still up in the air and argued among lawyers, both municipal bond type and those lawyers who deal in the business of real property evaluations as to whether the words "true value" in the constitution may be interpreted as meaning just that, one hundred percent of value; and, if so, what types of mechanics could be used in order to increase your values to one hundred percent of true value.

It is a very difficult problem. There was some legislation in one of the bills which has now been defeated in the general assembly which might have been utilized to put this question before the courts.

CHAIRMAN SCHROEDER: Thank you. It is 12:25. I'm sure the panelists are available if you have a question you'd like to direct to one of them informally in the

corridors.

I also urge you to write out questions, with your name and address, that we might help you with. Our Commission is here to serve you. Leave that out on the table out there.

We shall now take our positions to march to C and D, without X; the public dining room, with X; and the revolutionists to the river.

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Afternoon Session, 1:45 p.m.,

Thursday, November 18, 1971.

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MS. ERIKSSON: I believe we'll get started with our afternoon session. I'm the elusive Ann Eriksson. I believe Mr. Carter tried to introduce me this morning and I couldn't be found. I have been busy and have been out in the corridor for most of the morning session.

I'd like to start off this afternoon by making a public apology to any of you who were inconvenienced by the fact that we originally had not been able to secure the assembly hall for the meeting and had had to turn away some people and then make some phone calls at the last minute and reinviting you to come. And I realize that some of you we could not make a luncheon reservation for. I'm very sorry about it and I hope that you haven't been overly inconvenienced by that fact. I'd like to apologize to those person who aren't here who would otherwise have come had we been able to secure the assembly hall originally.

We're just delighted that we do have so many local officials and so many persons interested in the constitutional aspects of local government.

I'll tell you right now that the afternoon coffee will be served in Room D, which was one of the rooms that was used for lunch, so you know where that is now. May I

also ask you at this time, when you leave, if you think of it, we'd appreciate it if you would leave your name tag behind and you could place it on the table which is right outside the assembly hall where we have a book display. Also, if any of you have, or, in the course of the afternoon, should you pick up any of the books or publications on that table, please return them because the books themselves are not for distribution. They're just there for you to look at if you care to do so.

This afternoon, the first part of the program is devoted to three separate problems of urban areas. The first of the problems we are going to have discussion about is Urban Transportation.

Mr. Fredric Smith is going to discuss Urban Transportation with you relating it particularly to the Ohio Constitution insofar as he feels this is relevant. Mr. Smith is, of course, an attorney with a Columbus law firm, Dunbar, Kienzle & Murphey. Some of his qualifications are set forth in the paper that you have.

I would just emphasize that he is President and Trustee of the Central Ohio Transit Authority and would also like to mention that he was one of the prime movers in the enactment by the general assembly last session of the Regional Transit Bill, so that if you have any transit problems or had occasion to refer to that legislation, Mr.

Smith is one of the persons who was very active in its enactment.

So, without further ado, Mr. Fredric Smith.

MR. SMITH: Thank you. I'm going to speak today primarily not as a lawyer, because municipal law isn't really my area of law -- I look to Dick Desmond for those things -- but rather as a head of a transit authority and look to the question ~~not~~ of what kinds of ideal constitutional provisions could we have but rather to look to the question of whether or not the home rule or public utilities sections of Article 18 of the constitution impose unworkable restraints; that is, can we, a transit authority, function?

In talking about the functioning, it seems to me we first have to discuss, briefly, some comments on mass transit in Ohio, to put it into its proper context. Secondly, maybe we can examine a couple examples -- I hope they are outlandish, but maybe they aren't -- to see how the case law has developed on home rule and the public utility powers in Ohio and, hopefully, to conclude with a few observations and some tentative conclusions about whether or not we can in fact operate under home rule as it exists today.

First, the development of mass transit in Ohio. Prior to 1969 there were two primary kinds of systems in the State of Ohio. There were municipal systems owned by

municipalities; for example, Cleveland's system. The other kind of system was a private one; that is, the kind of transit system which existed in Columbus, Toledo, Cincinnati, private companies providing bus service. Between 1969 and 1971, a great deal of that is changed. There has been a movement towards regional authorities, and we have passed regional authority legislation.

And why this movement and what is its relevance to the subject? Well, first, the why. There are a number of reasons why regional authorities have come about.

One, Federal mass transit legislation has been passed during the last few years, which makes money available. That's probably the big single reason. Money is available from the Federal government so long as you can do certain things. And one of those things is to plan on a regional basis. In our case; that is, in the case of the Central Ohio Transit Authority, that's the key to what we're doing. We have asked the Federal government for a technical study grant of $77,000 and for a capital grant of twelve and a half million dollars. So that was the key reason, or one of the key reasons, why a regional authority.

Secondly, private companies all over the state have been going out of business.

Third, there is an increasing public awareness of traffic snarls, air pollution, traffic deaths; all of the

disadvantages which presently go with our transit systems.

Fourth, there is an increasing political awareness of the regional problem and regional responsibility which goes with transit. For example, in Columbus, the City of Columbus, as I will illustrate shortly, could have operated a transit system, because we all know we have to go to a public system. They could have operated it. They didn't want to operate it. They know that it's a regional problem. They know that the financing has to be done on a regional basis and they really don't want to undertake that problem as it relates to the rest of the region.

Now, regional transit authorities. Legislation was passed in 1970. Very briefly, what it does is say that a regional transit authority is a political subdivision of the state and a body corporate, with all of the powers of a corporation; that is, it's a political subdivision of the state. It has power to acquire and operate transit systems, to set fares, levy taxes, issue bonds and notes and acquire property through powers of eminent domain. It can be formed by a county and a municipality or two or more municipalities. And once formed, its taxing jurisdiction is the boundaries of its members.

Now, that's very important. That means that if a county joins a transit authority, then the entire county

is the taxing jurisdiction, whether or not some of the municipalities within the county join the transit authority.

As an illustration, the Central Ohio Transit Authority has as its members Franklin County and all eleven cities in Franklin County. That is, every city in the county has joined the transit authority. The representation on the transit authority is made up in whatever manner the jurisdictions deem appropriate; that is, you have power to set your own representation. We did it on a population basis. We went so far as to build in a reapportionment provision.

Now, what are transit authorities doing? Toledo has an authority and has already passed a tax levy to buy the Toledo Transit Company. Dayton has a transit authority and, about two weeks ago, passed a tax levy to purchase the Dayton Bus Company. Cincinnati did the same thing and failed. Columbus has formed the authority and is in the process of going to the voters next spring.

One other comment before we go to the constitutional issues about transit authorities, and that is that many, probably most, examples of authority of state, municipal disputes will never raise constitutional law questions. There are only a few municipalities which will have the potential political, economic power, by virtue of their unique size or location, to be so arbitrary as to

cause a dispute which ultimately involves a constitutional law question.

Now, with that brief background on mass transit in Ohio, let's take a hypothetical example. In my hypothetical, I'm going to abuse a little bit my home town, which is the town two miles west of here that Professor Fink referred to, Upper Arlington. I picked it only because I live there and decided if I was going to abuse one, it ought to be mine. But let's use this example. Let's look at Franklin County in 1977. Population, about a million people. Columbus has about 62 percent of the people; Upper Arlington, about five percent; Bexley, about two percent; with about 31 percent left over for the rest of the county.

Now, with that as a frame of reference, and keeping in mind this is hypothetical, let's look at some potential disputes which we might think up which would be maybe outlandish, maybe reasonable.

Let's say Upper Arlington is dissatisfied with its current downtown bus service; that it cannot satisfy itself that its needs are properly considered; that it decides to establish its own bus service to downtown with a limited number of minibuses which are to travel north and south on Tremont Road, north of Lane Avenue, and then express downtown; that it desires to discontinue all other

transit authority service in Upper Arlington; i.e., the less profitable service, which doesn't compete with the new system, so it passes three ordinances.

The first ordinance is to establish the Golden Bear Bus System, with routes on Tremont Avenue.

The second ordinance is to prohibit any buses from traveling on Northwest Boulevard, Redding Road or North Star Road north of Lane Avenue. These happen to be the three principal streets which run parallel to the new bus route and are believed to provide most of the Golden Bear passengers.

Closing these streets to transit effectively closes off North Arlington to the transit authority. The stated reasons were: to relieve the congested conditions of the streets; to protect pedestrians and the public, generally; and to preserve the public peace and safety.

Then it passes a third ordinance which is to prohibit any buses weighing more than a minibus traveling on Tremont Road because of wear and tear on the road, even though state law only prohibits buses weighing more than transit authority buses from using the roads.

This is one set of conflicts that you can really hypothesize about.

Let's take a second set of conflicts, a conflict of Bexley, a community on the other side of town. Let's

assume that the level of service is very satisfactory in Bexley. The residents, however, on several streets are very distressed with some collateral problems. The residents on Parkview Avenue, which is a very wealthy and modestly wide street, are upset because buses now travel on their streets for the first time. They consider them unsightly and noisy and would prefer to do without the service. They induce council to pass an ordinance prohibiting the use of Parkview Avenue by buses.

The residents on Stanwood Road, which is a fairly narrow road, like the service but they object to the use of full-size buses. They want the transit authority to use its minibuses on their street, so they induce council to pass a weight ordinance which is identical to the Upper Arlington ordinance requiring weight not in excess of the weight of a minibus.

Now, what kinds of constitutional responses can we make to these hypothetical examples?

First, let's just mention briefly the key sections that we're looking at. We're talking primarily about Section 3 of Article 18, the home rule provision, which, as the earlier speakers have pointed out, has two parts. The first part says, "Municipalities shall have authority to exercise all powers of local self-government." The second part, which is separated by the word "and" says,

"and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

We also have to look at the powers of a municipality to own a public utility, Section 4 of Article 18. Let me just summarize it by saying it is the power to own and operate a public utility -- and a bus service is a public utility within the meaning of those words -- and, finally, a limitation which is imposed on the public utility section with respect to the use of service outside the jurisdiction.

Now, let's take these sections and quickly look at the examples that I have posed to see whether or not we can operate.

First, the response to Upper Arlington, First, clearly, a municipality may establish and operate its own transit system under its Section 4 powers, although it is subject to numerous practical, probably insurmountable, problems. So there is no question but what a municipality can operate its own transit service. It has the practical problems. There are limitations imposed on its service outside its jurisdiction. It will probably bear the burden of a dual taxation system because it would be within the county and would be paying the transit authority's tax as well as whatever costs it incurs; that is, the operating

problems and all of the practical problems that have already forced all the communities to go to regional authorities. But it can do it.

I suggest, however, without going into any detail, that the power to do it poses no organized or very practical threat to transit authorities through the state.

Now, without trying to decide yet the intricate distinction between local government, the first part of Section 3, and police powers, the second part of Section 3, without trying to understand the relationship yet, let's take a look at the other two Upper Arlington ordinances.

First, it's clear that Upper Arlington has the power to prohibit, as well as the power to regulate, conduct. However, the exercise of its power must be reasonable and not constitute a denial of equal protection. Put another way -- and these are words that the court has used -- the means adopted by the ordinance must bear a real and substantial relationship to their purpose. They must be suitable to the end in view, must not be unduly oppressive and must not interfere with private rights beyond the necessity of the situation.

In the case of both of the ordinances in the hypothetical, I suggest that the court would find that Upper Arlington had failed to meet this prescribed test, just as the court, in 1925, in the City of Nelsonville

versus Ramsey, found that Nelsonville's prohibition of certain streets to buses was not really intended for its stated purpose -- which, by the way, is precisely the purpose in my hypothetical -- but was intended to prevent competition with a local bus line and did not provide a reasonable basis for diverting buses from streets previously designated for the bus passage by the Public Utilities Commission.

Thus, without reaching the critical home rule question, it seems clear that certain safeguards have been developed to avoid arbitrary and unreasonable abuse of home rule. Now, my hypothetical is intended only for this limited purpose. It develops all kinds of other problems that I wouldn't even start to go into now.

But now let's take a look at the Bexley hypothetical. Here the analysis is much more difficult. Does Bexley have power, as a matter of local self-government, to regulate the movement of transit authority buses on its streets?

Historically, the Ohio Supreme Court has stated very clearly that the right to control certain types of conduct on streets is a matter of local self-government and is not merely the exercise of the police power which is subject to the no conflict rule. In 1919, the court upheld an ordinance which prohibited the use of vehicles

which weighed more than ten tons on city streets even though state law only prohibited such use if the weight was over twelve tons. In 1923, the court upheld an ordinance which prohibited buses from stopping or starting within the village limits. Both of these cases seem to indicate that some control of the streets has been a matter of local self-government. During the past ten years, however, the court has reached the same result in three key cases, although it is not at all clear that the court has used the same rationale. In all three cases, the court upheld the ordinances. One case involved the maximum weight lower than that established by state law. Another restricted all through trucks to certain predetermined streets. Another prohibited truck traffic on residential streets by imposing prohibitive weight requirements.

The court acknowledged that it was very perplexed by the problems. The court said, "It is apparent that the situation presented in the instant case is a perplexing one and might well be the subject of study on the part of both the general assembly and the legislative bodies throughout the state." It went on to uphold the ordinances; but it advanced several different reason for it, including an old case, Section 3 of the constitution -- without saying whether they were looking at the first or the second part -- and some state statutes.

Why the uncertainty? If it's all that clear from the old cases that control of the streets is a matter of local self-government, wouldn't they be easy decisions?

It seems to me that the answer is the one that has been hinted at by several speakers today and has been commented on by a number of authors; and that is that the concept of local self-government is or should be a constantly changing concept. One author stated it this way, said municipal activities are dynamic and not static. At one point in history they may have been local in character whereas, with the passage of time, they have become mixed or wide in scope. An example of this phenomenon is control over local streets. Once such control was considered to be exclusively a municipal activity. Today, with the development of state highway systems, this activity is at least of a mixed nature.

It seems to me, to summarize -- because we're running short of time again -- that it is quite possible that within the framework of the prior cases, within the framework of the Ohio Constitution, as it exists right now, the court can take the view of local self-government -- that view that has been expressed by several people here today -- that it is a growing concept; that it takes into account changes in the dynamic factors that make communities grow; and that it can conclude, although it may have not

concluded yet, that control of the streets, at least as it would relate to the buses, is not a matter of local self-government but is rather a matter of the exercise of police powers.

Now, if this view is correct; that is, if the court can and has preserved the options to itself to do this, if it can do it, then the issue is whether or not the state law has taken action which is in conflict with the action of the city council. I suggest that in the Bexley examples, we would probably find that the Bexley action, at least as it relates precisely to our question, is probably proper action except to the extent that the state would preclude it from taking that action by virtue of the conflict rule.

Let me summarize then my conclusions. First, if the courts will treat the state constitution as a flexible instrument and take cognizance of the changing nature and function of local self-government, then I believe that, at least as it relates to the home rule powers, mass transit can function. I'm not suggesting that it will function perfectly. I am not suggesting that it shouldn't be changed but rather I am suggesting that it can function. But to function, it will require a recognition by the courts that the regulation of highways, at least as such regulations relate to mass transit, is not a matter of

local self-government.

Also, it will require a recognition by the courts that the no conflict rules must be more broadly defined to carry out the statewide transit objectives, even though it is not necessary for the court to find this to be an area of the exclusive state jurisdiction.

Finally, even where no conflict is present, the courts must be vigilant to require the municipality to conduct their affairs in a reasonable manner.

The question was asked then: Does the constitution hinder solution to mass transit problems? My answer is: As to home rule and the public utility sections of Article 18, the answer, not necessarily, and that it is possible for us to continue to operate, although somewhat imperfectly.

Thank you.

(Applause.)

MS. ERIKSSON: Thank you very much, Mr. Smith.

The second of our urban area problems -- and we will hold any questions for Mr. Smith until the end -- is the question of Land Use Planning and Zoning.

Professor Simmons, from the College of Law of Ohio State, will discuss these problems with you. He has had many activities in connection with planning and zoning and is presently Professor Law and Adjunct Professor of City and Regional Planning at the University. Mr. Simmons.

MR. SIMMONS: Thank you, Mrs. Eriksson. At first I thought I was being introduced as an urban problem; and while some of my students may think I'm an educational problem, I have never been accused of anything beyond that.

Since Mr. Smith has begun the tradition, let me disclose that I am a resident of the City of Columbus and not one of those nasty suburbanites.

Within the past few weeks, both the New York Times magazine and Newsweek have featured major articles on the American suburb. The last time that this coincidence occurred the subject under discussion was, predictably enough, suburban sexual practices and predilections. But now the focus has shifted to civil rights and housing opportunities.

Our newfound awareness of suburban opportunities and challenges is a reflection of the dramatic change which has occurred over the past two decades in urban growth patterns. Jobs are no longer concentrating solely in central cities. The suburbs have witnessed a rapid growth of industries, offices, shopping centers and other sources of employment. But housing, particularly for workers in the lower paying jobs, has lagged behind.

Current census data shows that Ohio's growth patterns reflect the national trend. Between 1960 and 1970, Ohio's population grew from 9.7 million to 10.6 million, an

increase of ten percent. In 1970, 78 percent of Ohio's total population lived in metropolitan areas, compared with 69 percent in the United States as a whole. A very high proportion of Ohio's population growth during the decade of the sixties occurred in the state's sixteen standard metropolitan statistical areas. In these areas there was an increase of 820,000 persons but only an increase of 125,000 in non-metropolitan areas; and within the metropolitan areas the suburban population grew by 23 percent, while central city populations declined by 62 percent in the past decade.

Thus, it is clear that in Ohio, as in the rest of the country, the metropolitan suburb is where the action is.

As fast as the population increased, housing costs have increased at even a quicker pace. The result -- as we have been informed repeatedly by the reports of the Douglas Commission, the Kaiser Commission, by virtually every other major investigation of current housing conditions -- is that we are far from achieving the articulated national goal of a decent, safe and sanitary dwelling for every American.

Despite increased government subsidies and improvements in federally funded programs, problems abound; and land use controls in the form of local codes, ordinances

and practices are contributing to the current shortage of reasonably priced homes for the average housing consumer, especially in areas convenient to suburban job opportunities.

Traditionally, local governments have exercised detailed controls over the construction of new housing in order to protect the public health, safety and general welfare. This control has been exercised through a wide variety of local codes and regulations, including zoning, subdivision control, housing codes and many other well known techniques. All too frequently, the operation of this system of land use control makes it impossible to construct housing within the means of low and moderate income persons. In some cases this exclusion is no doubt unintentional; but in all too many instances, it results from the fear of suburban governments about the impact of such housing upon them. Black families are hit especially hard not only because they make up a disproportionate segment of the low income population but because the availability of decent housing to middle income blacks is further reduced by patterns of racial discrimination.

In recent years there has been an increasing awareness of the exclusionary tendency of our system of locally administered land use controls. Civil rights groups have undertaken an extensive campaign of litigation to open up the suburbs to low and moderate income families, backed

with increasing frequency by labor unions and even home builders. Industry, too, concerned about housing for its labor force, both white and blue collar, has begun to make its voice heard.

But litigation is a very costly, time-consuming and inefficient route to social progress in the housing field; and in several instances, attention has been focused upon the legislative remedies to exclusionary land use practices.

Perhaps the most spectacular approach -- at least, in conception, if not in execution -- is that of New York, as seen in its Urban Development Corporation Act of 1968. The UDC is an attempt to bridge the gap between public control of land use and private entrepreneurs. The corporation has broad powers to plan projects and assemble land through eminent domain when necessary and to sell or lease the land to private dealers for actual development of a project or, when necessary, to act as the developer itself. The UDC has the authority to override local building and zoning regulations although, as yet, it has not attempted to exercise this power.

In 1969, Massachusetts passed legislation referred to as the anti-snob zoning law, to facilitate construction of low and moderate income housing by public agencies, non-profit and limited dividend corporations. A qualified developer is given recourse to a state agency which has the

power to issue necessary permits and licenses, local regulations notwithstanding, when the developers' plans are consistent with local needs as determined by the legislature. Strict limits are imposed on the amount of low and moderate income housing which can be constructed during any single year over the opposition of the local community. An account is taken of the amount of land being devoted to low and moderate income housing within the community whenever state override is sought under this Massachusetts law.

A third approach has been adopted by Fairfax County, Virginia, in an ordinance which obligates the developer of any project over a specified size to seek Federal funds that will permit him to set aside 15 percent of the units in the project for low and moderate income needs. If no subsidy funds are available, the developer is then free to develop housing at the price level of his choice; but if such funds are made available, the developer must make use of them.

Finally, the housing dispersal plan of Ohio's Miami Valley Regional Planning Commission is worthy of attention. At present, it is a voluntary arrangement of the local governments, comprises the Miami County-Dayton metropolitan region by which, hopefully, some 14,000 low and moderate income units will be constructed throughout the region over the next four years. Each of the

participating units of government was assigned a quota based upon expected needs of the region, as reflected in a formula which takes account of the wide variety of economic and planning factors.

The point of the foregoing enumeration of attempts to deal with the problem of exclusionary land use practices is to demonstrate that something can be done given the necessary legislative will and appropriate legal setting.

The remainder of my comments will be addressed to legal and conceptual problems which Ohio's system of constitutional home rule presents to one interested in overcoming the exclusionary practices of suburban communities.

Because both Professor Fink and Mr. Gotherman have commented upon the potentiality of dealing with exclusionary zoning if it is catagorized by the Ohio Supreme Court as being an exercise of the police power, I will not deal with that and, instead, will focus my remarks upon the possibility -- and I think it's a possibility not to be overlooked -- that the Ohio Supreme Court, instead of catagorizing exclusionary land use practices and modern attempts at planning as an exercise of the police power, will, for reason perhaps to be discussed in our question and answer period, deal with them as matters of local self-government, which I think presents a considerably

different problem because of the absence of the conflict laws.

Local control of land use has worked well from one vantage point. It has provided a maximum opportunity for citizen participation in the governmental process and effected means of minimizing the income redistribution function frequently associated with democratic governments. To put it another way, such local control has made good sense -- dollars and cents, that is -- to the suburban resident. To the extent that he can exclude low income residents, the less his taxes must be used to subsidize the provision of municipal services to them.

Thus, racial bigotry and social snobbery aside, there is at least a clearly manifest short-run economic interest that is at stake. And if other communities are playing the fiscal zoning game, only the indifferently rich or the wasteful would refuse to go along with the system. Of course, there are immense social costs generated by the resultant class and racial volcanization, but our balance sheet manages to hide these costs in between occasional long, hot summers.

The presence of such strong self-interest in maintaining the present system suggests one essential element of any successful political solution. You must be able to hold out the promise of equality in distributing

the fiscal burdens associated with low and moderate income families. Each community must be assured that it will be asked to do its share and only its share and that every other community will likewise be compelled to shoulder an appropriate burden.

But such a guarantee of equality of obligation can only be made in a legal setting which grants ultimate coercive power with a single, albeit neutral agency. At present, in Ohio, there is no such coercive or unique authority, and a very strong and longstanding tradition of home rule must be overcome before any such authority will be forthcoming.

In point of fact, I believe there is nothing inconsistent or mutually exclusive in accepting the fundamental principles of home rule and at the same time attempting to impose statewide limitations on exclusionary land use controls. Home rule, as an attempt for promoting local initiative and for freeing the state legislature from the numerous burdens of local decisionmaking, was never intended to encompass matters of more than a purely local concern. The Ohio decisions are replete with references to such limitation. On any number of occasions, Ohio courts have expounded the doctrine of statewide concern in explanation of why a state regulation ought to control in the face of a conflicting local ordinance

enacted under an assumed power of local self-government.

Is it fair to say that the exclusionary practices of any one suburb is a matter of concern to the people of the state at large? Perhaps the consequences of any single set of exclusionary practices is negligible, but the existence of a systematic and almost universal pattern has a profound impact. This is seen in the creation of racial and economic ghettoes, with their attendant social pathologies, and in the overwhelming fiscal burdens placed upon central cities. Clearly, every successful act of exclusion by a suburb is at the same time the reinforcement of existing patterns. The power to exclude is tantamount to the power to assign burdens to others.

Analytically, there is no difficulty in generating that exclusionary zoning practices are a matter of state-wide concern. Unfortunately, there are certain precedential problems associated largely with the historic development of zoning.

Until quite recently, zoning was largely restricted to attempt to control nuisance-like situations which often had only a very limited range of consequences. A commercial use, for example, in a residential neighbor-hood was largely of concern to the immediate neighbors of such use. They were the ones who would be bothered by the noise and attendant traffic. And if harm was visited upon

the neighborhood, this was a matter of scant concern to anyone who lived even as much as a mile or two away.

Thus, because of its initially timid reach and modest grasp, courts became accustomed to viewing zoning purely as a matter of local concern. But now that the use and direction of zoning has changed substantially, and as it has become a major tool in shaping the fiscal environment of a community and likewise influencing the fiscal burdens of other communities, there is reason to reassess the earlier conclusion of its parochialness.

Given an openminded arbiter, I would have little fear of failing to persuade that some types of land use practices, particularly exclusionary ones, are a matter of statewide concern and, thus, subject to state control.

While I do not mean to suggest that the Ohio courts are ever less than openminded, the Constitutional Revision Commission might give some thought to providing future generations of judges with more explicit guidelines, just in case I'm a little less a persuasive advocate than I imagine myself to be. Thank you.

(Applause.)

MS. ERIKSSON: Thank you very much, Professor Simmons.

I think, since Judge Holmes is here, that we will proceed to the third of our urban area problems, if you will

hold all of your questions for all three speakers until the end.

Judge Holmes is presently judge of the Court of Appeals in Franklin County. He is a former member of the Ohio House of Representatives and has had much activity in the field of environment, natural resources and has been interested in this field for sometime. Judge Holmes.

JUDGE HOLMES: Thank you very much, Ann.

I hasten to inform you that I do not in any manner hold myself out as an expert in this field. I only profess an abiding interest and dedication to the needs of our state in this field of ecological development and our environmental programs. I did that as an individual, I did it as a state legislator and, now, I do as a judge.

I believe that a concern for keeping the world and the communities within it a fit place for people to live has become an increasingly emphatic understanding and awareness of our American people; and concerns for conservation and the environment, a national awareness among our citizens, among our legislators, among our congressmen, has been an acute and abiding topic. But like our environment, the meaning of conservation and its interpretation, the conservation of our natural resources has been an ever-changing element.

The attention of conservationists, traditionally,

did not dwell upon the problems of conservation as such problems relate to people as they made the law of our towns and our cities and metropolitan areas where the great numbers of people were being concentrated. The concerns, basically, were of saving the natural resorces, of controlling the use of the utilities of such.

Today, with our tremendously growing population and our related growing demand for the natural substances of this earth, it remains, of course, all important to protect and conserve our natural resources and to develop up-dated programs for their proper management. However, within the context and meaning of the word "conservation," we must have capabilities of doing more than locking up our resources and preventing their use. Our conservation and environmental programs must have a broader thrust and import if we are to sustain the supply of resources we need now and into the future and for the continuing use and enjoyment of them by generations to come.

The fulfilling of the requirements for a sound environmental program in the state is not easy in the accomplishment. Many questions of a legal, economic, administrative and political nature must be considered and answered.

Generally, the first consideration is what do the people want for their environment, and for what are they

willing to pay. The next consideration would be, who -- or what governmental entities are required, or permitted, by our Constitution and by our laws to perform certain services and carry out certain programs that materially affect our environment. In the event of concurrent or overlapping authority to act, the question then becomes, which entity is best suited to perform the function by the very nature of the function; that is, what functions or services are thought of as being purely local versus those functions which are regional in nature. Of course, within the framework of the latter consideration are the integral questions of the economic and administrative feasibility of one entity against another having the responsibility to perform.

Let us look generally to what are the environmental responsibilities of the governmental entities in Ohio within the framework of the Ohio Constitution and our statutes.

First, the fundamental source of state governmental activity in the field of environmental programs is to be found within the Constitution of the State of Ohio at Article 2, Section 37, such constitution adopted in 1912. The phraseology is as follows: "Laws may be passed to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamplands and the development and regulation of water power and

the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

The basic authority, on the other hand, for municipalities to adopt programs affecting the environment is to be found within Article 18, Section 3, of the Constitution which has been mentioned. The import and thrust of that giving the governmental authorities the powers of local self-government and, in addition, the second power, that to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. The latter phraseology, of course, read and coupled with that power as given the state under Article 2, Section 37, enables the state in a broad sense to enact legislation laws and regulation under its police power for the protection of the general welfare of the public found within the State of Ohio.

Ohio has not adopted a distinct and separate environmental policy statement by statute, as some states have done, but our legislative attitude toward the natural resources of the state may be noted in a number of enactments. One such enactment was that which established a Department of Natural Resources in 1949. Senate Bill No. 13 called for a long-range state action to develop natural resources

and recognize their importance by the use of the following language:

"It is the intent of the General Assembly that the Department of Natural Resources created by this act shall formulate and put into execution a long-term, comprehensive plan and program for the development and wise use of the natural resources of the state, to the end that the health, happiness and wholesome enjoyment of life of the people of Ohio may be further encouraged."

We have additional laws establishing the responsibilities in our state for environment. The Department of Health under Ohio law has control of the public water supplies. All plans for water supply improvements must be reviewed and approved before construction. The Department has authority to confer with local agencies on their future needs; participate in the evaluation of existing and future sources of raw water supply; and supervise all municipal, county and other water supply systems. The Department has similar authority over planning, construction and operation of all large sewerage and sewage treatment plants and over the plans for industrial waste treatment and disposal.

In 1951, the Water Pollution Control Board was established within the Department of Health. This board has the authority to develop new programs for the prevention

and control and abatement of new or existing pollution in waters of the state. It consults and cooperates with federal, state, interstate and other agencies, and with industries, as well as others. It is authorized to issue permits with conditions attached for discharge of sewage and industrial or other wastes.

Chapter 1521, Revised Code, creating the Division of Water, is largely a state recognition of the importance of having adequate information on water resources. A more specific state attitude may be noted in Section 1521.04, subparagraphs H and I, in the recognition of the watershed as the basis upon which water management planning should be carried out.

In 1955, the General Assembly appropriated funds for the Division of Water to inventory all of the water resources of the state on a watershed basis.

Another step in state involvement in water resource management was taken in 1959 with the creation of the Ohio Water Commission. Section 1525.03 states the purpose of the commission: "For the purpose of coordinating water programs in and of the state, to develop water supply, flood control and flood plain zoning programs for all areas of the state, and to obtain the most beneficial use of water resources."

In 1967, by House Bill 314, the water pollution

control law was amended giving the board the authority to to adopt water quality standards throughout the state, and to prohibit connections to a sewerage system which would result in an increase in the polluting properties of the effluent from the system. Through the use of this power, a number of building or connecting permits in the City of Cleveland were most recently denied. And this, of course, has been the source of real power and is vested in the Board of Health as relates to the Water Pollution Control Board.

House Bill 314 also impowered the director of natural resources to construct and operate water management improvements and to charge for water or waste disposal services furnished persons or governmental agencies and to make loans and grants for water management.

Also, that bill, which is now law, requires the director of natural resources to prepare a comprehensive plan for the development, use and protection of the water resources in Ohio and authorizes the director to review water management plans of governmental agencies. This plan, of course, is now in the process and is being carried out by the Department of Natural Resources, Division of Water.

It might be noted that the word used is "review" water management plans. In like manner, there is language that requires state agencies and political subdivisions to

consult with the Division of Water when planning to build in a flood plain; authorized to mark past and probable flood heights with respect to existing publicly-owned facilities and instruct state agencies and political subdivisions to apply floodproofing measures to buildings where feasible.

There was also enacted in the same 107th General Assembly an act establishing the state air pollution control board in the Department of Health with authority to adopt air quality standards and emission standards for air contaminants and to issue, revoke or deny any permits, and to monitor air conditions. But in accordance with the state's philosophy of local control or local activity within this field, this measure specifies that this law does not limit a political subdivision's authority relating to air pollution control programs within its own community.

Another serious environmental problem was the subject of another bill of the same session, House Bill 623, prohibiting the operating or maintaining of a solid waste disposal site or facility after January 1, 1969, without a license from the board of health of the local health district.

Not to be overlooked as an expression of legislative attitude as its responsibilities in the conservation field, particularly in flood control, is an old Ohio law, that being the Conservancy District Act of 1914, enacted

following the disastrous flood of 1913. There is no statement of purpose in this law, but it was primarily to prevent future flood damage, and that is how it has been used.

The Conservancy District Act is typical of the governmental philosophy historically followed in Ohio. The emphasis is upon local initiative, management and control. The conservancy district is organized by the common pleas judges of the counties involved. The water management projects and their financing were also authorized to be of local determination within the district.

A more recent expression of the principle of local determination occurred in 1961, when the General Assembly was discussing and finally rejected a proposal of the Ohio Water Commission which tried to strike a compromise between local water management and state water management by providing for a watershed district organization coordinated from a state level with local officials. The General Assembly instead enacted a Watershed District Act, Chapter 6105, Revised Code, which would set up watershed planning and advisory agencies overseen and funded by the county commissioners of the counties involved.

This law placed water management responsibilities in a considerably less objective stance than did the Conservancy Act in that municipal governing bodies, which represent the population primarily concerned in major water

management problems, do not figure in the organization or operation of such districts.

County commissioners, in their normal roles, must leave water and flood problems in the hands of municipal authorities, yet the watershed district under the act depends for its existence upon the commissioners' annual approval.

Many alternatives have been suggested and some utilized to approach the problems on a cooperative basis, ranging from joint undertakings with neighboring communities to contracting with central cities, or establishing regional water and sewer districts.

In this latter regard, the legislature, at this session, passed Senate Bill 166, effective November 19, 1971. This new law grants a considerable amount of financing and procedural flexibility to regional water and sewer districts in Ohio in the supplying of water and the collection and treatment of waste water within as well as without the districts.

Under this law, any area situated in any unincorporated part of one or more contiguous counties, or in one or more municipal corporations, or both, may be organized as a regional water and sewer district in the manner provided by Chapter 6119 of the Revised Code.

Going back to a little bit of history, in 1968, the Ohio Water Development Authority was established. This

authority was authorized to make loans and grants to governmental agencies for water development projects, to construct and operate water development projects or lease to, or contract for their operation by governmental agencies or persons, and to charge rentals for use of water development projects, to issue water development revenue bonds and notes payable from revenues. The law provides that the water management projects of the authority are consistent with any applicable comprehensive plan of water management approved by the Director of Natural Resources, and not inconsistent with the standards for waters of the state as set by the Water Pollution Control Board.

In 1970, the Ohio Water Development Authority law was amended to give the authority similar authority for solid waste treatment facilities and programs as it previously had been granted for water and sewage treatment facilities, the stated purpose being for the conservation of the state's natural resources.

All water management projects, and solid waste treatment projects, under these original acts were initiated on a cooperative or contractual basis, with the local community making the determination as to its projects and its needs in order to be in compliance with the regulations of the pollution control board.

This brief history points to the conclusion that

Ohio as a state has believed that her natural resources and environmental programs are important to the state's welfare, and adheres to a policy that it is the state's function to do something about solving the state's growing environmental problems. However, the role of the state, in addition to policing, traditionally has been in the area of information, research and the provision of service to other entities of government rather than assuming a strong role of state leadership in establishing dramatic development programs for the environmental control and improvement.

In deference to the Constitutional Home Rule Enactment in 1912, the legislature has tended to leave the responsibility at the local level where it has been felt that, because of the diversity of the problems and the local nature of the municipal problems, they best would be served and solved.

However, because of the growing magnitude of our many environmental problems, particularly as they relate to water management, waste disposal and air pollution, local approaches and capabilities have clearly been inadequate. The desirability of utilizing significant economies of scale when large water and sewer systems are needed, as well as the frequent necessity of tapping distant sources of water or taking advantage of large natural drainage basins have occasioned the immediacy for broader solutions to what were

formerly looked upon as purely local problems.

One such approach to hopefully arrive at broader solutions to one of our pressing environmental problems, that of waste water treatment, is to be found in the recently enacted Amended Senate Bill 105. Such law provides that the Water Pollution Control Board may refuse to renew or extend the period of a permit for the operation of a disposal system which receives sewage from a residential area, for the reason that the permit holder has not complied with an order from the Board and the default has created a public nuisance. The nuisance must be such that it affects residents of a political subdivision other than that served by the district in default, and the properties of the waters of the state must be those that are affected.

The measure provides an exception to the limitation of the powers given to the Ohio Water Development Authority in the initial act in that the law provides that the state may appropriate a waste water facility which is polluting waters of the state, and it may designate a waste water facility service area to include not only that of noncomplying permit holders but also contiguous territory not presently served by a facility and any additional agency or person that agrees to join.

The most obvious inquiry into the kind of power given by this bill is to what extent you usurp the authority

of municipalities under the Home Rule Amendment. There is no attempt to deny to any municipality its authority to appropriate property or to design, build and operate its own waste water facility provided such municipality is in full conformity with statewide standards. Also, there is no attempt under this measure to specifically abrogate any existing ordinances or regulations at the municipal level; conversely, the local government is free to exercise its own police powers in respect to the control of its own problems relating to the general welfare of its residents.

The intent of the measure is that guidance which originated at the state level by means of general law concerning matters of statewide interest is given to local governments which may operate according to their own flexibility to deal with their own problems as they choose; albeit, failure to conform to the guidance will result in the pain of appropriation of their waste water facilities.

As stated previously, the existing state laws relating to the responsibilities for the proper management of governmental functions relating to the environment have not been such as to constitute an attempt to assert absolute authority in favor of the state. Rather, the laws have been intended to stimulate a cooperative approach to practical solutions by both the local community and the state authority.

Certainly, a great deal of progress has been made to this end, evidenced by the fact that in the last two years, O.W.D.A. has assembled 261 projects, accounting for an estimated cost of 635 million dollars, financed through loans to 170 cities and forty sewer districts. Under this arrangement, loans are to be repaid through charges to the users. Sixty-seven projects are now under construction, and the Authority expects to have in the process more than 300 units by 1974.

Ideally, local communities, operating pursuant to the philosophy of home rule, may be left to their own individual processes or a cooperative pattern to meet their local needs that affect the environment.

As noted, our state laws and programs thereunder have proceeded with local initiative being the keystone. In other times, with other circumstances, such approaches were successful in varying degrees.

However, the developments of the urban areas have eroded to some degree the validity of the past concepts of environmental programs in Ohio. Many problems have grown beyond city limits, but the city's power to cope with these magnified situations has abruptly ended at boundary lines.

There should be a continuing emphasis, of course, on the merits and advantages of freedom of action for local government. But there must be coupled with this philosophy

of local determination the flexibility to make changes in governmental responsibilities as the circumstances of the time would dictate in order to serve the best purposes of our environment.

It has been suggested that in order to provide this necessary flexibility in meeting your environmental problems as well as many others, a constitutional change would well be in order. I have tended to agree with the philosophy of those who say that our Constitution lacks the flexibility to meet our growing problems in the environment.

Yet, in reflecting what the state has done, what most recently has been enacted, O.W.D.A. and the enlarged authorities under that act, I have come to believe that perhaps the emphasis has been properly placed now by our legislative body in the full realization that the state under the police powers does, in fact, have broad powers to enact environmental rules, regulations and law.

I believe the question is, Has the legislature properly viewed our authority under our Constitution? Has it used that broad authority in the direction and to the extent that it can? And, if so, then are we hampered in approaching our environmental program? The question, as posed here for this panel, is, Does the Constitution hinder solutions?

I honestly believe, in reflection upon what has

most currently transpired in new law, the interpretation of the courts -- and hopefully that flexibility would remain -- I would have to answer the question that, yes, perhaps it does to a degree hinder our solution of these environmental problems, but I do not believe that it presents an insurmountable obstacle.

Thank you.

(Applause.)

MS. ERIKSSON: Thank you very much, Judge Holmes.

We have a few moments for questions before the coffee break. If you have some questions to address to any of the gentlemen, please identify yourself when you ask your question.

MS. HESSLER: I'm Iola Hessler, from the University of Cincinnati. I'd like to ask Professor Simmons whether you see the possibility under Article 18 of something like the Twin Cities Metropolitan Council establishing developmental guidelines which would be controlling over municipal plans or even of the general assembly giving counties review power over municipal plans or developments.

MR. SIMMONS: I'm less enthusiastic about the prospect of seeing counties receive that kind of authority than perhaps you might deem appropriate. My hesitation right now and all morning long, when questions kept coming

back to counties. I'm afraid if we fix that at the county level, we are going to miss a great opportunity to operate on a more sensible functional level; that is, a regional level, perhaps, but, yes, I would hope that the legislature might be willing to become a bit adventuresome and attempt to delegate that kind of authority. Although, as I say, I would suggest it be on regional rather than on county basis.

I certainly agree with Judge Holmes's comment that one of the problems is that of legislative abdication and not that of the overwhelming constitutional constraint.

MS. ERIKSSON: Mr. Wagner, Mayor of Napoleon, is asked to call his office, please, if he is in the room.

Are there some more questions?

MR. WESTENBURGER: Mr. Smith, in your fine remarks on transit authorities, I failed to hear anything said about what I consider a political disaster area. Would you care to comment on county transit authorities, which was passed by the legislature also?

MR. SMITH: Well, I frankly don't have much to say about the county authorities because almost everyone is using regional authorities, the regional transit authorities.

Even before 1969 it was possible to form either a county transit authority or a regional transit authority. There were, in fact, some authorities formed, but they

couldn't do anything. They didn't have any power.

In 1969 there was the dual movement towards county transit authorities and regional authorities. Frankly, with the exception, I believe, of the Cleveland area, most everyone else was interested in regional authorities, and I haven't seen much happening on county authorities.

Maybe you know whether or not any is going forward with them.

MR. WESTENBURGER: That's what worries me: Cuyahoga County.

MR. SMITH: Yes, they had some rather unique political problems that would stay us a long time.

MR. WESTENBURGER: That's an understatement.

MR. SMITH: Very.

MS. ERIKSSON: Is there another question?

MR. ZACK: For Professor Simmons and Mr. Smith.

MS. ERIKSSON: Would you identify yourself?

MR. ZACK: Marlin Zack, from Rocky River. I'm interested in what your opinion is of the trend toward regional authorities and its effect on general government and whether or not you think this is a good trend.

MR. SMITH: Well, I certainly have misgivings about the movement toward regional authorities, although I have worked very hard to form one.

What we found in Columbus was that we had to go forward on a regional problem at a particular moment in time, and this was the vehicle that we could put together to go forward. We recognize -- almost everyone that I have talked to recognizes that the regional authorities have a built-in hangup of some magnitude because what happens is, if we continue to form authorities for each of these services, we also build in problems that aren't going to be solved easily. As the transit authority has money, employees' vested interests, 15 years from now, it will be very difficult to take that transit authority apart and put it into a larger form.

So, we have, you know, grave concerns about them, although at the time we felt that it was the only way we could do it.

Now, someone mentioned Minneapolis-Saint Paul. When they made their change, they took quite a few of their authorities -- and transit was one, I believe -- and actually put it under the umbrella of their Twin City Planning Commission, or whatever its proper name. So it's an example of where it can be handled later, but it certainly has grave problems.

MR. SIMMONS: I would simply add the word of emphasis on the problem of political responsibility of authorities of any sort; that is, once you start to move

outside the normal governmental channels, you begin to reach almost the sanctity of some of the New York state authorities, which are answerable to no one but Mr. Moses, and we all know to whom Mr. Moses is answerable.

Beyond the question of authorities for special functions, there is also the implication perhaps in your question about regional government, and the motivation that perhaps may be present in contemporary instances where it is an attempt to dilute the innercity voting strength, the Black vote and, obviously, there is a good deal of resistance where there is a likelihood of Black Nationalist political power, they are going to resist the sudden insight, recognizing the value of the efficiency of large-scale government when it is going to deprive them of its natural political power. I think that's a reality we simply have to come to grips with in terms of the political structure, whatever large unit of government is to be formed.

MS. ERIKSSON: I think we have time for perhaps one more question, if there is one more. If not, thank you all very much.

We will have coffee in Room D, and I have been asked to ask you, please, not to bring your coffee cups back to the assembly, but I would like to ask you, please, to return promptly at 3:15 so we can continue with the county part of this.

Midafternoon Session, 3:15 p.m.,
Thursday, November 18, 1971.

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MR. HEISEL: Ladies and gentlemen, we have about 35 minutes to discuss the question that I think we could spend about 35 hours on; namely, the reorganization of county governments. We will be able, of course, to speed this up a bit, as we planned to do, by taking only the constitutional aspects.

Please keep in mind that we recognize that there are many other problems involved in reorganization of county governments than constitutional aspects, but in the time available today, we'll confine ourselves.

The format for the program this afternoon for the next 35 or 40 minutes will consist, first of all, of a presentation by Mrs. Hessler, of the Institute of Governmental Research, which arises out of a study which the Institute made in the last few months for the Constitutional Revision Commission. She will give a summary of this.

In view of the time, I am not going to read her credentials to you other than to publicly state, as I always take a great deal of pleasure in saying, that she is our very, very strong right arm at the Institute and it has been a pleasure over these years for me to work with her.

Following her presentation, we will have two

reactions: one from Miss McGovern, who is a former legislator and was one of the members of the Summit County Charter Commission in 1969-70; and also by Mr. Seth Taft, who is a county commissioner in Cuyahoga County.

Again, their resumes have been given to you and I will not take the time to read them.

So, without further introduction, Mrs. Iola Hessler.

MRS. HESSLER: Since adoption of Article 10 of the Ohio Constitution in 1933, there have been twenty-one attempts in Ohio to adopt either a county charter or an alternative form of county government. So far, the failure rate has been one hundred percent.

What were the reasons for these failures? Were they political? Did they result from constitutional provisions, or lack of constitutional authority, or, as we suspected, did defeat at the polls rest on a combination of factors varying from county to county?

These were the questions that we attempted to answer in our study over the last few months in the eight large urban counties where county reorganization has been tested at the polls.

We talked to persons identified both as proponents and opponents of county reorganization in the eight counties; with political party leaders, elected officials,

newspaper editors and political reporters and with representatives of the various citizens' organizations involved. We combed back files of newspapers to get the feel of the time. We analyzed the votes supplied by the various boards of election.

In addition, the Revision Commission was interested to know why other counties in other states were succeeding in adopting county reorganization when Ohio was unable to pull it off.

I went to Washington and New York for several days of extensive interviews with representatives of all of the national organizations in that area who are concerned with local government, both urban and county; and I visited a number of the counties where there has been considerable change, reorganization.

Our study also included an examination of the constitutional provisions for county government in the fifteen states -- there aren't very many -- the fifteen states where county modernization has occurred and examined the history of reorganization of such counties in those states. All these studies are reported in detail in our written report.

So much for the background of the study.

What did we find? In the first place, we found that those eight Ohio counties which have perceived a need

for reorganization were all large, highly urbanized counties, all among the dozen largest in the state. Cuyahoga County has tried seven times; Montgomery County, five; Hamilton, Summit and Lucas Counties, twice; Lake, this November, 1971; Franklin and Mahoning way back when, shortly after the adoption of Article 10.

Some of the attempts to draft a charter failed at the first election on the question of electing a charter commission. This was true three times in Montgomery County. Cuyahoga County, on the other hand, succeeded three times in electing a charter commission only to see the resulting charter go down to defeat the following year.

In all the counties studied, we found massive voter indifference and ignorance of county problems, a very low visibility for the functions and problems of county government. This appeared to be traceable in large part to the statutory organization of county government itself, which is not a government in the usual sense, having neither an executive nor a legislative body. It is, rather, nine or more state agencies operating at the county level with independently and locally elected officials who are responsible for the administration of rather limited functions and with powers strictly limited or delineated by the state. There is no one elected county official, as you know, who can speak for this so-called county government or

collection of governments.

Further, with only three county commissioners elected at large, it is virtually impossible to have genuine debate on priorities or broad representation of the diverse elements of an urban county electorate since they are all elected at large. This inevitably results in low visibility. Lack of controversy means low visibility. And it also results in immunity from voter influence and accountability. It is a protection for the existing county officials, who are almost always strong opponents of change.

Since county government is a responsibility of the general assembly, why then cannot the legislature change the form of county government to make it accountable, responsive, effective?

The answer appears to lie largely in the fact that only the urbanized counties feel the need for reorganization and new powers, but the legislature must provide for county government by general law, treating all 88 counties alike.

This means that a statute granting responsibility, for example, to provide solid waste disposal to Cuyahoga or Hamilton Counties means, also, authorizing Vinton County, with ten thousand population, or any other of the 69 counties with populations under a hundred thousand, to exercise the same powers. But in these less urbanized counties, the need

doesn't yet exist for this type of urban function. Why should their representatives to Columbus then vote to raise the issue of control over such services in their home counties? By blocking general assembly action, they can be relieved of this decision-making problem. They have no interest in it.

If a problem exists only in urbanized counties, the solution should obviously apply only to urbanized counties. So, we conclude that the Ohio Constitution should permit the classification of counties.

There are various ways of providing classification. About a dozen other states do permit classification of counties -- not as many as you would think. Some state constitutions specify the number of classifications or limit the number of classes which can be created. Others give the authority to classify to the general assembly. Most classify counties by population, but a few by assessment or, quote, criteria, unquote. I never could figure out what those other criteria might be.

Most of these states have used the classification authority to grant specified powers only to certain classes of counties. Some also permit the highest population class of counties to adopt charters or exercise home rule powers or make some elective county offices appointive.

Several suggestions came to us recently from the

Urban Counties Committee of the County Commissioners Association of Ohio. It was suggested that if counties were classified by population and certain powers given to, say, Class 1 counties, that the county commissioners of smaller counties, if they wished, be permitted to petition the legislature for inclusion in Class 1 for the purpose only of acquiring the added powers.

It was also suggested that the county commissioners of Class 1 counties -- and this is an interesting proposal, I think -- be authorized to adopt a charter reorganizing the structure -- just the structure -- of the county government but giving no new substantive powers; the charter to be subject to referendum within six months, for example, but not requiring a vote of the electors unless challenged by referendum.

The President of the United States and some governors and mayors do have this authority to reorganize their government to some extent.

Any charter or amendment to a charter, however, changing the powers of county government would require a vote of the people, in the view of these commissioners from the urban counties.

Classification would make it politically expedient for the general assembly to pass legislation or, for example, to amend the alternative forms of county

government statute to give more options only to the large urban counties, and so not run into opposition from the smaller counties that didn't want these options, such options as elimination of some elective positions to create a more accountable and effective structure of government, for example.

Some state constitutions permit legislatures to pass various forms of special legislation for counties, which has the effect of classification. We don't permit this in Ohio. In virtually all the states where there has been county reorganization activity, the constitution permits either the classification of counties or special legislation, or both; and both have been roots to county reorganization.

In addition to the low visibility of county government and, therefore, the built-in opposition of elected administrative officials, county charters have met with strong political opposition by various groups who are simply opposed to change. Much of the opposition was, of course, purely political and doesn't have constitutional aspects. But when you change the status quo, you do change political power bases and you usually change the relative power relationships of the political parties; in other words, the "in" party is also against change. Sometimes the "out" party has nothing to lose and will take a chance on supporting change, as has happened in Cuyahoga County.

But the problem is not only political, it is also constitutional. The Ohio Constitution requires first that the voters answer a double question, which is vastly confusing. The question: "Are you willing to allow the establishment and election of a charter commission?" This requires educating the voter on the powers and responsibilities of this commission, which the voter may never have heard of before. "If you agree to establish a charter commission, whom do you then vote for to draft the charter?"

You don't know what kind of a charter will be drafted; and the candidates can't tell you what kind of a charter they will write because no one knows who will be elected or what kind of agreement can come out of this new body which is elected. You don't know what powers will be affected by whatever charter this commission drafts, what interests might be jeopardized with which you are concerned. Will the charter, for example, take away powers from your more visible closer government, the municipality?

You're really buying a pig in a poke when you elect a charter commission; and so many voters will play it safe and vote "no" rather than take the trouble to get the answers to all of these questions. And some of the questions are simply not answerable. The Commission can't answer many of the questions which voters ask the candidates.

Moreover, in the original vote on the charter

question, with no definite proposal before the voters, it is easy to confuse the issue. And the issue has been confused in a great many ways in all of the elections that we looked at.

In Montgomery County, many people, for example, believing the opposition's ads, apparently thought that they were voting on a radical charter which would destroy their control over their county government, create a dictatorship, eliminate their city government, raise taxes, even though no charter had yet been proposed or even dreamed up by anyone.

After election of the charter commission, the Constitution provides that a year elapse before the second election on the proposed charter. During this time, political currents swirl among the elected officials of the county and the municipalities and the political parties.

The charter commission, with fifteen members, usually consisting very largely of lay citizens, is not in a position to make the kinds of political judgments and compromises that political pros such as county commissioners could make to soften opposition. They may not even know where the opposition is coming from. They are too large a body and too public, too exposed a body to make deals under the table. So, wild and unfounded charges can be made all during this period while they are meeting and usually which are very difficult to answer.

There's a year in which to build opposition but there's only a couple of months at the end in which to educate the public, build political support and sell a charter which may have been created by a divided vote of the commission and with a good deal of friction in the course of building this charter.

There is one other important source of opposition to county reorganization. Most of the municipal officials in the counties under study opposed change at the county level because they feared a dilution of their powers, taking something away from the cities. In Ohio, home rule powers for municipalities, which has been discussed before today, for all municipalities -- not just charter municipalities -- are very strong. In no state where there has been considerable county reorganization activity does the constitution of that state confer such strong home rule powers on municipalities, whether or not they have adopted a charter.

The framers of Ohio's Revised Constitution in 1912 planned it this way, and the Article 10 amendments in 1933 confirmed the preeminence of municipal home rule over charter home rule for counties.

The Constitutional Revision Commission today has the unenviable task of deciding whether it is possible politically or desirable to give a considerable measure of

home rule to counties at the expense of home rule for municipalities. And then you get into the boundary problem again that Professor Simmons brought up earlier and whether the county is the agency to put into a rigid form in the constitution.

If the Commission determines that the reorganization of county government, through the vehicle of charter adoption, is not particularly desirable, there is no need for amendment of Article 10. The safeguards against adoption of a county charter are sufficient, in my opinion, to prevent even modest reorganization.

The extra majorities required in the case of reallocation of municipal powers, exclusive municipal powers, are apparently so formidable as to defy utterly any type of that kind of change, even with the elimination of one of the four hurdles for counties over five hundred thousand in population.

The only county ever to win a simple majority for a county charter was Cuyahoga County, in 1935, which failed to gain two of the four -- then four required majorities, so we have no experience on which to base our conclusion that the three or four majorities are impossible to achieve except by projections of the patterns of voting in the various counties which have tried.

If, on the other hand, the Constitutional

Revision Commission finds that in today's growing and urbanizing counties adequate performance of many local functions is impossible at the municipal level, then it will want to consider all means of making county reorganization easier.

And to this end, we recommend amending Article 10 to make the adoption of county charters possible; elimination of the three or four majorities for charters; allocating exclusive municipal powers to counties should be changed to a simple majority, not only because of its effect on the drafting and passage of charters, but because it appears to run clearly counter to the one-man, one-vote decision of the Supreme Court.

For example, in Summit County, if the same pattern of voting that prevailed in their adoption of the question of electing a charter commission had prevailed in the adoption of a charter, two and a half percent of the population of Summit County could have prevented the adoption of a charter granting exclusive powers to the county.

We recommend that the county commissioners or any citizens' group, by petition, be permitted to frame and submit a charter to the voters for adopting in a single election. New York and Maryland, far ahead of all other states in the number and far-reaching character of county

charter reorganizations, both permit adoption of a charter in a single election. The Urban Counties Committee of the CCAO, by resolution of November 5th, supports such an amendment.

As indicated earlier, we recommend classification of counties. Although our report suggests two classes, with the breaking point between urbanized and nonurbanized counties at a hundred thousand population, personally, I am increasingly inclined to feel that classification should be left up to the legislature with some limit on the number of classes which could be created by the general assembly.

In spite of the strong municipal home rule tradition and constitutional provisions in Ohio, we also recommend constitutional amendment to enable both municipalities and counties to exercise any power or perform any function which is not denied by charter, is not denied to all home rule charter corporations by general law, and is within such limitations as may be established by statute -- the Fordham concept, which Professor Fordham so graciously assigned to Professor Knight this morning. This approach would clarify the role of local government vis-a-vis the states. It would eliminate questions concerning state preemption of powers and place the decision-making authority on allocation of functions and powers in the legislature rather than in the courts. It would

probably enlarge the implied powers of municipalities and would confer implied powers on counties. The Urban Counties Committee also supports these implied or residual powers for counties.

Since, however, adoption of the Fordham concept would also lead, hopefully, to the reallocation of powers to that level of government able to perform the various functions most effectively and economically, it might be considered a threat to the municipality. It should be noted, though, that the law of certain functions which cities might like to keep, usually moneymaking functions, would be balanced by relief from some of the headaches they would be glad to relinquish.

What this all boils down to is that constitutional revision is a very ticklish and difficult political exercise, and we offer our sympathy to the Commission.

(Applause.)

MR. HEISEL: Thank you, Mrs. Hessler.

Now, our first reactor will be Miss McGovern.

MISS McGOVERN: Do you want me to go to the microphone?

MR. HEISEL: Yes, it seems to be alive. All's well.

MISS McGOVERN: Well, Mrs. Hessler made a marvelous presentation and did a lot in a very short period

of time to discuss what she said, so it was quite something. And I'm not only overwhelmed by the task of discussing what she said but I'm also very conscious that I have some extra ideas of my own that I want to throw out.

As noted, I was a member of the Summit County Charter Commission, and one of the problems that contributed to the defeat of the Summit County Charter in 1970 was some litigation that was brought, perhaps intentionally, for the purpose of obscuring the issues. That litigation could not have been brought were it not for there being some real ambiguities in Article 10, Section 4, or at least it would have been confined to a much narrower group of issues.

That being so, I think that one of the things that we want to consider is to make Article 10, Section 4, as air tight as possible in the means or methods of going forward with the charter so that you don't leave awkward little questions that are resolved one way and then are tested in courts and the decision turns out to be something different.

To that end, I have three housekeeping suggestions that I think ought to go in Article 10, Section 4.

There is a provision in there that, within ten months after the election of the charter commission, it is to submit a charter to be voted on at a later election. One of the big issues that was raised in the litigation in

Summit County was: To whom is it submitted? Was it submitted when the charter commission handed it to the board of elections within ten months? Or, instead, should it have been submitted directly to the voters within ten months? In other words, should the mailing and distribution have taken place within that ten-month period?

Now, in the action for a temporary injunction, the judge found that submission to the board of elections was what was intended. And I think he was quite right. Notwithstanding that was not a final order, it is at best the order at the common pleas level in the locality; and the question could well arise again in another county and turn out to be extremely troublesome.

If the charter has to be distributed within ten months, it cuts down substantially on the amount of time that can be spent in drafting the charter.

Going then to the question of mailing, my second suggestion in Article 10, Section 4, is that mail is not necessarily the best way of getting the news out to the voters. We have switched, for other purposes, to publication under the State Constitution, and numerous city charters provide for notice by publication. I think that it would be extremely helpful and save a considerable amount of money, also obviate the risk of unusual delays in getting the mailing under way -- such as we happened to encounter

partly due to litigation -- and, therefore, that provision should be made for giving notice to the voters by publication.

Finally, in the housekeeping line, if something is to be mailed or even if it is to be published, it should be clear who is to do it. It says, "the authority submitting it," and that would appear to be the charter commission.

For practical purposes, the machinery for getting out a contract to print and mail was handled in our case through the county commissioners, raising the question of whether or not the commission did the job that it was supposed to do. Also, the commission, having been given the job, felt itself constrained by general laws to let bids, etc. It bobbled the bidding procedure and further delayed us with a result that the charters weren't mailed until so close to the election that it was reserved until after the election, if the charter should succeed, as to whether or not reasonable notice was given. We didn't have to worry about it then, because the voters went ahead and defeated the charter.

Two other suggestions that aren't housekeeping is that there be a provision for resubmission of a charter within one year, a second chance at the same charter.

The other -- I don't know that this is a

suggestion. Mrs. Hessler mentioned the problem of one-person, one-vote, in the four majorities. It turns up another aspect. It turns up in the fact that not more than seven people from the largest city can serve on the fifteen-member commission, even though they might have much more than seven-fifteenths of a population. Oddly enough, this didn't get raised in the litigation.

Over in Article 10, Section 1, Mrs. Hessler spoke about classification as a way to reach this problem that is perhaps uniquely that of large counties, and I go, I think, about 90 percent of the distance with Mrs. Hessler on that. In other words, I agree 100 percent with her that we ought to get away from the requirement for a general law. I think perhaps, however, the means that I would choose, rather than classification, is to permit the legislature to pass special acts for any county, with the thought that in any given county, such as our own, it might well be that sentiment would be such that our legislators would support a special act that would change not merely form but function of county government and the other legislators might be willing to go along with it as long as the local ones did.

This is the way UNIGO came out in Indiana and Marion County. It was a special act for Marion County in Indianapolis, Indiana. That is the way Metropolitan Toronto

came into being, through a special act of the Ontario legislature. And I would like to throw it out for consideration.

I would also think, housekeeping in Article 1, that Article 1 now says, "If the legislature may provide alternative forms of government." And thank heavens, after about thirty years, it did provide something. I think, though, it ought to say they shall provide it or else even that limited, extremely limited, accomplishment could vanish overnight by action of a legislature repealing the alternative form.

To summarize what I come up with on Article 1, it would be that the legislature be allowed to pass special acts dealing with form as well as function; that they be directed to provide alternative forms; and then -- this is more in a summary -- this is a final point -- that if they provide a form of government which calls for a chief executive, to which all other administrative officers are responsible, and if they provide for a legislative body then in such form of government, home rule powers should be given.

My thought is that it is the prize that you win if you adopt a rational form of county government under an alternative form statute, and that if you don't have a rational form of government, I myself am a little mistrustful

of giving home rule powers at the county level. Seth Taft may have some strong objections on that.

I have taken too much time in saying it, but I want to comment on one more thing, and that is how appropriate it is, I think, that Mr. Taft be one of the commentators. Not only he but members of his family have been leaders in this movement. Charles Taft was head of the committee that came up with the county charter amendment back in the 1930's.

(Applause.)

MR. HEISEL: Mr. Taft, do you want to go ahead?

MR. TAFT: Yes. I think the classification element of what's been talked about is terribly important. I can only give you a couple of illustrations.

In our county, the general health district, as in all other counties, is appointed by a committee composed of the mayors and township trustees, mayors of the villages and township trustees. The population of the villages and townships in our county constitute about 50,000 people out of almost two million, so that's what? about two or three percent. Yet our general health district provides health services to nearly a million people.

We need a health district which serves our county. It's called the county health district but, actually, it's for the villages.

I tried to induce the legislature to adopt a law which permitted the county commissioners to assume jurisdiction over the county health district. I couldn't get any response to it because everybody in the smaller counties was thinking what might happen to their situation.

I think we just have to have an arrangement where laws may be passed that apply only to certain groups of counties.

I am intrigued with Fran's suggestion that there be 88 categories of counties. That was the situation before an amendment to the constitution with respect to municipalities some years back, and people thought that wasn't a good idea. But I am kind of intrigued with it, at least as applicable to the larger counties.

But I would urge the Constitutional Revision Commission to provide something that permits classification, whether it is in the Constitution by numbers or whether it is as the legislature may do it with a maximum number or without a maximum number. Something of that sort, I think, is essential to recognize the different elements of organization that deal with the different counties.

We have more people in our county than in seventeen of the fifty states. In our county, we have a budget of three hundred million dollars a year, and yet we are compelled to spend that budget through the machinery

that was set up for rural counties. It can be done, but I can assure you it is not easy and it has a lot of slippage between the time when something is obviously a good idea and the time when something can be done.

The second major thing that I would be interested in is making it possible for the board of county commissioners to put a charter on the ballot. Once a charter is adopted, the legislative authority, board of county commissioners, if it is continued under a charter, has the power to submit amendments without having to go through the cumbersome two-year process of having a charter commission.

In our county, for example, in 1958, I guess it was, we had a two-to-one majority in favor of electing a charter commission. As you might expect, the people who could most easily get elected countywide ran for the charter commission, and there was a particular interest on the part of the county officials because it was their jobs that were being talked about. So, as a result, you ended up with a charter commission which had a greater stake in the continuation of the way in which the county was being run than it did on trying to work out improvements.

Now, what happened was that the county officials took the position that they were prepared to be reorganized only if they got control of the big assets and operations of the City of Cleveland. Well, so they wrote a strong

charter. They said, "We'll write the perfect charter." We organized the county government. We also took over all the major assets of the City of Cleveland.

Needless to say, the mayor of Cleveland opposed it, as did the mayors of many suburbs, and it went down to a defeat.

I think that when the iron is hot and the commissioners elect to put a question on the ballot, they have a pretty good feel as to what is feasible politically. As a matter of fact, a couple of us back in the mid-fifties wrote a county charter for Cuyahoga County which we got on one piece of paper. It was very interestingly simple. It did nothing but eliminate the office of county engineer and place the functions of the county engineer and the administrative functions of the board of county commissioners under a newly elected executive. No addition to the number of officials of county government, just as simple as you could imagine.

Then, as the other opportunities might come along as, for example, when our county recorder was found with his hand in the pot, an amendment could be popped onto the ballot bringing the county recorder's function under the wing of the executive and the legislative body.

This was how it was done, for example, in St. Louis County, suburbs of St. Louis, when they wrote a very simple

charter to start out with and, as particular problems dramatized themselves, they could put on an amendment that was pinpointed to the problem that was then being dramatized. And it could be whatever it happens to be in some community. Might be sewers one place, health in another, air pollution in a third. But just to the thing that suddenly had the community excited.

I really think this is the thing that would give us the greatest opportunity to have a county charter in our community. And I have been through seven elections so far on trying to reorganize county government, and I'm still interested. But I think we've got to find some ways to make it easier. I finally gave up and decided the only thing to do is work with what we have, and I guess that's why I'm a county commissioner.

(Applause.)

MR. HEISEL: Thank you, Mr. Taft, and all the members of the panel up here.

We have a very few minutes in case there are any questions from anybody in the audience or any comments that anyone wishes to make.

Yes?

MR. LOWEY: Ed Lowey, Ohio Chamber of Commerce.

The problem of the proliferation of counties in Ohio, is there some possibility of handling the joining

together of abutting counties in order to provide what they referred to this morning as regional efforts? Instead of only being able to solve one county's problem, might it be feasible to consider the political problems, of course, very strong, but should we make any recommendation in this direction?

MR. TAFT: Mr. Lowey, I think that I have a very strong view on that subject. If you sort of think about your own time as having a certain amount of value and you have to assign certain priorities to where you put your effort, I would say that neither you nor I have a long enough life ahead of us to try to change county boundaries. I think we better stick to things that are within the realm of feasibility. That just happens to be my own view.

MISS McGOVERN: But, no, I'd agree on the county boundary matter. Could I call your attention to something that was proposed a long time ago and is an absolutely lost cause, that it should be brought out until it was totally rethought and reworded because it is yesterday's flower?

But it was at one time called the Metropolitan Federation Amendment, another time called the Urban Service Authority, that would allow a federation of counties or of localities within a county for one purpose, or two purposes or ten, whatever would be given to it by charter. That was a way of reaching a regional problem. It was also a way of

adopting that tough political question of reorganizing somebody out of a job because all you did was federate the existing communities with all their infirmities and then lift from any of them that had the power to deal with the problem locally that power and get it instead to the federation to perform for the area. And you could pick off subject by subject, sort of as Seth was suggesting up there in the Cleveland area.

I think the germ of this idea is worth consideration still, even though I don't think it would be very practical to bring back that same old thing again.

MRS. HESSLER: I was interested this morning in what Professor Simmons had to say about the possibility of setting up such agencies for police powers which were subject to state legislative limitations.

MR. HEISEL: I am sorry that we are going to have to cut this off. I see Mrs. Eriksson is back there looking at her watch because we are behind times.

I would like to express my appreciation to you, the audience, as well as to our speaker and panelists on this subject, county reorganization. Thank you.

(Applause.)

CHAIRMAN CARTER: We have been talking today about a number of possible new forms of local government and some of the constitutional implications related thereto.

We are very fortunate to have with us today Mr. Norman Elkin, who is Executive Director of the Illinois Governor's Commission on Urban Area Government. Now, Mr. Elkin has been in this position for a number of years, and they have had the advantage of working both with the legislature and the convention, Illinois convention which was called to make changes in the constitution. I'm sure that he will have a number of things of great interest to us here in Ohio.

Now, following the format that we have today and being as we are running short on time, you all have a biography of Mr. Elkin with you, so with no further ado, I'm pleased to introduce Mr. Elkin, from Illinois.

MR. ELKIN: Well, the first word I bring you is the cold wave is on its way. It came with me in the airplane. It was a very rocky trip from Chicago.

We had the good fortune in Illinois, as far as our commission was concerned, of having a constitutional convention called just about when we were starting to do our own deliberations. We had to make a choice at that point in time whether or not we would participate in the deliberations of the convention, because many members of our commission felt that, first, you get a basic program lined up, you go as far as you can with legislation, and then when you run into a constitutional barrier, you then

draft constitutional amendments specific to the barriers you want to eliminate. This is generally conceived to be a logical approach.

A number of other people on the commission felt that opportunity was here, and to heck with logic and let's do what we can.

Well, the governor resolved the issue by asking us for our opinion on constitutional revisions as they pertained to local government. This was very therapeutic for us because it was a moment of truth, and the moment of truth that we grabbed was that if there was going to be any change in the pattern of local government, we ought to have a change in state-local relations.

There are many schools of thought on the subject of why we have so much fragmentation in local government. Many of them ascribe it to sort of a grass roots resistance, a love for local city halls, county court houses, the voting public.

The conclusion I arrived at was that we have fragmentation because this is the way the states want them. It's as simple as I can make it. There is just too much fragmentation across the country. There is too much of a pattern. At least my own analysis of this situation was that in many respects, at least in a power respect, the state and local communities are often in an adversary

situation because we find that it is very easy, at least in the midwest, to fragment government, to create new units; very difficult to reorganize, to consolidate power at a local level. I say it is difficult when you are dealing with state legislatures and state courts. This has been an historic pattern.

So, the moment of truth was due. We wanted to disturb this pattern and we said we did. So our commission, in concert with a lot of other people and organized groups, advocated a very, very strong home rule clause in a new constitution, which was adopted by the convention in modified form and then ratified by the people. And I think that in practical terms it may turn out to be one of the few home rule clauses that will stand the test of time.

I say this because we figured the real problem with enforcing home rule was not theoretical but had to do with how to legislate your structure. After all, the Colorado constitution, 1905 or some such vintage, states that in cases where an ordinance and state law are in conflict, the local ordinance shall prevail. You can't be any bolder or any stronger than that. But the courts took it apart anyhow and Denver is no more mightier a city than Santa Fe down the road.

Our thought was that you have to create a new operational situation; that if you simply write a new

constitution but go back to the same old practices, we would end up doing the same old things. Our problem was how to make the legislature pause, when it came back after the convention, constitution was ratified, and realize that it was now dealing with a new situation, and the heart of that question was what we call the preemption issue. We say local government shall have X powers. How do you then prevent the general assembly in its very first meeting after the convention to abrogate those powers and say, "Ha, ha, we have taken it back because we are the supreme power, we are the supreme power in this state"?

So we required that any law that is passed by the state must be specific as to whether it is intended to supersede local ordinances or not, and if it intends to supersede or to deny the exercise of that power to a local government, it must be adopted by 60 percent vote in both houses. It just so happens that the political division in Illinois between the Democratic and Republican parties is such that that 60 percent is almost impossible to achieve without some kind of real concensus cutting across party lines, which means you either are going to deal with very substantial issues, so substantial that the leaders in both parties will agree, you know, "Let's cut out the hankypanky, we need state policy on this issue," like a welfare reform would be a typical kind of problem. But, for the ordinary

course of events, it would be almost impossible to get a sufficient majority and, therefore, it would be a break on the legislature. And, in fact, we have not had two seconds since the constitution was ratified and there is a certain amount of legislative turmoil and indecision. A lot of the legislators think something is wrong, "This ain't the way it ought to be."

What's happened? They just can't do to local government or deny to local government certain exercises of initiative that they were able to do in the past.

So, in this sense, the operation aspects of the game, so to speak, have been altered by the new constitution, and I think that in a sense it has the effect of buying time. It's going to take a couple of years until everybody learns how to play it under the new rules and how to govern.

But we need that time for everybody to adjust themselves because even a city like Chicago, which is very powerful and one of the few metropolitan cities that's really fiscally and politically viable, very strong city, unlike, you know -- I don't want to mention the cities here, but we know in the midwest there are many cities that fiscally, at least, are on the brink of disaster. That is not true for Chicago.

But even here in Chicago, where the administration

fought very hard for the home rule clause, they don't know what it means. They have setups. The mayor has created a mayor's home rule commission for two years to figure out now they have all the goodies, what does it mean? So, you have to buy time.

Okay. Now, once we have redistributed power, which was what we focused on, we then had a second decision to make: were we going to deal with the structural problems of government in the constitution or just with the power problems? Our assessment; that is, the assessment, I would say, generally of the convention and everybody who was kind of flitting around it was that you might be taking on more than you're asking for.

So we did not get into the question of reorganization, but we wanted three conditions for the reorganization of local government, so we enacted in the constitution a very, very broad intergovernmental relations section which empowers, without enabling legislation. That was another goal. When we talked about home rule or grant of power in the constitution it was generally without reference to enabling legislation, self-executed.

Intergovernmental relations empowers any city, county or school district to transfer any power or act in concert with any other city, county, school district or other local unit of government, share its debt and go from

mutual funding, do anything it wants. It is carte blanche.

And we threw in another one. We also empowered directly the state to provide technical and financial assistance to units of local government that were pursuing some form of mutual cooperation.

There was a history to that. Because, under the previous constitution in Illinois, which was a very bad one, the state could not give general aid to local governments; in other words, it could not have a revenue sharing program. It could only give aid for specific public functions which the state itself had assumed, like education or police protection, but it just couldn't give a grant of funds, let's say, for reorganization or for general governmental support. So we dealt with that problem by making it very clear that that was a legitimate public purpose.

We also authorized -- I shouldn't say authorized, it went beyond that. We claimed in the new constitution that public education through the secondary schools was a state financial responsibility. Now, even though Illinois just gives about 40 percent of the funds for the support of local schools, we wanted to make clear that should the state feel generous in the future or should the program that seems to be evolving nationally where national government takes over welfare funding and the states take over education funding that don't now, it would be properly said

to participate in that program.

We also declared transportation to be a public purpose for which public funds could be expended.

Now, in addition, we dealt with some very direct financial matters since this part was the heart of many of the local government problems. We permit differential taxation under the new constitution to cities and counties. It means that they could provide special services to some areas within their jurisdiction and levy taxes in those subareas to pay for those services. We did not say what kind of taxes. We left that up to local government. Could be a sales tax, could be a property tax, could be a utility tax. That we left to the local discretion.

But we felt that while there is a tendency to go out toward centralizing, consolidating, there is also need to decentralize, provide day care centers. Day care centers are things that are needed in only certain sections of the city. Housing for the elderly, typically, is only needed in certain sections of the community. Even in the suburbs we have old sections and new sections. Up in Chicago, the North Shore suburbs, the older folks who live along the beaches don't want to pay for the public swimming pools in the inland part of the suburbs where the less affluent live. Under the new constitution, these towns can build, maintain the beaches with one tax on the east end of town and

swimming pools on the west end for the young families and tax them separately, float bond issues separately. So, the great flexibility.

We also gave this power to counties. And this is wonderful. This is a front -- or, I should say maybe a side door approach to the urban county that is permitting counties to provide different levels of services in different parts of the county with different tax rates, and it is also an attempt to eliminate the need for special districts.

You may or may not know that Illinois has more special districts than any state in the union. We have 6500 local units, about 1500 are cities, villages and counties, about a thousand school districts. That leaves about 4000 special districts, sanitary district, water district. We've got them for everything and we create them at the rate of 40 a year, so it's quite a thriving enterprise.

And it is a creative solution. Under the old constitution, it was a way to get service. I don't know what the condition is in Ohio, but in Illinois, since World War II, 35 percent of all new housing units have been built in the countryside, unincorporated areas. That's where the land is. There is no more land in the city, so we build population in the outskirts, and this is going to get accelerated in the years ahead, and without benefit of

municipal services, and the special district as a stopgap measure performs our function.

Our problem in Illinois is how to get rid of them once they have performed their function. They are still hanging around 80 years later. What do you do with them? Well, that comes to our legislature, but I'll get to that in a little bit.

In addition, on debt, we have what I think is a fairly intelligent approach. We used to have a five percent debt limit. You know, any town, any governmental body could not incur general obligation debt beyond five percent of the assessed value of the property in that community. Of course, this is another reason for the special district, it evades that limitation. Under the new constitution, there is no limitation on debt whatsoever.

It says that all communities above 500,000, I believe, can incur general obligation debt without referendum up to 3 percent of assessed value of property. In Chicago, that means 300 million dollar bond issues without referendum. Then it drops from cities below a half a million to something like 50,000 or 25,000 -- there's a break in there -- can do similarly up to one percent of their assessed value; then the smaller towns under 25, and float bond issues without a referendum up to one half of one percent.

The logic of this was simple. Once we decide, we -- and I say "we," I don't mean to preempt, I'm talking about just the general "we" in Illinois. There are many times, especially with the pollution problem and in schools, so forth, where government has a responsibility to act, and if it doesn't act in the first instance, the game is over. It is too late, for example, to put in streets after a town is built. You are going to have good streets if you put them in before. If you want good sewage disposal, you put the pipes in before you build the streets.

We recognize that people aren't always willing to approve bond issues for new development or for uses somewhere else. Government as a protector of public interests has a responsibility to a certain point to take some initiative. And this was a recognition of that principle; that you have to give local government some leeway in this area of careful funding for such things as streets, sewers, water pollution control, water supply, whatever it is; and that was the purpose of that provision.

Beyond that, the legislature can set up various standards and controls, and so forth. But it gives them that breathing space. It also means that your bond issues don't become political footballs where the schools may need ten million and the parks need five million. You compromise, you give them both half because you don't think the voters

can take so much. It gives you an ability, where you think it is critical, to float the bond issue. And if it is a little bit more controversial, you want to take your luck to the public, you can put that on a referendum. It does recognize there is some inherent responsibilities of the government.

The home rule of the constitution applied to two places: all cities over 25,000 population -- And if you ask why they picked 25, you know as well as I do. They were flipping coins. Some wanted 10, some wanted a 100,000; but it came out 25. Those are the facts of life. Under 25,000, you can become a home rule community by referendum. You can also lose your home rule status by referendum, if you want. You can get in, get out, do whatever you want.

Counties. We gave home rule status in the constitution of our county; that is, the county in which Chicago is located. For every other county, we said, "You can work your way in. All you have to do --" and here is where we are pushing a little bit destruction -- "if you have a chief executive officer elected at large in the county, you got home rule."

So, if you take the chief executive requirement to achieve county home rule, plus the differential taxation, giving the county the right to levy special taxes for special services in sub areas, plus the original substance

of home rule power, you have got basically all the ingredients for what we call the urban county, a different kind of animal than we have known in the past.

Now, just one more comment. The home rule provision is very general. It merely says that all home rule units have the power to tax, to incur debt, to license -- but only for purposes of regulation -- to change their form of government by referendum and to literally tax almost anything under the sun -- frightening thought, I guess -- except a tax on income. That did it. Only state, no income tax, no gross earnings tax, none of that sort of stuff. Other than that, they got carte blanche.

Now, my commission actually did much of the research for the committee on local government in the consitutional convention. I think it would be fair to say that the debt ceilings, the one and a half, one, three percent that I mentioned before, reflected the original research we did on where communities were in their debt levels, and those were the prevailing levels pretty much by size.

Now, we also found that there wasn't a major city in Illinois which, if you aggregated the debt of the city and its overlapping special districts, did not exceed the five percent constitutional limit under the old one. So, by removing the old five percent limit on debt, we now

make it legally and physically feasible to consolidate by removing limitations on tax rates, which was the real impact in terms of financing of the constitutional home rule. We make it possible for internal consolidation to occur.

For example, if you have a village and in that village you have a park district. Now, the constitution in Illinois discriminates in favor of cities and counties, but it gives them home rule powers and a lot of other goodies. It really doesn't say anything about special districts except the general assembly will have the right to write laws about them, and so forth. Okay. Under the new constitution, if the village is over 25,000, it has no limit on its tax rate for capital property tax. That's prevailing form in Illinois. The park district in that community will have a tax rate established by the legislature. That's the way it works. Now, all the community really has to do is -- that village cannot on its own assume park functions parallel to what the other one had -- simply raise its tax a little bit, it doesn't need a special park tax, and just organize in the sense of parallel function and really assume the activities of the park form, because they are so tightly regulated by statute that they could not compete, let's say, with the village or the city if the city wants to go in competition with them for parks.

That may sound crazy but I don't think it is

crazy because one of the thoughts we had really, as far as the public is concerned, you know government is monopoly. While the average person in Illinois pays taxes to ten different local units, those local units are not doing the same services. They are for different services. The duplication is an overhead cost. You got a mayor, park board chairman, sanitary district chief, etc. That is where the duplication is. They are carrying on different functions, which means if the citizen wants transportation, there is only one place to go. If he wants clean water, he has only one place to go. Well, you know, this might be a heck of a fix if this is the way we got our medical services.

So we didn't think that the prospect of competition was such a terrible thing in terms of public interest, and there is a lot of thought being given to this. A way of public education, through voucher systems, private firms. I think Gary took over the school function of one district. So, we wanted to loosen it up a little bit, frankly, take all the cobwebs out, throw a lot of oil through the machinery and let's see what would happen and let's see what came out. This was the basic strategy in the new concept and, so far, there are only a couple of bad booboo's. If we had to do it over, I guess they would do it differently; but other than those few mistakes, it is a pretty good advance.

Now, once we got past the convention, we turned to our legislative program. Here we got serious about destruction and we concocted four bills. They happened to be by designation constitutional limitation bills, which gives them a special status, because each house in Illinois now has a constitutional implementation committee which has greater leeway procedurally on time deadlines and a lot of other things.

One bill has been passed, is on the governor's desk, and that is if you want to trigger county home rule provisions -- because we have nothing in Illinois law we define as the functions of the chief executive, because we never had a chief county executive, so we had a bill on that. We had a bill on differential taxation, to give it some greater direction. But I think the bill that would be most appropriate perhaps to this group is what we have dubbed our Illinois Metropolitan Local Option.

Many, many people advised us not to use the word "metropolitan," public officials, pressmen, political people, including the members of our commission. I said, "What should we call it? regional? national? That will scare somebody. Areawide? That almost has no meaning. Us? We? How do you get it across?" We decided to take to the high ground, let them shoot arrows at us. Somebody has to be for metropolitan living. We called it our Local Options

Act, and it deals with the subject of metropolitan government, metropolitan local options.

Now, the philosophy behind this bill is that in Illinois, at least, since the old constitution of 1870, with very, very rare exceptions, the prerogative of creating units of local government, whether they are cities, villages, park districts, you name them, were the prerogative of the people, created by petition, local petition; goes up to the circuit court, he says, "Fine." According to if you get enough votes, create a referendum.

Why shouldn't this same prerogative be extended to metropolitan services? It is a common courtesy. If it is good enough to handle sewerage, it should be good enough procedure to handle metropolitan problems. So our bill and our approach is based on this point: local options. It has to be kicked off, so to speak, by local action, petition. You can provide six different ways of getting it on the ballot but, basically, it goes to the ballot.

Now, the question becomes, whenever you deal with a subject like metropolitan services or government, whatever you want to call it, forgetting reality for a moment, you think it is the forerunner of doom or salvation, you get into almost an academic situation: you are playing God, you are creating something new. So, what is the best form of metropolitan government? You know, how do you define a

metropolitan area? Our commission is just loaded with bright people, which mean we could sit around forever and debate these things rather intelligently but perhaps get nowhere. It became very frustrating. And we have a very few professors which livened it up, and the elder statesmen, business-leader types. We had to figure out somehow to get around that.

One of our commission members, who happens to be the gentleman I am now working for, had a good idea. He said, "Why should we assume we are smart and why should we presume to tell people what they ought to do? Why don't we tell them what the choices are? Give them an opportunity to act on it." We were ready to let them act on it, the local kickoff. But the question of substance was what they would act on.

So, we decided that we would look around at the American and Canadian experience and see why anybody would want metropolitan government -- and I am using that "government" in a very loose sense, including planning commissions, call it whatever you want. What has been the experience, what has worked and what forms that have been put into practice tend to give expressions to what purposes, to what needs?

We looked around a little bit and we classified needs into four categories. We said there is a serious need

like a customer service need, certain things. For example, you have a city, a series of suburbs, and you have industry, you have shopping centers and downtowns. These are spread all over the region. People have to get from one place to another. Transportation, kind of a service, really has very little to do with ideology. It is a service. In years past most of us paid for it by getting on a private bus or a private streetcar. There is a whole series of quasi public services that people need that, all of a sudden, is of an emergency character. Water in many communities is sold privately. Even sewerage in many communities is financed through private companies. Transportation, as I have mentioned. A series of these kinds of things that, if you let it run through your mind, are basically financed when they come into the public arena by user charges. They usually are not financed by general taxation. But many communities have a desperate need for these kinds of operations to be provided. Call them service values.

We found that the form of metropolitan government that sought to give this expression was found in cities like Portland, Seattle, Boston. They are essentially what you might call multipurpose special districts.

For example, two summers back, in the Tri-County Portland area, the voters approved a metropolitan district there and gave them four functions: mass transportation,

water pollution control, water supply, and I think it was probably ground water, went into that utility area, with sort of an open end, saying, "and anything else that we might want to endow you with later on."

Seattle has had an option like this now for about 12 or 14 years, mainly dealing with ground and drinking water.

Boston has had something like that for 40 or 50 years, when they consolidated water supply sewer service, parks. They have a metropolitan district commissioner, as they call it.

This is one kind of breed. This is one kind of animal. Basically, it is a service need. Usually, wherever you find them, they are financed basically by fees and user charges, generally not strong governmental bodies. They generally do not have powers of initiative, of new programs, new activities of their own. But this was one option that people ought to have, and so that was our first option.

We said that in many other communities the need of the moment, according to the local community, might be simply they want to avoid disaster, disaster that might result from the independent action of the governmental agencies in the community. If you have a conglomeration of cities like the Chicago area -- we have two hundred municipalities alone -- you just want to minimize the damage

that any one of them can do to the rest of us; for instance, if they polluted our streams, if they did certain things. In Illinois, we have a beautiful system. If you live north, that is where you pollute the streams. If you live downstream, it comes down that way. So we always have a problem of watching what the guy upstream is doing.

In situations like this, what people are looking for essentially is sort of a coordinating, planning device, some form of public authority to kind of look over everybody else's shoulder and see if they might do something that might be damaging. Of course, the best example of it today and probably one of the most promising examples in the country is the Metropolitan Council of Minneapolis-St. Paul, which is really much more than a planning council. It has tremendous power of review, veto. It has operational powers now over regional agencies. It appoints the members of the regional sewer district, regional transit district; approves their budget and is generally moving on from sort of a planning overseeing function to operation of certain metropolitan services of a regional character.

Virginia has toyed around with something that is also somewhat novel. They talk about creating a metropolitan planning district as a stage 1 which ultimately, in stage 2 might become a metropolitan municipality, but basically starting out as sort of a planning, coordinating

device.

Generally, what you're concerned with here is not only the damage that one community can do to the other, but how do you control and give some sense of direction to the growth? Most growth is on the fringe.

In our version, we give to the metropolitan council the second option: the power to regulate land use and issue building permits and everything else, if the county of that area has not. Under Illinois law, counties can zone building regulations. But many of them have not taken the opportunity. So, in our bill, we kind of test them. We say metropolitan council, in unincorporated areas, can regulate land use and enforce it until such time as the county has its own set of regulations; so if they want to kick big brother out, they can do it.

Then, of course, the third type of bill we found, which is really exemplified by Toronto, the federation, where you seem to be struggling in a sort of a try and get efficiency value. You know, what things ought to be done on a small scale and what things ought to be done on a large scale. I think that is the essence really of the federation concept, which is our third alternative. We plug all these in our laws, these bills that we have.

The unique thing about the federation concept is that it calls upon local communities and the state to share

with this new entity basic police powers. In Toronto, one of the really most effective parts of their program really has little to do with the hardware service. You are always building sewer pipes, drains and all that. But really one of the most effective ones has been that you have one uniform assessment of property, which is a critical property; secondly, all traffic movement is computerized and controlled centrally, so you have a flow, an automatic flow geared to the traffic. And only the metropolitan council can borrow money, a very interesting system there. The metropolitan government cannot levy taxes. It levies funds. It levies the bills, sends it in for use to each of the local units. You know, "This is your share. When you collect your taxes, add on something for us and then send it to us." So only the local units have power of taxing, but the local units cannot borrow money. The metropolitan government can borrow money for everybody, which means that they have the advantage, the credit rating, triple A credit rating of all the assessment, the total economic strength of the region. This is a third option.

The fourth option that we found had little to do with efficiency or service or coordination, but we thought it was valid, and that is civic value. There is some value simply in taking the dust off the machinery once in a while. This is really where we got to the problem of

reorganization and consolidation, and in that area, probably the most concrete examples of that is happening through city-county consolidation, which has really started to move a little bit in the United States, particularly in the southeast and on the west coast.

Then, finally, we said if none of these options are suitable for Chicago or Decatur or Peoria, Illinois, we give them the option of creating a charter commission, a little constitutional convention for your own community, which is a powerful instrument simply because charter commissions can lay its recommendations before the electorate by referendum, and if the electorate adopts those propositions, that's law. So it is a powerful instrument and it is used in some parts of the country with considerable effectiveness, usually within county areas.

I would like to mention one other thing which we have embodied in our concept at a very low-key level, which we kind of swiped from Minnesota. In fact, we swiped all of our ideas, as you can tell we did. You know, Portland had a good thing. We used it. Toronto, Saint Paul.

One of the things we slipped in that I don't want to stop without mentioning is that taxing system that they now have adopted for the seven-county area in Minneapolis-Saint Paul. One of our bills, which hasn't been adopted yet -- they have got it through the legislature -- and it is

a share-the-tax bill. We are quite interested in it in Illinois, because under the present government, we have developed our own kind of forms of revenue sharing. State and local are pretty good. They are fairly well advanced. But this one is particularly suited, the one in Minnesota, to metropolitan. It deals with the problems of fiscal disparity.

Even in a rich area like the Chicago region, we find the per capita spread for schools, for police and fire protection, is at least a thousand from one suburb to another, city to suburb; pay ten times as much taxes for one-tenth the service. This is basically a problem of the base. The tax base isn't there.

I don't know who administers the Minnesota law but I think the state does. They take 40 percent of the annual increment in taxable values created by commercial and industrial growth, take the top 40 percent off, deposit it in a regional account and then redistribute it back to all the local communities on a per capita basis, tempered by the assessed valuation of that community. So if a community has a very low assessed valuation, they will give them a little bit higher per capita allocation, balance it out. Of course, it isn't as true for the central city. We pay about 30 percent tax for our schools, but in the suburbs, about 90.

So this kind of method of financing is critical for education and probably in areas like Chicago and the Twin-Cities area, which are I think economically in good shape, with this kind of restructuring of the tax system, we could probably avoid the need for much state and federal aid because, you know, where do they get the money? They get it from us and they get it from the big cities and the suburbs around it.

The problem is how to redistribute it. I think this is a very interesting departure in Minnesota. It would probably lead to many structural changes, probably have to get some metropolitan mechanism, political mechanism to go with the tax mechanism.

Now, in our metropolitan bill, which has all of these options, by the way, we have certain general principles. That is the last point I will make. As I said, they have to be kicked off by referendum, the only way you can get it. We said if a region had a central city which contained 40 percent or more of the region's population, you needed a concurrent majority; in other words, majority to vote in the city and a majority to vote outside the city. If you don't have a concensus where you have a big city in the middle of a large region, governmental experience is it is not going to work well anyhow. So you must have a majority in both areas.

We make the referendum very easy: get it on by petition, the council resolution. Five or more suburbs joining together can call a referendum. But we say, regardless of what form of metropolitan government is adopted, even if it is just a regional planning operation, the governing body must be elected by the people, the one-man, one-vote basis; no appointments. Because if you don't have elected officials, you don't have a political legitimate tax base. Without a tax base you are always running and asking somebody else for money. This is the sad story of regional planning in other states. It is not funded, it is all based on contributions; and it just isn't working. So we say you must have an elected board.

We toyed around with this idea of proportionate representation. I think you are familiar with the council of government sort of thing where the mayor of each town is the representative, and that is impossible. It is all right if you have an area maybe of two or three communities of relatively equal size. You flip a coin, say four guys from each area. Here, you have Chicago: seven million people. Half of them are in Chicago, the other half are scattered over two hundred municipalities of which the average size is 20,000. Well, if we were to give Chicago one vote and each suburb one vote, we'd have 201 legislative bodies, but then we'd have to give the Chicago representative 200 votes. He'd

be sitting there like a dumbbell. Or else let Chicago send 200 people. That gives us 400 people sitting.

Now, when you get down to towns of five hundred, which is not unusual in Illinois, what do you give them? One-hundredth of one-millionth of a voting privilege? It is mechanically impossible because the fragmentation is so pervasive that you just can't deal with it that way anymore. Even in Cleveland, I think there was a lawsuit on their council of governments that the City of Cleveland was under-represented on this basis.

So we said, let it be elected by the people. And to avoid a political hassle too early, we said, any unit you create, you automatically elect the governing board at the same election as the referendum. So you have people arguing about it, candidates; you get a large participation.

Secondly, we didn't want to get into a hassle on district representation versus at-large representation, so we said the governing board, in the first instance, shall always be nine people elected at large. Within two years, they must submit a district plan of representation in which in that plan they can increase the membership up to twenty-five. We were gearing it at the largest region, which was Chicago, which would mean one elected person for every 250 or 300 persons. We felt anything smaller than that, your representation is too thin, you don't get enough local input.

So they can increase it up to twenty-five, and one-third of them could be at large; but at least two-thirds, 17 of them, had to be from districts, or all of them could be from districts.

That's the approach we took to, quote, new government, end quote.

(Applause.)

CHAIRMAN CARTER: Would you hold on just for a second? Mr. Elkin got in on the airplane just about two minutes before he came on the podium, so we didn't get a chance to talk to him.

We have to leave at five o'clock. That's our commitment. We have got five minutes for someone who would like to ask a question. I am sorry we didn't have more time to do this.

Mr. Elkin, you did a tremendous job. You don't know how nicely you wrapped up a number of things that were discussed.

Is there any question for Mr. Elkin?

I think everyone feels the pressure of time and, again, we thank you so much and, again, we hope you all enjoyed this conference today.

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Ohio Constitutional Revision Commission
Local Government Committee
April 27, 1971

Constitutional Provisions for Local Governmental Units

Two basic units of local government are provided for by the Ohio Constituion, for the "government" of which the General Assembly is required to enact laws--counties and municipal corporations, or municipalities. Other specific units mentioned in the Constitution are townships, towns, school districts, taxing districts, and political subdivisions. City wards are also mentioned (for purposes of residence to qualify as an elector and for defining boundaries in apportionment for the General Assembly) but they are not units of government for general purposes.

Municipal corporations, or municipalities (the terms are used interchangeably), are divided into cities and villages. Although "towns" are mentioned in the Constitution, there is no provision for their government either in the Constitution or in the statutes, and there are none in Ohio.

Counties

County boundaries are not defined by the Constitution, as they are in the constitutions of some states, but section 30 of Article II requires that all laws creating new counties, changing county lines, or removing county seats must be submitted to the electors of the counties affected and adopted by a majority of all of them voting at the election in each county before becoming effective. The section also contains minimum population and acreage (20,000 and 400 square miles) for creating new counties. The minimum requirements apply also to the "old" portion of the county, if a new county is created by dividing an old one.

Section 1 of Article X requires the General Assembly to provide by general law for the organization and government of counties, and for alternative forms of county government which may be adopted by the people of the county. Municipalities and townships may, if the county consents, transfer powers to the county, as

provided by law, retaining the right to revoke such transfer, and retaining the right of the initiative and referendum to the people of the municipality, township, and county with respect to such transfers or revocation.

In addition to requiring the General Assembly to provide for the government of counties, Article X permits the people of any county to frame and adopt a charter, and specifies the procedures for framing and adopting a charter. (Sections 3 and 4 of Article X.) Section 3 provides for county powers in the event a charter is adopted, and for the relationship between the municipalities and townships in the county and the county.

The county is the basic unit in the Ohio court system, with constitutional provision for a court of common pleas in each county and each county having at least one resident common pleas judge (section 4 of Article IV). Judges are elected by the electors of the county. (Sec. 6) Courts of Appeals (the state is divided into eleven appellate districts which consist of counties, although the Constitution does not prohibit dividing counties in forming appellate districts) "shall hold sessions in each county of the district as the necessity arises" and the county commissioners are required to provide a proper and convenient place for the court of appeals to hold court (section 3 of Article IV). Section 10 of Article I gives a person accused of a crime the right to a trial by a jury of the county where the offense was committed.

The county is also the basic unit for division of the state into districts for the election of members of the General Assembly, although the requirement that each county have one representative has, of course, been eliminated. It should also be noted that a county may be divided for this purpose. To the extent consistent with the population requirements, however, sections 7, 8, and 11 of Article XI require that districts shall contain one or more whole counties. If this is not possible within the population limits (established by sections 3, 9, and 10 of Article XI), the Constitution specifies how districts shall be

formed within counties and what shall be done with any excess of the county over the number of whole districts formed within the county.

There are no constitutional requirements for the election of any particular county officers (other than common pleas judges, if they should be considered county officers in any way). Section 1 of Article XVII requires that county officers be elected in November in even-numbered years, and section 2 specifies that the term of office of county officers shall be an even number of years as determined by the General Assembly but not exceeding four. County commissioners are mentioned in section 3 of Article IV (requiring them to provide a place for the Court of Appeals to hold court) and again in section 4 of Article X (permitting them, by a 2/3 vote, to place on the ballot the question of choosing a county charter commission) but neither section requires that county commissioners be elected and only in section 4 of Article X is there any implication that county commissioners must exist(in noncharter counties). County recorders are mentioned in section 40 of Article II, having to do with land titles, but without any requirement that such an officer must be provided for. Nominations for elective county offices are required to be made at direct primary or by petition, as provided by law (section 7 of Article V).

Miscellaneous Provisions

A county is a convenient unit of government for such things as establishing residence (for an elector - section 1 of Article V;for signing petitions - section 1g, Article II), for advertising (constitutional amendments - section 1 of Article XVI; bond issues - section 2b of Article VIII, section 2d of Article VIII). Counties constitute a unit for the collection of certain constitutionally mandated state taxes (section 2b of Article VIII, section 2d of Article VIII). Counties may be permitted to participate in the use of moneys raised by state bond issues for highway purposes (section 2c of Article VIII, section 2g of Article VIII) and for capital improvements generally (section 2i of Article VIII).

The state is prohibited from assuming county debts unless created to repel invasion, suppress insurrection, or defend the state in war, and counties may not be authorized to become stockholders in corporations or lend their credit to joint stock companies, corporations, or associations.

Counties are one of the units of government entitled to all or part of 50 percent of any inheritance or income tax collected by the state, (section 9 of Article XII). Counties are required to appoint and promote persons "in the civil service" according to merit and fitness (section 10 of Article XV).

Municipal Corporations

Municipal corporations, or municipalities, consist of cities and villages. The Constitution so classifies them, and provides that municipal corporations having a population of 5,000 or more are cities and all others are villages. (section 1 of Article XVIII). The General Assembly is required to provide for the incorporation and government of cities and villages (section 2 of Article XVIII) and, in an earlier section, is required to provide for the organization of cities and incorporated villages (section 6 of Article XIII). "Additional" laws may be passed for the government of municipalities, to become operative in any municipality when adopted by the people. (section 2, Article XVIII).

Article XVIII contains the basic home rule provisions of the Ohio Constitution for municipalities, provides for the framing and adoption of municipal charters, the acquisition and operation of public utilities or contracting for public utility service, acquisition of property for public use, special benefit assessments, and issuance of bonds for public utility acquisition.

The General Assembly may, by law, restrict the power of municipalities to levy taxes and incur debt (Article XVIII, section 13 and Article XIII, section 6), and section 13 of Article XVIII also permits laws to be passed requiring reports from municipalities as to their financial condition, and the examination of the books and accounts of municipal authorities. Other constitutional

provisions relating to taxation and debt with respect to municipal corporations include: section 5 of Article VIII, which forbids the state from assuming city debts unless incurred to repel invasion, suppress insurrection, or defend the state in war; section 6 of Article VIII which prohibits authorizing a city from becoming a stockholder or lending its credit to a joint stock company, corporation, or association; section 2 of Article XII which applies the one per cent of true value property tax limitation to all taxes unless a municipal charter authorizes a different limit; and section 9 of Article XII, which places cities and villages among the local governmental units entitled to a return of part or all of 50% of any inheritance or income tax collected by the state.

No municipal officers are specified in the Constitution. Municipal elections are to be held in odd-numbered years (section 1 of Article XVII), and nominations for municipal offices are to be made at direct primary elections or by petition as provided by law (Article V, section 7), but direct primaries shall not be held for nomination of municipal officers in municipalities of less than 2,000 people unless petitioned for by a majority of the people of the municipality. (Article V, section 7). Terms of municipal officers are to be such even number of years, not exceeding four, as prescribed by law (section 2 of Article XVII).

Municipal corporations may participate, with other units of governments, in bond moneys raised by the state for highway purposes and for other capital improvements (sections 2c, 2g, and 2i of Article VIII). Municipalities may transfer powers to counties, and revoke such transfers, by agreement, reserving the initiative and referendum power to the people (section 1 of Article X) and the adoption of a county charter may vest municipal powers in a county (section 3 of Article X).

Municipalities constitute a unit to be used in the formation of districts for election of representatives and senators to the General Assembly, and city

ward boundaries may also be used (various sections in Article XI).

Section 1f of Article II reserves the initiative and referendum powers to the people of municipalities with respect to questions which municipalities are authorized by law to control by legislative action, and section 1g of Article II requires the signer of any initiative or referendum petition to indicate his residence, including the municipality and ward and precinct in which he resides.

Section 30 of Article II (county boundaries) prohibits dividing a city if the county in which it is located is divided, and section 10 of Article XV requires appointments and promotions "in the civil service" of cities to be made according to merit and fitness.

Townships

The Constitution does not require that general laws be passed to provide for the government and organization of townships, as it does with respect to counties and municipalities. The General Assembly is required only to provide for the election of "such township officers as may be necessary." (Section 2 of Article X). Township trustees have powers of taxation as may be prescribed by law, and there is a prohibition against drawing money from a township treasury except by authority of law. (same section).

Township officers are an exception to the constitutional prohibition against a person who holds a lucrative office under authority of this state serving in the General Assembly. (section 4 of Article II).

Township officers (if any), like municipal officers, are to be elected in odd-numbered years (section 1 of Article XVII), are to have terms of office of an even number of years not exceeding four (section 2 of Article XVII), and are not to be nominated by direct primary unless petitioned for by a majority of the electors of the township (section 7 of Article V).

Township residence is to be indicated on an initiative or referendum

petition (section 1g of Article II), and constitutes residence (for a period of time to be fixed by law) for the purposes of qualifying as an elector (section 1 of Article V). Townships are used in the formation of General Assembly districts (section 7 of Article XI). Townships may be authorized to transfer and revoke powers to counties by agreement or pursuant to the adoption of a county charter (sections 1 and 3 of Article X). Townships may also be designated to participate in the 50% of a state-collected income or inheritance tax that is required to be returned to specified local units of government (section 9 of Article XII).

The state is prohibited from assuming township debts unless created to repel invasion, suppress insurrections, or defend the state in war (section 5 of Article VIII) and townships may not be authorized to become stockholders or lend their credit to joint stock companies, corporations, or associations. (section 6 of Article VIII).

Political Subdivisions

The term "political subdivision" (or, in one case, "taxing subdivision") is used a number of times in the Constitution, but is not defined nor given any specific governmental powers. It appears to cover any unit of government which the General Assembly might define as a political subdivision or might include within the meaning of the expression as it is used in the particular constitutional section. Sections using the term are: sections 37 and 41 of Article II, sections 2c, 2h, and 13 of Article VIII, section 6 of Article XI, and section 11 of Article XII.

Miscellaneous

The term "town" is used in the Constitution in three sections (sections 5 and 6 of Article VIII and section 30 of Article II) but there is no provision in either the Constitution or the statutes for the organization and government of towns.

"Governmental units" is used in section 7 of Article XI, referring to counties, townships, municipalities, and city wards. "Governmental entities" is used in section 2i of Article VIII in a context that indicates the General Assembly should specify what they are.

Finally, school districts are entitled to participate in part or all of the 50% distribution of state income and inheritance taxes (section 9 of Article XII), and any elected school officers are to have a term of office of an even number of years, not exceeding four (section 2 of Article XII), and be elected in odd-numbered years (with municipal and township officers). Another section (section 3 of Article VI) gives school districts wholly or in part within a city the power to determine the number of members and method or organization by referendum.

December 1971

THE PRESENT STATUS OF MUNICIPAL HOME RULE IN OHIO

This memorandum is not intended to be, and should not be regarded as, a definitive or comprehensive discussion of municipal home rule in Ohio in all of its many aspects. That subject is an extremely complex one and it is almost impossible to make any but the most generalized statements concerning municipal home rule without having to qualify the statement carefully. Such extensive treatment of various aspects of municipal home rule can be found in the following sources, and no attempt need be made to duplicate those efforts.

Duffey, John J., "Non-Charter Municipalities: Local Self-Government," 21 Ohio St. L. J. 304 (1960);

Vaubel, George D., "Municipal Corporations and the Police Power in Ohio," 29 Ohio St. L. J. 29 (1969);

Crawford, Henry J., "The Present Status of Home Rule in the State of Ohio," "Ohio Cities and Villages," (1958), p. 133.

The purpose of this memorandum is to present in brief form a discussion of some of the recent pronouncements of the Ohio Supreme Court in order to attempt to show the latest holdings on some of the major questions as to municipal home rule which have been considered by the Ohio Supreme Court since the last-cited article was published.

The concept of municipal home rule may be thought of and talked about in several ways, but for the purpose of considering the matter from the standpoint of framing or revising a charter, the focus must be on the language of the present constitutional provisions and the interpretations which have been given to those provisions by the supreme court of this state. The question whether the status of municipal home rule as it has evolved to the present time is consistent with the intent of the framers of Article XVIII at the 1912 Constitutional Convention or with any particular political philosophy of what

municipal home rule ought to be, should not be allowed to detract from the examination of what the current status is and how it came to be.

The language of Section 3 of Article XVIII is deceptively brief and seemingly simple. As a general description of home rule as provided for in that section, it is easy to say that all municipal corporations in Ohio, whether or not they have adopted a charter, "have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws" and to derive from this the principle that there are two categories of powers of municipal corporations, one being local self-government and the other police, sanitary and other similar regulations, with only the latter being subject to the rule that such regulations are invalid if in conflict with general laws. Unfortunately, such a statement greatly over-simplifies the matter and fails to take into account a good deal of essential history and case law which must be understood in some detail by anyone who seeks to deal with the question of so-called "home rule" for municipalities in connection with the drafting or revision of a municipal charter under which home rule power is to be exercised.

The historical background of the present Article XVIII is relatively simple and well known. Prior to 1912, as stated in the first syllabus of Ravenna v. Pennsylvania Company, 45 Ohio St. 118 (1887), describing the status of municipalities at that time,

> "Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

Thus the General Assembly had legal supremacy over local communities in all matters of government and it was necessary for municipalities to petition the legislature for each and every power which they wished to exercise. Moreover, even though the Constitution of 1851 sought to end the practice of special legislation for each municipality by requiring that matters of the incorporation and powers of municipal corporations be provided for by general laws, the General Assembly managed to circumvent this requirement by a system of classification of municipalities according to classes and grades, with different powers provided for each city of each class and grade. In fact, by the time the Supreme Court finally struck down this entire classification system as violative of the 1851 Constitution's requirement of general laws, each of the eleven largest cities in the State was in a separate class and grade.

During the debates on the proposed home rule article at the 1912 Constitutional Convention, the delegates described as one of the evils to be cured by the proposed home rule amendment the kind of political trading of votes for laws relating essentially to only one municipality which had been common in the legislature. It appeared, according to the delegates, some of whom had served in the General Assembly, that if a new law was desired by, say, Cincinnati, the leader of the Hamilton County delegation of the General Assembly would approach the leader of the Cuyahoga County delegation for the

support of that delegation for the bill, with the understanding that such support would be forthcoming regardless of the content or merits of the bill, on the basis of the assurance that the same unquestioning support would be supplied when another bill was requested for the benefit of Cleveland. It has also been said that a worse evil was the common inability of municipalities to secure the passage of desired or needed legislation because of the General Assembly's disinterest in local matters. This system of the passage of special legislation under the guise of general laws ended in 1902 with a series of decisions by the Supreme Court holding it unconstitutional. The result was the adoption by the legislature of the Municipal Code of 1902 which classified all municipal corporations as either cities or villages, with a population of five thousand being the dividing line, and providing a form of government for each which are basically the statutory forms of village and city government which exist today as part of the Revised Code. Having the same form of government for cities of five thousand persons and for cities of five hundred thousand persons led, as might be expected, to a good deal of inconvenience and problems, especially for the larger cities, and helped, along with the desire of some communities to employ other forms of municipal government -- most notably, the commission plan -- and to own and operate public utilities, to provide the impetus for the calling of the 1912 Constitutional Convention, at which municipal home rule was one of the major topics.

Members of the Committee which drafted the proposed Article XVIII for the 1912 Convention took great pains, in explaining their proposals to the Convention, to stress the lavish attention which had been devoted to each and every word of the sections, and the proposal was adopted very nearly intact

as recommended by the Committee. It does not seem necessary to go into any lengthy discussion of the debate which was had on these provisions at the Convention; suffice it to say that it was clearly recognized that the effect of the sections if adopted would be, to a large extent, to stand on its head the rule enunciated in the Ravenna v. Pennsylvania Company case referred to above. Municipal corporations would thereafter receive a grant of powers directly from the Constitution itself, and not by grant from the General Assembly. The theory, in general, was that the citizens of municipalities would have full powers, limited only by the requirement that local regulations not conflict with those which deal with matters of essentially statewide concern or which affect territory beyond municipal boundaries. The delegates recognized that the line which they were drawing between powers of local self-government and police, sanitary and similar regulations is a very general line of demarkation which can ultimately be drawn in particular cases only by the supreme court. The delegates, based upon their prior experience with the handling of essentially local matters by the General Assembly, seemingly were not willing to have the real power of drawing the line between state and local functions entrusted to that body. They preferred to place their confidence in the ability of the courts to do the job in a fair and impartial manner.

That the Supreme Court, and the lower courts also, have not found this an easy task or one in which it has been possible to be consistent, is shown by the excerpt from the opinion in Lynch v. Cleveland, 164 Ohio St. 437 (1956), quoted at page 43 of the Wilder report. The view that changing interpretations are the result of changing conditions as well as changing personnel

on the court was expressed in State, ex rel. McElroy v. Akron, 173 Ohio St. 189, 192, as follows:

> "Due to our changing society, many things which were once considered a matter of purely local concern and subject strictly to local regulation, if any, have now become a matter of state-wide concern, creating the necessity for state-wide control."

This excerpt was quoted by the court in Cleveland Electric Illuminating Company v. City of Painesville, 15 Ohio St.2d 125 (1968), in which the court described how the production of electrical power, which originally involved usually the production of power by an individual electric company for an individual municipality, has since changed so that now a single electric company serves large areas and many municipalities and transmission lines must run for many miles, and even interstate. In that case the court therefore held that an ordinance of the City requiring the underground installation of electrical transmission lines could not be enforced where the lines were being installed overhead in accordance with the relevant statutory provision. The court said that it has now become essential that the interstate transmission of electrical current be governed by laws of general application and not be impeded by local regulation. Other examples could be cited, but this case seems to illustrate well the flexibility of the present Section 3 of Article XVIII when interpreted by the courts to meet changing conditions. Even a decision such as this, however enlightening it may be on this aspect of home rule, does not necessarily provide the complete answer to other situations which may arise, for the present constitutional provision requires resolution of each question as it arises, on a case-by-case basis.

In recent years, however, the Supreme Court has apparently made a concerted effort to provide some clear guidelines and principles on this subject. In Leavers v. City of Canton, 1 Ohio St.2d 33 (1964), the court set out four propositions of law which were intended as a summary of the powers of charter and non-charter municipalities with respect to the passage of ordinances. These propositions, which are found at page 37 of the opinion in that case, are as follows:

> "Any ordinance dealing with police regulations passed by either a charter or noncharter city, which is at a variance with state law, is invalid. Section 3, Article XVIII of the Ohio Constitution.
>
> "An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute.
>
> "An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is no state statute at a variance with the ordinance.
>
> "An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with a state statute."

The first proposition seems to be self-evident from the language of Article XVIII, Section 3, but the distinction between a power of local self-government and a police or sanitary regulation or one which is of state-wide or extra-territorial concern can often be difficult to make, as can the determination whether a variance or conflict exists between an ordinance and the provisions of general law. The difficulty of the first distinction is illustrated by the Cleveland Electric Illuminating Company v. City of

Painesville case discussed above, which shows that the same function may or may not be a power of local self-government depending upon the time, place and other circumstances. A further difficulty in this area concerns the restrictions on even the powers of local self-government which may be imposed by the General Assembly under Article XIII, Section 6 and Article XVIII, Section 13 which provide, respectively, as follows:

> "Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement."

> "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

The question of what constitutes a variance and the extent of the power of the General Assembly to control municipal action by means of the "conflict" clause of Article XVIII, Section 3 was somewhat clarified in the case of Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113 (1965), in which the court upheld the validity of a municipal ordinance prohibiting the business of door-to-door selling and solicitation. The ordinance was challenged on the basis of the existence of two sections of the Revised Code purporting to authorize municipal corporations to regulate and license such activities and providing in some detail for such regulation and licensing. In upholding the validity of the ordinance in spite of the clear differences between its provisions and those of the statutory sections in question, the court held that the power of municipalities to enact police regulations is

derived directly from the constitution and not dependent upon any legislative grant. The term "general laws" in Article XVIII, Section 3 refers only to statutes which themselves set forth police, sanitary or similar regulations, and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.

Though the West Jefferson case is thus helpful in establishing that Article XVIII, Section 3 is a limitation on the police powers of municipalities, and not a grant thereof, the many questions concerning how it is to be determined whether a conflict does exist, as discussed in the article by Professor Vaubel referred to above, still remain. The case does seem to make it clear, however, that the first proposition in the Leavers case does not mean that the General Assembly has the power by statutory enactments to prohibit municipalities from exercising their police powers granted by the Constitution.

The second proposition of the Leavers case,

> "An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute. State, ex rel. Canada, v. Phillips, supra."

is based, as indicated, on the case of State, ex rel. Canada v. Phillips, 168 Ohio St. 191 (1958), in which the supreme court strongly reaffirmed the position which it had taken in the very early case of Fitzgerald v. Cleveland, 88 Ohio St. 338 (1913), that the phrase "as are not in conflict with general laws" is applicable to and limits only the second portion of that section dealing with local police, sanitary and other similar regulations and not to the first clause dealing with powers of local self-government. The court held in the Canada case that the appointment of police officers is a power of local self-government and

is not a police regulation merely because it relates to the police department, thus overruling a number of earlier decisions in which matters of organization and personnel of police and fire departments were held to be police regulations.

It is important to note, however, that the Canada case stands for the proposition that only a charter municipality may validly pass an ordinance on such a subject which is "at a variance with a state statute" for the fourth proposition of the Leavers case states that

> "An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with a state statute. State, ex rel. Petit, v. Wagner, supra."

In State, ex rel. Petit v. Wagner, 170 Ohio St.2d 297 (1960) the court held invalid a municipal ordinance which provided a method of appointment for a chief of police which differed from the procedure established by the state civil service statutes. While stating that it clearly recognized that all municipal corporations, both charter and non-charter, possess all powers of local self-government, the court said that noncharter municipalities may exercise those powers only by ordinances which are not at a variance with state statutes on the same subject. Therefore, while a charter municipality could have provided for the appointment of a police chief in the manner provided for in the ordinance held invalid in this case, North College Hill, not having a charter, could not do so.

Perrysburg v. Ridgway, 108 Ohio St. 245 (1923) was cited in the Petit case for the proposition that all municipalities derive their powers of local self-government by direct constitutional grant and also in the third proposition in the Leavers case as follows:

> "An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is not state statute at a variance with the ordinance. Perrysburg v. Ridgway, supra."

In the Leavers case itself the court held invalid an ordinance of the City of Canton, a non-charter city, which required employees of the fire department to retire at the age of 65, while the applicable state statute provided for employees to hold their positions "during good behavior and efficient service."

The result of the holdings of the supreme court represented in the four propositions of the Leavers case is a clear distinction between charter and non-charter municipalities in the exercise of the powers of local self-government. While the court says that the substantial home rule powers of each are the same and that the restriction on non-charter municipalities established in the Petit and Leavers cases goes only to the method or procedure by which such powers are exercised, such a "substantive - procedural" dichotomy, which seems to be not much clearer in this area of the law than in most others, adds little clarity to the subject. These holdings also seem, as pointed out by Judge Duffey in the article referred to above, to be inconsistent with earlier cases such as Hugger v. Ironton, 83 Ohio App. 21, appeal dismissed 148 Ohio St. 670 (1947), in which it was held that a non-charter city could, as a power of local self-government, sell or dispose of real estate as provided by ordinance. A statute purporting to govern the procedure for such a sale was held invalid. The question of a non-charter

municipality's powers with respect to the disposition of real property may thus still be unsettled.

The four propositions in the Leavers case also fail to take into consideration the so-called "state-wide concern" doctrine exemplified in such cases as Cleveland Electric Illuminating Company v. City of Painesville, discussed above, and what seems to be a more limited doctrine found in Village of Beachwood v. Board of Elections of Cuyahoga County, 167 Ohio St. 369 (1958) in which the court held that the procedure for detachment of territory from a municipality, since it affects more than simply the internal affairs of a municipality, is not a power of local self-government and is therefore governed exclusively by state statutes. This would be true as to both charter and non-charter municipalities under the reassuring of the Beachwood case.

The foregoing discussion confirms the observation made at the beginning hereof that municipal home rule is now, and has been throughout its history in this state, a general principle based upon constitutional language which is subject to wide variations in interpretation and which requires the courts to provide, by means of the usual judicial processes of case-by-case adjudication, to establish most of the substantive rules as to the exercise of the power. One of the major problems to be faced in framing or revising a municipal charter, therefore, involves the difficult task of attempting to assess existing or proposed charter provisions in light of sometimes inconsistent holdings of the courts on the subject of home rule. It does seem to be possible, however, to approach some of the problems with a fair degree of certainty and, if the intention is to secure a high degree of home rule power, to avoid language, which can result in undenied and unintended limitations on that power.

Judge Duffey seems to have outlined well three approaches which could be taken to resolve this problem, at pages 305 to 308 of the article referred to above, as follows:

> "1. Simply reverse the common law concept, i.e., instead of municipalities having only those powers granted by statute, give municipalities very broad power to act by constitutional grant but allow the legislature to limit or prohibit municipal powers by statute.

"An immediate subsidiary problem would be to decide what legislative action is to be considered as limiting municipal power. A liberal approach using statutory interpretation to draw broad implications, creation or preemption concepts, etc., could easily put the situation back very close to the legislative supremacy of common law. A strict approach requiring specific positive statutory provision would have great legal and political significance. Politically, it is much easier to block restrictive legislation than it is to obtain enactment of broadening legislation. This is especially true if, as in Ohio, municipal representation in the legislature is substantial. Legally, municipalities could obtain wide freedom from reliance on statutory law. Municipal action would require only a proper public purpose and lack of restrictive statutes.

"The primary responsibility for determining the division and scope of specific power would rest with the state legislature and political processes.

> "2. Distribute governmental power by constitutional provision between the legislature and the local units.

"Two subsidiary problems immediately arise. Is the separation to be absolute so that each has exclusive jurisdiction over its fields and the other has no power to act; or is each to be supreme in its field so that one can act where the other has not? How are the respective fields of power to be defined -- by specific enumeration or by general guides, such as "municipal affairs," "local self government" or "state-wide concern"?

"This general approach would obviously have a drastic impact. Within the sweep of their power, municipalities would have complete protection from legislative indifference and abuse. On the other hand, the state legislature would lack power to act and could not gain any such power except by a change in the constitution. Further, if the state is deprived of any ability to control municipal action, some device is needed to allow the inhabitants of the municipality to place limits on their own officials. One such device is to allow the local adoption of municipal charters which would operate as a local constitution.

"Finally, there is the question of what municipalities are to have these powers, i.e., are the constitutional grants to be self-executing or to require local action. If self-executing, each municipality, whether charter or non-charter, small village or large city, becomes a state legislature in miniature -- within, of course, the powers granted. Substantial arguments can be made that many small municipalities are not prepared to assume complete responsibility for guiding their own affairs -- especially not prepared to draft and adopt their own local constitution.

"Defining the powers granted is a far more important problem in a distribution approach than in the case of a mere reversal of the common law concept. The respective interests and needs of the state and municipality change with time and, inherently, they overlap. Since the division is by constitutional provision any mistake is set in 'concrete' and it would require a change in the constitution to rectify it. The 'mistake' could be made originally in the distribution of powers or it could become a mistake through changes in the social conditions. Specific enumeration of powers is obviously difficult -- in fact, impossible in the sense that at some point general categories would have to be made.

"Under this approach, the scope of municipal power is largely a matter of constitutional interpretation. The primary responsibility for determining the division and scope of municipal power would rest upon the state courts. The broader the categories of powers stated, the heavier the courts' responsibility becomes. The serious question must then arise whether the courts are institutionally capable of doing an adequate job of dividing legislative power between the state and its municipalities.

> "3. The third approach is a combination of constitutional municipal power with legislative supremacy, and of a separation of powers. The variations possible are as innumerable as the breakdown of specific powers.

"Article XVIII of the Ohio Constitution, as interpreted by the Ohio courts, uses the compromise approach. For example, power over municipal utilities is for the most part granted exclusively to municipalities. On the other hand, taxing powers are granted to municipalities but are specifically subject to legislative control."

Ohio Constitutional Revision Commission
Local Government Committee
May 15, 1972

Twin Cities Council (Minneapolis-St. Paul)
Indianapolis-Marion County

At the last meeting of the Local Government Committee, there was some discussion about two of the examples of regional or metropolitan-area government instituted in recent years in the United States. One is Unigov, the merger of the City of Indianapolis and Marion County in which it lies, and the other is the creation of a Metropolitan Council for a 7-county area in Minnesota which includes Minneapolis and St. Paul. Unigov is not the only city-county combination in this country but the Twin Cities Council is a unique device for solving metropolitan problems.

Metropolitan Council of the Twin Cities Area

The Minnesota State Legislature established the Metropolitan Council of the Twin Cities Area in 1967 to "...coordinate the planning and development of the Metropolitan Area comprising the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington..." It replaced the Twin Cities Metropolitan Planning Commission. A cross between a metropolitan government and a special district, the Metropolitan Council not only has a range of planning and coordinating responsibilities, but it is also, in some limited respects, placed over other special districts operating in the area.

Two basic formats were considered at the time of the formation of the Council.

(1) a council which would consist of popularly-elected members and possess authority to operate area-wide service programs, and

(2) a board whose membership would be appointed by the Governor and whose powers would be restricted generally to the coordination of work undertaken by other governmental units.

The latter option, more acceptable to the conservatives, was the one ultimately adopted, but the legislative division over the adoption was surprisingly even, a fact which has left many supporters of the elective-operative option optimistic about achieving both of these objectives in future legislative sessions.

Prior to 1967, planners and "good government" groups had been pushing for regional action in the area to deal with an increasing sewer problem, other elements of urbanization and the ineffective Planning Commission. By early 1967, eight business, civic, and political organizations established as a fundamental goal the enactment of state legislation creating an areawide unit of government. The Citizen's League and the Upper Midwest Research Council were responsible for the production of a draft for legislative consideration, and the plan received rigorous support from the business community and the public. The new metropolitan council would speak and act for the urban region as a whole; supplying a limited number of regional services--those which the municipalities

could not provide individually; and it would oversee separate projects so that these projects could be integrated into an overall metropolitan economic and physical development pattern. The regional council would neither usurp local prerogatives nor replace existing municipalities; it would not be a consolidated, metropolitan "super" government and viable local units were seen as necessary and desirable.

The Council, as created, is composed of 14 members, one from each of the state senatorial districts in the metropolitan area, appointed by the Governor with the advice and consent of the state senate, to serve six year terms. A 15th member of the Council, the Council chairman and principal executive officer who may reside anywhere in the metropolitan area, is also appointed by the Governor with the advice and consent of the senate, to serve at the pleasure of the Governor. The Council is authorized to appoint whatever staff and to hire whatever consultants it deems necessary in discharging its responsibilities.

By law, the Council is given the following duties, functions, and prerogatives:

(1) to undertake comprehensive planning for the seven county area;

(2) to prepare a comprehensive development guide setting forth "policy statements, goals, standards, programs, and maps prescribing guides for an orderly and economic development, public and private, of the metropolitan area;"

(3) to review all long term comprehensive plans of each special district operating in the metropolitan area, and literally veto any plan, or part of a plan, which it finds inconsistent with its comprehensive guide for the metropolitan area or detrimental to the orderly development of the area;

(4) to review and comment upon all long term plans and any other action which has a substantial effect on metropolitan area development proposed by any municipality in the metropolitan area, notifying other affected municipalities of such plans or actions;

(5) to review and comment on all federal grant applications requiring review by a regional agency;

(6) to establish a center for data collection and storage for the use of all governments in the area;

(7) to undertake a continuing program of research on public problems confronting the area;

(8) to coordinate civil defense activities within the metropolitan area;

(9) to testify before the state's governmental boundary commission on proposed changes of the boundaries of governmental units in the area;

(10) to render space and assistance to any metropolitan expediter assigned to the metropolitan area by the federal government;

(11) to approve all land acquisition projects being undertaken by governments within

the metropolitan area with funds provided by either the national or the state government; and

(12) to place a non-voting member on the governing board of each metropolitan area special district, commission, or board.

Setting up the Council took definite balancing to provide effective regional power and allay local government's fears of encroachment. The Council holds the usual authority to prepare a regional development plan, to review long-term plans of various governmental units to insure coordinated action, and to conduct research into pollution, open spaces, waste disposal, and the tax structure. Its review power reflects the compromises. When city plans, for example, affect the region, the council can hold them up to 60 days while it attempts to mediate and persuade--but it cannot halt them. On the other hand, where county boards and other agencies are concerned, the council can prevent them. Disputes that cannot be reconciled are sent to the legislature for resolution.

Beyond review, the Council holds some clear-cut powers, uncommon for such groups. Most importantly, it collects a regional tax and has authority to issue bonds. The Council has sold a $14-million sewerage bond issue, and in 1969, its tax collection brought in $720,000 of its $1.6-million budget, the rest coming from federal grants. The Council also can establish its own operating subsidies to conduct actual regional functions. To handle the sewerage problem, it set up a board to oversee operations of area-wide interceptors and treatment plants.

After the submission of the Council's first detailed report to the legislature in 1969, the Council was given further powers, including review powers for regional highway planning and the authority to set land use standars near the site of a proposed new airport and to set aircraft noise levels. Stanley Baldinger presents the following example of the Council's highway review powers in Planning and Governing the Metropolis: The Twin Cities Experience, p. 260:

FEDERAL HIGHWAY REVIEW
Burnsville Highway Interchange

> In late 1968, the Minnesota Highway Department submitted plans for approval to build a complex highway interchange in suburban Burnsville in Dakota County. Two months later, after some bitter discussion, the Council's Referral Committss endorsed the design submitted by the Highway Department and demanded by Burnsville. (In Minnesota, until May 1969, local governments had the right to veto highway plans not meeting their approval). The suburb insisted on the interchange because of its need for an commitment to a commercial development. In March, 1969, the Council rejected the design in a six to five vote after its transportation planner stated that two of the exit ramps were unsafe. They would require a weaving motion and give motorists some fifteen seconds to decide to exit or to change lanes; further, he questioned whether or not they were even necessary. These evaluations were again bitterly challenged by the Highway Department and Burnsville. The transportation planner, backed by a member of the council, claimed that the unsafe qualities of the interchanges warranted disapproval. When a council

member asked the representative of Burnsville whether the suburb would want the proposed interchange and shopping center if there were an area-wide tax sharing scheme, he replied that the community would then probably prefer to remain residential. The Highway Department, while expressing sympathy for the Council's stand, noted that the plan had to be a compromise in view of the politics of local consent and that plans had been under preparation for over four years. The Department and Burnsville then asked the Council to reconsider its decision. At one point in the deliberations, the Burnsville mayor threatened to seek help from the state's congressional delegation were the interchange rejected. In mid-June, the Council offered a compromise solution which, if accepted by the applicants, it could approve. The solution, creative but simple, called for adding an additional two thousand feet to the exit lanes which would give motorists twenty more seconds to make a decision on whether to exit or not. The Highway Department and Burnsville indicated acceptance of the compromise, and the Council approved the plan. This was the first time the Council could act entirely within federal and state legislation without necessarily considering outside factors, such as contractual agreements. It was, further, a demonstration to the metropolitan community of what intelligent planning and review could accomplish.

Specific accomplishments of the Twin Cities Metropolitan Council to date include:

Sewerage

The Council's physical and financial plan for a metropolitan-wide sewer district was approved by the Legislature. The district was created, and a seven-man management board, appointed by and responsible to the Council, operates the system. The board was authorized to take over ownership and management of all existing major sewage-disposal facilities and treatment plants in the seven-county area. Its operating budget and capital expenditure programs must be approved by the Council, along with the timing and location of treatment plants and major interceptors.

Solid Waste Disposal

A plan for the disposal of solid waste within the region has been prepared by the Council, and the seven counties have been directed by the Legislature to implement the Council plan. The Council is equipped with the power to ensure that standards of the Council and the Pollution Control Agency are met.

Parks

A metropolitan parks and open-space board is appointed by the Council and operates under it to acquire and maintain a regional park system. A plan which has been developed by the Council identifies sites for public use directly threatened by urbanization and protection areas that should not be developed.

Health

The Council is the Comprehensive Health Planning Unit for the Area, and is assisted by a 15-member Council appointed Health Board made up of citizens and professionals in the field. The Board advises the Council about the health of the region, and participates in the review of health oriented funding program requests. (An advisory committee to the Council, after 9 months of study, recommended that the Council should be the Comprehensive Health Planning Unit for the Metropolitan Area. The Council sought and obtained state and federal approval of the designation. The Council is the third organization in the nation to gain such status. The function and staff of the Metropolitan Hospital Planning Agency have subsequently been transferred to the Council.)

1971-continuing programs

Critical decisions for the Council lie ahead in the areas of housing, transportation, fiscal planning, open space, and education and health care. Decisions must also be made about the allocation of responsibility among levels and units of local government. All of these issues are being studied by the various branches of the governmental system and by "mixed task forces" of citizens and public officials set up by the Council. Study proposals can be taken by the Council to the Legislature for action.

Fiscal Disparities Law

In 1971, the Minnesota Legislature approved a first-in-the-nation "fiscal disparities" law for this seven-county area, which will provide metropolitan-wide sharing of 40% of all increases in the industrial and commercial property tax base--further encouraging the development of a true metropolis. The purpose of this complex "fiscal disparities" law is simple: to provide metropolitan-wide sharing of part of the area's growth in nonresidential property. The following purposes are stated in the legislation:

"The legislature finds it desirable to improve the revenue raising and distribution system in the seven county Twin Cities area to accomplish the following objectives:

1. To provide a way for local governments to share in the resources generated by the growth of the area, without removing any resources which local governments already have;

2. To increase the likelihood of orderly urban development by reducing the impact of fiscal considerations on the location of business and residential growth and of highways, transit facilities, and airports;

3. To establish incentives for all parts of the area to work for the growth of the area as a whole;

4. To provide a way whereby the area's resources can be made available within and through the existing systems of local governments and local decision making;

5. To help communities in different stages of development by making resources increasingly available to communities at those early stages of development and re-development when financial pressures on them are the greatest;

6. To encourage protection of the environment by reducing the impact of fiscal considerations so that flood plains can be protected and land for parts and open space can be preserved; and

7. To provide for the distribution to municipalities of additional revenues generated within the area or from outside sources pursuant to other legislation."

Essentially, the law prescribes that 40% of the entire area's post-1971 growth in commercial and industrial property values will be gathered--administratively--into a single, metropolitan pot. Each local unit, including school districts, then receives a portion of the tax proceeds from this "metropolitan" tax base. The portion is based on the local unit's assessed valuation per capita. Those with the lowest assessed valuation per person receive proportionately the largest amounts of money.

The non-residential valuation of the metropolitan area is expected to double, based on extrapolations, in 15 to 20 years. By 1985, 23 percent of the total non-residential base would be involved in the pooling arrangement.

This law is seen as a way to reduce the significant existing disparities among municipalities in their ability to finance local services; to disseminate the tax benefits of large, subregional shopping centers and office complexes beyond the borders of the municipality in which they happen to be located; and to reduce the pressure on city councils to violate sound development principles in order to attract a commercial and industrial tax base.

This tax law breaks down the barriers which have been created between central cities and their suburbs and between the suburbs and the surrounding rural areas and reduces the incentive for "fiscal zoning" which have presented such an obstacle to orderly planning and development in urban areas--without changing in any fashion the autonomy of some 300 independent taxing units in the metropolitan area.

Home Rule--The Minnesota Constitution

Minnesota constitutional provisions regarding municipal home rule are substantially different from Ohio's and, in effect, only prevent special legislation without local consent. Even this provision can be modified by general law. Using the general law device, the Minnesota legislature, in May, 1967, just shortly before passage of the Metropolitan Council Act, acted to prevent possible local government veto of pending metropolitan enactments.

Home rule, or "local consent" as it is commonly called in Minnesota, first became operative in the state in 1898 when special legislation dealing with local government was prohibited. Under Minnesota law, special legislation applies only to specific units of government in contrast to general legislation, which applies state-wide without any specific reference to any local unit of government. Since 1898, the legislature has used various devices, such as the classifications of local units by population, area, assessed-valuation, etc., to pass special laws evading a constitutional question. The Minnesota

Constitution, to overcome this situation, was amended in November, 1958, to provide increased protection to local units of government from arbitrary special legislation. The amendment continued to recognize that "under Minnesota doctrine, the legislature is supreme," and may override the provisions by "general law."

Because of this amendment, any kind of legislation establishing a metropolitan council for a specific area would have been virtually impossible. Such legislation would have been a special law subject to referendum or approval by each local council in the area, and there were suburban communities opposed to the metropolitan reorganization. The only way to solve this dilemma was to pass a general law providing that "a special law enacted pursuant to the provisions of the Constitution, Article XI, Section 2, shall become effective without the approval of any affected local government unit or group of such units in a single county or a number of contiguous counties." Local consent still applies if the provisions of the general law require it.

Proponents of the Metropolitan Council did not seek the loss of home rule, because it was opposed by the League of Minnesota Municipalities and similar groups. It was enacted as a result of an arrangement between supporters of a Metropolitan Transit Commission law and legislators eager to get rid of "home role" and maintain legislative supremacy.

The loss of local consent, or home rule, while considered unfortunate, was not thought to be a major loss by proponents of the Metropolitan Council. The loss was considered minor in comparison to the establishment of the Metropolitan Council. (Baldinger, p. 141-145)

Applicability Elsewhere

The Twin Cities Metropolitan Council has been called a "model" for reorganizing metropolitan government. Widely recognized as a major innovation in metropolitan government, the question remains as to whether it can be effectively duplicated elsewhere. Stanley Baldinger, author of Planning and Governing the Metropolis: The Twin Cities Experience, feels that it can, tailored in each case to meet the specific area's needs and goals, but makes clear that obstacles to metropolitan reorganization must be overcome.

"All obstacles to metropolitan reorganization are determined by popular attitudes toward local government in this country, the rules by which our political system operates, and the structure of the political system itself. (He must be referring to constitutional structure here, but he does not say so.) Political bloc interests, popular suspicion of "big" government, and the American attachment to small, more intimate government are typical obstacles generated by popular attitudes; accountability, partisan elections, and referenda are some of the examples of the rules of local politics; home rule, limitations on annexation and incorporation, and interstate compacts are measures of the political system--all are considerations which the advocates of metropolitan reorganization must deal with successfully if they are to achieve their goals." (Baldinger, p. 229)

"The Twin Cities Area proponents of the Metropolitan Council were successful in overcoming obstacles, because over the period of a decade, the people had been taught to think in metropolitan terms for solutions to their metropolitan problems. The issues of home rule and the referendum, they recognized, were critical to success; to achieve their goal, they accepted limitations on home rule and the elimination of a referendum on the Council because these are the issues on which most attempts to reorganize an area's metropolitan structure have, up to now, failed. To be sure, council proponents did not achieve 100 percent of their goal--an elected body with more operating powers--but they did achieve most of it and, equally important, they won a mechanism which they could adapt, build on, and elect for the future." (Baldinger, p. 230.)

Baldinger also says that the key to success of any effort to establish a metropolitan council is the state legislature, and that it is the only body which has the authority to create supra-municipal governments with sufficient powers to resolve an area's problems.

Summary

The Metropolitan Council attributes its achievements to many factors:

--eight vocal and influential business, civic, and political organizations setting the formation of the Council as their major goal for 1967, analyzing area needs and objectively weighing the options for them

--excellent staff work by these organizations to keep members informed and the issue before the public

--extensive backing by the business community, through individual participation or financial support of research.

--strong support of suburban officials because of the worsening of the sewer crisis, and their experiencing the consequences of the failure of advanced planning

--the failure of the Planning Commission due to its lack of authority

--the decisions to ask the Legislature to create the Council rather than to attempt to do so through a referendum, and to not eliminate local governments

--political timing--in this case having a Republican governor with a heavy majority of his party controlling both houses of the legislature.

Baldinger notes that opposition to the Council from some counties, suburbs, and suburban newspapers was not organized and was late in forming, and may have been, for these reasons, ineffective.

The Council attributes it subsequent success as a community force to its ability to achieve consensus or compromise among the various groups. A strong factor in its ability to achieve such agreement is felt to be that member's districts are formed from combinations of state senatorial districts, with the result that members' ties are to their people, and not to a governmental unit. Essentially, emphasis must be placed on convincing people that many seemingly "local" issues--crime, housing, zoning, public health--are really "regional."

Indianapolis and Marion County--UNIGOV

Unigov represents the first city-county consolidation in a northern metropolitan area of the United States. Unigov went into operation on January 1, 1970, and is the result of the approval by the 1969 Indiana General Assembly of a bill providing for the merger of Indianapolis and Marion County without a referendum. The law permits constitutional county officers and incorporated satellite cities and towns to remain. (The cities of Beech Grove and Lawrence and the incorporated town of Speedway remain outside Unigov both functionally and territorially.) The consolidated government encompasses a 402-square mile area with a population of 780,000, and was formulated by a task force of business, civic, and governmental leaders appointed by Indianapolis' Mayor Richard G. Lugar.

It seems appropriate to look at the previous government setting in Indianapolis and Marion County in order to better understand how this consolidation came about. Indianapolis was a midwestern capitol city with a population of about a half-million, and Marion County, of which Indianapolis is the county seat, contained a population of over a quarter of a million outside the city. Chief among the activities in Indianapolis are government, transportation, insurance, and small industry and business. Marion County, previously a wealthy agricultural area, was rapidly becoming more urbanized--new highways, housing subdivisions, small businesses and industries and shopping centers. Before Unigov, the area contained three cities, 20 towns, nine townships, 11 school districts, 14 special service districts and the county government. Since 1951, the Indiana General Assembly had been enacting piecemeal consolidations, beginning with a merger of four hospital systems and continuing with this kind of legislation until the Unigov law was enacted in 1969.

The Indiana Constitution of 1851 provides that all 92 counties shall elect the following administrative officials: clerk, recorder, auditor, coroner, treasurer, surveyor and sheriff. Since that time the General Assembly has provided that the counties shall also elect an assessor, a plural executive of three county commissioners, and a seven-member council. The state legislature determines the organization of cities and has established five classes for this purpose. Indianapolis was the only first class city and as such, elected a mayor and seven councilmen by districts.

In discussing the new Unigov before the thirty-fourth annual conference of the National Association of Counties, Indianapolis Mayor Richard G. Lugar pointed to some of the difficulties unique to Marion County:

--The population is larger than in either Davidson or Duval Counties where this type of consolidation has taken place previously in Tennessee and Florida.

--There was no obvious breakdown of government such as bankruptcy or extreme corruption.

--While the idea of Unigov had been around for some 44 years, no effective leadership had taken it up as their goal.

--Politicians in both the county and the city were reluctant to risk their political futures on combining the electorate.

--There was deeply felt hostility between urban and suburban dwellers.

The strategy followed by the Marion County group and other interested citizens was to organize statewide and back candidates for state office sympathetic to their cause. Lawyer-researchers explored all state laws pertaining to the county since 1851. A campaign to elect state senators, representatives and other office-holders was successful, and brought about the eventual enactment of the Unigov legislation.

The new law eliminated most of the traditional powers of the three elected county commissioners. Essentially, the Unigov law provided that the mayor is the chief executive of the consolidated city-county government. The combined city-county council served as the legislative body until January 1, 1972, after which the board of county commissioners and the city and county councils were abolished. Lugar was reelected mayor in November, 1971, and a 29 member legislative council was elected at the same time. Twenty-five councilmen were elected from single-member districts and four were elected at large. The county treasurer, auditor, and recorder will serve as ex-officio members. All citizens in combined Indianapolis and Marion County vote for the Unigov mayor and the four councilmen at large. Nearly all important functions were transferred to the consolidated government, but for political and social reasons, the township volunteer fire departments and the individual school systems were left virtually untouched by the reorganization. Townships and special districts were abolished.

The decision that the police and fire services of the city of Indianapolis would not be extended immediately to the rest of the consolidated area was a compromise decision. It was intended to :

"1. minimize the tax impact of city fire and police costs upon the suburban area residents;

2. hopefully appease the county sheriff and assure him that his law enforcement powers would not be stripped away immediately, and

3. keep the voluntary firemen and fire buffs from storming the statehouse in opposition to any plan which would eliminate the so-called volunteer fire departments serving the unincorporated area of the county."

(Carl R. Dortch, Governmental Research Assn. Speech, 1969)

The law provides further for six new city administrative departments (administration, development and planning, public works, transportation, public safety, and parks and recreation.) A deputy mayor, directors of the six new departments, and administrators are appointed by the mayor subject to the confirmation of the council. Two major city-county agencies already in existence have remained independent but are subject to budget review by the council. These are the Indianapolis Airport Authority and the Indianapolis-Marion County Health and Hospital Corporation. (These had already been consolidated prior to Unigov.)

In an article in the June 1971 National Civic Review, entitled "Unigov: The First Year," by R. Steven Hill and William P. Maxam, the authors maintain that the integrated Unigov system in its first year of operation may point to at least four areas of positive achievement: general administration, personnel, budgeting and efficiency. Responsibility is more clearly defined in the consolidated government than in the

previous county organization, and the accomplishments if Unigov in its first year are impressive, say Hill and Maxam, especially recognizing that the total system has only been in effect since the November election.

COUNTY CHARTER GOVERNMENT IN OHIO

A. Existing Powers of County Government.

Every county in Ohio presently operates under the form of government provided in the Revised Code. This form of government may be changed by adoption of a county charter, without which a county has no home rule powers.

Each of the eighty-eight counties in the State of Ohio presently is governed by and operates under the general provisions of law provided in the Ohio Revised Code. Several attempts have been made in certain counties to alter the statutory form of government by the framing and adoption of a county charter pursuant to Article X, Sections 3 and 4 of the Ohio Constitution. Because none of the proposed county charters has ever been adopted and put into operation, there exists no basis in experience for analyzing the form and structure of a county charter form of government and the problems which may arise in the operation thereof. The questions which may come to mind concerning charter government must, therefore, be considered on the basis of the language of the sections of the Constitution referred to and by analogy to municipal charter government. One basic question which should be resolved is whether by adoption of a charter a county may assume and provide for exercise of all powers of local self-government ("home rule") or whether in adopting a charter the people of the county are limited to providing only for changes in the structure and form of county government, but must still carry out the functions and exercise the powers and duties of the county government in the manner provided by the statutory law of the State of Ohio.

There is not to be found in the Constitution any provision with respect to counties analogous to Article XVIII, Section 3, which is the direct grant of powers of local self-government to municipalities. That article provides that "municipalities shall have authority to exercise all powers of local

self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In the absence of any such provision applicable to all counties, it seems clear that counties generally do not possess all powers of local self-government, and numerous cases are to be found in which the courts of this State have reiterated the principle that counties are creatures of statute and have only those powers which are granted expressly by the Constitution or by the General Assembly or arise by necessary implication from the expressly-granted powers. If a county is to be able to exercise powers of local self-government in a manner other than as provided by statute, therefore, it is necessary that such power be conferred in accordance with a procedure established by some provision of the Constitution itself. A careful analysis of Article X, Section 3 of the Constitution leads to the conclusion that by the adoption of a charter as provided in that section a county may be empowered to exercise at least some powers of local self-government in the same manner as provided for municipalities by Article XVIII, Section 3.

B. Scope of County Home Rule Under a Charter.

By adoption of a charter a county may either simply restructure its government or it may assume home rule powers similar to those of municipalities or be organized as a municipal corporation.

The powers which may be conferred upon or granted to a county by a charter, however, probably are not coextensive with those granted to municipalities under Article XVIII, Section 3, except, possibly, in the case where the charter, as authorized by Article X, Section 3 "provide[s] for the organization of the county as a municipal corporation...." In the case of such organization of the

county as a municipal corporation, the county charter may "provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein...." and thus do away with the prior county, municipal and township governments in the county and create in their place a new municipality which would have and be able to exercise all of the powers of a municipality. Even in the case where the county is reorganized as a municipal corporation, there must also be observed the provision of Article X, Section 3 that each county charter "shall provide for the exercise of all powers vested therein, and the performance of all duties imposed upon counties and county officers by law." Since the words "by law" are used without restriction, it seems that the term includes both existing and future statutory enactments. To this extent, therefore, whatever powers might be granted to the county and its officers by the charter, the General Assembly would maintain the power to impose upon counites and county officers other duties which must be carried out.

No provision similar to that just quoted is found in the provisions of the Constitution dealing with the powers of municipal corporations. Article XVIII, Section 3, however, is analogous to this provision in that municipalities in adopting and enforcing local police, sanitary and other similar regulations may not make provisions which are "in conflict with general law." This negative provision does, in effect, confer upon municipal corporations what amount to affirmative obligations in carrying out many basic functions of municipal government. In addition, Article XVIII, Section 13 authorizes the General Assembly to pass laws limiting the power of municipalities to levy taxes and incur debts for local purposes and to require reports from municipalities as to their financial condition and transactions, and Article XVIII, Section 6 authorizes

the General Assembly to "restrict their (cities' and villages') power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power." Except for such police and sanitary and fiscal regulations and certain matters deemed to be extra-territorial as of state-wide general concern, however, the General Assembly does not have any general power to impose duties or restrictions upon municipal corporations (at least in those cases where a municipality has by charter provided for the manner in which it will exercise the power in question).

C. Limitations on County Home Rule.

County home rule under a charter is limited in that the charter must provide for the exercise of all powers vested in the county and for the performance of all duties imposed upon counties and county officers by law. A county under a charter would be subject to limitations on the power to levy taxes and incur debts in a manner similar to municipalities.

Because of the provision of Article X, Section 3 of the Constitution which requires that a county charter provide for the exercise of all powers vested in and the performance of all duties imposed upon counties and county officers by law, it would seem that the authorization for a county charter to provide for "concurrent and exclusive exercise by the county, in all or any part of its area, of all or any designated powers vested by the constitution or laws of Ohio in municipalities" does not constitute a blanket conferral upon a charter county of the same powers granted to municipalities by Article X, Section 3. In this connection, however, it must be remembered that Article X, Section 2 was first adopted in 1933 after approximately twenty years of experience in this State with the exercise of local self-government by municipalities and it seems likely that the intention was to confer similar, if not identical, powers upon counties.

Since a county charter may, therefore, do more than merely provide for a reorganization and restructuring of the county government and may actually confer powers upon the county which the county would not possess in the absence of a charter, the question then is the proper interpretation of the requirement that the charter provide for the exercise of all powers vested in and the performance of all duties imposed upon counties and county officers by law. If this latter provision is interpreted to mean that each and every power and duty imposed by the statutes of the State upon counties and county officers is to be performed in the exact manner therein provided, the charter could not in reality provide for more than a restructuring of the county government and a redistribution and reallocation of powers and duties. This being the case, it seems that the meaning of the provision in question is that each and every power conferred, and each and every duty imposed by the statutes, upon counties and county officers must be provided for in the charter, but that the charter, and the county and its officers acting under the charter, may deviate, at least in some cases, from the procedures and methods established by the statutes for exercising those powers and carrying out those duties.

In actual practice it could be difficult to determine in some cases how a particular power or duty could be separated from the procedure or method for exercising the power or performing the duty. The collection of taxes by the county seems to be a good example of this difficulty. The Ohio Revised Code provides for a detailed and elaborate system for the levying and collection of taxes by the county and the political subdivisions within the county. Whether these powers and duties to levy and collect taxes could be carried out in a

manner which differs in any substantial particulars from the method established by the statutes is questionable. Since the county is the unit of government which collects property taxes for other political subdivisions besides itself, its powers with respect to the method of collecting and distributing such taxes affect subdivisions other than the county and thus probably could not be considered and treated as a power of local self-government. In the case of certain other matters of concern to a county, however, such as the planning function, there seems to be no essential reason why this power and duty could not be provided for and exercised in such manner as reasonably determined by the county to be suited to the county's needs.

Perhaps the solution to this difficulty is to be found by reference to Article XIII, Section 6, and Article XVIII, Section 13 of the Constitution, referred to above, which authorize the General Assembly to limit the power of municipalities to levy taxes and incur debts and to require financial reports from the municipalities, and to restrict their powers of taxation, borrowing, and so on. Since Article X, Section 3 provides for conferral of municipal powers upon counties by charter, it seems that those powers must be taken also with their limitations. Based upon this analysis, the county charter government could operate in much the same manner as a municipal charter government in being subject to statutory requirements as to procedures dealing with financial and budgetary matters, while being free to adopt such local self-government measures as may be determined to be necessary or desirable and which are not in conflict with general law in matters of local police and sanitary regulations. As discussed above, however, the county would seem to be more circumscribed in its powers because of the necessity of looking to the general law to determine those powers and duties which must be exercised and carried out, particularly

in those areas where the county is acting in the role of the agent of the state in carrying out functions for, or in connection with, other political subdivisions such as municipal corporations, townships and school districts.

D. Required Provisions of County Charters.

The initiative and referendum and all powers vested in, and the performance of all duties imposed upon counties and county officers by law must be provided for.

Article X, Section 3 of the Constitution is very general in its terms with respect to the matters which may be provided for in a county charter, and thus it is left to the framers of such a charter to determine what the contents thereof shall be, within the limitations provided in the Constitution. The first specific requirement that any county charter must meet is that "the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action." In order to make the provision of Article X, Section 3 as to the initiative and referendum operable, it would seem that a county charter would have to make some provision for the manner of exercising those powers. If a county charter should fail to make such provision, the General Assembly would probably then have the power -- and possibly the duty -- to provide by statute for the exercise of the powers of initiative and referendum in charter conties, but, as in the case of municipalities, it would seem that charter provisions would prevail over such a statute.

Article X, Section 3 further provides that

> "Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties

> imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for the purposes of administration or of taxation or of both."

From this portion of the section it is clear that the county charter may alter the existing form of government and establish any form that is able "to provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." In order to be able to provide for the issuance of bonds or notes under the Uniform Bond Law, for instance, it would be necessary for the charter to provide for a "taxing authority" and a "fiscal officer." The functions of the various offices such as the auditor, treasurer, prosecuting attorney, engineer, recorder, and coroner would also have to be provided for, as would the functions of the various boards, commissions and other officers who are part of the county government under the statutory form.

E. Vote Required for Adoption of a County Charter.

A county charter which alters the form and offices of county government or which provides for the non-exclusive exercise of municipal powers by the county requires only a simple majority for adoption. A county charter which would organize the county as a municipal corporation or provide for the exclusive exercise of municipal powers by the county or for succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of the municipality or township requires multiple majorities for adoption.

The most difficult problem which must be faced in attempting to interpret and understand Article X, Section 3 is the distinction made therein

between two types of county charters, one of which requires for approval only a majority of the votes cast thereon. The other type of charter requires the approval of the so-called "four majorities," including a majority of those voting on the charter (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality).

The difference between the two kinds of charters is defined in the following provision:

> "Any such charter may provide for the concurrent or exclusive exercise by the county, in all or part of its area, of all or any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both."

In order to understand this language and that which follows, it is helpful to consider the case of State, ex rel. Howland v. Krause, 130 Ohio St. 456 (1936), in which the Ohio Supreme Court interpreted this section of the Constitution as it existed prior to its amendment to its present form in 1957. The Krause case involved the proposed Cuyahoga County charter which was submitted in 1935 and which received a majority of the votes cast thereon in the entire county and in the City of Cleveland, but which failed to receive the other two majorities provided for in Article X, Section 3. The point at issue in the case was whether the charter required only a

simple majority of all the votes cast thereon, and had thus been approved, or whether it required, but had failed to receive, the four majorities.

The language of Article X, Section 3 at that time was as follows:

> "Any county may frame and adopt or amend a charter as provided in this Article. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the Constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal powers so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality)."

Under the foregoing language, the court held, any charter which provided for the exercise by the county, whether exclusively or concurrently, of any powers vested in municipalities could be adopted only by receiving the four majorities. The court found in that case that the power given to the county legislative authority under the charter to enact ordinances, the power of the county police department to enforce ordinances of cities and villages, the initiative and referendum powers, and the power to establish a civil service commission were municipal powers and that the proposed county charter was thus not adopted, even though the charter did not purport to permit the county to exercise such

powers exclusively and contained a specific provision directing that nothing therein was to be construed so as to require the four majorities.

While the correctness of the decision is questionable - and has been seriously questioned - still it provided a formidable obstacle to the adoption of any meaningful county charter, and the amendments to Article X, Section 3 approved in 1957 apparently were intended primarily to overcome the effects of that decision. The provision as to the right of the initiative and referendum is a good example of this. The following language was added in 1957 to specify the kind of charter which requires only a single majority:

> "Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon."

This provision apparently is limited to the concurrent exercise of such municipal powers, for the next sentence provides that

> "In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail."

The second type of charter, which requires the multiple majorities for adoption, is described in the sentence following the one just quoted as "a charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township...." This

provision seems to refer back to the latter portion of the second sentence of the section which provides that a county charter "... may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both."

The additions to Article X, Section 3 just discussed, then, seem to have overcome the problem which resulted in the failure of the court to rule in favor of the adoption of the 1935 Cuyahoga County charter. It now seems clear that a county charter establishing a form of government with powers, functions and officers and a structure similar to those of municipalities ("vested" in municipalities, in the constitutional language) may, if it does not attempt to exercise municipal powers to the exclusion of municipalities or succeed to any property or obligations of municipalities or townships without their consent, be adopted by a simple majority vote. Such a charter would, therefore, for the most part be limited to restructuring the government of a county; it would not permit the establishment of a "metropolitan government," since the municipalities and townships within the county would retain all of their rights and powers except as they might be voluntarily turned over to the county by agreements as permitted by law.

F. Constitutionality of Multiple Majority Requirement.

A county charter adopted by the multiple majorities could provide a form of strong metropolitan government, but the requirement of multiple majorities may violate the equal protection clause of the fourteenth amendment to the United States Constitution.

A true metropolitan government comprising all of the territory of a county could be established under Article X, Section 3 only by a charter adopted by the several majorities set out at the end of that section. One of the options provided is the organization of the county as a municipal corporation, but, as discussed above, it would be a municipal corporation which also has the powers and duties of a county. The provision for the multiple majorities, however, raises a serious question under the so-called "one-man - one vote" principle based upon the equal protection clause of the fourteenth amendment to the Constitution of the United States. Whether the courts would find the surrender of municipal and township powers which might be provided for in a proposed county charter to be a sufficient justification for a requirement for adoption of other than a simple majority is a question which probably could be answered only by litigation of the matter.

G. Statutory Enactments for Charter Counties.

The general assembly has by statute provided for civil service under a county charter and for any such charter to abolish all health districts in the county and provide for a single health district.

The General Assembly has enacted three sections of the Revised Code which deal specifically with powers which may be exercised under county charters. Section 301.22 simply provides that

> "Every county adopting a charter or an alternative form of government is a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this State. Such county is capable of suing and being sued, pleading and being impleaded."

Section 301.23 provides for civil service in a charter county as follows:

> "The electors of any county may establish, by charter provision, a county civil service commission, personnel office, or personnel department. In any county which, by its charter creates such a commission, office, or department, and provides a system for appointment to the county service on the basis of merit and fitness, as ascertained by competitive examination, sections 143.01 to 143.48, inclusive, of the Revised Code shall not be operative; but the state civil service commission shall have the same powers and duties with respect to all county civil service commissions, personnel offices, and personnel departments as it possesses with reference to municipal civil service commissions."

Whether this section makes any change in the situation which would otherwise result is debatable, assuming that a county operating under a charter would have "home rule" powers, of which the power to hire, dismiss, promote, reduce or discipline employees is one, subject to Article XV, Section 10 of the Ohio Constitution, which provides that:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Section 301.24 of the Revised Code permits a county by charter to abolish all health districts within the county and provide a single county department or agency for public health services, as follows:

> "The electors of any county may establish, by charter provision, a county department or agency for the administration of public health services. The authorities provided in accordance with the county charter shall exercise all the powers and perform all the duties which are vested in or imposed upon the authorities of city or general health districts. All health districts shall thereupon be abolished within the county, and the county shall succeed to the peoperty, rights, and obligations of such districts. The department of health shall have the same powers with respect to a county health department or agency as it possesses with reference to a general health district. A county health department or agency may participate in any state grants for the expenses of local health administration on the same basis and to the same degree as a general health district."

A county charter containing a provision in accordance with the section just quoted would not, it seems, because of such a provision require the multiple majorities for adoption for, even though city health districts might thereby be abolished, the courts of this state have held health services are not matters of local self-government and health districts are agencies of the state, not any of the political subdivisions of the state.

Ohio Constitutional Revision Commission
Local Government Committee
December 1, 1972

Counties: Proposals for Change

The Local Government Committee has nearly completed its discussion about a proposal for regional units of government, and it is now the intention of the chairman to return to discussions of counties, and possible constitutional changes regarding county structure and powers. Among the initial papers distributed to committee members was a discussion outline dated December, 1971, which raised a number of questions suggesting changes in municipal and county constitutional provisions. Only one of the county questions has been discussed in detail by the committee: question "G" on page 9, relating to whether the General Assembly should be authorized (or required) to provide for the classification of counties, and for what purposes. A copy of that discussion outline is enclosed.

Much of the available literature regarding counties has been reviewed, and a list of suggestions has been compiled. Some of this literature is general in nature, while other materials relate directly to Ohio counties. However, the problems of counties are fairly standard across the country, and the suggestions for changes in county structure and powers tend to be similar.

This memorandum lists suggestions for change in five categories: (1) Structure; (2) Powers; (3) Structure and Powers; (4) the Charter-Adoption Process; (5) the Alternate Forms. Many of these suggestions are found in the discussion outline, but are presented here in slightly different form so that the objective of the change can be more readily identified.

Inherent in these suggestions is the idea that counties should be <u>strengthened</u>, and county government "improved." This means (a) giving counties more power vis a vis the state and other units of local government; (b) structural changes which are designed to improve administration and county control over county affairs; (c) make the adoption of charters easier and clarify the process, which is viewed as one way of attaining improved county government.

It must be noted that not all suggestions for strengthening county government require constitutional change for implementation. Many, in fact, could be instituted by the General Assembly. Some of those included in this list could be instituted by the General Assembly. They are included here, anyway, because there is either <u>some</u> doubt about the power of the General Assembly to enact appropriate legislation, or the General Assembly has failed to make the changes which some view as desirable and constitutional change is another method of accomplishing the goal.

<u>Structure</u>

All Ohio counties, regardless of size or problems, are organized the same way. Counties have options of different forms of organization, either by adoption of a charter or of an alternate form as provided by statute. No county has yet succeeded in adopting either. The General Assembly has complete authority to alter county government structure.

Problems with county government organization have been identified as follows: too many elected officials, all independent of the general county government operated by the county commissioners; many county functions carried out by independent boards and commissions over which the commissioners have no control although they are

required to provide funds or submit tax levies to the people to support these functions; many functions mandated by the legislature, such as elections and courts, to which the commissioners must supply funds but whose budgets are not subject to their scrutiny; commissioner form of government (3 county-wide elected officials who perform both administrative and legislative functions) is inefficient and ineffective, particularly in large and urban counties.

If constitutional change is viewed as a desirable way of altering county government organization, the following might be considered:

1. Write the desired county structure into the Constitution.

2. Require the General Assembly to provide a different structure for county government. For example, the Constitution might require that county legislative bodies be elected from districts, or increased in number, or that each county have a county administration under a single elected executive official, and then leave to the General Assembly the task of filling in the details.

3. Prohibit a long county ballot. Since county elected officials are presently provided by statute in Ohio, and not in the Constitution, a short ballot cannot be achieved by eliminating these officials from the Constitution, as is the case in many states.

4. Permit county commissioners to reorganize county government, without affecting substantive powers, which reorganization would be final if no petition for referendum were filed by voters in the county within 60 (90, etc.) days. Variations of this suggestion include: permit county commissioners to place all independent county boards and commissions under their jurisdiction (but perhaps not independently elected county officials, and not the courts), and permit county commissioners to institute new budgetary and administrative procedures. Limit the creation of autonomous county boards and agencies by the General Assembly.

5. Permit pay raises for county officials during term (Article II, section 20).

6. Permit alteration in county boundaries without vote of the people (Article II, section 30).

7. Prohibit the General Assembly from assigning duties to counties without providing funds.

8. Require the state to pay all the costs of operating the courts.

Powers

Counties are creatures of the state, and have only those powers given to them by the General Assembly. They are also mandated by the General Assembly to perform functions of a statewide nature (for example, the local administration of welfare) and are given permission to perform other functions. County commissioners cannot provide, by ordinance, for any service or function not authorized by the General Assembly. Some county commissioners complain because they cannot take care of even minor problems (signs on township roads, for example) without coming to the General Assembly and having a law enacted. Such a procedure not only takes valuable time from the state legislature, it may not be of interest to more than a few counties.

1. The alternate form of government permits counties which adopt one of the alternates to assume greater, although still limited, legislative authority, so long as its actions are not in conflict with general law. Give this authority to all counties.

2. The alternate form approach, giving counties limited "residual" powers, could be expanded to permit conflicts between counties and townships or municipalities to be resolved in favor of counties. With respect to municipalities, this could only be accomplished by constitutional change because of municipal corporations' "home rule" powers under Article XVIII.

3. Give counties the power to establish separate tax and service districts within the county.

4. Under the charter provisions, give counties supremacy, at least over townships.

5. Permit counties to levy taxes not pre-empted by the state, similar to the authority municipal corporations have under home rule powers.

6. Permit the General Assembly to enact special acts for counties, so that each county's problems could be considered separately.

7. Under the charter provisions, give counties the same "home rule" powers of local self-government that municipal corporations have.

Structure and Powers

1. Permit (or require) the General Assembly to classify counties in order to provide different forms of government or different powers, or both, to different counties or groups of counties.

2. Permit counties to be divided into tax and service districts.

3. Consolidate all units of government (or all units of government of a certain type such as townships and cities and villages) within certain counties, classified according to population, population density, or other factors.

4. Provide, in the Constitution, for certain functions (such as transportation, zoning and land use, water and air pollution) to be handled exclusively by counties, or by counties of a certain size or density, etc.

Clarifying and Improving the Charter-Adoption Process ("Making it Easier")

Article X was added to the Ohio Constitution in 1933 to permit counties to frame their own form of government and adopt charters. Although efforts to adopt charters have been made in eight Ohio urban counties, and more than once in some of them, none have been successful. A number of proposals have been made for altering the constitutional provisions for adopting charters on the assumption that one of these, or a combination of them, may be the key to securing the necessary voter approval for a county charter. Of course, these suggestions will only overcome some of the legal difficulties and confusion that has surrounded some charter efforts, and will not affect whatever political, social, economic, or other difficulties might lead to charter failures.

1. Remove the provision requiring multiple majorities if the charter assumes municipal functions to the exclusion of other units of government. This provision could now be suspect under the one man - one vote rulings of the Supreme Court.

2. Permit county commissioners to place a proposed charter, and proposed amendments, on the ballot without the necessity of electing a charter commission (or as an alternate to electing a charter commission).

3. As another alternate, permit a group of citizens by petition to place a proposed charter on the ballot, or charter amendments.

4. Permit resubmission of a defeated charter at least once; permit the charter commission which drafted a charter which failed to make changes in it and resubmit it (without having to elect a new charter commission).

5. Require charter commission members to be elected on an equal representation basis.

6. Clarify procedures:

   Does "submission to the electors" mean submission to the voters on election day or submission to the board of elections to be placed on the ballot?

   Permit publication of the charter (or amendments) instead of requiring mailing to voters.

   Make clear who is to do what--is mailing or publication to be done by the charter commission or the county commissioners?

   Provide procedural matters with respect to charter commissions, such as officers, quorum, number needed for approval of charter proposal, filling vacancies, funds, etc.

7. As an alternate to #6, remove the details of charter submission from the Constitution and permit the General Assembly, by general law, to provide these details.

8. Charter review every twenty years.

9. Elect commissioners by districts or reduce the number or slates of candidates.

Alternate Forms

The Ohio Constitution authorizes the General Assembly to provide alternate forms of county government, and the General Assembly has done so. An alternate form may take effect in a county only if submitted to the voters and adopted by a majority voting on the question. Whether the statutory provisions for alternate forms are adequate or will solve any county's problems cannot be answered since none has been adopted.

The only suggestion for changing the constitutional language regarding the alternate forms is to make the language mandatory rather than permissive (The General Assembly . . . . "shall" instead of "may") in order to prevent the General Assembly from repealing the statute since it took so long to get it enacted.

Ohio Constitutional Revision Commission
Local Government Committee
March 1, 1973

Regional Government: Nashville-Davidson County

The city-county consolidation in Nashville-Davidson County (Tennessee) into a single unit of local government was established by voter approval of a charter providing for the consolidation effective April 1, 1963. Davidson County, located in central Tennessee, is the center of a metropolitan region dominating approximately 100 counties in central Tennessee, southern Kentucky, northern Alabama, and Mississippi.

The first post-war attempt to restructure the system of local government in the Nashville area was made in 1951 when the Tennessee legislature established the Community Services Commission to study the governmental problems of Nashville and Davidson County. The Commission's report of June 1, 1952 recommended city and county home rule, functional consolidation of the health and welfare programs, and that Nashville annex a sizable amount of territory.

In 1953, Tennessee voters approved constitutional amendments which granted home rule and authorized the consolidation of city and county functions. (See Appendix 2, attached.) Concurrent majorities in the central city and the remainder of the county are required to implement city-county consolidation.

The Legislature, in 1957, created a ten-member Metropolitan Government Charter Commission to draft a charter for submission to Davidson County voters. The Commission proposed a charter in early 1958 which would (1) consolidate Nashville and Davidson County, (2) create a twenty-one member metropolitan council (3) establish an expandable urban services district and a general services district, and (4) establish a tax rate for each district based upon services rendered. The chief executive would be a metropolitan mayor elected for a four year term. The proposed charter was approved in June of that year by voters in Nashville but was rejected by the remainder of the county. Approximately twenty-two per cent of Nashville voters and fourty-four per cent of the voters in the balance of Davidson County voted in the referendum. The defeat of the proposed charter induced Nashville to turn to annexation as a solution for its problems. Approximately 50 square miles of territory were annexed between 1958-1960.

A 1961 act passed by the Legislature authorized the creation of a new Davidson County Charter Commission subject to voter approval. On August 17, 1961, the creation of a charter commission was authorized in both Nashville and outside the city limits.

The Charter Commission filed, on April 6, 1962, a proposed charter which closely resembled the proposed 1958 charter. The new charter consolidating the city of Nashville and Davidson County was approved on June 28, 1962, with both majorities in Nashville and in the county area. Six small cities were permitted to exist, but were forbidden to expand their boundaries by annexation. The cities may choose to disincorporate and join the urban services district when it expands to their area. (A summary of the Metropolitan Charter of Nashville-Davidson County is attached as Appendix 1.)

Defeat in '58--Adoption in '62

It seems that the Charter for Consolidation of Nashville and Davidson County was not approved in 1958 as a result of overconfidence on the part of its supporters in the three months prior to the vote after the filing of the charter, and a scare campaign by its opponents in the last week prior to the vote on the charter. The campaign for the charter had the support of both the Mayor of Nashville and the County Court Judge (exec. official of the county) and both area newspapers, as well as the majority of business leaders, League of Women Voters and civic and professional groups. A citizens' committee for metropolitan government was created, but its principal work was supplying speakers for civic clubs and distributing a pamphlet summarizing the provisions of the charter.

Active opposition to metro was hardly visible until the final week before the referendum, when a flood of antimetro handbills appeared supporting the themes that the consolidation would mean bigger government, higher taxes, and a "virtual mortgage on your home." Involved in the attack on metro were the suburban police (private) and fire companies, about one half of the members of the city council and the county court and most of the operators of the small suburban business establishments, and a few Nashville businessmen. The scare campaign was most effective in the lower-income suburbs, and least effective in the higher-income suburbs. A plausible explanation of this would be that it was a result of the proponents' excessive reliance on newspaper publicity and civic club speeches and failure to develop a precinct and block organization. The suburban and rural alarm was reflected in a fairly heavy negative vote, 19, 234 to 13, 794, while the vote inside the city was light but favorable, 7,797 to 4,804.

Not long after the rejection of the metro charter, the city of Nashville began to use for the first time the strong annexation powers which had been authorized by the Tennessee legislature in 1955, as a first effort to deal with the problems which were encompassing Nashville and which eventually had lead to the need for metro. The city council annexed enough territory to double the city population, without a vote in the affected areas, causing many of the suburbanites to reexamine their earlier opposition to metro. While many other factors were involved, including the levy of a "green sticker" tax for use of city streets by non-city residents, the second effort to secure metropolitan government in the area received its main impetus from this massive annexation move by the city of Nashville. A new charter commission was approved to draw up a charter, which was a revision of the 1958 version, but remarkably similar in most ways.

Two major differences may be cited between the 1962 and 1958 metro campaigns. The first is the much more effective organization of the pro-metro forces in 1962 than in the earlier effort. Very early, a "Citizens' Committee for Better Government" was organized, including an extremely effective women's division, which carried on a door-to-door campaign. Many of the same groups endorsed the new charter, and because the offices of county tax assessor and county trustee were protected by the charter, important support from some of the "organization politicians" in the county was provided. In the 1962 contest, Mayor West, the mayor of Nashville, did not support the charter, and part of the vote for it resulted as a vote against the Mayor who had allowed the undesirable annexations to go through the city council. Also opposing the charter were a newspaper

that had supported the mayor through the annexations, most of the city council, and a few right wing extremists.

In the referendum on June 28, 1962, the consolidation received the necessary separate majorities inside and outside Nashville. Even though the Mayor was able to carry the "old city" to a close vote against metro, this was more than outweighed by the overwhelmingly favorable vote in the newly annexed areas. The totals in Nashville were 21,064 in favor and 15, 914 against. Outside Nashville, 15,591 voted in favor and 12,514 against.

Constitutional Challenge

Following approval of the consolidation charter, a judicial challenge was instituted, first in Chancery Court, and then in the Tennessee Supreme Court. (Lewis Frazier et al. v. Joe C. Carr et al., 210 Tennessee 565, 360 S.W. 2nd 449 (1962)) The unanimous decision of the Supreme Court upheld the finding of the lower court. The opinion ruled on and upheld the constitutionality of each step which led to consolidation, but hinged principally on the meaning of the 1953 Constitutional Amendment providing for the consolidation of cities and counties in Tennessee. This amendment was interpreted as giving wide latitude to the legislature in setting up the machinery of consolidation, allowing local problems to be taken into consideration. Thus, the provision of two service districts and two tax rates was quite reasonable and quite compatible with the intentions of the members of the Constitutional Convention.

The Court concluded its opinion by saying that it was impossible to overstress the fact that the Constitutional Amendment and every subsequent step which gave rise to consolidation had been approved by the people. Also, by voting favorably on these documents, the people had acted in good faith believing them to be constitutional. The opinion then added, "after all, this is the people's government. Their wishes, constitutionally expressed, must prevail, no matter how much it upsets the previous status quo."

The decision of the Court was of great importance to both parties in the case, and also of considerable interest to the residents and decision makers of the two other metropolitan areas in Tennessee which are contemplating city-county consolidation. The Court's interpretation of the constitutional amendment is believed to provide a good deal of latitude to other local communities to tailor their consolidation plans to their own local needs and problems.

Special Features of the Charter--The Two Service Districts

A somewhat unique and important feature of the Metropolitan Government of Nashville and Davidson County is the division of the county into two service districts. The general services district covers the entire area of Davidson County and the urban services district encompasses the 72-square-mile area of the former city of Nashville at the time of the metropolitan charter's adoption. The area of the urban services district may be expanded by annexation whenever particular areas need these services and the urban services area has a plan indicating that they are able to serve the area with these services within one year after taxes become due and payable in the area. The metropolitan

government is authorized to provide a wide range of services on a countywide basis to residents in the general services district, including health, hospitals, welfare, schools, parks and recreation, libraries, police, courts, jail and other general governmental services. The government is authorized inside the urban services district to provide an additional layer of services, including fire protection, street lights, sanitary and storm sewers, street cleaning, and refuse collection. Only the residents of the urban services district pay additional taxes for the additional services they receive.

Taxation in Nashville-Davidson County

An important feature of the Metropolitan Government of Nashville and Davidson County is the division of the county into two service districts. The General Services District, as previously mentioned, covers the entire area of Davidson County, and the Urban Services District encompasses the area of Nashville at the time the Metropolitan Charter was adopted. The area of the Urban Services District may be expanded by annexation whenever particular areas of the General Services District come to need urban services. However, the Metropolitan Government cannot expand the Urban Services District unless it can provide urban services to the areas annexed within a year.

The property tax rate adopted in 1964 was the same as in 1963, but strong pressures were building up for much larger expenditures for the consolidated school system and for new services in the annexed area. Two important fiscal decisions were made in 1965 which not only provided more revenue but permitted the property tax to be reduced by 20 cents on an areawide basis (to $3.50) with an additional reduction of 20 cents in the Urban Services District (to $5.30, overall). These decisions were the placing of sewers on a service-charge basis and the adoption of a one-cent local sales tax, the latter by popular referendum.

More than half the revenue of the Metropolitan Government of Nashville-Davidson County comes from property taxes and payments made in lieu of property taxes by the Electric Power Board, Nashville Housing Authority and Tennessee Valley Authority. Other large sources of county income are: state aid, state shared taxes, federal aid, licenses, permits, fines, charges for services, and revenues from municipal enterprises. The Metropolitan Government anticipates, for example, receovong $642,000 from the operation of the airport, $190,000 in golf fees from municipal courses, and $836,000 from the operation of the general hospital.

Property tax assessment is the responsibility of an assessor elected for a term of four years. The collection of property taxes is administered by a second elected official, the County Trustee. Thus, two important areas of fiscal administration are not under the control of the County Mayor.

APPENDIX 1—Summary of the Metropolitan Govt. Charter

urce: Massachusetts Regional Planning Council Report
Relative to Regional Government

Article I of the charter stipulates that the city and county be consolidated, and in particular reads: "Said consolidation shall result in the creation and establishment of a new Metropolitan Government to perform all, or substantially all, of the governmental and corporate functions previously performed by the County and by the City, to be known as the Metropolitan Government of Nashville and Davidson County . . ." In addition to specifying the county as the territory of the regional government, the charter established the concept of a dual district; the General Services District and the Urban Services District.

The functions of the General Services District are enumerated as follows: General Administration; Police; Court; Jails; Assessment; Health; Welfare; Hospitals; Housing for the Aged; Streets and Roads; Traffic; Schools; Parks and Recreation; Library; Auditorium; Fair Grounds; Airport; Public Housing; Urban Redevelopment; Urban Renewal; Planning; Electrical Code; Building Code; Plumbing Code; Housing Code; Electricity; Transit; Refuse Disposal; Beer Supervision; and Taxicab Regulation.

In the Urban Services District, the citizens receive all the services of the General Services District, together with the following: Additional Police Protection; Fire Protection; Water; Sanitary Sewers; Storm Sewers; Street Lighting; Street Cleaning; Refuse Collections; and Wine and Whiskey Supervision. The charter provides that the territory of the Urban Services District can be expanded whenever areas of the General Services District need urban services, and the metropolitan government is in a position to furnish the same.

The charter specifies that the metropolitan government shall be administered by a popularly-elected mayor as chief executive officer; a Metropolitan Council, which shall be the prinicipal legislative body; an Urban Council with power to levy taxes within the Urban Services District; the Judges of the Metropolitan Court; and minor officials.

[1] *Op. cit.*, p. 23 ff.

Article are the Metropolitan Traffic and Parking Commission, the Metropolitan Board of Parks and Recreation, the Metropolitan Welfare Commission and the Public Library Board.

A regional civil service system calling for the application of merit principles in metropolitan employment is required under Article 12. A Civil Service Commission, responsible to the Mayor and Council, is created as the administrative arm. Article 13 establishes a Metropolitan Employee Benefits Board to administer a pension and retirement system, together with medical and disability insurance programs.

Article 14 created a Metropolitan Court System and provides for an elected judiciary. The court system is divided into Division I, similar in most respects to the Massachusetts district court system; and Division II, essentially a motor vehicle court. Each is presided over by a single justice.

Article 15 defines election procedures for metropolitan offices, and provides for the removal of officials under existing statutory law of the State of Tennessee. Article 16 recognizes the continuance of the offices of County Judge, Sheriff and County Court Clerks, as well as designated lower officials dealing with deeds and probate. Articles 18 through 20 deal with a multitude of general provisions and transition provisions, including the method of amending the charter. The final article, No. 21, spells out the intent of the charter and furnishes a separability clause.

In summary, the charter document, like its counterpart in Toronto, is replete with much detail. At the same time, it leaves little doubt what powers and responsibilities the regional government is endowed with. The elected mayor is the strong chief executive and while many of his appointments require confirmation by the Council he has important powers in his own right. The distinction between the two types of service districts is a logical one, since members of the county not receiving urban services are not assessed for them, but pay instead for all the general services which are available to them. The charter permits expansion of the Urban Services District without limitation just as long as the city-county can provide the service and a need for the same has been proven. What is not contained in the charter, precisely because it is not a charter matter, is the fact that a great deal of Davidson County at the time of the effective date of the charter was unincorporated territory, lending itself readily to the principles of annexation prevalent in the state.

Article 2 of the charter details some 40 distinct powers which are delegated to the metropolitan government. Since an enumeration of powers often leads to a strict construction by the courts, the charter also vests general, broad powers in the metropolitan government, permitting it to exercise any powers which may be conferred upon it by the statutes and the state constitution, and any laws giving further powers to counties generally.

Under the provisions of Article 3, the Metropolitan County Council is organized with 40 members: 5 elected-at-large and 35 elected by districts. Councilmanic districts are created for the sole purpose of electing the district councillors. Each member is elected to a four year term. Candidates need to be at least 25 years of age, to have resided in the county for at least one year and in the district for at least six months.

Article 4 provides for the Urban Council which consists of three individuals who have been elected to the Metropolitan Council as councillors-at-large. They must reside within the limits of the Urban Services District. If three at-large members cannot be found with the qualifications, the membership of the entire Metropolitan Council have the right to elect one of their number who resides within the Urban Services District.

Article 5 designates the mayor as the chief executive officer of the city-county. The charter provides for a "strong" mayor, with appointment powers, responsibility for preparation of the annual budget and a veto right over legislative acts.

Fiscal matters are covered by Articles 6 and 7 of the charter. The former deals with budget preparation, review and adoption, and with allied financial matters. Article 7 deals with the issuance of governmental bonds and notes, including provision for a bond referendum election on issues which do not receive a two-thirds vote of the entire membership of the Council.

The structuring of the executive branch is treated in Article 8. Departments mandated include: (1) a consolidated Department of Finance, embracing Divisions of Budget, Accounts, Treasury, Collections, Purchasing and Public Property Administration; (2) a Department of Metropolitan Police; (3) a Metropolitan Department of Fire; (4) a Metropolitan Department of Public Works; (5) a Metropolitan Department of Water and Sewerage Services; (6) a Department of Law; and (7) a Department of Aviation. The Department of Aviation is charged with the operation, maintenance and control of the Nashville Metropolitan Airport, and any other airports owned in whole or in part by the city-county.

Article 9 provides for a regional school system, supervised by a Metropolitan Board of Education of nine members appointed for a term of six years, with the terms of three members expiring every two years. The mayor appoints members, subject to a two-thirds confirmation vote of the Council, from school districts which are established on the basis of a combination of councilmanic districts. The Board of Education, thus constituted, becomes the governing body of a consolidated regional school system. The Board votes a budget and submits it to the Mayor and Council for final action. If the Board is not satisfied with the budget as adopted, it may initiate a special referendum election to carry its case to the people.

The charter in Article 10 (Chapter I) establishes a five-member Metropolitan Board of Health, three of whom must be practicing physicians in the state. A broad range of functions and responsibilities are spelled out in this chapter for the health agency. Chapter 2 provides for a Metropolitan Board of Hospitals of seven members, three of whom must be practicing physicians of the state, and its specific responsibility is to administer and operate all institutions owned by the city-county for the sick, disabled and mentally ill.

Article 11 deals with the creation of boards and commissions. Chapter 1 (of the Article) details general provisions applicable to all boards and commissions. Chapter 2 creates a Board of Equalization. Chapter 3 establishes an Electric Power Board, with powers similar to state departments of public utilities. Chapter 4 provides for the transfer of the Nashville Transit Authority to the metropolitan government. The mayor appoints its members, with confirmation by a majority vote of the whole membership of the council. Chapter 5 establishes a Metropolitan Planning Commission of 10 members, eight of whom are appointed by the mayor; one being the mayor himself; and one being a member of the metropolitan council elected by that body. The chapter provides for mandatory referrals to the planning commission of all proposed construction. The commission must report to the council which is authorized to approve the recommendation of the planning commission or overrule it. Other major agencies subject to the requirements of this

Sec. 9. Power over local affairs—Home rule for cities and counties—nsolidation of functions.—The Legislature shall have the right to st such powers in the Courts of Justice, with regard to private and al affairs, as may be expedient.

The General Assembly shall have no power to pass a special, local or vate act having the effect of removing the incumbent from any nicipal or county office or abridging the term or altering the salary ior to the end of the term for which such public officer was selected, d any act of the General Assembly private or local in form or effect plicable to a particular county or municipality either in its governntal or its proprietary capacity shall be void and of no effect unless act by its terms either requires the approval by a two-thirds vote the local legislative body of the municipality or county, or requires roval in an election by a majority of those voting in said election in municipality or county affected.

Any municipality may by ordinance submit to its qualified voters a general or special election the question: "Shall this municipality opt home rule?"

In the event of an affirmative vote by a majority of the qualified ers voting thereon, and until the repeal thereof by the same procure, such municipality shall be a home rule municipality, and the eral Assembly shall act with respect to such home rule municipality y by laws which are general in terms and effect.

Any municipality after adopting home rule may continue to operate ler its existing charter, or amend the same, or adopt and thereafter end a new charter to provide for its governmental and proprietary vers, duties and functions, and for the form, structure, personnel organization of its government, provided that no charter provision ept with respect to compensation of municipal personnel shall be ctive if inconsistent with any general act of the General Assembly provided further that the power of taxation of such municipality ll not be enlarged or increased except by General act of the General embly. The General Assembly shall by general law provide the usive methods by which municipalities may be created, merged, olidated and dissolved and by which municipal boundaries may be ed.

charter or amendment may be proposed by ordinance of any home municipality, by a charter commission provided for by Act of the eral Assembly and elected by the qualified voters of a home rule icipality voting thereon or, in the absence of such act of the eral Assembly, by a charter commission of seven (7) members, en at large not more often than once in two (2) years, in a icipal election pursuant to petition for such election signed by ified voters of a home rule municipality not less in number than (10%) per cent of those voting in the then most recent general icipal election.

shall be the duty of the legislative body of such municipality to sh any proposal so made and to submit the same to it

voters at the first general state election which shall be held at sixty (60) days after such publication and such proposal shall b effective sixty (60) days after approval by a majority of the qu voters voting thereon.

The General Assembly shall not authorize any municipality t incomes, estates, or inheritances, or to impose any other tax not a ized by Sections 28 or 29 of Article II of this Constitution. No herein shall be construed as invalidating the provisions of any m ipal charter in existence at the time of the adoption of this a ment.

The General Assembly may provide for the consolidation of a all of the governmental and corporate functions now or hereafter v in municipal corporations with the governmental and corporate tions now or hereafter vested in the counties in which such mun corporations are located; provided, such consolidations shall not be effective until submitted to the qualified voters residing within municipal corporation and in the county outside thereof, and app by a majority of those voting within the municipal corporation a a majority of those voting in the county outside the municipal cor tion. [As amended: Adopted in Convention June 4, 1953; App at election November 3, 1953; Proclaimed by Governor, Novembe 1953.]

Compiler's Notes. The 1953 amendments added all new matter after the first paragraph. The second paragraph was adopted by the Limited Constitutional Convention of 1953 and submitted to the people as Amendment No. 6, the third through eighth paragraphs as Amendment No. 7, and the final paragraph as Amendment No. 8.

This section originated with the stitution of 1834, Art. 11, § 8. See v. Armstrong (1856), 35 Tenn. 63

In the Constitution of 1834, the "deemed" was used before "expe in line 4.

3518

NOTES TO DECISIONS

Analysis

1. General purpose of section.
2. Legislative delegation of powers.
3. —Unauthorized acts.
4. Exercise of delegated powers.
5. No exclusive jurisdiction.
6. —School district.
7. —County courts.

1. General Purpose of Section.

The term "powers" is not very definite in meaning, and the court reserves the question and refuses to attempt to define the precise extent of the "powers" within the purview of this provision. This section authorizes the courts to be empowered, by a general law, applicable to all persons who might bring themselves within its provisions, to grant to individuals, as citizens and members of the community, such rights and privileges defined by law, in regard to matpedient to bestow. State v. Arm (1856), 3 Tenn. 634; Hunter v. bell (1869), 47 Tenn. 49; Grant v. say (1872), 58 Tenn. 651; Nashv K. R. Co. v. Wilson County (189 Tenn. 597, 15 S. W. 446; Sullivan v. Ruth & Co. (1900), 106 Tenn. S. W. 138. See Code, § 54-170 notes.

This section means that such may be vested in the governing of the county, but it does not au the delegation of a legislative fu such as giving the circuit or ch court the authority to fix sala county officers where fees are inad Henderson County v. Wallace 173 Tenn. 184, 116 S. W. (2d) 10

2. Legislative Delegation of Pow

Whatever doubts may exist up abstract question of the authority

Appendix No. 3

"A Comparison of Predictions and Experience with Nashville Metro" by Daniel R. Grant

Summary

The above article, published in Urban Affairs Quarterly , Vol. I, No. I, September, 1965, is a discussion of the pre-adoption claims by both the proponents and the opponents of the Metropolitan Government for Nashville-Davidson County.

Most of the arguments for metro may be found in the original 1956 report, which in summary, predicted that metro would:

1. Eliminate city-county bickering and buck-passing and help fix political responsibility.

2. Eliminate duplication of administrative effort and thus provide more economical government.

3. Result in greater specialization and professionalization of personnel.

4. Equalize core-city and suburban services on a "single-community basis".

5. Provide a "truly progressive solution" to the universal problem of how to plan and guide growth in the suburban and rural fringe.

6. Eliminate city-county financial inequities.

7. Permit the financing of new suburban services on a pay-as-you-are served basis.

8. Create a progressive-community image in the national spotlight.

The claims of the opponents, in summary, were that metro would:

1. Create a bigger, more centralized government which will be less responsible and less accessible to the people.

2. Increase taxes substantially.

3. Provide no benefits to rural residents, while raising their taxes.

4. Reduce the quality and quantity of services, and delay new services, in the core city area.

5. Paralyze the community in a quagmire of lawsuits by which the charter would be held unconstitutional in many parts if not in toto.

6. Result in a dilution of Negro political influence in local government decisions.

7. Remove from power the political organization of Mayor Ben West.

Grant concludes that after more than two years of experience with the new metropolitan government for Nashville and Davidson County, it is perhaps more significant that none of the predictions by metro's supporters have been proved incorrect and about half of them already give eviden of being fulfilled. In the case of the other half, at the time this article was written, it was either still too early to know or the evidence was inadequate. In the case of the opponents' pre-metro predictions, two already gave evidence of being incorrect, only one of the predictions has been actually fulfilled (the removal of the previous mayor from office), one other gives evidence of at least short-run fulfillment (higher taxes on rural residents without significant new benefits), and in the case of the remainder, it was felt that it was either too early to judge the new governmental system or the evidence was inadequate.

It is Mr. Grant's opinion, based on this "early, preliminary, tentative appraisal" of such hard and soft data as then were available, that Nashville's metro was living up to the predictions of most of its supporters, and was moving in the direction of proving incorrect most of the predictions of its opponents.

STARK COUNTY COMMISSIONERS

County Office Building
Canton, Ohio 44702 • Phone 454-5651

BOARD OF COMMISSIONERS
Norman W. Sponseller, Pres.
Albert M. Creighton
Robert D. Freeman

May 31, 1973

Mrs. Ann Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

COUNTY RECOMMENDATIONS

I will be on vacation at the time of your June 14th hearing and unable to testify....but we can unqualifiedly and enthusiastically endorse the Local Government Committee's recommendations for County Constitutional changes, for :

1. Classification of Counties.....for there is no way that one organizational structure can be adequate for Counties with 10,000 population, and 2 million population.

2. Local self-government for Counties.....for most urban Counties, if not all Counties, now have the same problems that resulted in the grant of local self government to municipalities in 1912.

3. Simple majority vote on County charters.....for the present language of the Constitution almost automatically insures defeat, and certainly a majority of the residents of a County ought to have the right to determine their own form of government.

4. The amendments proposed in Section 4, Article X, especially the right of a Board of County Commissioners to submit a charter.....for too often such charters are written by lay persons without regard to what is practical and what is acceptable.

The Commission and Local Government Committee has produced a monumental vehicle for the improvement of County government in the 20th Century.

STARK COUNTY COMMISSIONERS

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Robert D. Freeman

COUNTY RECOMMENDATIONS

However, it is suggested that ample time be provided between endorsement by the General Assembly and election day to permit the usual slow moving forces interested in producing such changes, to marshal their energies in behalf of these issues.

WILLIAM KEEN
Stark County Administrator

WK: fl

ADDRESS ALL COMMUNICATIONS TO THE CLERK OF THE BOARD

County of Cuyahoga

COUNTY ADMINISTRATION BUILDING
1219 Ontario Street
Cleveland, Ohio 44113

BOARD OF
COUNTY COMMISSIONERS
FRANK R. POKORNY, PRESIDENT
HUGH A. CORRIGAN
SETH C. TAFT

CLERK OF THE BOARD
LOUISE M. MULOCK

June 5, 1973

Mrs. Ann M. Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Ann:

Thanks for your letter of May 18 inviting me to appear at the June 14 hearing of the Commission. I presently plan to attend the hearing and would appreciate the opportunity to testify. Here are a few comments which I will propose to make, among others:

1) The Classification Proposal is excellent.

2) The new Section 5 granting home rule to counties is very good. I would only suggest that there be added after the word "enforce" the words "or carry out". The reason for this is that it is not clear that the county may spend its funds on public activities not now authorized. I am not sure that "adopt and enforce" would extend to activities of the county government which are basically the rendering of public services.

3) Although I concur heartily in your proposed amendment to Section 3 of Article 10 eliminating the special votes, I think this may produce significant opposition from municipalities and therefore I would recommend that it not be placed on the ballot at the same time as the other proposals.

4) The amendments to Section 4 of Article 10 are excellent. I would suggest that in the first parenthetical clause following the words "legislative authority" the words "as used in this Section" be inserted before the word "includes". The reason for this is to make sure that when the words "legislative authority" are used later in the Section the inclusion of the Board of County Commissioners is made certain. I am not sure this is so with your language. There is also considerable doubt in my mind that any public official should be barred from serving on a charter commission. One of the major reasons why our charter was not written in such a way as to

be successful in 1959, was that neither the Mayor nor any Cleveland City Coucilman could serve on the Charter Commission. I do believe that the presence of public officials renders the the likelehood of a feasible charter somewhat greater.

I am not certain why in the third paragraph you have called for a vote by a majority of all the members elected to the Commission. If a person resigns or dies and his vacancy is filled, it is not clear to me that he can be counted among the favorable votes in the vote on a charter. I would suggest that the words "elected to" be deleted and the word "of" be inserted in their place.

I am particularly glad to see the County Commissioners' authority to place a charter on the ballot. I am convinced that the two-year procedure is simply too long. The iron is hot and it is cold by the time the charter is presented.

If for any reason I am not able to get to the hearing, I hope you will place the foregoing comments in the record.

Sincerely,

Seth Taft
County Commissioner

ST:ga

cc: Mr. Estal E. Sparlin

Statement of Estal E. Sparlin to Local Government Committee of the Ohio Constitutional Revision Commission, June 14, 1973

Re: County Government Proposals

Thank you for giving me the opportunity to comment on the proposals contained in your report of March 26, 1973. I am making this statement in the capacity of a private citizen.

Introduction

I congratulate you on the excellent statement of the importance of the county in solving urban problems. Strengthening county government is indeed a necessary first step in the process.

Classification

First, I wish to make it clear that I agree with the committee there is need for an amendment to the constitution on county classification and that there are many advantages to be gained from such a system.

The Ohio supreme court's interpretation of the uniformity clause of the constitution has placed Ohio among the few states that require complete uniformity with no classification of counties or municipalities, except the differentiation between villages and cities contained in the constitution itself. This straitjacket has handicapped us in solving important urban problems.

However, there is great danger that we, in reacting to the shortcomings of the present system, will swing the pendulum too far in the other direction and find ourselves buried in the grave of classification run rampant.

In my judgment, allowing more than one classification, as provided in your proposal, would do just that.

May I illustrate the kinds of laws we can expect if the system of more than one classification is allowed?

"The counties of this state are hereby classified into the following classes: 1. All counties with a population of more than 100,000; 2. All counties with a population of 50,000 to 99,999; 3. All counties with a population of 45,000 to 49,999; 4. All counties with a population of less than 45,000. In counties of Class 3, the board of county commissioners shall annually appropriate at least $100,000 for the purpose of maintaining a zoo."

"The counties of this state are hereby classified into the following classes: 1. All counties with a population of more than 1,000,000; 2. All counties with a population of 100,000 to 999,999; 3. All counties with a population of 50,000 to 99,999; 4. All counties with a population of less than 50,000. In counties of the first class, the board of county commissioners shall annually appropriate at least $1,000,000 for the purpose of maintaining a county fair."

"The counties of this state are hereby classified into the following classes: 1. All counties with an assessed valuation of more than $1,000,000,000; 2. All counties with an assessed valuation of $500,000,000 to $999,999,999; 3. All counties with an assessed valuation of $50,000,000 to $499,999,999; 4. All counties with less than $50,000,000 assessed valuation. In counties of the first class there is hereby created the office of hospital administrator and he shall be elected for a four year term in the same manner as other elected county officials."

I would predict that in the course of a decade or two there would be at least 100 such laws on the books.

The problem of classification should be appreached differently than in your proposal.

I would suggest the following as a substitute for the first paragraph of your proposed Section 1:

"The General Assembly shall provide by general law for the organization and government of counties, and FOR SUCH PURPOSES MAY DIVIDE THE COUNTIES OF THE STATE INTO NO MORE THAN SIX CLASSES. EACH CLASS SHALL CONTAIN MORE THAN ONE COUNTY. THE ORGANIZATION AND POWERS OF EACH CLASS SHALL BE DEFINED BY GENERAL LAWS SO THAT ALL COUNTIES WITHIN THE SAME CLASS SHALL POSSESS THE SAME POWERS AND BE SUBJECT TO THE SAME RESTRICTIONS. A LAW APPLICABLE TO ANY COUNTY SHALL APPLY TO ALL COUNTIES IN THE CLASS TO WHICH SUCH COUNTY BELONGS."

My proposal for a single classification of six (I would accept seven or eight) would give us an adequately flexible system to allow for the desired differentiation of types of counties and would clearly avoid the devastating swing of the pendulum to the other extreme of classification run rampant.

The last two sentences would make it doubly clear there is to be no subclassification and I urge they be included. This recommendation is based not on theory but on nearly half-a-century of practical, and often bitter, experience.

County Local Self-Government

Your proposal for adding a new Section 5 to Article X giving counties substantially the same powers of local self-government as municipalities is excellent and I recommend it. I agree that there should be a provision relative to the conflict between such county powers and municipal powers.

County Charters

There is much in the proposed Section 4 that is good and should be adopted. May I make some suggestions?

In the first paragraph, I believe that the number of signatures required should be six per cent and not ten per cent. Ten per cent is an almost unsurmountable number and virtually eliminates the use of the initiative method to secure a charter commission. Six per cent would protect from vain attempts but would be attainable by a serious group.

In Paragraph 2, I believe it would be a mistake to bar holders of public office from membership on the commission. I am cognizent of the argument that in some instances public officials become members of charter commissions in order to scuttle progressive changes. On the other hand, my experience is that public officials are valuable members of charter commissions and contribute much to an improved document. In addition, they are usually quite influential once the charter is on the ballot and thus their support is needed. In the last charter commission campaign in Cuyahoga County, the mayor and councilmen of Cleveland were prevented from becoming members of the county charter commission by provisions of the city charter. In the campaign for the adoption of the charter, the mayor of Cleveland was an important opponent. If he had been a member of the charter commission, a compromise would have been attained and he would have supported the charter. There is much evidence that the charter would have carried with his support.

In the third paragraph, I would recommend that all of the language beginning with the word "Amendments" in Line 7 and ending with the word "vote" in the fourth line on Page 12 be deleted and the following substituted: "The charter shall provide a method for amendment." Charter commissions should have this flexibility.

In the fourth paragraph, I recommend that the petition per cent be changed from ten to six.

New Counties and County Boundaries

Any attempt to consolidate counties is probably an empty gesture but your proposal is a good one and I would recommend it.

* * *

I wish to express my appreciation to you for the many hours you have spent on this difficult task and also for giving me this opportunity to present my views.

Respectfully submitted,

Estal E. Sparlin
10301 Lake Avenue
Cleveland, Ohio 44102

League of Women Voters of Ohio
65 South Fourth Street
Columbus, Ohio 43215
614-463-1247

STATEMENT BEFORE THE OHIO CONSTITUTIONAL REVISION COMMISSION
Regarding Article X - County Government
by Mrs. Richard M. Brownell
June 14, 1973

The League of Women Voters of Ohio supports revision of the Ohio Constitution which will provide effective government responsive to the needs of the people of Ohio. Our concern today is Article X dealing with County Government. The League has long felt that County Government needed to be strengthened. We have implemented this stand through our support for county home rule and for permissive legislation to achieve county reorganization. Many Ohio Leagues have worked locally for reorganization of their county governments, either by home rule charter or by an alternative form of county government. There have been 21 attempts since 1934 to achieve reorganization of the eight largest counties in Ohio. Considering that all of these attempts have failed, the League is very interested in the proposed changes before you.

The first proposal for classification of counties is one that the League has not studied directly, but the intended purpose is certainly one of the active concerns of the League. Classification would make possible an alternative organization for urban and rural counties. The League recognizes the shortcomings of our present county government structure. A more flexible approach is needed in order to deal with the different functions performed by counties. There is some debate as to whether the General Assembly could under present constitutional provisions provide for classification. We already have classification of counties for the purpose of setting salaries of elected county officials. On the other hand there have been situations in which laws have been declared unconstitutional because a given law has authorized a different procedure in some counties from that authorized in others. Therefore, the League concurs with the Local Government Committee's concern for removing doubt and we urge that this provision be adopted. Such an amendment would clarify the intent of the Constitution and certainly if the people approved the amendment it would indicate their desire that counties be classified. We urge you to keep the proposal in broad enough terms that a variety of approaches to classification could be taken in the future. The details of provisions for classification should be left to the General Assembly and the Constitution should contain only the fundamental principle.

The League supports in principle the second proposal before you concerning a new Section 5 to Article X. League members believe the Constitution should be changed to allow for maximum flexibility to permit state and local governments to share power. This concept of implied powers provides for a flexible approach to the functions of counties and their relationship to the state. This concept allows the county to do whatever is not prohibited by general law so long as it is in conformity with the state Constitution. Thus, unless prohibited expressly by general law, the county <u>may</u> act. Giving counties increased powers might mean that requests for the formation of new special districts would taper off. The ability to act unless specifically denied allows government to handle problems as they arise rather than wait for approval of the General Assembly.

The League would like to question, however, the use of the same wording as in Section 3 of Article XVIII. We understand that court decisions have clarified much of the wording, but it seems to us that perhaps now is the time to suggest a clearer wording. In addition the League urges careful consideration of the county vs. municipal powers question. Conflicts in this area can hinder effective delivery

of services in the county. We urge you to consider Sections 4, 5, and 6 of Article XVIII which give the municipalities exclusive rights in the area of utilities. The delivery of services in the area of water, sewers, and electricity has been and will be a problem in dealing with environmental and other regional problems. We hope you will be looking into these provisions and their implication to counties and other units of government handling regional problems. A true shared powers approach leaves the state in the driver's seat, so to speak, having full power to determine what unit of government should provide each function and service. We urge you not to hamper this power with constitutional provisions that limit the state in its determinations.

The League would also like to stress here that the key to any effort to provide services to the people is the power to execute these services and functions -- this involves the power of taxation. The matter of financing county government is imperative to the success of the government. We urge the Local Government Committee to look closely at the finance provisions which continue to hamper local governments.

The League of Women Voters favors the proposed changes in Section 3 of Article X. League members believe that the Ohio Constitution should continue to permit the people to choose the form of their county government. To facilitate this in the counties our members favor replacement of the three and four way majority vote for adoption of a county charter with a simple majority. We consider these present majorities too restrictive and not in conformity with the one man-one vote principle.

The League has no position on Section 4 of Article X dealing with the rewording of the procedures for a County Charter Commission. A number of our local Leagues have worked with County Charter Commission proposals, but since there has been no statewide study of this we cannot comment on it. In general we favor clarification of wording in the Constitution. Insofar as the changes proposed make our Constitution structurally sound and clear, we favor the changes. Maintaining a logical organization and internal consistency is important in any constitutional provision. Some members have questioned lowering the allowed minimum number of citizens serving on the Charter Commission. This might restrict citizen participation and responsiveness The League would also like to point out that this whole section could be handled in statutory law. The Constitution would then merely state that the General Assembly may set up procedures for county charter commissions.

Our members have not considered directly your final proposed change to Section 30 of Article II. We agree this matter is properly in Article X as it deals with the creation of counties and changing of county lines. Our members feel the General Assembly should be empowered to set up procedures for combining local units of government allowing the state as well as the people or local governments to initiate proposals. This proposed change would allow the legislature to initiate changes in county boundary lines and would give the people the power to petition for a vote on these changes. Our members feel that citizens should be assured of the right to vote on any proposed change in governmental boundary lines without having to petition for the right to vote on them. We support your proposal that a simple majority vote in the affected areas be sufficient to approve changes. This is consistent with the one-man-one vote principle and with the simple majority approval for adoption of a county home rule charter.

The League of Women Voters of Ohio commends the Local Government Committee under its Chairwoman, Linda Orfirer, for moving ahead with consideration of constitutional reform. We appreciate the many hours of work that have gone into these proposals. Thank you for this opportunity to appear before you.

BOARD OF MONTGOMERY COUNTY COMMISSIONERS

Thomas A. Cloud
Robert E. Kline
Charles V. Simms

MONTGOMERY COUNTY ADMINISTRATION BUILDING
COUNTY GOVERNMENT PLAZA
THIRD AND ST. MARYS
DAYTON, OHIO 45402

Telephone 225-4690

June 15, 1973

Mrs. Ann M. Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Mrs. Eriksson:

I regret very much that I was unable to attend the public hearing conducted by the Ohio Constitutional Revision Commission regarding the report of the Local Government Committee dated March 26, 1973. I was committed to a schedule in Montgomery County which did not permit me sufficient time to arrive in Columbus during the scheduled time period of the hearing.

However, I have reviewed the report of the Local Government Committee in detail, and would like to offer my formal comments on the report. I would hope these comments would become a part of the formal record of the Commission.

My position on this report is already well known to the Local Government Committee. As Chairman of the Urban Counties Committee of the County Commissioners Association of Ohio (CCAO), and as a member of the Executive Committee of the CCAO, I have had a great deal of input over the past eighteen months into the activities of the Local Government Committee.

First, I would like to say that the Local Government Committee is to be commended for the preparation of the most progressive, far-sighted, and at the same time, practical document concerning the modernization of County Government in Ohio that I have ever reviewed. I enthusiastically support the adoption of this report in its entirety by the Commission.

Most of Ohio's urban counties are quite aware of the problems of today's complex urban society, and as responsive local governments, are struggling to confront and solve these problems. Time and time again, these same counties have found themselves shackled by the long outdated,

rural oriented, 1851 legislation under which they must operate. We are long past the time when this legislation should have been updated.

I too, firmly believe that the future hope of local government in Ohio lies in the ability of Counties to respond to, and solve the problems of our communities. To be in a position to assume this responsibility however, County government must have the proper legislative tools with which to act. The adoption of the report of the Local Government Committee by the Commission, the State Legislature, and finally the electorate, would achieve this goal.

Of the five proposed changes to Article X of the Constitution of the State of Ohio, four have been advocated, and formally adopted by both the Urban Counties Committee of the CCAO, and the General Membership of the CCAO. Only the proposed change to section 6 regarding county boundaries has not been acted upon by the CCAO.

The classification of counties is a legislative tool which would allow counties to solve the types of problems particular to their size or type of county, while at the same time, not forcing every county to act in the same manner. This approach is strongly advocated by urban County Commissioners in Ohio.

The proposed revision to section 5 is perhaps the most important change proposed by the Local Government Committee. Current legislation, allowing counties to do only those things specifically allowed by State Statute, is no longer workable if County government is to be responsive to the needs of its citizens. With the adoption of the proposed change to section 5, Boards of County Commissioners could act in any manner not specifically prohibited by State Law. If Counties are to fully meet the problems of an urbanized society, receipt of this power is extremely critical.

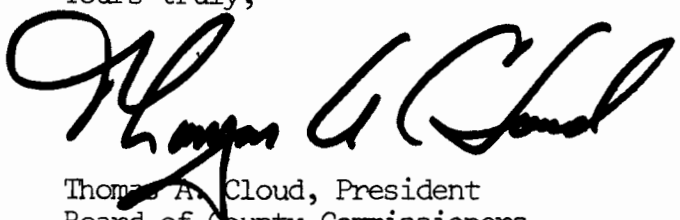
The proposed revisions to sections 3 and 4, dealing with the adoption of County Charters have been long advocated by the CCAO. Of 3,347 counties in the United States, more than 10% have been able to modernize their form of County Government. Not one of these, however, has been in the State of Ohio. One of the reasons for this is the nearly impossible task imposed upon Charter Commissions and Boards of County Commissioners by the current County Charter legislation. The proposed changes would give the citizen a clearer definition of his choices, and a better chance at responsive county government.

I would support the proposed section 6 revision regarding county boundaries, because it like the other proposals, would allow county governments to structure themselves in such a manner as to best address the needs of the 1970's. This proposed new language is permissive in nature and should be adopted.

In conclusion, I firmly believe the Constitutional Revision Commission, the State Legislature, and the people of the State of Ohio

have a great opportunity facing them at present. By the adoption of the changes proposed by the Local Government Committee of the Ohio Constitutional Revision Commission, Ohio can take the most dynamic step toward the solution of problems of our urban areas that has been taken in 122 years. A full realization of the problems of today's urban county, and the courage to act forthrightly to correct them, can only result in the favorable adoption of the March 26, 1973, report of the Local Government Committee.

Yours truly,



Thomas A. Cloud, President
Board of County Commissioners
Montgomery County, Ohio

TAC/mks

Ohio Chamber of Commerce

STATEMENT RELATING TO COUNTY GOVERNMENT PROPOSALS
BEFORE THE OHIO CONSTITUTIONAL REVISION COMMISSION
BY EDMOND M. LOEWE, GOVERNMENTAL AFFAIRS SPECIALIST
REPRESENTING OHIO CHAMBER OF COMMERCE, JUNE 14, 1973

My name is Edmond M. Loewe, Governmental Affairs Specialist of the Ohio Chamber of Commerce. I appear here today as a representative of the Ohio Chamber of Commerce to give staff-level observations on the subject you are considering. While I serve as a member of the Ohio Commission on Local Government Services and am chairman of its subcommittee on county government, this statement is not intended in any way to reflect the views of that Commission.

BUSINESS INTEREST IN LOCAL GOVERNMENT

Businessmen involved in the search for more effective ways to solve community problems frequently come up against the fact that the form and functions of some local government units lack the adaptability or flexibility for civic problem solving. The Ohio Chamber of Commerce, therefore, is pleased that this Commission is exploring alternatives for improving municipal and county government and appreciates this opportunity to speak to the issue of constitutional reform as it relates to county government in Ohio.

We have followed with great interest and have participated in the activity and deliberations of the Commission's Local Government Committee since its creation. Also, to help the business community better reflect on the work of this committee, as well as the efforts of the Ohio Commission on Local Government Services, the Chamber has been coordinating closely with a

special local government committee of the Chamber of Commerce Executives of Ohio. On this chamber liaison group are 27 leading city chamber of commerce executives-- professionals who deal every day with the problems of cities, villages, townships, and counties and thus have a wealth of experience in local government.

STRENGTHS OF OHIO LOCAL GOVERNMENT

Before discussing the constitutional proposals under consideration, it would be appropriate to note some of the strengths of Ohio local government, as well as to identify what are commonly thought to be the basic problems of Ohio county government.

Many of the criteria to be found in a typical local government modernization check list are either in use in Ohio today, or are available to local units subject only to voter or local legislative approval. Thus it is possible in Ohio to:

1. Adopt optional or charter forms of government for counties and municipalities.
2. Authorize counties to assume more of the urban activities that can best be provided on a county-wide basis.
3. Transfer functions between municipalities and counties.
4. Use contractual agreements for the performance of certain functions.
5. Establish voluntary associations of elected officials (councils of governments).
6. Use extraterritorial development powers and regional planning agencies to promote sound area-wide land use.
7. Annex unincorporated areas to municipalities to avoid proliferation of governmental units.

PROBLEMS ASSOCIATED WITH COUNTY GOVERNMENT

On the other side of the ledger, several problems often associated with county government can be identified as follows:

1. There is no single administrative head of the government.
2. The political power exercised by separately elected administrative officials makes any reorganization difficult.
3. The existence of several elected department chiefs tends to diffuse responsibility.
4. County commissioners have no real legislative powers.
5. The budget process is weak.
6. Personnel administration cannot be centralized.
7. Law enforcement is often diffused and overlapping.
8. The county is often mistakenly considered to be serving only citizens of the unincorporated areas.

OPTIONS FOR COUNTY GOVERNMENT

In considering the future role of the urban county in Ohio, four options stand out as possibilities:

- Keep the same "weak" statutory form now in use in all 88 counties.
- Provide a unit which retains the same basic form and functions, but add "home-rule type" or self government powers to enable counties to do a more effective job. (Home-rule type powers give a county the ability to pass and enforce ordinances not in conflict with state law.)
- Create a strong reorganized governmental vehicle which would assume most if not all of the functions better performed on an area-wide basis. (Functional consolidation)
- Establish the framework under which all local government services would be performed on a county-wide basis by one unit as the

result of the consolidation of existing governmental jurisdictions. (Complete city-village-county consolidation)

If the Commission decides that the future role of the county should be any one of the latter three choices, then the general intent or thrust of the five proposed constitutional amendments before you are directly related to achieving these ends.

AMENDMENTS PATTERNED AFTER MUNICIPAL GOVERNMENT

While there may be an over-abundance of small villages and cities, and insufficient coordination among neighboring municipalities, municipal government has established a comparatively good record in this state. Cities and villages have most of the tools necessary to operate effectively and many municipalities have used these tools well. It is, therefore, not surprising that practically all of the five constitutional amendments propose to give to Ohio counties many of the strengths and options that now belong to municipalities.

The county classification concept springs from the use of two classes for municipalities-- cities (5,000 population and up) and villages (under 5,000 population).

The language for the county "home-rule type" powers proposal is based on the self-government powers given to non-charter municipalities in the Ohio Constitution.

The amendment on county charters requests the same procedure for charter adoption that city and village charters have-- a single majority vote regardless of the type of charter being considered (versus the present requirement of a majority vote each in the entire county, the largest municipality, and the rest of the county for charters in counties over 500,000 population which mandate the transfer of functions to the county).

The proposal on county charter commissions clarifies the complicated procedures necessary to elect a charter commission and place a proposed county charter before the electorate-- in much the same way city and village charters are processed.

Finally, the county boundary change proposal provides a procedure for changing boundary lines without necessarily having the electorate consider each proposal-- in a manner similar to the method used in annexation of unincorporated areas to municipalities.

OBSERVATIONS ON PROPOSED AMENDMENTS

Some observations about the general merits of the five amendments may be appropriate to your discussions.

If the Ohio electorate were to approve a classification amendment, the General Assembly might view the vote as a mandate to create new county governmental structures, especially for Ohio's highly populated metropolitan counties. On the other hand, because this proposal is not self-implementing, the General Assembly could well delay action for a long time. As an illustration, the constitutional amendment permitting alternative forms of county government was adopted by the voters in 1933, but the General Assembly waited until 1961 to provide a framework of alternative county forms. Another concern is that classification, if carried out to excess, could lead to unwarranted variation and complexity.

Perhaps the strongest potential help that counties could receive, short of a charter-- drafted and approved by local voters-- would be the "home-rule type" powers proposed by the county self-government amendment. Unlike the classification proposal, this amendment would be self-executing and available for use by counties upon approval by the voters of the State. Parenthetically, it should be noted that this amendment would prohibit the levy of taxes

except as authorized by the General Assembly. This is as it should be. The unrestricted application of taxing powers on a local option basis, with costly administration and nighmarish compliance costs, is one "revision" that must certainly be avoided.

Although no Ohio county to date has adopted either a concurrent (weak) charter or an exclusive (strong) charter, there is considerable merit in at least easing the multiple majority vote now required to approve an exclusive-type charter. While it may be unlikely that any exclusive-power charters will be drafted in the near future, this revision anticipates the long-term possibilities of the exercise of this option and avoidance of certain defeat of such charters at the polls, regardless of their possible merits. This amendment and the county boundary proposal are likely to be the most controversial of the five, mainly because they involve the removal of voting power.

There is one important concern relating to county charter home-rule powers in general that must not be overlooked. The endowment of a county government with home-rule powers, existing alongside similar home-rule powers of its cities and villages, must not be permitted in any way to add to the levels of government that can exercise control over the licensing or other regulation of business, or the rate-making processes of public utility service.

The procedure used by a county-charter commission in preparing a charter and presenting it to the electorate is badly in need of clarification, such as is contemplated in the fourth of the amendments. The confusing experience of the Summit County charter commission is perhaps the best recent example of why clearer language is needed in the Constitution. It is also appropriate for the amendment, as it does (1) to provide for the resubmission of a defeated charter, (2) make possible the option of an "instant" or petitioned charter, and (3) give county commissioners the ability to submit a charter of their choosing directly to the voters.

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OHIO CHAMBER OF COMMERCE

17 South High Street, Room 820 • Columbus, Ohio 43215 • Telephone: 614/228-4201

July 19, 1973

Mr. Richard Carter, Chairman
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Mr. Carter:

At the June 14 hearing of the Ohio Constitutional Revision Commission on county government, a spokesman for the Ohio Chamber appeared in general support of the recommendations of the OCRC Local Government Committee.

This consisted of oral testimony by Edmond M. Loewe, OCC Governmental Affairs Specialist, and a written organizational statement - both in the nature of staff commentaries.

Since then, at the request of OCC President, Don W. Montgomery, the Chamber's Executive Committee was asked to review the pending recommendations and to provide initial organizational policy positions. Having done so, we are now in a position to present the following consensus views:

RECOMMENDATION 1 - COUNTY CLASSIFICATION (ARTICLE 10). PERMIT THE CLASSIFICATION OF COUNTIES BY THE STATE LEGISLATURE IN ORDER TO PROVIDE DIFFERENT POWERS AND STRUCTURE FOR COUNTIES BASED ON THEIR POPULATION OR OTHER CRITERIA.

Consensus approval, with the observation that the amendment language could permit excessive classification and that the number of classes should be limited to four or five.

RECOMMENDATION 2 - COUNTY POWERS (ARTICLE 10). PROVIDE FOR "HOME RULE TYPE" OR "IMPLIED" POWERS THUS GIVING COUNTIES FREEDOM TO ACT UNLESS PREVENTED SPECIFICALLY BY STATE LAW. HOWEVER, THE POWER TO TAX WOULD NOT BE INCLUDED.

Consensus approval, with the proviso that the extension of home rule powers to counties not permit the exercise by both municipalities and counties of the power to license or regulate business or engage in the rate-determination processes of public utility service.

RECOMMENDATION 3 - COUNTY CHARTERS (ARTICLE 10). REQUIRE THAT ALL COUNTY CHARTER ADOPTIONS WHETHER FOR "STRONG OR WEAK" CHARTERS BE BY MAJORITY VOTE, THUS ELIMINATING THE MULTIPLE MAJORITY STIPULATION FOR "EXCLUSIVE POWER" CHARTER PROPOSALS.

Consensus approval, with the proviso that a majority vote of 60% or 65% be required for the exclusive assumption of powers by a county or for the termination of municipal government.

RECOMMENDATION 4 - COUNTY CHARTER COMMISSIONS (ARTICLE 10). CLARIFY THE REQUIREMENTS FOR COUNTY CHARTER COMMISSION OPERATION, AND PERMIT CHARTER PREPARATION BY THE PETITION METHOD AS WELL AS DIRECTLY FROM THE BOARD OF COUNTY COMMISSIONERS.

Consensus approval.

RECOMMENDATION 5 - COUNTY BOUNDARIES (ARTICLE 2). GIVE THE GENERAL ASSEMBLY THE POWER TO ALTER COUNTY BOUNDARIES, CREATE NEW COUNTIES OR TO REDUCE THE NUMBER OF EXISTING COUNTIES WITHOUT A MANDATORY VOTE BY COUNTY VOTERS. REFERENDUM CONSIDERATION BY VOTERS WOULD STILL BE AVAILABLE ON AN OPTIONAL BASIS.

No position at present.

Very truly yours,

Executive Vice President

cc - Mr. Don W. Montgomery

All Members, OCC
Executive Committee

Ohio Constitutional Revision Commission
Local Government Committee Report, Part 1
July 23, 1973

Local Government Committee

Article X - Counties

The Local Government Committee recommends to the Commission amendments to Article X of the Constitution, dealing with counties, as follows:

Section 1 - amend - county classification

Section 5 - new section - county powers

Section 3 - amend - county charters

Section 4 - amend - county charter commissions

Section 6 - new section - county boundaries
(Repeal section 30 of Article II)

Introduction

The Local Government Committee began its study by reviewing the constitutional provisions dealing with local government - primarily Article XVIII, municipal corporations; and Article X, counties - in order to learn what is (and is not) provided in the Ohio Constitution regarding local government structure and powers. It then turned its attention to the various services which local governments do, or are expected to, or are authorized to, or should, render to people, and to which units of government the state allocates functions or powers of various types. The committee considered whether the local government provisions of the Constitution hinder the operation of local government or of state government, and whether the Constitution should be changed by adding provisions would improve governmental operations and services to the people.

The committee concluded, as have many others, that many of today's problems, particularly in metropolitan areas, are not confined to the boundaries of existing political subdivisions. Air and water pollution, waste disposal, transportation, land use regulation, are often cited as examples of such problems. The multiplicity of subdivisions even within a single county and the overlapping of jurisdictions of special and general purpose units of government often make the solutions to these problems difficult even if all appropriate units of government cooperate.

Some problems do not stop at county boundaries, and the committee held a series of public hearings to explore the idea of adding to the Constitution a provision for regional units of government. Many experts addressed the committee at these hearings, held in Cincinnati, Columbus, and Cleveland. The hearings brought to light many problems of intergovernmental relations and support for the concept that most modern urban problems do not stop at political subdivision boundaries. The committee is not yet ready, however, to recommend the regional approach as a proposed constitutional amendment.

In the course of the hearings, and through consultation with county officials and a review of the literature on county government, the committee concluded that strengthening county government in Ohio is a necessary first step toward solving many of the urban problems. Eight of the 14 Standard Metropolitan Statistical Areas

wholly in Ohio have 80% or more of their population entirely in one county; three of these are single-county SMSAs. Outside the cities, many problems exist, especially in the urban counties, which no one is solving, and which lend themselves to county solutions if counties are given the necessary authority and tools.

All 88 Ohio counties have the same type of governmental organization and the same powers, since the powers they may exercise are only those specifically conferred by the legislature and they are substantially the same for all counties. Counties could acquire a measure of self-government (while still performing state functions) and could reorganize themselves through the adoption of a county charter or an alternate form, but this has not happened. The committee is aware that not all Ohio counties are urbanized, and that not all desire or need to change their form of government or acquire additional powers, and the committee's recommendations will not force change on any county.

One member of the committee has asserted that "County government is the government of the future." The committee does not know whether this is so, but it has concluded that the manner in which counties operate today in Ohio will never offer any opportunity to test this statement. Therefore, the committee concluded that amendments to the Constitution are needed in order to assist in the process of strengthening county government so that it can demonstrate its ability, or lack of it, to deal with urban problems.

The committee's proposals would strengthen county government by (a) permitting the General Assembly to classify counties for the purpose of establishing their organization and government; (b) grant counties powers of local self-government, subject to certain limitations; (c) make strong county charters easier to adopt; (d) clarify ambiguities in the provisions for the operation of county charter commissions and placing proposed charters on the ballot; and (e) relieve somewhat the present restrictions on the General Assembly in changing county boundaries.

Robert Merriam, Chairman of the Advisory Commission on Intergovernmental Relations, summarized the current emphasis on strong county government in the ACIR's report "For a More Perfect Union - County Reform" as follows:

The Critical Need for Strong Counties

"Even if county government had not existed in the Anglo-American structure, it would have to be invented now." Such was the conclusion of the authoritative second report of New Jersey's County and Municipal Government Study Commission. And this must be the conclusion of more and more policy-makers - at all levels of government - who are grappling with the ever increasing need for an effective governmental mechanism below the State level and above the localities.

For those who ponder this areawide need as it relates to counties, let me underscore a few of the more obvious linkages:

- When we seek effective regional answers to urban service problems, we, in effect, are seeking an effective county government in a majority of cases, since more than half of the Nation's standard metropolitan areas still are single county in scope.

- When we struggle with the imbalances that characterize recent urban growth

and especially the agonizing plight of rural areas suffering from outmigration, economic decline, and costly services, we squarely confront the burdensome agenda now troubling hundreds of our rural counties.

- When we see the helter-skelter consumption of valuable land on the urban periphery and the ineffectiveness of most land use controls and zoning, we see, in many instances a glaring weakness of many county governments.

- When we criticize the proliferation and the frequent lack of accountability of special districts in both urban and rural areas, we, in effect, are criticizing a shackle that limits all too many counties.

- When we come to grips with the areawide implications of the various environmental programs and proposals requiring our urgent attention, we will see a new role for many counties.

- When we weigh the pros and cons of new towns and rural growth centers, we end up assessing the capabilities of the counties affected, since these jurisdictions have a prime role in coping with many of the governmental needs of such communities and centers.

- Finally, when we strive to reconcile bitter differences between the States and many of their larger municipalities, we strive for an effective intermediary force that can help arbitrate these destructive conflicts--hopefully, the counties."

Article X

Section 1. Organization and Government of Counties

Present Constitution

Section 1. The General Assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law. Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Committee Recommendation

The committee recommends that Section 1 be amended to read as follows:

Section 1. The General Assembly shall provide by general law for the organization and government of counties,and FOR SUCH PURPOSES MAY CLASSIFY THE COUNTIES OF THE STATE. EACH CLASSIFICATION SHALL BE FOR A PURPOSE AS SPECIFIED IN THE LAW ESTABLISHING THE SAME AND SHALL BE ON THE BASIS OF POPULATION, OR ANY OTHER REASONABLE BASIS, RELATED TO THE PURPOSE OF THE CLASSIFICATION. NO CLASSIFICATION SHALL CONTAIN MORE THAN FOUR CLASSES, AND EACH CLASS SHALL CONTAIN MORE THAN ONE COUNTY.

THE GENERAL ASSEMBLY may ALSO provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law.

Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Comment

This proposed amendment would add to the existing power of the General Assembly to provide by general law for the organization and government of counties, the power also to classify counties for such purpose. This would enable the General Assembly, within specified limits, to recognize differences among counties in legislation relating to their organization and powers, by arranging counties into groups having common defined characteristics.

Any number of classifications would be permitted, each one for a purpose specified in the law by which the classification is made. The basis upon which counties would be assigned to the classes created by any classification would have to be

reasonably related to the purpose of the classification. The language permitting the General Assembly to classify on the basis of population "or any other reasonable basis related to the purpose of the classification," is borrowed from Section 8.01 of the Model State Constitution of the National Municipal League and is intended to give the General Assembly a high degree of flexibility in reaching solutions to county problems. As an example of the manner in which classification might be employed by the General Assembly, the General Assembly might determine that not all counties need powers, or the same powers, to establish and operate systems of mass transportation, and that the differing needs of counties in this respect are related to the density of population and degree of urbanization of the various counties. The law establishing the classification for this purpose would, therefore, specify that the classification is for the purpose of defining the powers of counties relative to mass transportation and would establish the criteria or characteristics by which each county is assigned to one of the classes thus established. The factors used for this purpose might include such things as population density and number of automobile registrations. Once the classification is established, the General Assembly would continue to be required to provide by general law for the powers of counties relating to mass transportation, but such laws might relate to only one class, or differently to different classes.

The first limitation on the General Assembly's authority is that no single classification could consist of more than four classes. The term "classification" is used to mean the entire group of eighty-eight counties as divided into classes for a specific purpose. Within any one classification, all the counties of the state could be placed into not more than four classes. The second limitation is that each class must contain more than one county. These two limitations are intended to prevent excessive classification and special legislation, which were the hallmarks of municipal legislation prior to the adoption of the home rule provisions of the Constitution in 1912. The committee feels that an unlimited authority to classify, which could result in legislative adoption of particular governmental or organizational provisions for each of the 88 counties, is a burden the General Assembly should not be permitted to assume.

The only other change in the section--adding "also" in the sentence permitting the General Assembly to provide alternative forms of county government--is intended to emphasize the committee's intention that the power to classify be in addition to the other powers in the section which the General Assembly possesses regarding county government.

Why Amend the Constitution?

The Local Government Committee is aware of the fact that there is a division of opinion among legal authorities as to the power of the General Assembly, under present constitutional provisions, to classify counties.

Section 26 of Article II of the Constitution provides that "All laws, of a general nature, shall have a uniform operation throughout the State . . ." and Section 1 of Article X presently requires the General Assembly to provide "by general law" for the organization and government of counties. These provisions have been the basis for several Court opinions holding unconstitutional various legislative acts classifying counties for one purpose or another. At the same time, classification does exist in the statutes and has been upheld in other Court decisions. Without attempting to analyze these decisions or to render judgment on any specific classification proposals, the committee, convinced that the General Assembly should

have this flexibility in dealing with county government and organization problems, believes that a constitutional amendment is desirable to remove doubt.

Advantages of Classification

"The day of uniformity in county government is as long gone as the day when all counties were alike." (Alastair McArthur, director of the New County Center, in an article in the April, 1971, issue of "Public Management" published by the International City Management Association)

All Ohio counties today have the same form of government, provided by law, which has not been altered in its basic format since counties were first organized. County government, created as a geographical unit for the convenience of administering state policies, has assumed today, particularly in urban areas, many functions and provides many services which residents need and want, and which municipal corporations have long provided for their residents. However, boards of county commissioners are neither executives, with sufficient authority to administer a large enterprise in an efficient manner, nor are they legislators, with the authority to enact legislation in order to carry out in a proper manner, for their own localities, even those functions which they are authorized by the General Assembly to provide.

Urban county commissioners cite as an example of their lack of administrative authority the confused personnel situation in the large counties, which results in persons employed in various county departments having the same duties and the same qualifications and experience, but being paid different salaries and given different titles. With respect to legislative powers, county commissioners have none--they may do only what the legislature has specifically authorized them to do. Special legislation, which must be of uniform application in order to avoid being held unconstitutional, is required to enable an urban county to employ a county justice coordinator, or to provide a parking garage under a new county building--things which rural counties neither need nor want, and which they may oppose in the legislature because they believe that an unnecessary burden is being placed on them.

What will classification do? It will enable the legislature to provide a structure of government and powers to govern for some counties which differ from those provided for other counties. It should enable the legislature to tailor county government and organization to groups of counties as needs are made evident to the General Assembly. At the same time, counties which see no need for change need not be changed.

With the cooperation of the County Commissioners Association, a questionnaire was sent to the board of county commissioners in all 88 counties, soliciting their opinions about classification. To date, 34 replies have been received, most of them indicating they were filled out on behalf of all three commissioners. Twenty-one favor classification, and 13 are opposed. All responses (5) from counties over 150,000 in population (13) favor classification. There are 30 counties with populations between 50,000 and 150,000; of the 11 responses from this group, 8 favor and 3 oppose classification. Of the 18 responses from the remaining 45 counties, under 50,000, 8 favor and 10 oppose classification. One comment indicated a reason which is often given as the reason smaller counties are opposed to classification--that it will be used as a device to confer monetary benefits on some counties and not on others. The committee believes, however, that any arbitrary action by the General Assembly would still be held to be unconstitutional. Any programs devised by the legislature to help solve county problems, and any benefits that accompany such programs, would still have to be related to the problem to be solved, and no county

which met the qualifications could be denied the benefits of the program or distribution. Indeed, the committee sees this as a further reason to permit classification on bases other than population.

County commissioners who favored classification, in fact, also tended to favor using criteria other than population alone. Five stated that only population should be used, but 16 indicated that other criteria might also be important. Several criteria were suggested in the questionnaire--number of local units in the county, property valuation, area, location--and additional criteria were suggested by those responding. These included such things as: source of revenue, drainage areas, complexities of services provided, summer population, budget, urban and rural population, size and poverty level of the core city, per capita income, tax effort, and "use the federal revenue sharing formula."

At least 13 states classify counties for one or more purposes; some have specific constitutional provisions permitting classification and others apparently do it without specific constitutional authorization. In addition, at least seven states permit special local legislation--something which the committee feels is undesirable. The committee believes that its proposal, to permit classification but within certain limitations, will avoid special legislation, and the vast amount of legislative time it consumes.

Some interest has been expressed in the idea of permitting counties to move from one class to another, depending on the county problems and what the classification is intended to accomplish. The committee believes that its proposal is flexible enough to permit the General Assembly to provide for such selection, if it wishes to do so.

The committee is aware that some of the advantages of classification could be secured by those counties which need them either by the adoption of a county charter or an alternative form of government. However, since no county has yet been successful in any attempts to do either of these, it is unrealistic to respond to the real needs of some counties in this fashion.

Article X

Section 5. County Local Self-Government

The committee recommends the adoption of a new Section 5 of Article X to read as follows:

Section 5. COUNTIES MAY, EXCEPT AS LIMITED BY GENERAL LAW, ADOPT AND ENFORCE WITHIN THEIR LIMITS ALL MEASURES FOR THE LOCAL SELF-GOVERNMENT OF THE COUNTY, INCLUDING LOCAL POLICE, SANITARY, AND OTHER SIMILAR REGULATIONS, AS ARE NOT AT VARIANCE WITH THE GENERAL LAWS OR IN CONFLICT WITH THE EXERCISE BY ANY MUNICIPAL CORPORATION OF ANY MUNICIPAL POWER AUTHORIZED BY THIS CONSTITUTION; PROVIDED, THAT NO TAX SHALL BE LEVIED BY ANY COUNTY EXCEPT AS AUTHORIZED BY GENERAL LAW.

Comment:

This committee proposal would add a new section to Article X providing for the powers of all counties. It would put counties in substantially the same relationship to the state and to the General Assembly as that which now pertains to noncharter municipalities, except for the power to tax. The language of the section is adapted from Section 3 of Article XVIII, familiar to all students of local government in Ohio, which reads:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

A series of Ohio Supreme Court decisions culminating in Leavers v. City of Canton, 1 Ohio St. 2d 33 (1964) resulted in what may be regarded as an authoritative pronouncement by the Supreme Court concerning the powers of charter and noncharter municipalities and the differences between them.

> Any ordinance dealing with police regulations passed by either a charter or noncharter city, which is at a variance with state law, in invalid. Section 3, Article XVIII of the Ohio Constitution.
>
> An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute. State ex rel. Canada v. Phillips, supra.
>
> An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is no state statute at a variance with the ordinance. Perrysburg v. Ridgway, supra.
>
> An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at variance with a state statute. State ex rel. Petit v. Wagner, supra.

The language of the proposed section would not make a distinction between measures providing for local self-government and police, sanitary and other similar regulations; rather, the latter provisions would be treated as being among the powers of local self-government of the county. This seems to be the result of the Leavers case as to noncharter municipalities. In addition to the limitations on this grant of powers to counties that measures adopted by the county must not be at variance with the general laws, this section would also provide that any such exercise of powers by the county may not conflict with the exercise by any municipal corporation of its powers under the constitution.

Under this proposed section the General Assembly could also establish limits upon the exercise of the power conferred. As an example, the General Assembly could put all matters involving the incurrence of debt or the levying of taxes outside the ability of counties to act without expressly granted powers. The language regarding taxes probably would not be necessary, but it is deemed desirable to include it to assure any who might question whether unlimited taxing powers were being conferred upon counties, that it is not.

The section, as drafted, would be self-executing, as is section 3 of Article XVIII.

This section would have limited practical effect, at least initially. A county having the powers granted by the section would have freedom to act with respect to any matter of local self-government in those areas where the General Assembly has not already provided for the matter. The General Assembly has, of course, legislated with respect to a great many matters involving counties, but this section would eliminate the necessity for counties to request legislation from the General Assembly as to those cases where the statutes are silent. The section would not substantially affect the relationship between counties and municipalities now existing, except that it might permit counties more easily to be able to enter into agreements with municipalities in those areas where specific statutory authority cannot be found. Repeal or substantial revision of many existing statutes relating to counties by the General Assembly would give counties greater freedom of action and since county officials complain that many of the existing statutes are greatly outmoded, the committee believes this section would hasten the process of legislative review of county law.

Why Amend the Constitution?

As is the case with classification, there is the possibility that the legislature could presently confer upon counties the powers provided for in this section. Indeed, there is even more reason to believe this would be possible for powers than for classification since a conferral of similar powers upon counties which might adopt an alternative form of government has been upheld by the Ohio Supreme Court against a challenge that it was an unlawful delegation of legislation power (Blacker v. Wiethe, 16 O.S. 2nd 65, 1968). That language of that statute (County commissioners may "by ordinance or resolution make any rule, or act in any matter not specifically prohibited by general law . . .," Division (M) of Section 302.13 of the Revised Code) was not selected by the committee because its meaning is not as clear as that of Section 3 of Article XVIII, and it appears, on the surface, to be considerably more limited. No county has been able to take advantage of that provision, however, since no county has adopted an alternative form of government. During the 109th General Assembly, H.B. 435 would have conferred upon all counties powers of local self-government similar to those being proposed in this section, but the bill did not pass.

The committee has been convinced, in its study of local government and particularly the limitations placed upon counties, that conferral of limited "home rule" powers on counties is not only desirable but is necessary in order to meet the increasingly complex problems of urbanization. It will give counties which need to act, the power to act; it will not force programs and burdens on counties which do not need them. Therefore, in spite of the apparent ability of the General Assembly to do by law what this section proposes, the committee believes it important enough to propose a constitutional amendment.

The Need for County Powers of Local Self-Government

The often-quoted but little-implemented report on "The Reorganization of County Government in Ohio" by the Governor's Commission on County Government submitted in 1934 states, under its recommendations dealing with the Board of County Commissioners:

> Considerable ordinance-making power is needed as to unincorporated territory to permit the regulation of amusement places, nuisance industries, etc., and to meet other problems involving local legislation.

That commission noted Ohio's increasing urbanization, and the difficulties counties had dealing with the problems caused by urbanization under the restrictive and outmoded county laws. These problems have increased substantially since 1934.

Counties are today, and have been since the beginning of statehood, creatures of the state--state agencies, designed originally to carry out essentially state functions in designated geographical areas. As a result of this legal theory of what a county is, the legal theory of what a county may do follows: that a county may do only those things specifically provided by the General Assembly, and those necessarily required to carry out the mandated duties.

Such limitations mean that counties have no ability to meet new situations. Each county needs to provide services, to regulate activities for the benefit of the citizens, and to provide for the better administration of government can be met only by legislation enacted by the General Assembly. One county official, urging support of H.B. 435, listed a number of county needs which cannot be dealt with by county officials because of statutory silence. They included: placing delinquent water bills as a lien against property, street lighting of county roads, removing obstructions to good site distance at intersections, hiring a financial consultant, establishing moving and razing regulating, requiring sanitary sewer connections, sign control, etc. Other commentators on this subject have noted that counties cannot adopt a fire prevention or a housing code and, if there is not adequate state legislation in these areas, residents may be denied essential protections.

The committee believes that the proposed section will help counties meet present-day problems without diminishing municipal powers.

Article X

Section 3. County Charters

The committee recommends that Section 3 be amended to read as follows:

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in ~~any such~~ EITHER case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment ~~which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both,~~ shall become effective if approved by a majority of the electors voting thereon. ~~In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter of amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality.~~

Comment:

This section presently provides for county charters, and for the powers which counties may have if they adopt charters. Two kinds of county charters are provided for: a "strong" county charter, by which the county would exercise municipal powers to the exclusion of municipalities within the county or succeed to property or obligations of municipalities or townships without their consent, and a "weak" county charter, which could provide for alteration of county government form or offices and for the exercise of municipal powers concurrently with, but not to the exclusion of, the municipalities. The first requires approval by majorities in the county, in the largest municipality, in the county outside the largest municipality, and, in counties with a population of 500,000 or less, in a majority of the combined total of municipalities and townships in the county.

The committee proposal, in essence, eliminates the distinctions between the two types of charters. It does this by eliminating the requirement for the "multiple majority" approval of the strong county charter; thus permitting the adoption of a county charter by a majority of the electors voting thereon. In addition, the proposal would remove a provision attached to the "weak" county charter which resolves any conflict between the county, on the one hand, and municipalities or townships, on the other hand, in the exercise of powers, in favor of the municipalities or townships. The removal of this provision would also serve to remove a distinction between the two types of charters.

The proposal retains the provision that any county charter must "provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." The intention of this provision seems to be to make it clear that even counties having charters continue to be administrative arms of the state for purposes of carrying out certain functions throughout the state. While, therefore, a county could by charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, those duties required by general law of counties and county officers would still have to be carried out.

The proposal retains the provision allowing a county to provide by charter for the current or exclusive exercise by the county in all or part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities, for the organization of the county as a municipal corporation and for the succession by the county to the rights, properties and obligations of municipalities and townships in the county incident to the municipal powers vested in the county. Since these provisions are optional, a county charter could provide for some, all or none of those powers, or the effect of a charter could be limited to changes in the form and existing powers of county government. The vote required for the adoption of any county charter would be the same regardless of the powers acquired.

Home rule for counties in Ohio, which could be achieved through the adoption of a charter, has had a 100% failure rate. Voters have, in some instances, agreed to the idea of the drafting of a charter and elected a charter commission, only to reject the commission's work when completed. Analyses of charter failures are found in a number of publications. Among them are a study done for the Constitutional Revision Commission, "Obstacles to County Reorganization: Constitutional Aspects", prepared by the Institute of Governmental Research of the University of Cincinnati; a detailed analysis of the recent Summit County failure by John H. Bowden and Howard D. Hamilton entitled "Some Notes on Metropolitics in Ohio" in the Kent State University book "Political Behavior and Public Issues in Ohio"; "Constitutional Problems of County Home Rule in Ohio," by Earl L. Shoup on the 1949 volume of the Western Reserve Law Review; "Metropolitan Government for Metropolitan Cleveland," by Watson and Romani in 5 Midwest Journal of Political Science, No. 4 (November 1961); and an ACIR report entitled "Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas" published in 1962.

Several conclusions seem possible after studying the county charter efforts in Ohio:

1. The "multiple majority" requirement for the strong county charter is an insurmountable obstacle. Several observers noted that it seems to have been designed deliberately to prevent the adoption of such charters.

2. The Supreme Court decision in Howland v. Krause, 130 O.S. 455, which held a proposed Cuyahoga County charter to be of the strong variety requiring the multiple majorities even though it did not purport to permit the exercise of municipal powers by the county to the exclusion of the municipalities (in fact, it denied such an intention) was a crippling blow to county charter adoption efforts.

3. The removal of the multiple majority requirement will not assure the adoption of charters, since a majority of the county as a whole has not even been achieved in most votes on charters.

Nonetheless, the committee urges the amendment of the section for the following reasons:

1. By removing the multiple majority obstacle, charter commissions, which continue to be elected by the people, can devote themselves entirely to a consideration of the best kind of government for that particular county. The pros and cons of various types of structure and powers can be weighed with a consideration of acceptability to all the people of the county, without the added complication of finding solutions to problems which will be acceptable to a large number of small groups within the county.

2. Permitting the people in one or a few subdivisions, or the people in suburbia, to veto a charter which is adopted by a majority of all the people voting on the question in the county is minority rule. If the state constitution can be amended by a majority, surely a county charter should be adopted and amended by a majority. The committee also believes that, apart from the question of whether it is right to permit a minority to veto majority will in this case, it may also be unconstitutional to require various majorities to adopt a charter for a unit of government with general governmental powers such as a county. The United States Supreme Court has held that "equal protection of the laws" requires that one man's vote be given the same weight as another man's vote regardless of residence in elections of state legislators, United States representatives, county governing bodies, and other units of local government. No case has been found raising the precise question presented here--whether majorities in several jurisdictions can be required for the adoption of a charter which will apply to all. It is clear that such a requirement gives greater weight to the "no" votes in the smaller jurisdiction than to the "yes" votes in the larger. The New Mexico Supreme Court has found unconstitutional, under the one man-one vote rule, a provision in that state's Constitution which required a 2/3 vote in each county in the state in order to adopt an amendment to the state constitution. Thus, slightly more than 1/3 of the voters in a single county could thwart the will of a majority of the voters of the state, and of all the other counties. The court stated that, in one election, this made the vote of a voter in one county equal to 100 voters in another county. (State ex rel. Wilt v. State Canvassing Board, 78 N.M. 682, 437 P. 2d 143, 1968).

The committee does not know, of course, whether the multiple majority requirement would be held unconstitutional if challenged, but feels that there are sufficient reasons to recommend its removal without such absolute knowledge.

Article X

Section 4. County Charter Commission

The committee recommends that Section 4 be amended to read as follows:

Section 4. The legislative authority ~~of any charter county or~~ (WHICH INCLUDES the board of county commissioners) of any ~~other~~ county may by a two-thirds vote of its members, or upon petition of ~~ten~~ SIX per cent of the electors of the county AS CERTIFIED BY THE ELECTION AUTHORITIES OF THE COUNTY shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general ~~or primary~~ election, occurring not sooner than ~~sixty~~ NINETY-FIVE days ~~thereafter~~ AFTER CERTIFICATION OF THE RESOLUTION TO THE ELECTION AUTHORITIES. The ballot containing the question shall bear no party designation. Provision shall be made thereon for the election TO SUCH COMMISSION from the county at large ~~of fifteen electors as such commission~~ OF AN ODD NUMBER OF ELECTORS NOT LESS THAN SEVEN NOR MORE THAN FIFTEEN, AS PROVIDED IN SUCH RESOLUTION, if a majority of the electors voting on the question shall have voted in the affirmative.

Candidates for such commission shall be nominated by petition of one per cent of the electors of the county, ~~which~~ THE PETITION shall be filed with the election authorities not less than ~~forty~~ SEVENTY-FIVE days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number; but not more than ONE-HALF OF THE ~~seven~~ candidates ~~residing in~~ ELECTED SHALL BE RESIDENTS OF the same city or village ~~may be elected~~. NO MEMBER OF ANY SUCH COMMISSION SHALL HOLD OTHER PUBLIC OFFICE. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF.

~~Within ten months after its election such~~ THE commission shall frame a charter for the county or amendments to the existing charter, and shall, BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION, ~~submit the same to~~ the electors of the county, to be voted upon at the general election ~~occurring not sooner than sixty days after such submission~~ NEXT FOLLOWING THE ELECTION OF THE COMMISSION, THE COMMISSION SHALL CERTIFY THE PROPOSED CHARTER OR AMENDMENTS TO THE ELECTION AUTHORITIES NOT LATER THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Amendments to a county charter OR THE QUESTION OF THE REPEAL THEREOF may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen; ~~to be voted upon at the first general election occurring not sooner than sixty days after their submission~~. The LEGISLATIVE authority OR CHARTER COMMISSION submitting any charter or amendment SHALL, NOT LATER THAN THIRTY DAYS PRIOR TO THE ELECTION ON SUCH CHARTER OR AMENDMENT, mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible, except THAT, as provided BY LAW, NOTICE OF PROPOSED AMENDMENTS MAY BE GIVEN BY NEWSPAPER ADVERTISING. ~~in Section 3 of this Article, every~~ A charter of amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment, WHICH SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER, is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case of conflict between TWO OR MORE CHARTERS OF the provisions of two or more amendments ~~adopted~~ SUBMITTED at the same, that CHARTER OR provision shall prevail which received the

highest affirmative vote. IF A CHARTER OR AMENDMENT SUBMITTED BY A CHARTER COMMISSION IS NOT APPROVED BY THE ELECTORS OF THE COUNTY, THE CHARTER COMMISSION MAY RESUBMIT THE SAME, IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION, TO THE ELECTORS OF THE COUNTY AT THE NEXT SUCCEEDING GENERAL ELECTION OR AT ANY OTHER ELECTION HELD THROUGHOUT THE COUNTY PRIOR THERETO, IN THE MANNER PROVIDED FOR THE ORIGINAL SUBMISSION THEREOF.

THE LEGISLATIVE AUTHORITY OF ANY COUNTY MAY, BY A TWO-THIRDS VOTE OF ITS MEMBERS, OR UPON PETITION OF SIX PER CENT OF THE ELECTORS OF THE COUNTY SHALL, FORTHWITH, BY RESOLUTION SUBMIT TO THE ELECTORS OF THE COUNTY, IN THE MANNER PROVIDED IN THIS SECTION FOR THE SUBMISSION OF THE QUESTION WHETHER A CHARTER COMMISSION SHALL BE CHOSEN, THE QUESTION OF THE ADOPTION OF A CHARTER FRAMED BY THE LEGISLATIVE AUTHORITY OR, IN THE CASE OF A PETITION, IN THE FORM ATTACHED TO SUCH PETITION, EXCEPT THAT NO CHARTER SHALL BE SO SUBMITTED AT ANY ELECTION AT WHICH A CHARTER IS SUBMITTED BY A CHARTER COMMISSION.

LAWS MAY BE PASSED TO PROVIDE FOR THE ORGANIZATION AND PROCEDURES OF COUNTY CHARTER COMMISSIONS, INCLUDING THE FILLING OF ANY VACANCY WHICH MAY OCCUR, AND OTHERWISE TO FACILITATE THE OPERATION OF THIS SECTION. The basis upon which the required numbers of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the last preceding election therefor. The foregoing provisions of this ~~Article~~ SECTION shall be self-executing except as herein otherwise provided.

Comment

This section provides for the procedure for the election of county charter commissions and for the framing and submission to the electors of proposed county charters and amendments. Some of the amendments proposed for this section are technical in nature and intended to remedy existing defects or ambiguities, while others represent significant departures from, or additions to, the existing provisions. The proposed changes will be discussed, to the extent possible, in the order in which they occur.

1. The term "legislative authority" is defined to include a board of county commissioners, so that a single term may be used throughout the section to refer to both bodies.

2. The number of signatures required on a petition to have the question of calling a county charter commission placed on the ballot, or to submit a proposed charter to the voters, is reduced from 10% to 6% of the electors. The committee believes that 10%, particularly in a very large county, is too great an obstacle and that 6% is a sufficient number to prevent vain and frivolous attempts, yet would be attainable by a serious group of citizens.

3. Responsibility for determining whether a petition has a sufficient number of valid signatures is transferred from the legislative authority or board of county commissioners, which has limited ability to perform this function, to the board of elections, which has the facilities and personnel needed for this purpose.

4. Since the constitution does not provide for primary elections, questions arise as to which election may be used for submission of questions under this section; e.g., primary elections are not held county-wide in odd-numbered years. The proposed amendments would limit all elections relating to county charters and

amendments to general elections, which are held on the first Tuesday after the first Monday of each November, except that a defeated charter or amendment could be resubmitted earlier than the next general election at any countywide election.

5. The section presently does not specify the action required to be taken with respect to the board of elections to cause an election to be held on a proposed charter or amendment or the time by which it must be accomplished. The proposed amendment to the section would require certification of the resolution of the legislative authority to the board of elections not later than seventy-five days prior to the election. This is the period of time required for submission of proposed constitutional amendments and by statute for preparation of absentee ballots. The Secretary of State is presently urging the adoption, as far as possible, of a uniform seventy-five day deadline for submission of questions for elections. Other changes are also proposed which will conform to the Secretary of State's request that additional time is needed for ballot preparation and mailings to absent voters.

6. Since the election of 15 members to a charter commission ordinarily results in a lengthy ballot because of the number of candidates, and since a commission of smaller size may suffice, the legislative authority would by resolution determine the number of members to be elected to the commission. This would be an odd number not less than seven nor more than fifteen.

7. Because of the provision for the varying number of members of charter commissions, the restriction as to the number of members who could be residents of the same city or village is changed to limit such number to not more than one-half of the members.

8. The section presently is silent on the question whether membership on a county charter commission constitutes the holding of a public office, but the Ohio Supreme Court in State, ex rel. Bricker v. Gessner, 129 Ohio St. 290 (1935) has held that such membership is a public office. As a result, those officers prohibited by the constitution, laws or municipal charters from holding other public office may not be members of a county charter commission. The operation of the prohibition is thus not uniform, since not all public officers are forbidden to hold other public office. The amendment makes the prohibition applicable to all persons holding other public office. It would not prohibit a person holding other public office from being a candidate for membership on the charter commission, but he would have to relinquish the other office in order to qualify as a member of the commission.

9. While case law seems to establish clearly the obligation of the board of county commissioners to provide necessary funds for a charter commission to carry out its duties, this has proved in some cases to be a matter of controversy. A specific requirement to this effect in the constitution would resolve any question concerning the existence of this duty to provide the means for carrying into effect the intention of the voters, expressed in the election, that the charter commission have the ability to perform its assigned function.

10. With elimination of the provision for submission at a primary election of the question of the election of a charter commission, the need for the ten-month deadline no longer exists. The deadline for completion of the commission's work would not be related to the time when the proposed charter or amendments must be certified to the board of elections.

11. No provision is presently made for the vote required by a charter commission

for the submission of a proposed charter or amendment. The proposed amendment to the section would require for this purpose a majority of the total number of members authorized to be elected to the commission, which number would remain constant even if the number of members on the commission were diminished by death, resignation or disqualification.

12. The procedure by which the proposed charter or amendment is placed before the voters is presently unclear. The amendment to the section provides for certification to the board of elections not less than seventy-five days before the election.

13. This section presently makes no provision for the repeal of an existing charter. Addition of such a provision would permit a return to the statutory form of government, if desired by the electors of the county, or for the repeal of an existing charter and adoption of a new one or an alternative form of county government at the same election. In the case of a repeal only, legislation by the General Assembly might be required to provide the procedure for reestablishment of the statutory form.

14. Responsibility for giving notice of the election on the proposed charter or amendments is presently not entirely clear, nor is the time by which the mailing or distribution to be completed specified. The amendment provides that the authority (either legislative authority or charter commission) which is submitting the charter or amendment is to give notice thereof, and that such mailing or distribution must be accomplished not less than thirty days before the election, which is the deadline for the similar municipal charter provision of Article XVIII, Section 8.

15. In the same manner as provided in the recent amendment to Article XVIII, Section 9 relating to amendments to municipal charters, the General Assembly could by law provide for notice of proposed county charter amendments to be given by newspaper advertising. In the absence of such a law, the requirements as to mailing or other distribution would apply.

16. The additional language as to what may constitute a single amendment is intended to reflect current case law on that subject as it relates to proposed constitutional amendments and to negate any inference that an amendment may relate to only a single section of a charter.

17. Because of the later provision for direct submission of proposed charters by legislative authorities or by petition, the possibility would exist that more than one charter could be submitted at the same election. Should more than one of such proposed charters receive a majority vote, the one receiving the highest majority would be adopted.

18. Presently a charter commission has one, and only one, opportunity to submit a proposed charter to the electors. This amendment would give the commission the opportunity to resubmit, or to revise and resubmit, the proposed charter at the following general election. In the case of a close vote initially or where the commission believes that it is able to identify the objectionable features of the proposed charter or other reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new charter commission and a two-year delay in resubmission, might be advantageous.

19. The election of a charter commission at a general election and the submission of the proposed charter framed by it at the following general election

entails considerable delay, and the electors have little or no control, in the election of the commission, over the type of charter which the commission will propose. This new provision would permit the direct submission to the electors of a proposed charter either by the county legislative authority or upon petition of six per cent of the electors. In order, however, to forestall the possibility of this power being used to frustrate or confuse the issue of a proposed charter framed by a charter commission elected by the people of the county, no charter proposed in this manner could be submitted at the same election at which a commission-proposed charter is submitted.

20. The authority of the General Assembly to provide by law for matters involving the procedure for adoption of county charters is of limited and uncertain extent. This amendment would in general terms and, similar to the provision relating to the initiative and referendum in Article II, Section 1g, authorize the General Assembly as necessary to facilitate the operation of the section. Procedures as to the printing, mailing, distribution or advertising of proposed charters and amendments is an example of the kind of provision which might be made by statute. Such power might avoid the need for constitutional amendments with respect to some unforeseen problems as they arise in the future.

21. County charter commissions presently have no authoritative or established procedures concerning such matters as the method of their organization, election of officers, rules of procedure, notice of meetings, filling of vacancies and other such matters. This amendment would allow the General Assembly to provide by statute for these procedural matters and for the filling of vacancies. Failure of the General Assembly to act, however, would not preclude charter commissions to organize and carry out their functions under rules adopted by themselves, as is presently the case. The General Assembly could also provide by statute for procedures and rules which a charter commission could adopt at its option.

Article II

Section 30. New Counties and County Boundaries

Section 30. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and all laws creating new counties, changing county lines, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose; but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.

Committee Recommendation

The committee recommends repeal of this section in Article II and adoption of a new section 6 in Article X containing some of these provisions to read as follows: (shown here as an amended section in order to show clearly what changes are being proposed):

Section 6. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and ~~all laws~~ ANY LAW creating new counties, changing county lines, REDUCING THE NUMBER OF COUNTIES, or removing county seats, shall, UPON A PETITION SIGNED BY NOT LESS THAN SIX PER CENT OF THE ELECTORS OF THE SEVERAL COUNTIES TO BE AFFECTED THEREBY, BE SUBMITTED TO THE ELECTORS OF SUCH COUNTIES FOR THEIR APPROVAL OR REJECTION, IN THE MANNER PROVIDED BY SECTIONS 1c AND 1g RELATIVE TO THE REFERENDUM WITH RESPECT TO LAWS ENACTED BY THE GENERAL ASSEMBLY OF ARTICLE II OF THE CONSTITUTION, EXCEPT THAT NOTICE OF SUCH ELECTION MAY BE GIVEN BY NEWSPAPER ADVERTISING IN THE MANNER PROVIDED BY LAW ~~before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose; but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.~~

Comment:

The committee proposes moving this section from Article II to Article X because it relates solely to counties, which is the subject matter of Article X.

This proposed revision of Article II, Section 30 (as new Section 6 in Article X) would bring about a basic procedural change with respect to the manner of providing for the creation of new counties, changes in county lines or the removal of county seats and would also add a provision specifically authorizing a reduction in the number of counties. It is arguable that the existing language of Article II, Section 30 providing for the creation of new counties and change of county lines authorizes the consolidation of counties, but this is not clear and if the power to accomplish that result is thought to be desirable, a constitutional amendment to that effect would be advantageous.

Under the existing section, no law providing for any of the matters referred to in the section would become effective until submitted to the electors of each county to be affected and the law must be approved by a majority of the electors voting separately in each county.

Instead of providing for automatic referral of the law to the electors of the affected counties, the suggested amendment would subject all such laws to the same referendum requirements applicable to other laws, except that the referendum would be held only in the affected counties and provision could be made by general law for giving notice of the election by newspaper advertising rather than by individual mailed notice as provided in Section 1g of Article II with respect to all other legislation.

The committee believes that a simple majority in the entire area affected by such a law should be sufficient for approval. The same research conerning the "one-man, one-vote" cases decided by the United States Supreme Court, as to the "multiple majorities" requirement of Article X, Section 3, indicates that a similar problem may exist with respect to the requirement in this section for separate majorities. Once the counties to be affected by the law have been determined, in any case where one county is smaller than the other affected counties, the vote of each elector in the smaller county would be weighted more heavily than those of the electors in the larger counties, since the smaller county would, in effect, have a veto over the law. Again, no case precisely on point has been found, but indications are that the existing provision might violate the federal constitution's equal protection clause.

The removal of the last portion of the section (about dividing a county with 100,000 or more inhabitants) as well as the removal of the automatic referendum requirement and the multiple majority requirement are viewed by the committee as removing undesirable restrictions on the General Assembly's power to design local units of government in accord with the needs of all the people of the state. The legislature is still restricted by the general conditions that no new county shall contain less than 400 square miles nor shall any county be reduced below that amount. The people of the county still retain the right to act on a law changing county boundaries if they wish to exercise that right.

THE OHIO MUNICIPAL LEAGUE 60 EAST BROAD STREET • COLUMBUS, OHIO 43215 • PHONE 221-4349

October 15, 1973

To: Ohio Constitutional Revision Commission

From: John E. Gotherman, Chief Counsel, Ohio Municipal League

Subject: Proposed Constitutional Amendments to Article X - Counties.

This memorandum is based upon policy established by The Ohio Municipal Leagues Special Study Committee on Constitutional Revision. That committee is composed of mayors, city managers, finance officers, law directors and other officials of Ohio municipalities. Our comments are offered to the commission in the sincere hope that some changes will be made prior to recommendation to the General Assembly.

Section 1, Article X - Classification

We offer no objection to classification of counties, primarily since it will not directly affect municipal government. We do wish to make it clear we feel classifications are unacceptable when applied to municipal government. We have generally found the problems of cities, whether large or small, urban or rural are the same with the frequency of occurance and magnitude being the variable. Classifications can be abused.

Section 3, Article X - Charters

We find the proposed amendment to be an improvement and desirable to facilitate reforms in local government.

Section 4, Article X - Charter Commissions

We offer the following comments in this section. We object to allowing a lesser number than 15 members of the commission. We believe a lesser number will decrease

the chances of the commission being representative of the citizenry. With only seven members on a commission, a majority of only four can establish the destiny of county government. Fifteen should be retained as the membership.

We strongly object to prohibiting public officials from serving on county charter commissions. Mayors, county commissioners state legislators, etc., are the political leaders of the community, are broadly representative of the people, and knowledgible about government and the processes to be dealt with in the charter. They should be eligible to serve on a charter commission and the constitution should specifically permit public officials to be members of the charter commission.

We also object to allowing the county commissioners and special interest groups (by petition) to place specific charters on the ballot. This would give every vested interest the opportunity to offer a form of government that best serves their interest, but not necessarily in the public interest. The time for discussion would be limited to a campaign period. A period where paid advertisements and slogans will be more important than a detailed discussion of the issues. A charter should be drafted only by the charter commission (or review commission) by a deliberate process where the citizenry will have adequate time in which to discuss the issues.

Rather than directing the General Assembly to provide for the procedures for and organization of the charter commission, we believe the constitution should authorize the commission to adopt its own procedures and provide for its own organization.

Section 5, Article X - County Local Self Government

We believe this provision to be workable and hope that it will be approved as recommended by the local government committee.

Section 6, Article X - County Boundaries - New Counties

No Comments.

Ohio Constitutional Revision Commission
Local Government Committee
November 26, 1973

Municipal Corporation Boundaries

The Ohio Constitution requires that "General laws shall be passed to provide for the incorporation and government of cities and villages" (Article XVIII, section 2,) and further prohibits the General Assembly from passing special acts conferring corporate powers (Article XIII, section 1).

The General Assembly has carried out the constitutional mandate by providing statutorily for the incorporation of municipal corporations as villages. There is no provision for direct incorporation as a city, even though the population of the territory proposing to incorporate is over 5,000; to become a city, the territory must first be a village and then proceed to city status by one of the methods provided by law.

Once incorporated, cities and villages alike share in the home rule powers of local self-government, whatever those powers are, whether or not they adopt charters.

There is no statutory provision for dissolution of a municipal corporation.

Adjusting Municipal Boundaries

Chapter 709. of the Revised Code provides three methods of adjusting the boundaries of municipal corporations: annexation, merger, and detachment of territory. Annexation of territory to a municipal corporation may be accomplished either by petition by the persons living in territory outside a municipal corporation who wish to annex, and the consent of the municipality, or may be initiated by the municipality but then requires an election in the entire township of which only part may be proposed for annexation. The procedures for all three processes--annexation, merger, and detachment of territory--are set forth in detail in the Code and are not relevant for the purpose of discussing the constitutional implications of involuntary boundary adjustment, since all are voluntary methods of changing boundaries. That is, either the government or a majority of the people in the territory must consent to whatever is being done to change the boundary.

In a speech on "The Role of the States in the Urban Crisis" to the Midwest American Assembly in 1970, Larry Margolis, Executive Director of the Citizens Conference on State Legislatures, reviewed the problems of the City of St. Louis and St. Louis County. He noted that, although it was possible for the citizens in these two jurisdictions to act to merge the city and the county or to take other action to distribute the wealth, and therefore the taxing base, of the area more equitably, it appeared very unlikely, because of the various interests involved, that they would do so. He then went on to say:

> "The state legislature, however, could merge the county and the city; could redraw the boundaries of the city; and, more importantly, could do dozens of other things which you and I haven't even thought of yet."

The legislature in Indiana did merge Indianapolis and Marion County, creating what is known as "Unigov" in that area.

Without examining the validity of Mr. Margolis's assertion with respect to the power of the Missouri legislature over the boundaries of the cities and counties in

Missouri, it is appropriate to inquire what the powers of the Ohio General Assembly might be.

Involuntary Boundary Adjustment in Ohio

What could the Ohio General Assembly do to dissolve existing municipal corporations, or to provide for changing their boundaries without their consent, or without the consent of a township or any part of it?

1. The General Assembly could confer greater powers of annexation on municipal corporations to permit them to take township territory without township consent, since townships do not have constitutional home rule powers.

2. The General Assembly could not, in Ohio, pass a special act redrawing municipal boundaries. Two constitutional provisions would appear to prohibit such special legislation--the provision of section 1 of Article XIII which prohibits special acts conferring corporate powers, and the uniformity provision of section 26 of Article II which says that "All laws, of a general nature, shall have a uniform operation throughout the State . . ." Although no cases are found directly on this point, since the General Assembly has not attempted to redraw municipal boundaries by special act, it has been held that annexation, not being a power of local self-government, is a law of a general nature which must be uniform. Therefore, it seems logical to conclude that other boundary adjustment laws must also be uniform, and not special.

3. The most difficult problem, of course, is whether the General Assembly could pass a law, general in nature and of uniform effect, which would enable municipal boundary changes to take place against the wishes of the municipality or the people.

Several states have created statewide boundary commissions, charged, variously, with the duty to review boundary change proposals, or to initiate them, or to "adjudicate"and make decisions on boundary changes. Several states have, by law, created boundary commissions at the local level--either county (California) or metropolitan area (Oregon)--or authorized counties or other areawide local bodies to create them.

Except in Alaska, however, state boundary commissions, whether statewide or local in nature, cannot compel boundary changes against the wishes of the local electorate of municipal corporations which have home rule powers. Some provision exists for consent--by city council, by an automatic referendum, or by a petitioned referendum. In Alaska, a state boundary commission is created by the Constitution (called a "local boundary commission" to indicate that it deals with local boundaries, it is nevertheless, a state agency). The power of the Commission is to recommend changes to the legislature, which changes take effect unless vetoed by the legislature. A copy of the Alaska provision is attached.

A boundary commission created by the General Assembly in Ohio could go far toward establishing policies and implementing urban growth and development planning by acting as a review agency for local boundary changes, halting boundary changes by refusing to approve them, and even initiating proposals for change. It could also, undoubtedly, be empowered by the General Assembly to effect changes except where incorporated municipalities with home rule powers are involved. However, it might

ne seriously questioned whether dissolution, merger, or any boundary change could be forced on a municipal corporation in Ohio without some provision for consent.

Constitutional Choices

If boundary changes in municipal corporations are viewed as necessary for better governance of metropolitan areas or for better provision of services to people, and if the voluntary provisions presently in effect in Ohio are not adequate, and if there is serious doubt about the constitutionality of legislation which would provide a method of requiring such changes without local consent, several choices for constitutional change exist.

1. The Constitution might be amended to permit special acts relating to local government boundaries.

2. The Constitution presently permits the adjustment of county boundaries by the General Assembly (presumably by special act) but requires an automatic referendum which must result in approval by a majority of the people voting in each county involved. A similar provision could be written into the constitution for municipal corporations.

3. Section 2 of Article XVIII could be amended to add to "incorporation" words indicating boundary change such as "merger" or, specifically, "change of boundaries." It might also be amended to provide for "dissolution" of municipal corporations. Of course, just as incorporation and annexation must be provided for by general law, under this language, it is presumed that dissolution or merger or boundary changes would also have to be provided for by general law. The creation of a boundary commission might be one method of so providing. Attached is the language of the Minnesota Constitution which suggests a way of expanding the provisions of section 2 of Article XVIII. It should be kept in mind, however, that Minnesota does act by special law in these matters--the Twin Cities Metropolitan Council, consisting of seven counties in Minnesota, is created by law which specifically names the counties and municipalities included.

4. A boundary commission provision similar to that of Alaska could be written into the Ohio Constitution, or the constitution could be amended to specifically permit the General Assembly to create such a commission.

Appendix

Alaska, Article X, section 12

A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

Minnesota, Article XI, section 1

The legislature may provide by law for the creation, organization, administration, consolidation, division and dissolution of local governmental units and their functions, for the change of boundaries thereof, for their officers, including qualifications for office, both elective and appointive, and for the transfer of county seats. No county boundary shall be changed or county seat transferred until approved by a majority of the voters of each county affected voting thereon.

SUMMARY OUTLINE

MUNICIPAL HOME RULE POWERS

UNDER

SECTIONS 2, 3 and 7 of ARTICLE XVIII

PREPARED FOR THE LOCAL GOVERNMENT COMMITTEE, OHIO CONSTITUTIONAL REVISION COMMISSION

JANUARY, 1974

TABLE OF CONTENTS

I PURPOSE OF OUTLINE

This summary is designed to provide a simplified outline of municipal home rule powers under sections 2, 3 and 7 of Article XVIII, Ohio Constitution. It concisely presents the meaning of those provisions as interpreted by the Courts at the time this outline was prepared. While it may represent an oversimplification since it does not engage in a discussion of the intricacies of issues not yet presented to the courts or the scholarly but highly theoretical rationale for those sections as intended by the drafters, it is an accurate description of the existing law. This outline should be a useful took in the discussion of issues involving state-municipal relationships as well as a convenient reference for members of the Local Government Committee and others following its work.

A. Provisions of Section 2.

1. Authorizes passage of general laws to provide for

a. Incorporation of municipalities

b. Government of municipalities

2. Authorizes additional laws for municipalities

a. Special plans of government (or additional laws) must be approved by a majority vote of people

b. General Assembly has provided the following optional plans (Chapter 705. Revised Code):

1) City manager plan
2) Commission plan
3) Federal plan

B. What is meant by "Government" of municipalities

1. "Government" includes matters pertaining to the structure and organization of municipal government, i.e. the form of government for non-charter municipalities.

a. Where a charter has been adopted under section 7, the provisions of the charter control matters of structure and organization. (Fitzgerald v. Cleveland, 88 Ohio St. 338 - 1913).

2. "Government includes matters pertaining to procedures for exercising powers of local self government by non-charter municipalities. (Morris v. Roseman, 162 Ohio St. 447 - 1954)

a. Where a charter has been adopted under section 7, the provisions of the charter control matters of procedure. (Morris v. Roseman, 162 Ohio St. 447 - 1954)

III - SECTION 3, ARTICLE XVIII - POWERS

A. Provisions of Section 3. - Authorizes municipalities to:

1. Exercise all powers of local self government, and

2. Adopt local police, sanitary and other similar regulations not in conflict with general laws.

B. "Powers of local self government."

1. "Powers of local self government" relate to the internal affairs of the municipality, i.e. matters purely of local concern

a. If the result of the exercise of the power affects only the municipality itself, with no extra-territorial effect, the subject

is clearly within the power of local self government.

b. If the result affects more than the municipality, it is not a "power of local self government"

c. Examples of matters not purely of local concern where general laws upheld:

(1) Sewage control - (Bucyrus v. Department of Health, 120 Ohio St. 426 - 1929)

(2) Detachment of territory - (Beachwood v. Board of Elections, 167 Ohio St. 369 - 1958)

(3) Inter-city electrical transmission lines - (Cleveland Electric Illuminating Co. v. Painesville, 15 Ohio St. 2d 125 - 1968)

d. All powers of local self government is a dynamic concept as evidenced by the following excerpt from the opinion in State ex rel McElroy v. Akron, 173 Ohio St. 189, at 192:

"Due to our changing society, many things which were once considered a matter of purely local concern and subject strictly to local regulation, if any, have now become a matter of statewide concern, creating the necessity for statewide control."

e. The term "statewide concern" has been used to describe matters that are broader than the local concern of a municipality. In order for general laws to prevail over a municipal enactment it is not necessary for the specific matter to be of concern everywhere in Ohio, rather it need only to have a result that affects more than the municipality. (Beachwood v. Board of Elections, 167 Ohio St. 369 - 1968)

2. Charter - Non-charter Distinction

a. The exercise of powers of local self-government by a Charter municipality is valid even if it is at variance with a statute. (Leavers v. Canton, 1 Ohio st. 2d 33 - 1964)

b. The exercise of powers of local self-government by a Non-charter municipality is valid where there is no statute at variance with the local exercise of the power, but is invalid where the local exercise of a power of local self-government is at variance with a statute (Petit v. Wagner, 170 Ohio St. 297 - 1960; Leavers v. Canton, 1 Ohio St. 2d 33 - 1964)

C. Police Powers

1. Municipalities (charter and non-charter) are granted authority to adopt police, sanitary and other similar regulations as are not in conflict with general laws.

2. Therefore municipalities and the state exercise police powers concurrently, but the local exercise of a police power is invalid where it is in conflict with a general law.

3. A conflict exists where:

   a. The municipality permits or licenses that which the state prohibits, or

   b. The state permits or licenses that which the municipality prohibits. (Struthers v. Sokol, 108 Ohio St. 263-1923; Auxter v. Toledo, 173 Ohio St. 444-1962; Anderson v. Brown, 13 Ohio St. 2d 53-1968)

4. A conflict does not exist:

   a. Where certain acts made unlawful by the municipality are not covered by the general law. (Struthers v. Sokol, above)

   b. Where certain acts are omitted in an ordinance but covered by the general law. (Struthers v. Sokol, above)

   c. Because there is a difference in penalties, (Struthers v. Sokol, above; Dayton v. Miller, 154 Ohio St. 500 - 1951; Toledo v. Best, 172 Ohio St. 371 - 1961) except -

      (1) In a criminal offense - there is a conflict where there is a difference in the degree of the penalty - felony vs. misdemeanor. (Cleveland v. Betts, 168 Ohio St. 386-1958)

5. Conflict vs. Pre-emption

   a. Pre-emption of a regulatory field by the state is <u>not</u> an appropriate doctrine in reviewing the validity of municipal police powers. (Cleveland v. Raffa, 13 Ohio St. 2d 112 - 1968)

   b. Pre-emption is limited to the subject matter of taxation in governing the intergovernmental relationships of state and municipal government in Ohio. (Cleveland v. Raffa, 13 Ohio St. 2d 112 - 1968; Zielonka v. Carrel, 99 Ohio St. 220 - 1919; Haefner v. Youngstown, 147 Ohio St. 58 - 1946; East Ohio Gas Co. v. Akron, 7 Ohio St. 2d 73 - 1966)

6. <u>General laws</u> must create the conflict.

   a. Not all statutes pertaining to municipal police regulations create a conflict. Only <u>general laws</u> can create a conflict.

   b. An effort by the state to <u>limit or prohibit</u> the exercise of police power by a municipality is not a general law, and does <u>not</u> invalidate municipal use of police power due to conflict.

   c. When the state exercises its police power by setting forth <u>substantive regulations</u>, a municipal exercise of police power in conflict with the state exercise is invalid.
   (Youngstown v. Evans, 121 Ohio St. 342 - 1929; West Jefferson v. Robinson, 1 Ohio St. 2d 113 - 1965)

IV - SECTION 7, ARTICLE XVIII - CHARTERS

A. Provisions of section 7.

1. Section 7 authorizes any municipality to adopt a charter.

2. This authorization is subject to or limited by section 3, in that:

   a. The powers dealt with must be "powers of local self-government."and

   b. Police powers exercised by or under the charter must not conflict with general laws.

B. Significant results of a charter on section 2 and 3 powers.

1. Powers of local self-government are not subject to the variance concept applicable to noncharter municipalities, and the following powers of local self-government are not subject to control by the state:

   a. Structure and organization - i.e. form of government.
   b. Procedures used by the municipal corporation.
   c. Other substantive powers of local self government.

2. Charter municipalities gain no additional police powers - compared to non-charter municipalities - due to the adoption of a charter.

3. The people, through the charter, may impose additional restrictions on the municipality's exercise of:

   a. powers of local self-government
   b. police powers
   c. other powers not covered in this outline - such as the powers of taxation and debt.

V - OTHER CONSTITUTIONAL PROVISIONS LIMITING POWERS GRANTED TO MUNICIPALITIES BY SECTIONS 2, 3 AND 7, ARTICLE XVIII

A. Tax and debt powers

1. Powers granted to municipalities under sections 2, 3 and 7 are limited by the power given to the General Assembly to restrict and regulate municipal tax and debt powers under section 6 of Article XIII, and section 13 of Article XVIII of the Constitution.

2. Section 2, Article XII limits property taxing powers of state and political subdivisions to 1% of true value without a vote of the people, but allows additional levies:

   a. under laws providing for voted levies, or
   b. when provided for by a municipal charter

B. Laws for welfare of employees

1. Section 34, Article II provides that laws may be passed fixing and regulating hours of labor, establishing a minimum wage, and providing for the welfare of employees.

2. A recent case upheld the validity of a statute creating a statewide police and fire pension fund--based on section 34 of Article II. (Bd. Trustees of Pension Fund v. Board of Trustees of Relief Fund, 12 Ohio St. 2d 105 - 1967)

3. Whether the rationale of the pension fund case is to be extended beyond its limited facts, only time will tell.

C. Courts

1. Municipalities have no power, by charter or otherwise, to create courts or appoint judges, since that power is vested in the General Assembly by the Constitution - Article IV (Cherrington v. Hutsinpiller, 112 Ohio St. 468 - 1925)

2. The General Assembly's power over courts includes the power to define jurisdiction and to provide for its maintenance. (State ex rel Ramey v. Davis, 119 Ohio St. 596 - 1929)

3. The General Assembly may limit the time in which an action may be brought and such statutes of limitation prevail over conflicting municipal ordinances. (Akron v. Smith 14 Ohio St. 2d 247 0 1968)

D. Merit System

1. Section 10 of Article XV requires that appointments in the civil service of cities be made according to merit and fitness.

2. Therefore a charter city may not eliminate civil service, but it is not required to follow the statutes in defining a merit system that meets the requirements of section 10, Article XV.

E. Initiative and referendum

1. Section 1f of Article II reserves the right of initiative and referendum to the people of each municipality, to be exercised in the manner provided by law.

   a. In the case of <u>charter</u> municipalities, "charter law" controls the manner of exercise referred to in E.1, above. (Bramblette v. Yordy, 24 Ohio St. 2d 147 - 1970)

   b. In the case of <u>Non-charter</u> municipalities, "statutory law" controls the manner of exercise referred to in E.1., above. (Bramblette v. Yordy, above)

c. Where charter is silent as to initiative and referendum, the "statutory law" controls the manner of exercise referred to in E. 1., above (Dubyak v. Kovach, 164 Ohio St. 247 - 1955)

2. A charter municipality may abolish its charter by initiative procedures. (Youngstown v. Craver, 127 Ohio St. 195 - 1933)

F. Lending credit and state assumption of debt

1. Section 5, Article VIII prohibits the state from assuming the debts of cities unless created to repel invasion, suppress insurrection, or defend the state in war.

2. Section 6, Article VIII prohibits loaning the credit of cities to private corporations.

Ohio Constitutional Revision Commission
Local Government Committee
March 5, 1974

Townships

Constitutional Provisions

The basic, and most important, constitutional reference to township government in the Constitution in Section 2 of Article X which provides as follows:

> The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such powers of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.

This section was adopted in 1933, when Article X was rewritten to permit counties to adopt charters and to provide for alternative forms of county government. The township provision, although rewritten at that time and separated from the county provisions, has remained basically the same since Ohio's first constitution. It speaks only about the election of such township officers "as may be necessary." This contrasts with both the county and municipal corporation provisions of the constitution; the General Assembly is required to provide by general law "for the organization and government" of counties (Section 1 of Article X) and to pass general laws to provide "for the incorporation and government of cities and villages" (Section 2 of Article XVIII).

There are other references to townships and to township officers in the Constitution. Township officers are elected in the odd-numbered years (with municipal officials) and have even-numbered terms not exceeding 4 years (Article XVII, sections 1 and 2). Section 7 of Article V, which requires direct primary elections for nominations for all elective state, district, county and municipal offices makes an exception for township officers unless petitioned for by a majority of the electors of such township. The Elections and Suffrage Committee has studied these sections but is not proposing any changes in the provision relating to townships.

Section 1 of Article X permits townships, pursuant to general law, to transfer or revoke the transfer of any of their powers to the county, with county consent. The right of initiative and referendum must be reserved to the people of the township with respect to such transfers. No statutes have been enacted implementing these provisions. Section 3 of Article X, which provides for the powers a county may acquire with a county charter, presently resolves a conflict between county and township powers in favor of the township; the Commission's recommendation on this section, howevever, would remove this provision. The recommendation would also remove other restrictions in the section having to do with the majorities required to adopt certain kinds of county charters, and would permit the adoption of a charter, regardless of what powers or property the county assumes, by a majority in the county.

Just as townships do not acquire a form of government nor substantive powers from the Constitution, they do not acquire tax-levying power. Specifically, they are restricted by Section 2 of Article X to powers of local taxation as prescribed by law. They are subject to the 1% of true value property tax limit of Section 2 of Article XII and to the indirect debt limit of Sections 2 and 11 of Article XII, together with all other political entities which levy property taxes; the authority of the General Assembly to prescribe both taxing power and debt incurring power for townships is clearly supreme. Townships share in the 50% of the income and estate taxes which is required to be returned to specified political subdivisions by Section 9 of Article

XII. The Commission has recommended that this provision be retained in the Constitution.

Section 5 of Article VIII prohibits the state from assuming township (and other subdivision) debts. This section was studied by the Commission's Finance and Taxation Committee, and the Commission report on State Debt recommends no change in this section. Section 6 of Article VIII presently prohibits the General Assembly from passing laws authorizing townships, among others, to raise money for, or lend its credit to, or become a stockholder in any joint stock company, corporation, or association. The Commission recommendation would alter this section to permit any local governmental entity, pursuant to law, to engage in these activities.

Townships as places of residence are mentioned in Section 1 of Article V (residency for purpose of voting) and section 1g of Article II (signer of initiative or referendum petition to indicate township of residence if he resides outside a municipality). They are governmental units to be used in forming Ohio House of Representative districts (Section 7 of Article XI).

Township Government

Townships in Ohio were originally conceived of as administrative units of the county; they were created by the county and their officers appointed by the county officials. Early in Ohio's history, however, they became units of government independent of the county although they have always been creatures of the legislature, deriving neither governmental structure nor powers from the Constitution.

Township officers have not changed since early in Ohio's statehood. Three township trustees and one township clerk are elected at large by township electors. They are elected, two at a time, in the odd-numbered years, when municipal officials are elected. They have four-year terms. Township trustees are viewed more as administrative officials than legislative, although legislation in recent years giving townships permissive power to perform certain functions places more policy-making decisions in their hands than had previously been the case. In rural areas, the main function of township trustees is township road maintenance; indeed, overall, slightly more than half of all township expenditures is for road functions.

The Township "Problem"

Most writers on metropolitan area problems agree that, as the population on the "fringes" of the established urban centers increases, there is a need to increase the provision of urban-type services in those areas. Many people in a small area have a need for governmental services which the same number of people spread out over a large area do not need. The best examples, perhaps, of these needs are water and the sanitary disposal of wastes. In a rural setting, wells and septic tanks may supply these basic needs of human beings. In an urban setting, both water and sewers must be supplied by a central agency, most of the time by a government.

In Ohio, people who do not live in a city or village live in a township (townships and municipal corporations are not mutually exclusive, but may be considered so for the purpose of contrasting township and municipal government). If the setting is a rural one, township government in Ohio may be able to supply most of the necessary governmental services not being supplied by another government. If the setting is an urban one, however, townships do not have the authority to provide certain urban services such as water and sewer, noted above.

To say that township government cannot provide certain urban services to residents is not, however, the same thing as saying that there is a gap in the ability of any government to provide these services. Both county government and municipal government can, and do in many instances, provide these services.

The township problem, therefore, with respect to the provision of services to residents, would appear to be more a question of people's preferences than of a lack of legal ability to acquire the needed service.

There are undoubtedly other problems of township government. One most frequently cited is that cities annex the most wealthy (property value) and highly populated portions of a township and leave the remainder of the township with a greatly reduced tax base. While this is undoubtedly true, none of the reports found examine, in any specific instances, the actual effect of this reduction on the future of the township. If the greatest concentrations of people are gone from the jurisdiction, there is obviously a greatly reduced need for the provision of township services. Townships receive money for road maintenance from vehicle registration fees and from the gasoline taxes, but these funds are distributed, in one case, on the basis of mileage and, in the other, an equal amount to each township. Another township complaint is that cities engage in "corridor" annexation, leaving one portion of a township not adjacent to the remainder.

There are about 1320 townships in Ohio, and people who wish to obtain additional powers or a different form of government, or both, for townships generally refer to "urban" townships as most in need of more powers or more government. One solution often suggested for the urban townships is that they incorporate, and the response by township officials to that is that they cannot incorporate because they are within the three-mile limit of a municipal corporation, and municipal corporations can, in effect, veto any incorporation attempt within three miles of their boundaries. No studies were found indicating how often this has happened.

One problem which is apparent from reading the few studies that exist of Ohio townships is that there is no standard definition of an "urban" township. Based on population alone, the following figures have been offered as a definition of an "urban" township: 5,000; 10,000; 15,000; 20,000; 25,000. According to the 1970 census figures, there are 5 Ohio townships with populations over 35,000, and 104 townships between 5,000 and 35,000. However, population alone may not be a valid standard. Other measurements used to measure urbanization are: population density, property valuation, whether the township is within a Standard Metropolitan Statistical Area, revenue and expenditure patterns, economic and ecological data, and similar matters. The number of urban townships is variously given at 109, 92, 50, and so forth.

The most comprehensive study of Ohio townships which could be located is, unfortunately, 10 years old and all data are, therefore, out of date. It is a Ph. D. dissertation by Stanley E. Dewey, written in 1964 at Ohio State University. It is entitled "The Ohio Township as a Local Government Unit: A Study in Obsolesence and Adaptation." The final chapter, "Conclusions and Recommendations" is attached. It is a good summary of the problems, even though the data may now be outdated. From this report, and from other sources, the following are the solutions to the township problem which are currently being discussed.

1. Abolish township government; counties would assume all functions or counties would assume functions for rural areas and urban areas would

be either incorporated or annexed to an adjacent municipal corporation.

2. Alter the 3-mile rule to permit urban townships, or urban areas, to incorporate.

3. Alter annexation laws to: (1) prohibit corridor annexation; (2) require the annexing city to take the entire township; (3) permit township officials to appear at annexation hearings on behalf of the township; (4) require the city to provide city services to the annexed area within a fixed period of time after annexation; (5) other changes aimed at strengthening the township position vis-a-vis the municipal corporation.

4. Permit townships to adopt charters and confer the same basic home rule powers on townships with charters as on municipal corporations.

5. Confer on townships the power to do anything not prohibited by law.

6. Permit townships to levy an income tax; increase township power to incur debt.

7. Classify townships and provide alternate forms of township government; or provide a different form of government for urban townships than for nonurban townships; or confer certain powers on urban townships; or provide certain governmental structure, such as the authority to employ a township manager, for urban townships.

8. Provide a wide variety of individual powers for townships which they do not now possess.

9. Authority to consolidate township and villages within its limits.

In the current session of the General Assembly, several bills have been introduced which would adopt one or more of the above proposals. H. B. 512 would give urban townships the power to adopt charters and have "any powers of local self-government which are not prohibited by general law." H. B. 513, which has passed the House and been reported favorably by the Senate Transportation and Local Government Committee, would require urban townships to establish a civil service system. H. B. 514 would allow a township with an area of not less than 2 square miles and a population of 25,000 to incorporate (presumably, without submitting the question to an adjacent municipality). H. B. 594 would do the same thing as H. B. 514. Other bills deal with specific powers--such as H. B. 522, which would permit a township to require road crews to wear special wearing apparel. The Auditor of State has apparently ruled that, because specific authority is not conferred by law, townships cannot require road crews to wear any special apparel.

Constitutional Questions

Of all the possible solutions to the various problems of people in townships, there are three concerning which it could be questioned whether the General Assembly has constitutional authority to adopt that solution. The three possible constitutional questions are:

1. Classification of townships. As with counties, it might be questioned whether the General Assembly can classify townships for the purposes of

providing governmental structure or powers or both. Section 26 of Article II provides "All laws, of a general nature, shall have a uniform operation throughout the State . . . ." However, reasonable classification is permitted under this language. The doubt about county classification was strengthened by the specific language of Section 1 of Article X which provides "The General Assembly shall provide by general law for the organization and government of counties . . ." which the Commission is now recommending be altered to permit limited classification. The doubt was further strengthened by language in court decisions holding certain acts of the General Assembly unconstitutional when classification of counties was attempted so that only one county was in the class.

Townships are classified in the code at the present time with respect to compensation paid to township trustees and the clerk (as, indeed, counties are classified for purposes of compensation for county officers). The township classification is not based on population, but on the size of the township budget.

2. It might be questioned whether or not the General Assembly can abolish townships, if it wanted to do so. However, the constitutional language relating to townships--which only requires the legislature to provide for the election of such township officers "as may be necessary"--appears to give the General Assembly considerably more latitude with respect to townships than it has with respect to either counties or municipal corporations.

3. The third possible question is whether the General Assembly can grant authority to townships to adopt charters. Since the people, through the Constitution, have granted this power to municipal corporations and to counties, is the power therefor restricted to these two entities? There does not seem to be a parallel in Ohio law from which an answer to this question can be drawn.

The Committee might consider the following alternates:

1. Amend the Constitution to make it clear that the General Assembly can do any or all of the above--classify, abolish, permit charters--to townships (even though the chances are reasonably good that it presently could do any of these).

2. Amend the Constitution to deal directly with the problems of township government and powers--abolish, prescribe a different or alternate forms of government, provide for charters, grant powers. Considerably more study would be needed before specific recommendations could be prepared.

Ohio Constitutional Revision Commission
Local Government Committee
June 20, 1974

REPORT

Article XII, Section 11
The Indirect Debt Limit

The Local Government Committee recommends the repeal of Section 11 of Article XII and the enactment of a new section 6 in Article XII.

Present Section 11 of Article XII reads as follows:

Section 11. No bonded indebtedness of the state, or any political sub-divisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

The committee recommends repeal of Section 11 and enactment of a new Section 6 as follows:

Section 6. SO LONG AS ANY BONDS OR NOTES WHICH ARE GENERAL OBLIGATIONS OF A POLITICAL SUBDIVISION ARE OUTSTANDING, SUCH POLITICAL SUBDIVISION SHALL AT THE TIMES REQUIRED MAKE PROVISIONS FOR THE TIMELY PAYMENT OF THE PRINCIPAL OF AND INTEREST ON SUCH BONDS AND NOTES BY PROVIDING FOR AND COLLECTING BY TAXATION OR BY ANY OTHER MEANS BY WHICH SUCH SUBDIVISION IS AUTHORIZED BY THIS CONSTITUTION OR BY LAW TO OBTAIN MONEYS FOR SUCH PURPOSES AND BY APPROPRIATING SUFFICIENT AMOUNTS FOR SUCH PURPOSE. IF AT ANY TIME THE OFFICERS OR OTHER AUTHORITY OF THE SUBDIVISION HAVING RESPONSIBILITY FOR MAKING SUCH PROVISIONS FOR THE TIMELY PAYMENT OF PRINCIPAL AND INTEREST FAIL TO DO SO, THE TREASURER OR OTHER OFFICER HAVING CHARGE OF THE RECEIPT OF MONEYS OF THE SUBDIVISION SHALL SET ASIDE FROM LAWFULLY AVAILABLE MONEYS OF THE SUBDIVISION, INCLUDING THOSE FIRST RECEIVED THEREAFTER, SUFFICIENT AMOUNTS FOR SUCH PAYMENT AND SHALL APPLY SUCH MONEYS THERETO. THIS SECTION AND SECTION 2 OF ARTICLE XII OF THIS CONSTITUTION DO NOT DIRECTLY OR INDIRECTLY LIMIT THE AMOUNT OF GENERAL OBLIGATION DEBT WHICH MAY BE INCURRED BY A POLITICAL SUBDIVISION BUT THE GENERAL ASSEMBLY MAY, BY LAW, PROVIDE FOR LIMITATIONS ON SUCH AMOUNTS. THIS SECTION DOES

NOT AUTHORIZE THE LEVY OF ANY AD VALOREM PROPERTY TAX OTHER THAN AS AUTHORIZED OR PERMITTED BY SECTION 2 OF ARTICLE XII OF THIS CONSTITUTION.

History of Section 11

Section 11 was added to Article XII, the Taxation Article, as a result of the proposals of the 1912 Convention. It prohibits bonded indebtedness from being incurred or renewed by the state or any political subdivision unless the legislation provides for levying and collecting, annually, by taxation an amount sufficient to pay the interest and to provide a sinking fund for the redemption of the bonds at maturity.

As interpreted by the Ohio Supreme Court, when read in conjunction with Section 2 of Article XII which prohibits levying ad valorem property taxes in excess of one per cent of the value of the property without a vote of the people in the taxing district, Section 11 constitutes a limit on the amount of general obligation debt which may be incurred. The Court held, in Portsmouth v. Kountz, 129 Ohio St. 272 (1935), that the amount required to meet the payments on general obligation debt must be computed within the one per cent (statutory 10-mill) limit even though the debtor anticipated that revenues other than those received from property taxation would be sufficient to meet the bond payments. Moreover, the outstanding unvoted indebtedness of all overlapping political subdivisions must be included in computing whether the proposed bond issue will fall within the "10-mill" limit. The 1912 convention debates, of course, do not indicate that this was the anticipated effect of the section--for one thing, the Constitution did not contain a property millage tax limitation and the Convention rejected a proposal to insert one in the Constitution; for another the Smith "one per cent" law, in effect at the time, excluded millage necessary to meet payments to sinking funds and interest on bonds. Thus, it was clearly anticipated by the delegates that the taxes referred to in Section 11 would not fall within the 10 mill limit. However interesting this historical observation may be, the Supreme Court held that the people must have intended, when

the one per cent limitation was subsequently placed in the Constitution, to have intended the limit to cover taxes levied, or which might be necessary to be levied, for debt, as well as those levied for current expenses of government.

The 1912 debates on Section 11 discuss almost entirely the problems of political subdivisions, and very little the problems of state debt. Indeed, the $750,000 limitation on state debt, which carried over from 1851, was, and is, a severe limitation on the state's ability to incur debt and, as a practical matter, all major amounts of state debt must be voted by the people. In another report, the Commission has made recommendations to the General Assembly regarding state debt. Except where specifically provided, the State has not levied ad valorem property taxes to meet payments on state debt.

Another effect of Section 11 is to place debt charges in a priority position over other expenses of government. (State ex rel. Bruml v. Brooklyn, 126 Ohio St. 459 (1933)). Thus, the section is a guarantee of payment--at least, to the extent that payment can be obtained from within the one per cent (10 mill) limit.

The section was studied by the Commission's Finance and Taxation Committee as part of its study of Article XII. The committee's State Debt proposals had already, at that time, been approved by the Commission and it was that committee's opinion that, if adopted by the General Assembly and approved by the voters, the proposed debt recommendations would obviate entirely the necessity for a provision such as Section 11 relating to state debt. Therefore, the Finance and Taxation Committee recommended the deletion of references to the state in Section 11 and referral of the section to the Local Government Committee for study and recommendation, since the problems created by the indirect debt limit are problems of local government.

The Local Government Committee Recommendation

The Local Government Committee noted, as it began its study of Section 11 and the problems posed by interpretation of this section as an "indirect" debt limit, that the General Assembly has complete authority, and has exercised that authority,

to limit and control debt of local governments, including municipal corporations which otherwise derive powers directly from the Constitution. Testimony presented to both the Finance and Taxation and the Local Government Committees indicated no desire to alter this authority. Nor was there any indication that local governments in Ohio are failing to meet debt payments when due. The problem of the indirect debt limit is that it is an artificial limit, since levies within the 10 mills are rarely, if ever, necessary to meet debt payments. Other sources of taxation, and revenues other than tax revenues, are used for debt purposes; the particular local government may, nevertheless, and with the statutory limits, prefer to issue unvoted general obligation bonds to finance a particular project for a variety of reasons--lower interest rate; immediate need for a project and lack of time to go to the voters; a decision that the project is not one to engender great public support and might lose at the polls, no matter how necessary it might be; or for some other reason.

The Local Government Committee's recommendation for a replacement for Section 11 will do the following:

1. Continue the guarantee aspects of Section 11 by requiring timely payment of principal and interest on general obligations, and requiring the treasurer or other officer in charge of the receipt of money to set aside from lawfully available moneys of the subdivision sufficient amounts for payment if sufficient provision is not made.

2. Permit provision for payment to be made from taxation or by any other means by which the subdivision can legally obtain money.

3. Eliminate the reference to the state from the section, for reasons noted above.

4. Eliminate the sinking fund requirement, since the committee is advised that most bonds today are serial bonds.

5. Specifically state that the tax limitation of Section 2 is not a debt limit, but reinforce the provision that the General Assembly may provide for political subdivision debt limitations.

6. Specifically state that the new section does not authorize the levy of any ad valorem proper tax other than as authorized by Section 2 of Article XII. Thus, the one per cent tax limit could not be violated by construction of the new section.

The committee notes that adoption of this section alone will not solve any problems for the political subdivisions presently restricted by its application as an indirect debt limit, since statutes presently impose the same limit and will require alteration before the indirect debt limit is removed. However, this is a necessary first step.

The recommendation of the committee is to place the section in Article XII, where it presently is, since it applies to all political subdivisions and it would be inappropriate to place it in Article XVIII, applying to municipal corporations, or in any other Article which relates only to specific subdivisions. Section 7 is the first vacant section in Article XII if the taxation recommendations of the Commission are adopted. It would also be appropriate to place the section in Article VIII, which deals with State Debt but does contain references to political subdivision debt also.

Ohio Constitutional Revision Commission
Local Government Committee
July 9, 1974

REPORT

Section 1f, Article II
(Initiative and Referendum)

The Local Government Committee recommends the repeal of Section 1f, Article II and the enactment of a new section with similar provisions as Section 7 of Article XIV. The Elections and Suffrage Committee has already recommended the repeal of Sections 1a, 1b, 1c, 1d, 1e, and 1g of Article II and the enactment of new Sections 1, 2, 3, 4, 5, and 6 of Article XIV.

Section 1f of Article II reads as follows:

Section 1f. The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

The recommended new section would read as follows:

Article XIV

Section 7. THE RIGHT OF THE INITIATIVE AND REFERENDUM IS RESERVED TO THE PEOPLE OF EACH MUNICIPALITY AND EACH COUNTY ON ALL MATTERS WHICH SUCH MUNICIPALITY OR COUNTY MAY NOW OR HEREAFTER BE AUTHORIZED TO CONTROL BY LEGISLATIVE ACTION. SUCH RIGHTS SHALL BE EXERCISED IN THE MANNER NOW OR HEREAFTER PROVIDED BY THE CHARTER OF THE MUNICIPALITY OR COUNTY OR, IF NOT SO PROVIDED, IN THE MANNER NOW OR HEREAFTER PROVIDED BY LAW.

Comment:

Presently, the Constitution reserves to the people of municipalities (cities and villages) the power of the initiative and referendum with respect to matters which the municipality may control by legislative action. Since municipalities have "home rule" powers under the Ohio Constitution, the range of matters that may be controlled by legislative action is broad.

Language almost identical to Section 1f, except that the word "right" rather than "power" is used, is found in Section 3 of Article X and gives the initiative and referendum right to the people of a county which adopts a county charter. Since no county has adopted a county charter, this right is presently not exercisable. However, the General Assembly, in giving certain legislative powers to county commissioners (for example, the permissive tax law), has granted to the people of the counties similar referendum rights.

One of the recommendations of the Local Government Committee, already adopted by the Commission would give counties limited "home rule" powers. It would, if adopted by the people, broaden the scope of the authority of the county commissioners (or whatever the legislative body is called) to act legislatively. Therefore, it seemed appropriate to the Local Government Committee that the initiative and referendum right should also be broadened to cover legislative actions of counties as well as those of municipalities.

The word "right" rather than "power" was chosen as more descriptive of the true nature of the initiative and referendum.

The only other change recommended in this section, and this change is deemed by the Committee as clarifying the present situation and not as making a substantive change, is to indicate that the initiative and referendum right may be exercised as provided in a municipal or county charter. Most municipalities which have charters provide for the initiative and referendum in the charter; other municipalities are subject to the general law which provides for municipal initiative and referendum. If, however, the charter differs in any respect from the statute, it is always possible for a challenge to the charter procedures to be made. Although charter provisions have, thus far, been upheld, it seemed to the committee better to clarify this point in the Constitution.

There is presently no statute providing, generally, for county initiative and referendum procedures, and the Committee recognizes that such a statute will be necessary if this recommendation and the "county powers" recommendation, are adopted.

THE OHIO CONSTITUTIONAL REVISION COMMISSION

PUBLIC HEARING ON THE

PROPOSAL TO REPEAL SECTION 11 OF ARTICLE XII

JULY 23, 1974

TESTIMONY PRESENTED BY MICHAEL J. GABLE, FINANCE DIRECTOR,

CITY OF COLUMBUS

COMMISSION MEMBERS:

ON BEHALF OF THE CITY OF COLUMBUS AND THE OHIO MUNICIPAL LEAGUE, I STRONGLY URGE YOU TO ACCEPT THE REPORT OF THE LOCAL GOVERNMENT COMMITTEE WHICH RECOMMENDS THE REPEAL OF SECTION 11, ARTICLE XII AND THE ENACTMENT OF NEW SECTION 6, ARTICLE XII. IT IS OUR HOPE THAT THE COMMISSION WOULD MOVE FORWARD EXPEDITIOUSLY IN AN EFFORT TO SEE THAT THIS REVISION OF THE CONSTITUTION OF THE STATE OF OHIO IS PLACED ON THE BALLOT AS SOON AS POSSIBLE.

THE STAFF MEMORANDUM ON THIS SUBJECT IS AN EXCELLENT ONE. THEREFORE, I WOULD LIKE ONLY TO ELABORATE ON A FEW POINTS MADE IN THAT MEMORANDUM AND ALSO TO RELATE SOME OF THESE POINTS TO THE SPECIFIC EXPERIENCE OF THE CITY OF COLUMBUS.

AS HAS BEEN POINTED OUT TO YOU, THE COURT INTERPRETS SECTION 11, WHEN READ IN CONJUNCTION WITH SECTION 2, AS A LIMIT ON THE AMOUNT OF GENERAL OBLIGATION DEBT WHICH MAY BE INCURRED. THIS INDIRECT LIMIT EFFECT COMES ABOUT BECAUSE THE COURT HAS HELD THAT THE AMOUNT REQUIRED TO MEET PAYMENTS ON GENERAL OBLIGATION DEBT MUST BE COMPUTED WITHIN THE STATUTORY TEN MILL LIMIT EVEN IF REVENUES OTHER THAN THOSE RECEIVED FROM PROPERTY TAXATION WOULD BE SUFFICIENT TO MEET SUCH PAYMENTS.

THE INDIRECT LIMIT IMPOSED BY SECTION 11 IS AN ARTIFICIAL LIMIT. THE PATTERN OF TAXATION EMPLOYED BY MUNICIPALITIES IN OHIO HAS CHANGED MARKEDLY IN THE LAST 15 YEARS. ALTHOUGH THERE IS STILL, FOR MANY COMMUNITIES, A SOLID RELIANCE ON THE PROPERTY TAX, THE BURDEN IS MOST DEFINITELY SHIFTING TO THE MUNICIPAL INCOME TAX. TO BE SURE, THE LARGER CITIES IN OHIO RELY VERY HEAVILY ON THE INCOME TAX AS THE BACKBONE OF THEIR REVENUE SOURCES. AND, QUITE NATURALLY, IT IS THESE LARGER CITIES THAT INCUR MOST OF THE DEBT PRESENTLY OUTSTANDING.

THE SECTION 11 INDIRECT LIMIT IS ARTIFICIAL BECAUSE, IN MOST CASES, LEVIES WITHIN THE TEN MILL LIMIT ARE RARELY, IF EVER, ACTUALLY COLLECTED TO MEET DEBT PAYMENTS. REVENUES FROM OTHER SOURCES, SUCH AS THE INCOME TAX MENTIONED ABOVE, AND UTILITY REVENUES ARE ACTUALLY UTILIZED TO MEET DEBT PAYMENTS.

THE CURRENT OVERLAP STATEMENT ON THE STATUTORY TEN MILL LIMIT FOR COLUMBUS AND FRANKLIN COUNTY SHOWS THAT 9.20 MILLS ARE LEGALLY BEING UTILIZED. COLUMBUS IS RESPONSIBLE FOR 8.74 MILLS OF THAT TOTAL. FULLY 7.65 MILLS WILL NEVER BE LEVIED BY THE CITY OF COLUMBUS. THIS MILLAGE REPRESENTS OUTSTANDING PUBLIC UTILITY DEBT AND SUCH DEBT WILL BE, AND HAS BEEN, COMPLETELY PAID FROM UTILITY REVENUES.

THE CITY OF COLUMBUS OPERATES LARGE WATER AND SEWER SYSTEMS. IN AN ERA OF GROWTH AND EVER INCREASING REQUIREMENTS MANDATED BY THE ENVIRONMENTAL PROTECTION AGENCY, THE CAPITAL NEEDS OF THESE SYSTEMS ARE HUGE. THE CITY OF COLUMBUS HAS ISSUED GENERAL OBLIGATION DEBT FOR UTILITY PURPOSES, EVEN THOUGH THE ENTIRE DEBT IS PAID OUT OF UTILITY REVENUES, PRINCIPALLY

BECAUSE OF THE LARGE INTEREST RATE ADVANTAGE (ESPECIALLY ON LARGE AMOUNTS OF DEBT) WHICH GENERAL OBLIGATION DEBT AFFORDS OVER REVENUE BOND FINANCING.

THUS, SECTION 11, IS AN ARTIFICIAL LIMIT IN TERMS OF CURTAILING DEBT. BUT, IT DOES EFFECTIVELY REMOVE THE ABILITY OF A MUNICIPALITY TO INCUR DEBT WITHIN THE STATUTORY TEN MILL LIMIT WITHOUT A VOTE OF THE PEOPLE UNLESS THE MUNICIPALITY IS WILLING TO ACCEPT THE MUCH HIGHER EXPENSE OF BORROWING THROUGH THE USE OF REVENUE BONDS. CITIES MUST HAVE THE ABILITY TO INCUR DEBT WITHOUT A VOTE OF THE PEOPLE IN ORDER TO PROVIDE FOR RELATIVE EMERGENCIES, TO PROVIDE SOME FLEXIBILITY, AND TO ACQUIRE ITEMS WHICH ARE NECESSARY BUT WHICH LACK VOTER APPEAL. A VERY REAL EXAMPLE OF THIS LAST TYPE OF NEED IS A SEWER PLANT EXPANSION REQUIRED TO MEET EPA REQUIREMENTS FOR TERTIARY TREATMENT. IT IS A NECESSITY AND MUST BE ACCOMPLISHED, BUT THIS TYPE OF PROJECT LACKS THE APPEAL OF A RECREATION CENTER, STREET LIGHTS, OR STREET IMPROVEMENTS. YES, REVENUE BONDS CAN BE UTILIZED, BUT THE COST TO THE COMMUNITY OF BORROWING IS APPRECIABLY HIGHER UNDER THIS METHOD OF FINANCING THAN IF GENERAL OBLIGATION BONDS ARE EMPLOYED. IF MOST OF THE TEN MILL LIMIT IS COMMITTED LEGALLY FOR DEBT PAYMENTS, EVEN THOUGH THE TAXES WILL NEVER BE LEVIED, THEN THE CITY IS DENIED THE ABILITY TO INCUR DEBT WITHIN THAT TEN MILLS WITHOUT A VOTE OF THE PEOPLE.

THE CITY OF COLUMBUS USES A FIVE YEAR CAPITAL PROGRAM FOR PLANNING AND SCHEDULING NEEDED CAPITAL IMPROVEMENTS. NORMALLY, THE CITY REQUESTS VOTER APPROVAL OF A PACKAGE OF CAPITAL IMPROVEMENTS, TO BE SUPPORTED WITH OUR INCOME TAX, ONCE IN EVERY FIVE YEARS. THE LACK OF ABILITY TO INCUR DEBT WIHTOUT A VOTE OF THE PEOPLE WITHIN THE TEN MILL LIMIT OFTEN CAUSES OUR CAPITAL PROGRAMMING EFFORT TO BE SKEWED IN FAVOR OF ITEMS CALCULATED

TO HAVE SPECIFIC VOTER APPEAL AND AGAINST ITEMS WHICH ARE NECESSARY, BUT LACK SUCH APPEAL.

IT IS UNREALISTIC TO REQUIRE THAT ALL DEBT BE TIED TO PROPERTY TAX LEVIES. THE PROPERTY TAX IS ONLY ONE OF SEVERAL METHODS OF RAISING REVENUE WHICH ARE AVAILABLE TO OHIO'S CITIES. AND, AS MENTIONED, UTILITY REVENUES AND MUNICIPAL INCOME TAXES PROVIDE REVENUES NEEDED TO FINANCE LARGE AMOUNTS OF DEBT INCURRED BY THE CITIES. THE PROPERTY TAX SHOULD BE AN ALTERNATIVE REVENUE SOURCE, BUT IT IS CERTAINLY NOT THE ONLY ONE. BOTH THE CONSTITUTION AND THE STATUTES MUST RECOGNIZE THIS FACT.

THE AMENDMENT OF THE CONSTITUTION AS HERE PROPOSED, AND THE SUBSEQUENT AMENDMENT OF THE OHIO REVISED CODE ACCORDINGLY, WILL REMOVE THE ARTIFICIAL DEBT LIMIT. THIS WILL BE A DEFINITE STEP TOWARD ENCOURAGING MORE RATIONAL CAPITAL PROGRAMMING BY CITIES AND TOWARD REDUCING THE COST OF BORROWING TO OHIO'S MUNICIPALITIES.

Ohio Constitutional Revision Commission
Local Government Committee
September 9, 1974

R E P O R T

Municipal Corporations and Townships

The Local Government Committee hereby submits its recommendations on the following present sections of Article XVIII and Article X of the Ohio Constitution:

Article XVIII

Section	Subject	Recommendation
Section 1	Classification of municipal corporations into cities and villages	No change
Section 2	Incorporation and government of cities and villages	Amend
Section 3	Local Self-Government	No change
Section 7	Charters for municipal corporations	No change except to renumber (4)
Section 8	Adoption of charters	Amend; renumber (5)
Section 9	Amendment of Charters	Amend; renumber (6)
Section 13	Taxation and Debt: Power of General Assembly	Amend; renumber (7) Repeal section 6 of Article XIII
Section 4.	Public Utilities; acquisition	No change except to renumber (8)
Section 5	Public Utilities; referendum	No substantive change; Renumber (9)
Section 12	Mortgage bonds for public utilities	Amend; renumber (10)
Section 6	Sale of surplus utility product	Amend; renumber (11)
Section 10	Appropriation in excess of public use	No change; renumber (12)
Section 11	Assessment of property to pay for local improvements	No change; renumber (13)
Section 14	Elections	No change

In addition, the committee studied three topics relating primarily to municipal government that were referred to it by other committees. The indirect debt limit, Section 11 of Article XII, was originally studied by the Finance and Taxation committee, as was the topic of tax pre-emption. The Local Government Committee has already presented its recommendation on the indirect debt limit to the Commission in a separate

report. The conclusion of the committee with respect to tax pre-emption is that no constitutional provision should be recommended. The third matter, municipal initiative and referendum (section 1f of Article II) was referred to the Local Government Committee by the Elections and Suffrage Committee and a separate report and recommendation on that matter, also, has already been presented to the Commission to be incorporated in the report of the Elections and Suffrage Committee on Initiative and Referendum.

Article X

Article X deals primarily with county government, and most of the sections were included in the first Local Government Committee report to the Commission. Included in this report are the following:

Section	Subject	Recommendation
Section 2	Townships	Repeal and Enact a new section
Section 7	Townships	Enact

Introduction

The Local Government Committee was one of the first established by the Commission shortly after the Commission began business in the Spring of 1971. It has worked diligently to attempt to untangle and help solve one of the most complex problems in government today. The committee studied the present Ohio constitutional provisions relating to local government, and the problems of living, particularly in metropolitan areas, that are related to local government structure and services. A seminar, under the committee's auspices, on the constitutional aspects of local government held at the Ohio State University in the Fall of 1971, helped focus on current problems and resulted in the publication of a series of articles in the Ohio State Law Journal on local government.

The committee studed metropolitan problems of a regional nature, such as transportation, law enforcement, pollution and waste disposal, which are not confined to arbitrary geographic or political boundaries, even county boundaries. The committee studied regional governments which have been created elsewhere--particularly the Minneapolis-St. Paul 7-county region in Minnesota, and the often-cited Toronto, Canada, experience--and worked extensively on a draft for a constitutional provision which would enable the creation of regional government by the voters. It then held a series of public hearings in Columbus, Cleveland and Cincinnati, at which a variety of public officials and private citizens expressed their views on the problems of local government and on regional government as a means of solving those problems. What emerged from these meetings was a belief that regional government is the government of the future, but that in Ohio it is, indeed, still in the future. It is a concept not yet acceptable to many officials and citizens in Ohio, who variously fear loss of identity, or deplore a third level of government and a third level of taxation. With a lapse of time, and the increasing emphasis by both the state and federal government on regional organization in that period of time, this situation may be altered before the end of the Commission's work. The Local Government Committee may wish to reopen its own discussions on this topic and present a further report to the Commission.

The alternative concept that emerged from the study of regional government was the belief that some local government problems in Ohio could be solved if county government were strengthened--indeed, in all but a few of the metropolitan areas in the state, the county <u>is</u> the region within which effective action could be taken to solve problems. The committee then studied county government and its first report to the Commission dealt with those sections in Article X which provide for county government, county powers, and charters. The general thrust of those recommendations, which have already been adopted by the Commission, is to strengthen county government.

This report deals with the remaining units of general purpose local government in Ohio--municipal corporations (cities and villages). It also contains recommendations related to townships. The Ohio Constitution presently contains an Article entirely devoted to municipal corporations, and very little relating to townships.

I. Municipal Corporations

Article XVIII was added to the Constitution by the 1912 Constitutional Convention. Indeed, dissatisfaction with the condition of municipal government and powers was one of the major reasons for calling the convention. The tight legislative control over municipal affairs that the General Assembly had exercised throughout the first century of Ohio's history--first by special acts and then, after the 1851 Constitution was adopted containing provisions prohibiting special acts of incorporation and requiring acts of a general nature to have uniform effect, by classification--was viewed as undesirable by municipal officials and residents, who wanted

to run their own affairs, and by those who realized that the "logrolling" that the system engendered in the legislature did not necessarily result in the passage of good legislation. After the classification system was ruled unconstitutional by the Ohio Supreme Court, the Municipal Code of 1902 was enacted, and remains the basis of municipal law today. However, a single municipal code did not satisfy the needs of cities and villages of all sizes, and having a wide variety of problems. Municipal officials and residents wanted to have control of their own affairs. "Home rule" was a byword of the era, and it was a foregone conclusion that the Convention would propose home rule of some sort for Ohio municipalities.

"Home rule" for municipalities--cities and villages--is, therefore, the major accomplishment of Article XVIII. The home rule formulation in the Constitution is Ohio's alone--it is not exactly like that of any model or any other state. Specific discussion of its interpretation and effect on municipalities and their powers in the 62 years since its adoption by the people will be discussed in the comment following Sections 3 and 7, the sections which contain the language. It is to be noted that the committee is not recommending any changes in these basic home rule provisions, although it spent many hours dissecting them and considering alternatives. The committee viewed its basic task as not writing the ideal Constitution with ideal solutions to state and local problems in terms of local government structure and powers, but rather as ascertaining whether solutions to current problems are hindered by the present constitutional language or lack of it. The committee was also concerned with whether the present language, as currently interpreted, creates problems because those who must use and understand it are confused or unable to determine a course of action because they do not know what it means. In the final analysis, the Committee determined that although the Constitutional language has been open to varying legal interpretations, those interpretations are now understood and a body of law has grown up around them. They are not, therefore, presently a barrier to solving pressing current problems. The meaning is reasonably fixed today and appears to be satisfactory to officials of both charter and noncharter municipalities.

Other sections in Article XVIII, in addition to charter sections, either give municipalities specific powers, such as the utility sections, or contain limitations by reserving certain powers to the General Assembly, such as Section 13. Although it might be questioned whether some provisions are necessary, such as the authority for a municipal corporation to acquire utilities which would probably be considered part of the home rule power of local self-government, most of the sections contain specific limitations or conditions which both the state and the municipalities have come to rely upon over the years, and extensive rewriting or repeal did not seem advisable. Changes are recommended to correct particular problems.

The committee recommends changing the order of the sections in Article XVIII because the present arrangement does not place all sections dealing with the same subject together or in proper sequence. For some sections, the only recommended change is the number of the section.

Article XVIII

Section 1

Present Constitution:

Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Committee Recommendation:

No change

Background of section:

Section 1 of Article XVIII was enacted in 1912 in an attempt to end widespread overclassification of municipal corporations. Although a constitutional provision was adopted in 1851 prohibiting the legislature from enacting special laws relating to municipalities, the legislature, under the guise of general law, managed to evade this restriction by use of the device of classification. The legislature created many classes of municipalities with varying powers, some classes consisting of only one municipality.

Finally, in 1902, the state Supreme Court invalidated the entire classification structure of Ohio municipal law (State ex rel. Attorney General v. Beacom, 66 O.S. 491, 64 N.E. 427, 1902; State ex rel. Knisely v. Jones 66 O.S. 453, 64 N.E. 424, 1902). From the resulting crisis emerged the Municipal Code of 1902 at a special session of the legislature. This Code still forms the basis of municipal government in Ohio for noncharter municipalities except as modified by court interpretation of the 1912 home rule provisions.

In 1912 the present constitutional provision was enacted authorizing two classes of municipal corporations: those with populations of 5,000 or more are classified as cities; all others as villages. The framers of this section believed that the two divisions adequately met the requirements of municipal corporations. Villages, they reasoned, because they are smaller units, would need less complex governmental structures than the larger units, cities. Also, the framers thought that the detailed regulations of the state code would lighten the work load on village officers, who were usually part-time. The section also provides that a village can become a city by meeting the requirements established by general law.

Comment:

The Local Government Committee recommends that no changes be made in Section 1 because no further classifications of municipal corporations are needed.

Classification is unimportant when it is realized that both cities and villages have equal power to adopt charters, and the ability to structure the municipal government by charter adoption is not in any way limited or restricted by law or by the Constitution, regardless of size, once a municipal corporation has been created. In addition to charter adoption, many devices other than classification exist for solving municipal problems, including contracts with other political subdivisions for the transfer or joint exercise of powers and cooperation through councils of government.

The committee did consider the suggestion advanced by the constitutional authority, Dean Jefferson B. Fordham, that only municipal corporations over 5,000 population (cities) should be permitted to adopt charters and acquire home rule powers. He argues that because of their small size and uncomplicated governmental activities, very few of the villages in Ohio have been compelled to draft and adopt charters, preferring instead to function under statutory law.

The committee rejected Dean Fordham's notion of limiting the charter option and home rule powers to cities. It believes that the 5,000 population demarcation between villages and cities established by Section 1 is an artificial distinction and that factors other than population level usually determine whether a municipality needs the governing latitude provided by a charter, or whether the statutory forms provided are sufficient. Some Ohio villages are more active governmentally than some cities (operating utilities, police forces, and other matters). The villages that have felt the need to adopt charters or that may feel that need in the future should not be restricted from exercising the charter option in governing their affairs.

Further, the committee concluded that not only is 5,000 an artificial line, but any population figure chosen for classification would be artificial. Many other factors--density, poverty, ability to raise taxes--determine a corporation's needs and abilities to provide for those needs. It is neither practical nor necessary to attempt to write such standards in the Constitution.

Article XVIII

Section 2

Present Constitution:

General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Committee recommendation:

Section 2. General laws shall be passed to provide for the incorporation, CONSOLIDATION, DIVISION, DISSOLUTION, ALTERATION OF BOUNDARIES, and government of cities and villages; and additonal laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Comment:

The proposed amendment to Section 2 would clarify and add to the constitutional requirement that the General Assembly provide by general law for the incorporation and government of municipal corporations. The amendment is an attempt to state clearly in the Constitution that the General Assembly does possess the power to change the boundaries of municipal corporations, including the specific powers to consolidate, divide, dissolve or alter boundaries, in order to meet changing needs and demands placed upon both the state and local units of government in Ohio. The statutes currently provide three methods of municipalities to adjust their boundaries voluntarily: annexation, merger and detachment of territory. There is no statutory provision for dissolution of a municipality.

The General Assembly, in carrying out the constitutional mandate of Section 2, has provided statutorily for the incorporation of municipal corporations as villages. There is no provision for direct incorporation as a city, even though the population of the territory proposing to incorporate is over 5,000. To become a city, a territory must first become a village and then proceed to city status by one of the methods provided by general law. The committee believes that the General Assembly should change this procedure and provide a staturtory method for direct incorporation as a city.

Once incorporated, cities and villages alike share in the home rule powers of local self-government, whether or not they adopt charters, and in the ability to adopt charters.

Section 2 also authorized passage of additional laws for the government of municipalities with the restriction that any such passed by the legislature must also be approved by a majority vote of the electors of a municipality. Laws enacted pursuant to this section provide for optional forms of government.

Background of Section 2

The boundaries of political subdivisions are usually drawn, initially, in order to provide the benefits of a substantial number of services to the inhabitants of a defined area and, at the same time, provide a general form of government accountable to the people who elect the officials. However, such boundaries tend to become obsolete over time, making it extremely difficult and often impossible for a subdivision to efficiently and effectively provide the services demanded of it by its citizens, or to meet the changing demands placed upon it by outside factors such as the state and federal governments, or by regional pressures.

The nationally-recognized Committee for Economic Development expressed the problem in these terms:

> The bewildering multiplicity of small, piecemeal, duplicative, overlapping local jurisdictions cannot cope with the staggering difficulties encountered in managing modern urban affairs. The fiscal effects of duplicative suburban separatism create great difficulty in provision of costly central city services benefiting the whole urbanized area. If local governments are to function effectively in metropolitan area, they must have sufficient size and authority to plan, administer, and provide significant financial support for solutions to areawide problems. (Reshaping Government in Metropolitan Areas, Committee for Economic Development, 1970.)

Generally, until 1967 when the statutory restriction against incorporation within three miles of a municipal corporation was enacted, incorporation of territory as a municipality was a relatively easy matter. Annexation of territory by a municipality and merger of two municipalities were more difficult. This policy contributed to the proliferation of smaller municipalities surrounding, and ofttimes suffocating, larger cities, causing serious problems in many metropolitan areas of the state. The central cities, which are usually older, very often lack the financial resources necessary to provide for even a low level of services and government, much less for the new or improved services demanded by their citizens. The surrounding municipalities and townships, because of their small size or the configuration of their boundaries or their lack of resources, are often unable to take advantage of economies of scale and instead are sometimes forced to provide services which are inadequate, inefficient or overlapping in order to meet demands of their citizens and of the state. Both the larger municipalities and the townships and municipalities surrounding them are often unable to solve problems such as pollution effectively because these problems are not confined to borders of one political unit and, consequently, can't be solved by applying remedies to the single municipality.

A further problem that was exacerbated by the state's former policy of permissive incorporation and restrictive annexation and merger concerns municipalities and townships which, because of small populations or the inability to raise sufficient revinues, or both, are unable to provide adequate services or government. There exist in Ohio today some municipalities that cannot meet the population density and assessed valuation criteria presently required for incorporation, and thus, could not now be incorporated under present statutes. Some municipalities in Ohio have difficulty finding enough people to vill village or city offices.

Why Amend the Constitution?

The Local Government Committee, through its deliberations and consultations with officials and citizens of local units of government, the Ohio Municipal League, and other groups involved in the problems of local government, concluded that, if the General Assembly determines that boundary changes in municipal corporations are necessary for bettergovernment of metropolitan areas, or for better provision of services to the people, the constitution should clearly give the legislature the needed authority to act.

The committee believes that the amendment to Section 2 that it proposes will make it clear that the General Assembly does possess the powers necessary to provide for modification of municipal boundaries if necessary to alleviate current problems.

The method by which the General Assembly implements the proposed amendments to Section 2 is left entirely in the hands of the General Aseembly, except that it must be by general law. This is in keeping with the general philosophy which has governed the recommendations of the Local Government Committee: that the General Assembly has, through the Constitution, the duty and responsibility to set overall policy for the state and that the Constitution should provide the General Assembly with the flexibility necessary for it to fulfull its functions effectively and equitably now and in the future. While the committee did undertake to study methods currently employed to help alleviate boundary problems (including examination of the use of boundary commissions on a local, regional and state level, with either recommending or enforcement powers, and referenda), it is the committee's belief that the state legislature, in its wisdom, will provide for what it considers the best methods for implementing this amendment and will be free to make changes in the methods or adopt new ones as experience and knowledge about boundary problems increase.

The committee not only refrained from prescribing the methods to be used in implementing proposed Section 2, it also did not prescribe what form the application of these methods adopted by the General Assembly should take (i.e. metropolitan government, regional government, city-county merger, elimination of urban townships, increase in powers of large metropolitan areas, etc.).

The committee is aware that inclusion of these specified powers in the Constitution will not, in and of itself, alter the present statutes dealing with merger, annexation and incorporation. Unless the General Assembly approves changes in the statutes governing these procedures, they will remain the same. It is the committee's conclusion, however, that upon adoption of proposed Section 2 the General Assembly will have to provide statutorily for the means by which a municipal corporation may be dissolved.

It is hoped that the General Assembly will be encouraged to seek new solutions to boundary problems. The committee believes that adoption of proposed Section 2 will support the General Assembly in its obligation to provide an effective framework for local government.

Article XVIII

Sections 3 and 7

Present Constitution:

Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Ccommittee Recommendation:

No change, except to change the order of the sections in Article XVIII by making section 7, section 4.

Background of Sections:

Sections 3 and 7, considered together with section 2, represent the heart of the home rule provisions of the Constitution and, because sections 3 and 7 are usually considered in tandem, they will be discussed together here.

Section 3 authorizes municipalities to exercise all powers of local self-government and to adopt local police, sanitary and similar regulations that are not in conflict with general law. Section 7 permits any municipality to adopt a charter, and to exercise thereunder all powers of local self-government, subject to provisions of Section 3.

In order to understand the current status of the municipal home rule powers in Ohio, it is necessary to examine briefly home rule in its historical context.

Under the Ohio Constitution of 1802, municipalities were incorporated by special acts of the state legislature which granted charters establishing the form of government and enumerated the substantive powers of the chartered municipality. As municipalities grew, they began to chafe under the strict legislative control, and legislative logrolling did not always yield the best results. This method of incorporation proved so unsatisfactory that a provision was written into the 1851 Constitution prohibiting the granting of corporate power by special act. At the same time, another provision was adopted that required the legislature to provide for the organization of cities and incorporated villages by general law. Out of these two provisions grew an elaborate classification system, which, among other things, placed each of the eleven largest cities in separate classes, thus enabling the legislature to pass special laws for the government of any one of these eleven cities, under the guise of general law. General laws based upon such classifications were the same as special acts and municipalities were no better off in terms of controlling their own affairs than before 1851.

The state Supreme Court, however, put an end to the classification system in 1902 by ruling that it was contrary to the general law provision (State ex rel. Attorney-General v. Beacom, 66 O. S. 491, 64 N. E. 427, 1902; State ex rel. Knisely v. Jones 66 O. S. 453, 64 N. E. 424, 1902). Called into special session to fill the gap created by these two Supreme Court decisions, the General Assembly repealed all of the constitutionally invalid municipal statutes and enacted the Municipal Code of 1902, which is still the basis of municipal statutory law today.

Between 1902 and 1912, however, dissatisfaction with the Municipal Code grew, especially in the larger cities which felt constricted by the limited authority granted municpalities by the Code. Out of this dissatisfaction emerged the Article XVIII at the 1912 Constitutional Convention. According to Professor Knight, who explained Article XVIII to the constitutional convention, it was intended to:

1. Empower each municipality to adopt a form of government of its own choosing;

2. Give each municipality authority to carry out municipal functions without statutory authority; and

3. Facilitate municipal ownership and operation of public utilities.

Very soon after the adoption of Article XVIII, the question arose as to whether the conflict clause in Section 3 modified both the powers of "local self-government" and "police powers". From Fitzgerald v. Cleveland, 88 O. S. 338, N. E. 512, 1913, to State ex rel. Canada v. Phillips, 168 O. S. 191, 151 N. E. 2d 722, 1958, and continuing to the present time, the court has consistently held that the conflict clause applies only to police and sanitary powers.

A second question raised in the aftermath of the adoption of Article XVIII was whether Section 3 confers the powers of local self-government on all municipalities. The existence of the separate section permitting charters, Section 7, raised the question of whether the powers of Section 3 are self-executing or if the powers granted by Section 3 come into play only when a charter is adopted. An early case, State ex rel. Toledo v. Lynch, 88 O. S. 71, 102 N. E. 670, 1913, held that a charter is a prerequisite to the exercise of the home rule powers under Section 3. In Perrysburg v. Ridgeway, 108 O. S. 245, 140 N. E. 595, 1923, however, the Supreme Court overruled Lynch and held that all municipalities derive their powers of local self-government from the Constitution and that the grant of powers in Section 3 is self-executing, not dependent on adoption of a charter.

From 1923 to 1953, the court reiterated the Perrysburg doctrine time and again, but also developed two devices to evade some of the impact of the doctrine, the concept of "statewide concern" and an extremely broad interpretation of the meaning of police regulations. In Morris v. Roseman, 162 O. S. 447, 123 N. E. 2d 419, 1954, however, the court, while specifically reaffirming Perrysburg, held that the procedures used in governing a noncharter municipality were controlled by statute through Article XVIII, Section 2, although the noncharter municipality's substantive powers exercised through those procedures were derived directly from Section 3 and were, therefore, not subject to statutory control.

The Morris decision brought up the question of the difference between procedural and substantive powers but did not give an adequate answer.

In 1960, the decision in Petit v. Wagner, 1970 O. S. 297, 164 N. E. 2d 574, 1960, almost totally eroded the Perrysburg doctrine. In Petit, the court held that the only powers of local self-government open to noncharter municipalities are those not covered by statute. In Leavers v. Canton, 1 O. S. 2d 33, 203 N. E. 2d 354, 1964, which reinforced Petit, the court's view of Section 3 as it applies to charter and non-charter municipalities was stated as follows:

1. Any ordinance dealing with police regulations passed by either a charter or a noncharter city, which is in variance with state law, is invalid.

2. An ordinance passed by a charter city, which is not a police regulation but deals with local self-government, is valid and effective even though it is at variance with a state statute.

3. An ordinance passed by a noncharter city, which is not a police regulation, is valid where there is no state statute at a variance with the ordinance.

4. An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with state statute.

The issue of what constitutes a conflict with general laws in the adoption and enforcement of "local police, sanitary and other similar regulations" was spelled out in an early case, Struthers v. Sokol, 108 O. S. 263, 140 N. E. 519 (1923), and was reaffirmed in later cases. According to Struthers, a conflict exists if (1) a municipality permits or licenses that which the state prohibits, or (2) the state permits or licenses that which the municipality prohibits. A conflict does not exist where (1) certain acts are omitted in an ordinance but covered by general law, (2) certain acts made unlawful by the municipality are not covered by general law, or (3) because there is a difference in penalties.

While it is clear from this brief discussion of home rule that its present interpretation is the result of a long and often conflicting history of judicial decisions, there has been a dearth of recent cases on the subject.

Comment:

The committee, after long and careful study of the home rule provisions and their current interpretations, has concluded that no change should be made in present Sections 3 and 7. This conclusion was based on several considerations, including:

1. The committee's belief that the state has sufficient power under the present interpretation of home rule powers to enact laws to solve the major urban problems facing Ohio municipalities in the areas of zoning, land use and planning; transportation; crime and law enforcement; housing; pollution, water supply and waste disposal; welfare; recreation and parks; economic development and job opportunities; and health.

2. The committee initially reached the conclusion that while the home rule powers themelves granted by the Constitution should not be altered, the language of Section 2, 3 and 7 should be changed in order to clarify the major questions that have arisen since adoption of Article XVIII in 1912. (The committee's draft of language to clarify these sections is contained in Appendix A.) In seeking the opinions of municipal officials and others whose daily work brings them into close contact with the home rule sections, however, the committee found little sentiment for changing sections 3 and 7.

As Daniel J. O'Loughlin stated recently,

> "After almost 60 years of interpretation since its adoption as a result of the Constitutional Convention of 1912, municipal home rule in Ohio has traveled an uncertain and sometimes curious path. However, a review of the case law decided during the past few years begins to evidence a pattern of change, and to some hopeful degree, consistency in construction." (Reference Manual for Continuing Legal Education Program, Ohio Legal Center Institute, publication No. 73-1972.)

It was the overwhelming opinion of the municipal officials and the Ohio Municipal League that any attempt to change the language of Sections 3 and 7 would almost certainly lead to another long battle over reinterpretation, with no guarantee of the final result. The committee, therefore, acquiesed to this opinion and withdrew the language changes it had considered.

3. The committee considered the provisions of the Model State Constitution of the National Municipal League (See Appendix B) and concluded that acceptance of it would reduce the powers currently enjoyed by Ohio municipalities under home rule and would place the local self-government of municipalities under the control of the General Assembly. The home rule section of the Model State Constitution, written by Dean Jefferson B. Fordham, proposes that only a municipal corporation which adopts a home rule charter be permitted to exercise any power or perform any function which is not denied to the corporation by its home rule charter, and is not denied to all home rule charter municipalities by statute, and is within such limitations as may be established by statute. The committee recommended against adoption of the home rule provisions of the Model State Constitution because it would be a step backward into Ohio home rule history, requiring a reduction in present home rule powers and an increase in state control of internal municipal affairs, which the committee does not believe would benefit municipal corporations in the state.

4. The committee considered strengthening the home rule provisions for noncharter municipalities so that the General Assembly would not have to concern itself with problems brought to it relating to details of governmental structure, but decided against such a recommendation. The committee's decision was based on four reasons: First, a change of this type is likely to wreak havoc upon the present interpretation of home rule (See No. 2, above). Second, when and if the courts reconsider the constitutional sections dealing with noncharter municipalities, the result could be a return to the Perrysburg doctrine which held that all noncharter municipalities derive their powers of local self-government directly from Section 3 of the Constitution,

thereby eliminating the General Assembly's present involvement in local self-government of noncharter municipalities. Third, the noncharter municipalities themselves have not expressed the view that this is an overriding concern to them. Finally, if a noncharter municipality feels that a problem does indeed exist in this area, it has recourse to the constitutional alternative to general law, adoption of a charter.

Article XVIII

Section 8

Present Constitution:

The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter". The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Committee Recommendation:

Section 8 5. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ~~ten~~ SIX per ~~centum~~ CENT of the electors OF THE MUNICIPALITY, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next ~~regular municipal~~ GENERAL election ~~if one shall occur~~ OCCURRING not less than ~~sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid~~ SEVENTY-FIVE DAYS AFTER CERTIFICATION OF THE ORDINANCE TO THE ELECTION AUTHORITIES, OR AT A SPECIAL ELECTION TO BE CALLED AND HELD NOT LESS THAN SEVENTY-FIVE DAYS AFTER SUCH CERTIFICATION. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question ~~shall~~ have voted in the affirmative.

CANDIDATES FOR SUCH COMMISSION SHALL BE NOMINATED BY PETITION OF ONE PER CENT OF THE ELECTORS OF THE MUNICIPALITY FILED WITH THE ELECTION AUTHORITIES NOT LESS THAN SIXTY DAYS PRIOR TO SUCH ELECTION. CANDIDATES SHALL BE DECLARED ELECTED IN THE ORDER OF THE NUMBER OF VOTES RECEIVED, BEGINNING WITH THE CANDIDATE RECEIVING THE LARGEST NUMBER. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF. THE HOLDING OF A PUBLIC OFFICE DOES NOT PRECLUDE ANY PERSON FROM SEEKING OR HOLDING MEMBERSHIP ON A CHARTER COMMISSION, NOR DOES MEMBERSHIP ON A CHARTER COMMISSION PRECLUDE ANY SUCH MEMBER FROM SEEKING OR HOLDING OTHER PUBLIC OFFICE.

Any charter so framed shall be submitted BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION to the electors of the municipality at an election

to be held at a time fixed by the charter commission and within ~~one-year~~ NINETEEN MONTHS from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. THE CHARTER COMMISSION SHALL CERTIFY THE PROPOSED CHARTER TO THE ELECTION AUTHORITIES NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Not less than thirty days prior to such election the ~~clerk of the municipality~~ CHARTER COMMISSION shall ~~mail~~ CAUSE TO BE MAILED OR OTHERWISE DISTRIBUTED a copy of the proposed charter to each elector ~~whose name appears upon the poll or registration books of the last regular or general election held~~ therein OF THE MUNICIPALITY AS FAR AS MAY BE REASONABLY POSSIBLE. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of ~~such~~ THE municipality at the time fixed therein. IF SUCH PROPOSED CHARTER IS NOT APPROVED BY THE ELECTORS, THE CHARTER COMMISSION MAY RESUBMIT THE SAME, IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION AND WITHIN THIRTEEN MONTHS FROM THE DATE OF THE FIRST ELECTION ON THE PROPOSED CHARTER.

A CHARTER COMMISSION MAY ADOPT RULES FOR ITS ORGANIZATION AND PROCEDURES AND MAY FILL ANY VACANCY BY MAJORITY VOTE OF THE REMAINING MEMBERS OF THE COMMISSION.

Comment:

Section 8 provides for the procedures for electing municipal charter commissions and for the framing and submission to the electors of proposed municipal charters. The Local Government Committee recommends the charter commission method of proposing a charter as the only method that should be allowed by the Constitution. It is the committee's belief that no group, either by petition or through legislative action, should be permitted to submit a charter directly to the electors, without going through the deliberative process inherent in the commission method.

Several amendments proposed by the committee to Section 8 and 9 (Section 9 deals with amending municipal charters) closely parallel the proposed amendments to Article X, Section 4 (county charter commissions) which have already been adopted by the Constitutional Revision Commission. Inclusion of similar amendments to Sections 8 and 9 provides consistency, where possible and appropriate, to portions of both articles which deal with the same matters. The committee recognizes, however, that municipalities and counties are different entities, with some differing demands and requirements. Therefore, the committee's overriding standard in proposing constitutional amendments was not consistency for consistency's sake; close consideration was given to amending these two sections in order that their application would be improved or clarified.

Some of the amendments proposed for Section 8 are technical in nature and intended to remedy existing defects or amgibuities, while others represent significant departures from, or additions to, the existing provisions. Major substantive changes proposed by the committee are:

1. Changing the percentage of petition signatures required to place the charter commission question on the ballot from 10% to 6%.

2. Establishing uniform procedures for electing charter commissioners.

3. Clearly establishing the municipality's obligation to provide funding for a charter commission.

4. Allowing persons who hold other public office to be charter commission members at the same time.

5. Clearly establishing procedures required for submission of a proposed

charter to the electorate.

6. Allowing the charter commission to resubmit a defeated charter to the voters.

The proposed changes will be discussed, to the extent possible, in the order in which they occur.

1. The section number would be changed to Section 5.

2. The number of signatures on a petition to have the question of choosing a municipal charter commission placed on the ballot would be reduced from 10% to 6% of the electors. The committee determined that 10%, especially in large municipalities, is too great an obstacle; 6% is a sufficient number to discourage frivolous attempts, and still is reasonably within the power of a serious group of citizens to attain. The commission has already agreed to the same reduction for the county provisions. The suggestion that the question of choosing a commission be placed automatically on the ballot every twenty years was rejected because the process of getting the charter commission question on the ballot as presently established has proved very successful.

3. The responsibility for certifying whether a petition has a sufficient number of valid signatures is specifically given to the board of elections, which has the necessary facilities and personnel to perform this function. Under existing Section 8, the municipal official with whom the petition is filed has the responsibility of determining its sufficiency. The proposed amendment is identical to provisions already adopted by the Commission in the county amendments.

4. A regular municipal election is that general election held in November of odd-numbered years. The proposed amendment substituting "general election" for "regular municipal election" will permit the charter question to be placed on the ballot every year and, therefore, doubles the likelihood that the question will not require placement on the ballot in a special election, whether at the regular primary time or a specially-called election. The option of placing the Commission question on the ballot in a special election, however, is retained.

5. The proposed amendment would require certification of the ordinance for submission to the board of elections (which is the same procedure followed for tax levies and bond issues) not less than 75 days prior to the election, thus filling a gap in the present section. This is the same period of time required for submission of proposed constitutional amendments and by statute for preparation of absentee ballots. The Secretary of State is presently urging adoption, as far as possible, of a uniform 75-day deadline for submission of questions for elections. The Secretary of State does not believe a maximum time limit is necessary in the Constitution. This amendment is similar to provisions in the county sections already adopted by the Commission.

6. The present Constitution is silent in the area of procedures for electing municipal charter commissioners. The proposed amendment would establish uniform procedures for electing charter commissioners to which all boards of elections could refer. The amendment specifies the percentage of petition signatures necessary (1%) and the procedures for filing candidacies and determining who is elected. This amendment is parallel to present constitutional provisions on county charter commissions. The original county provisions were placed in the Constitution twenty-one years after the municipal sections and were based substantially on the earlier municipal sections. However, some provisions were added to the county sections in

order to fill gaps in the procedure that had become evident after enactment of the municipal sections. This amendment is intended to fill this gap in municipal procedures.

7. Controversy has arisen in some cases because there is no constitutional requirement clearly establishing the obligation of a municipality's legislative authority to provide the funds necessary for a charter commission to carry out its duties. A specific requirement to this effect in the Constitution would resolve any question concerning the existence of the duty to provide the means of carrying into effect the intention of the voters, expressed in the election, that the charter commission have the ability to perform its assigned function. This amendment is identical to the proposed county provisions already adopted by the Commission.

8. The amendment would allow a person holding other public office to be a member of a municipal charter commission at the same time. The Local Government Committee's original proposal with respect to county charter commissioners would have precluded another public office holder from serving as a member of a county charter commission. However, after considerable commission discussion and debate on this provision, the Commission amended the proposal to include a provision specifically permitting other public officeholders to be charter commissioners.

9. The present Constitution is silent on the vote required by a charter commission for submission of a proposed charter. Because of this, problems over the legitimate vote required have arisen. The proposed amendment would require an affirmative vote of a majority of the total number of members authorized to be elected to the Commission. This number would remain constant even if the number of members on the commission was diminished by death, resignation or disqualification.

10. A technical problem has arisen over the present constitutional provision "within one year". One year has been interpreted to be 365 days (366 in leap year), which means that if the charter commission is chosen at one general election and the general election for the following year is more than 365 days in the future, a special election to vote on the charter must be called. The proposed 19-month deadline would not only clear up this problem, but it would also give the charter commission adequate time to do a thorough job, and would allow time for public comment and study of the proposed charter.

11. The procedure for placing the proposed charter before the voters is presently unclear, and if it is interpreted to require submission to a municipality's legislative body before being sent to the board of elections, the legislative body has an opportunity to delay its submission. The amendment specifically provides for direct submission by the charter commission to the board of elections not less than 75 days before an election.

12. Because the proposed amendment provides for direct submission of the proposed charter to the board of elections, the charter commission, rather than the clerk of the municipality, is charged with the responsibility of distributing copies of the proposed charter to electors. Problems have arisen in the past over failure of the municipality to allocate money or personnel to mail copies of the charter to the electorate, despite the dity to do so which is made explicit in the committee's proposed amendment. The proposed amendment is so worded as to allow the charter commission to be given assistance in printing and distribution of the charter by volunteer groups such as the League of Women Voters.

13. Technical problems have arisen dealing with the distribution of copies of the proposed charter "to each elector whose name appears upon the poll or registration books..." because of the differences between registration and nonregistration counties. The proposed amendment makes clear that what is required is an attempt to mail or otherwise distribute a copy to each elector in so far as may be reasonably possible, and does not actually require that every elector receive a copy. The amendment does not recognize newspaper publication of the charter as meeting the requirements for distributing a copy of the charter to each elector, although the amendment does allow door-to-door distribution when feasible.

14. Presently a charter commission has only one opportunity to submit a proposed charter to the electors. The proposed amendment would give the charter commission the opportunity to resubmit, or revise and resubmit, the charter at the following general election. In the case of a close vote initially, or where the commission believes it is able to identify the objectionable features of the proposed charter or the reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new commission and a two-year delay in submission, might be advantageous.

15. Although few insurmountable procedural problems have arisen to date in regard to the functioning of charter commissions, a constitutional provision that gives specific powers over adoption of rules and procedures and the filling of vacancies to the charter commission will eliminate any question of where this power lies.

Article XVIII

Section 9

Present Constitution:

Section 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

Committee Recommendation:

Section 9 6. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ~~ten~~ SIX per ~~centum~~ CENT of the electors of the municipality, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 5 as to the submission of the question of choosing a charter commission; and NOT LESS THAN THIRTY DAYS PRIOR TO THE ELECTION THEREON, copies of proposed amendments ~~may~~ SHALL be mailed OR OTHERWISE DISTRIBUTED BY THE CLERK OF THE LEGISLATIVE AUTHORITY TO ~~the electors as hereinbefore provided for copies of a proposed charter;~~ EACH ELECTOR OF THE MUNICIPALITY AS FAR AS MAY BE REASONABLY POSSIBLE, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality IMMEDIATELY UPON ITS APPROVAL BY THE ELECTORS UNLESS ANOTHER TIME IS SPECIFIED IN THE PETITION OR ORDINANCE PROVIDING FOR SUBMISSION OF THE AMENDMENT. WHEN MORE THAN ONE AMENDMENT IS SUBMITTED AT THE SAME TIME, THEY SHALL BE SO SUBMITTED AS TO ENABLE THE ELECTORS TO VOTE ON EACH SEPARATELY. IN CASE OF CONFLICT BETWEEN THE PROVISIONS OF TWO OR MORE AMENDMENTS SUBMITTED AT THE SAME ELECTION, THE AMENDMENT WHICH RECEIVES THE HIGHEST AFFIRMATIVE VOTE NOT LESS THAN A MAJORITY SHALL PREVAIL. AN AMENDMENT SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after the adoption by a referendum vote.

THERE MAY BE SUBMITTED TO THE ELECTORS OF ANY MUNICIPALITY HAVING A CHARTER THE QUESTION "SHALL A COMMISSION BE CHOSEN TO AMEND OR REVISE THE CHARTER OF THE (CITY OR VILLAGE) OF _____?" AND A CHARTER COMMISSION MAY BE ELECTED FOR SUCH PURPOSE, IN THE MANNER PROVIDED IN SECTION 5 AS TO THE QUESTION OF CHOOSING A CHARTER COMMISSION. SUCH CHARTER COMMISSION MAY FRAME AND SUBMIT TO THE ELECTORS OF THE MUNICIPALITY, IN THE MANNER PROVIDED IN SECTION 5 FOR THE SUBMISSION OF A PROPOSED CHARTER, ONE OR MORE AMENDMENTS TO THE EXISTING CHARTER OR A NEW OR REVISED CHARTER FOR THE MUNICIPALITY. ANY SUCH AMENDMENT OR NEW OR REVISED CHARTER SHALL BECOME EFFECTIVE, IF APPROVED BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING THEREON, AT THE TIME SPECIFIED THEREIN.

A CHARTER MAY BE REPEALED IN THE MANNER PROVIDED IN THIS SECTION FOR THE AMENDMENT OF A CHARTER, BY THE SUBMISSION TO THE ELECTORS OF THE MUNICIPALITY OF THE QUESTION "SHALL THE CHARTER FORM OF GOVERNMENT FOR THE (CITY OR VILLAGE) OF _____ BE REPEALED?" THE EFFECTIVE DATE OF SUCH REPEAL AND THE ELECTION OF THE OFFICERS OF THE GOVERNMENT OF THE MUNICIPALITY TO BECOME EFFECTIVE UPON SUCH REPEAL SHALL BE AS PROVIDED BY GENERAL LAW EXCEPT AS OTHERWISE PROVIDED IN A CHARTER APPROVED BY THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS OR SUBSEQUENT TO APPROVAL OF THE QUESTION OF REPEAL.

IF THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER FORM OF GOVERNMENT IS SUBMITTED TO THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS THE SUBMISSION OF THE QUESTION OF THE ELECTORS OF A COMMISSION TO REVISE THE CHARTER OR THE QUESTION OF THE ADOPTION OF A NEW OR REVISED CHARTER THAT QUESTION WHICH RECEIVES THE LARGEST NUMBER OF AFFIRMATIVE VOTES, NOT LESS THAN A MAJORITY, SHALL PREVAIL. THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER SHALL NOT BE SUBMITTED TO THE ELECTORS AT ANY TIME AFTER A COMMISSION HAS BEEN CHOSEN TO FRAME A NEW OR REVISED CHARTER FOR THE MUNICIPALITY AND BEFORE THE SUBMISSION OF SUCH NEW OR REVISED CHARTER TO THE ELECTORS, OR WITHIN TWO YEARS FOLLOWING THE ADOPTION OF A CHARTER OR A NEW OR REVISED CHARTER.

Comment:

Section 9 provides the procedures for (1) submitting municipal charter amendments to the electorate; (2) choosing an elected commission to revise the charter; and (3) repealing an existing charter.

As discussed in the commentary on Section 8, several amendments to Section 9 were framed to parallel proposed amendments to Article X, Section 4, which deals with county charter commissions. As with Section 8, some of the amendments proposed for Section 9 are technical changes designed to remedy existing defects or ambiguities. Others, however, represent significant departures from the existing provisions.

For a discussion of amendments in the section which parallel proposed amendments in Section 8, the reader will be referred to specific points of the commentary to Section 6. Proposed amendments unique to Section 9 will be discussed, when possible, in the order in which they occur.

1. The section number would be changed from 9 to 6.

2. Number of petition signatures reduced from 10% to 6%. See No. 1, Section 8.

3. Certification of signatures by the board of elections. See No. 2, Section 8.

4. Distribution of charter amendments to electors. See No. 12, Section 8.

5. Present constitutional provisions do not provide for designation of a specified time an amendment approved by the voters becomes part of the charter. This amendment provides for a uniform time (immediately) for inclusion of an approved amendment, yet retains the voters' power to specify a different time in the charter amendment.

6. Presently the Constitution does not provide procedures for adoption if there is a conflict between provisions of two or more charter amendments. A 1931 opinion by the Ohio Attorney General (3626) confirmed the present procedure (under Article II, Section 1b), which, by the proposed amendment, would become a specific provision of

the Constitution. That procedure provides that the amendment which receives the highest affirmative vote not less than a majority shall prevail.

7. No present provision specifically provides that a charter amendment must relate to only one subject. Inclusion of such a provision would specifically bring municipal charters under the same requirements for single-subject amendments as constitutional provisions for amending the state constitution and county charters, and for bond issues and tax levies. Single-subject amendments, as provided for in the proposed provision, would permit submission as a single amendment proposals that may affect or include more than one section of the charter.

8. Presently there is no constitutional provision for procedures for a comprehensive revision of a charter. While some municipal charters permit appointment of charter revision advisory commissions, recommended amendments must first pass through the municipality's legislative body which has the power to change or reject a proposed amendment. The constitution does provide a procedure for direct placement of a proposed amendment on the ballot (through petition of a percentage of the electors), but this type of approach is capable of resulting only in piecemeal amendment or revision. The proposed amendment would allow the question of choosing a commission to revise or amend the charter to be placed before the voters. Any amendment framed and approved by the duly-elected commission, according to the procedures prescribed in proposed Section 8, would then be directly submitted to the voters, eliminating the legislative body's present prerogative to change or reject amendments submitted to it. This amendment is advocated by the Citizens League of Greater Cleveland. The Citizens League's intention, in assisting in the drafting of the 1912 provision, was that, after the first charter was adopted, additional charter commissions could be convened as years went by in the same way and with the same powers as the original charter commission. This amendment fulfills the League's original intention. The committee believes, however, that proposals submitted by charter revision advisory groups, appointed by mayors or councils to make recommendations, should remain subject to the appointing body's approval.

9. In order to allow an elected charter revision commission flexibility in proposing changes and so as to avoid possible legal conflicts over the differences between amending and revising a charter, the proposed amendment dealing with submission of the question of electing a charter revision commission specifically provides that "a commission be chosen to amend or revise the charter..." It is the committee's feeling that it should be the Revision Commission's prerogative to decide whether its proposed amendments are substantial enough to constitute a revision.

10. There is no present constitutional provision for repeal of a charter. Charter repeals that have occurred have been based on an old Supreme Court decision (Youngstown v. Craver, 127 O.S. 195, 187 N.E. 715, 1933) which held that a charter municipality may abolish its charter by initiative procedures. While the Constitution does provide the authority and procedures for adopting and amending charters, it does not make express provision for abrogation of a charter. In upholding resort to the initiative to achieve charter repeal, the court, in effect, held that a charter is a matter which a municipality may control by legislative action. This interpretation is considered faulty by many legal authorities and they believe the Supreme Court's holding might not now stand up if challenged in the courts. Therefore, the committee believes it is best to include specific provisions in the Constitution providing for repeal and specifying its procedures.

11. The committee has proposed an amendment which would deal with the possibility that a conflict might arise if the question of repeal of a charter were

submitted to the electorate at the same election as the submission of the question of adoption of a new or revised charter. The proposed amendment provides that in the case of conflicting questions on the same ballot, the question which receives the larger number of affirmative votes above a majority shall prevail.

12. Because the committee believes stability is an overriding principle of municipal government, it has included in its proposed provisions for repeal the prohibition against placement of a repeal question on the ballot any time after a revision commission has been chosen or before submission of a new or revised charter by the commission, or two years following adoption of a charter, or a new or revised charter. This not only insures an element of stability in governance, but also allows a charter, if it has been adopted or revised, a period of time in which to prove its worth.

Article XVIII, Section 13

Article XIII, Section 6

Present Constitution:

Article XVIII, Section 13

Section 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Article XIII, Section 6

Section 6. The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

Committee Recommendation:

Section ~~13~~ 7. Laws may be passed to limit the power of municipalities to levy taxes AND ASSESSMENTS and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Repeal Section 6 of Article XIII.

Comment:

Article XIII (corporations) was adopted in 1851 in part to prohibit the legislature from enacting special acts for the government of municipal corporations, a practice which had been greatly abused by the legislature since the Constitution of 1802 was adopted. Section 6 authorized the legislature to pass general laws for the organization of cities and incorporated villages. As noted earlier, in spite of the "general law" requirement, an extensive classification structure of Ohio municipalities was created by the legislature and eventually declared unconstitutional by the state Supreme Court in 1902. Adoption of Article XVIII in 1912 was an attempt to prevent any future efforts at overclassification. The first portion of Section 6 of Article XIII (General Assembly to provide for organization of cities and villages by general law) is provided in Sections 1 and 2 of Article XVIII.

Article XIII, section 6 also authorizes the General Assembly to restrict the powers of municipalities to levy taxes and assessments, borrow money, contract debts and lend their credit. Article XVIII, Section 13 authorizes the passage of laws to limit the power of municipalities to levy taxes and incur debt for local purposes. Except for the provision about assessments, Article XIII, Section 6 duplicates present Article XVIII, Section 13. Furthermore, there is no case law under Section 6 which interprets that section that would not also apply to Section 13.

The framers of Article XVIII in 1912 apparently intended to repeal Article XIII,

Section 6; however, its repeal was inadvertently forgotten or overlooked.

The committee proposes repeal of Article XIII, Section 6 in order to eliminate the duplication with Section 13 and to add to Section 13 authorization for the General Assembly to limit municipal power to levy assessments, the only nonoverlapping provision of Section 6.

Section 13 would become section 7 in the committee's proposed rearrangement of sections in Article XVIII.

Article XVIII

Section 4

Present Constitution

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of such utility.

Committee Recommendation:

No change, except to change the section number from 4 to 8.

Background of Section 4:

The sections of Article XVIII dealing with utilities (4, 5, 12, 6) were designed by the Constitution's framers to give municipalities powers completely independent of the General Assembly so that municipalities could have flexibility in dealing with their individual utility problems and needs.

Present Section 4 provides municipalities the right to acquire, construct, own, lease or operate a public utility for its residents.

The courts have consistently upheld the high degree of independence and powers relating to ownership and operation of public utilities which were granted municipalities under Section 4. However, the courts have ruled against complete municipal autonomy in the area of surplus utility revenues and have refused to permit the use of such revenues to pay general municipal expenses. The Supreme Court decided that a charge for a utility which produced an excess over the amount required to cover the cost of the utility service constituted a tax, and taxes are subject to regulation by the General Assembly pursuant to Article XVIII, Section 13 and Article XIII, Section 6 of the Constitution. (Cincinnati v. Roettinger, 105 O. S. 145, 137 N. E. 6, 1922; Hartwick Realty Co. v. City of Cleveland, 128 O. S. 583, 192 N. E. 880, 1934; City of Lakewood v. Rees, 132 O. S. 399, 8 N. E. 2d 250, 1937).

Section 4 also gives municipalities the power to acquire land for utility purposes by condemnation, even though the land is outside the municipality. That power has been upheld in the courts. (Toledo v. Link, 102 O. S. 336, 131 N. E. 796, 1921). Problems have arisen, however, when one municipality attempts to condem land which is used for a public purpose by another municipality. This produces a conflict between co-equal governmental units with co-equal powers of eminent domain. In Blue Ash v. Cincinnati, 173 O. S. 345, 182 N. E. 2d 557 (1962), the Supreme Court held that the power to condemn granted in Section 4 did not extend to the public lands of another municipality that are maintained as part of that municipality's governmental function, unless such power is expressly authorized by statute or arises by necessary implication. The Supreme Court in Britt v. Columbus, 38 O. S. 2d 1 (1974) decided that the right of eminent domain is not available if the property acquisition is solely for the purpose of supplying the customers outside the municipal border. While there is a statutory eminent domain power covering this circumstance, the municipality must make payment in lieu of taxes on such property.

Comment:

During its deliberations on the utility sections, the Local Government Committee considered alternatives to the present Section 4 that would alleviate the negative impact of the Roettinger, Blue Ash and Britt decisions.

On the issue of surplus utility revenues to be used for general municipal expenses other than utilities, the committee determined that, while it does not agree with the theory behind Roettinger that such revenues constitute a tax, a change in present Section 4 is not necessary, for several reasons.

1. As a matter of practical politics, municipal officials are reluctant to raise utility rates, even when the need is compelling. The political process effectively acts to keep rates from rising to a point where they would create surplus funds. Municipal officers are very unlikely to attempt to fund all or a large part of the operation of their municipality from utility rates for fear the an angry electorate might replace them at the first opportunity.

2. Municipalities have a common law obligation to provide utility products and services at reasonable rates, so rates cannot be excessive or confiscatory.

3. While municipalities are restricted by common law and the effects of the Roettinger decision from charging rates in excess of utility operating costs, the accumulation of a fund for the reasonable repair and replacement of the utility is allowed.

4. No municipal or citizens group has proposed changing present Section 4. The Ohio Municipal League believes that, while the Roettinger decision does impose a theoretical restriction on municipalities, even if Section 4 were amended the results would be the same--a municipality would not set utility rates at a level high enough to raise revenues.

The committee recommended against amending Section 4 in order to undo the negative effects of the Blue Ash and Britt decisions. It is the committee's conclusion that the General Assembly could set out the conditions under which one municipality's utility needs are of higher priority than another's, permitting condemnation of one municipality's property by another. It believes that this would be very difficult to do in the Constitution and is essentially statutory material.

A second issue dealing with eminent domain concerns the statutory provision for payment in lieu of taxes by a municipality that acquires utility property from another municipality. While the Municipal League expressed some interest in amending Section 4 to make it clear that the power of condemnation granted in Section 4 extends to the acquisiton of property by a municipality solely for utility expansion outside its territory, the committee determined that municipalities have statutory powers, if not power directly from the Constitution, to take property outside their territory solely for such a purpose. The committee also concluded that the staturtory requirement of payment in lieu of taxes could be amended by the General Assembly in order to handle problems relating to those payments and concluded that the General Assembly is the proper forum for making such a decision, which should be viewed from the perspective of all units of government competing for taxes and weighing their various needs.

Article XVIII

Section 5

Present Constitution:

Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Committee Recommendation:

No change except to change the section number from 5 to 9, and the reference in the section to section 8 to section 5.

Comment:

Section 5 provides for a referendum on any ordinance passed by a municipality to acquire, construct, own, lease or operate a public utility. The courts have consistently held that the only ordinance subject to referendum under Section 5 is that ordinance which first begins the process of exercising Section 4 powers, as opposed to subsequent ordinances which are merely a continuation of or additon to the first. (Fostoria v. King, 154 O. S. 213, 94 N. E. 2d 697, 1950.)

The committee determined that present Section 5 does not pose any problems for municipalities that need clarification in the Constitution. It also concluded that it is not possible, nor even desirable, to constitutionally define what specific kinds of ordinances are subject to referendum under Section 5. Therefore, the committee recommends that no change be made in present Section 5.

Article XVIII

Section 12

Present Constitution:

Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefore beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Committee Recommendation:

Section ~~12~~ 10. Any municipality which acquires, constructs, IMPROVES, or extends any public utility and desires to raise money for such purposes, OR TO REFUND OR PROVIDE FOR REFUNDING AT ANY SUBSEQUENT DATE ANY BONDS OR NOTES, INCLUDING GENERAL OBLIGATION BONDS OR NOTES, ISSUED AT ANY TIME FOR SUCH PURPOSES, may issue ~~mortgage~~ bonds AND NOTES IN ANTICIPATION OF BONDS therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such ~~mortgage~~ bonds AND NOTES issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the ~~property and~~ revenues of such public utility, AND MAY BE FURTHER SECURED BY A MORTGAGE UPON ALL OR PART OF THE PROPERTY OF SUCH PUBLIC UTILITY WHICH MORTGAGE MAY PROVIDE FOR ~~including~~ a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Comment:

Section 12 permits municipalities to issue revenue bonds, which are not general obligation debt of municipalities, to purchase, construct, or extend a utility. These bonds require a mortgage on the utility property and the grant of a franchise upon foreclosure to the bondholder.

The Supreme Court, in City of Middletown v. City Commissioners, 138 O.S. 596, 37 N.E. 2d 609 (1941), ruled that Section 12 is self-executing and self sufficient, and that utility mortgage revenue bonds issued strictly within its terms are not affected by other parts of the Constitution or by the Uniform Bond Act.

The amendments to Section 12 proposed by the committee include four specific changes:

1. It specifically permits the issuance of bonds to improve the utility. Although municipalities presently possess this power, addition of the word "improve" to "any municipality which acquires, constructs, improves or extends any public utility. . ." makes it clear that bonds can be issued for that purpose.

2. It permits the issuance of notes in anticipation of bonds. This change

would allow for temporary financing, especially during the period of construction, until final costs could be determined in order to issue bonds. This procedure is the same as in general obligation financing, and in certain other kinds of revenue bond financing.

3. It removes the designation of the bonds as "mortgage" bonds and makes optional the provision of a mortgage on the property or for a mortgage and a franchise to operate as security. Many municipal officials, as well as many bond underwriters and investment bankers, believe that the concept of a mortgage on the utility is archaic and that no municipality would default and allow a bondholder to take over a utility except as a last resort in an economic depression. Furthermore, officials believe bond purchasers are primarily interested in the revenue anticipated by the bonds, not in the mortgage or franchise. However, if a municipality and its bond underwriters, bankers, and financial advisors believe that the security of a mortgage, with or without a franchise, is needed, the proposed amendment permits this.

4. It allows refunding of notes or bonds, including those of general obligation, by revenue bonds. Section 12 now provides that revenue bonds can be issued only for the purposes of acquiring, constructing or extending a utility, so that if general obligation bonds have already been issued, the utility has already been acquired, constructed or extended. Therefore, under the present section, it is not clear that revenue bonds could be used simply to refund the general obligation debt. The proposed amendment also would permit either immediate refunding (refunding outstanding obligations at their maturity) or advance refunding. The committee believes that the refunding of revenue bonds by general obligation bonds could be provided by the General Assembly under existing law, and therefore, is not essential in the Constitution.

The committee also recommends that the section number be changed from 12 to 10 in order to place the section in logical sequential order with the other utility sections in Article XVIII.

The committee's recommendations for changes in Section 12 are based on several considerations. The committee determined that municipalities needed more flexibility and the changes proposed are intended to make local decision-making in the area of utility financing more flexible in that financing arrangements could be tailored by the municipality, with advice from underwriters, investment bankers and financial advisors to fit particular needs and requirements.

The committee also believes that the proposed amendment to Section 12 will allow municipalities to more readily take advantage of changes in the economic situation as it applies to bonding. Municipalities will no longer be tied to a restrictive means of raising money for utility construction or improvement, but instead will be able to explore other bonding methods to raise needed revenues.

Article XVIII

Section 6

Present Constitution:

Section 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty percent of the total service or product supplied by such utility within the municipality, provided that such fifty percent limitation shall not apply to the sale of water or sewage services.

Committee Recommendation:

Section 6 11. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water, ~~or~~ sewage, TRANSPORTATION, OR SOLID WASTE MANAGEMENT services.

Comment:

Section 6 limits the amount of utility products or services that a municipality may sell outside its borders to 50% of the total service or product supplied by the utility within the municipality. An exemption to the 50% limit for water and sewage services was added to the Constitution in 1953.

The committee decided to add transportation and solid waste management to the list of exemptions. This recommendation is based on the growing realization that the problems arising in these service areas cannot be solved adequately on the level of a single municipality. The large outlays needed, in terms of planning and operating costs, facilities and equipment, to begin or improve existing mass transit systems and solid waste management systems necessitates large scale operations in order to benefit from economies of scale. Moreover, these two types of services are matters of areawide concern. Coordinated and efficient service, that will adequately meet the needs of citizens and the requirements of the state and federal governments, can probably be provided only on a larger scale. It is the committee's intention that inclusion in proposed Section 6 of the term "solid waste management" would cover establishment of resource recovery plants for recycling or reuse of solid waste materials. Such plants need large areas, very often entire metropolitan areas, from which to collect in order to be economically viable.

The committee did consider repeal of the 50% limitation on utility products or services sold by a municipality outside its borders. The only major municipal utilities to which the 50% restriction now applies are the municipal electric utilities and the few municipally-owned gas companies.

The 50% restriction was originally placed in the Constitution at the urging

of the private electric utilities in order to overcome some of the competition they were facing from rural electric co-ops. The framers of the section realized that economically, a municipality had to build in a surplus electric capacity when it erected its generating facility in order to be able to meet future electrical needs of its residents without expansion. They also knew that this surplus electricity could be sold outside the municipality in competition with private utility companies which did not enjoy the tax exemptions of municipal utilities. Therefore, the framers agreed upon the 50% limitation on municipal utility products or services sold outside a municipality in order to balance the economic needs of both private and municipal utility owners. The Local Government Committee concluded that the 50% restriction should be retained for municipally-owned electric and gas utilities.

Article XVIII

Section 10

Present Constitution:

A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Committee recommendation:

No change, except to change section number from 10 to 12.

Comment:

Section 10 authorizes municipalities, when appropriating or otherwise acquiring property for public use, to acquire property in excess of that actually needed for the improvement and to sell such excess. It also permits them to borrow money and issue revenue bonds to buy the excess property.

The intent of the framers of Section 10 in 1912 was to allow municipalities making improvements to acquire, either by purchase or condemnation, more property than needed for the improvements and then to sell the excess property, which would have increased in value because of the improvements, in order to offset a substantial portion of the cost of improvements.

The courts, however, have ruled that under the 14th Amendment to the U.S. Constitution, municipalities could not use the excess condemnation provisions of Section 10 unless the municipality, in its ordinance, clearly specified a valid purpose, other than as a means of raising revenue, for the taking, as well as showing its necessity. (Cincinnati V. Vester, 33 F. (2d) 242, (aff. by 281 U.S. 439); and East Cleveland v. Nau, 124 O. S. 433.) The interpretation of Section 10 as regards the Cincinnati and East Cleveland decisions, in effect. limits municipalities to eminent domain powers they already possessed in Article XVIII Section 4 and by statute, and negates the original intention of the section's framers.

However, Section 10 has been cited by the Ohio Supreme Court as specifically authorizing acquistion of property for urban renewal purposes. In State ex rel. Bruestle v. Rich, 159 O. S. 13, the court ruled that even if purchase or condemnation of real estate involves acquisition of a greater portion than actually necessary to accomplish the purpose of eliminating slum conditions and providing against their recurrence, this acquisition is specifically authorized by Section 10.

Because of the section's significance to urban renewal, the committee recommends retaining the section in the constitution changing only the number even though the original purpose of the section seems no longer valid.

Article XVIII

Section 11

Present Constitution:

Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per centum of the cost of such appropriation.

Committee recommendation:

No change, except to change section number from 11 to 13.

Comment:

Section 11 provides for the assessment of property to finance local improvements. Identical provisions are provided for by statute, Section 727. 08 of the Revised Code.

The committee does not believe that there are any problems with Section 11 that necessitate constitutional remedies, nor is there any sentiment for changing it. Therefore, the committee recommends that no change be made in Section 11.

Article XVIII

Section 14

Present Constitution:

All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The precentage of electors required to sign any petition provided for herin shall be based upon the total vote cast at the last preceding general municipal election.

Committee recommendation:

No change.

Comment:

Section 14 requires that the election authorities prescribed by general law must conduct all elections and submissions of questions authorized in Article XVIII. It also requires that the percentage of signatures needed be based upon the total vote in the last general municipal election.

The committee is not aware of any constitutional problems with present Section 14 and, therefore, recommends that no change be made in it.

II Townships

Article X

Section 2

Present Constitution:

The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such powers of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.

Committee recommendation:

Repeal Section 2 and enact a new Section 2 to read as follows:

Section 2. THE GENERAL ASSEMBLY SHALL PROVIDE BY GENERAL LAW FOR THE ORGANIZATION, CONSOLIDATION, DIVISION, DISSOLUTION, ALTERNATION OF BOUNDARIES, AND GOVERNMENT OF TOWNSHIPS.

THE GENERAL ASSEMBLY MAY BY GENERAL LAW DIVIDE TOWNSHIPS INTO TWO CLASSES, ONE OF WHICH SHALL BE DESIGNATED THE URBAN TOWNSHIP CLASS: ESTABLISH CRITERIA FOR SUCH CLASSIFICATION: PROVIDE THE METHOD OF TRANSITION FROM ONE CLASS TO THE OTHER: AND PROVIDE ALTERNATIVE FORMS OF TOWNSHIP GOVERNMENT FOR URBAN TOWNSHIPS, BUT NO ALTERNATIVE FORM SHALL BECOME OPERATIVE UNTIL SUBMITTED TO THE ELECTORS OF A TOWNSHIP AND APPROVED BY A MAJORITY OF THOSE VOTING THEREON UNDER REGULATIONS PROVIDED BY LAW.

NO ALTERNATIVE FORM SHALL BE SUBMITTED TO THE ELECTORS OF A TOWNSHIP FOR APPROVAL UNLESS PROCEDURES FOR ANNEXATION OF SUCH TOWNSHIP TO A CONTIGUOUS MUNICIPAL CORPORATION AND INCORPORATION OF SUCH TOWNSHIP AS A MUNICIPAL CORPORATION HAVE BEEN UNDERTAKEN AS PROVIDED BY LAW AND NEITHER ANNEXATION NOR INCORPORATION HAS BECOME EFFECTIVE BECAUSE OF THE LACK OF APPROVAL BY THE ELECTORS, OFFICERS, OR LEGISLATIVE AUTHORITY OF A POLITICAL SUBDIVISION OTHER THAN THE TOWNSHIP.

AN URBAN TOWNSHIP THAT ADOPTS AN ALTERNATIVE FORM OF GOVERNMENT MAY, EXCEPT AS LIMITED BY THE GENERAL LAW, ADOPT AND ENFORCE WITHIN THE LIMITS OF THE UNINCORPORATED TERRITORY OF THE TOWNSHIP ALL MEASURES FOR THE LOCAL SELF-GOVERNMENT OF THE TOWNSHIP, INCLUDING LOCAL POLICE, SANITARY, AND OTHER SIMILAR REGULATIONS, AS ARE NOT AT VARIANCE WITH THE GENERAL LAWS OR IN CONFLICT WITH THE EXERCISE BY A COUNTY OF ANY POWER AUTHORIZED BY THIS CONSTITUTION OR BY LAW: PROVIDED, THAT NO TAX SHALL BE LEVIED BY A TOWNSHIP EXCEPT AS AUTHORIZED BY LAW.

Comment:

The first paragraph of the proposed new section is intended to replace the present section 2, and to make clear the power of the General Assembly, which is implied in the present language, to create, alter, dissolve, and provide for the governments of townships. The language of this section parallels that of the proposed change in Section 2 of Article XVIII, relating to municipal corporations. In the opinion of the Committee, this language does not in any way alter the powers which the General Assembly presently possesses with respect to townships.

It is intended to make clear that the General Assembly does have such powers in the event that there might be a challenge based on the argument that townships existed before the adoption of the present Ohio Constitution.

The remainder of the section is entirely new, and is not derived from the Constitution or laws of any other state. It is intended by the committee to be a response to the needs of urban townships in Ohio.

Paragraph 2 of the proposed section begins with a provision for limited classification of townships. The General Assembly would be authorized to create two classes of townships, one to be designated the "urban township" class. The definition and criteria would be established by the General Assembly. Testimony presented to the committee indicated that there is a difference which should be recognized between the needs of those township areas, outside the municipalities, which are urban and heavily populated and those which are rural and sparsely populated. It was also indicated that two classes would be sufficient--that the problems of urban townships may differ from one another in degree but not in kind.

The remainder of paragraph 2 would permit the General Assembly to provide alternative forms of government for urban townships. No township could operate under an alternative form until such alternative form had been submitted to the electors of the township and had received a majority vote. Township officials have suggested such changes in the structure of township government as a larger governing body and authorization for the appointment of a township manager.

Paragraph 4 states that an "urban township" which adopted an alternative form would acquire from this constitutional provision powers of local self-government identical to those proposed by this Commission for counties except that, in case of conflict between a county ordinance and a township ordinance, the county would prevail. This exception is in accord with the committee's philosophy that county government should be given the first opportunity to solve metropolitan problems.

The committee gave very lengthy consideration to the requests of some township officials for greater powers and to the consequences of a constitutional grant of such powers. There was recognition that, in some cases of heavily populated townships, there are problems which cannot be dealt with effectively under present township provisions. It has been the philosophy of the committee to look to existing remedies before recommending constitutional changes. In this case, there are two such remedies: a majority of the property owners in territory adjacent to a municipal corporation may request annexation to a contiguous municipal corporation or a majority of the adult freeholders in an area may petition the county commissioners to incorporate. Therefore, in paragraph 3, it has been provided that no urban township may be permitted to vote on an alternate form until the township has attempted incorporation procedures and annexation procedures and both have been denied. However, because it is possible for both of these procedures to be thwarted by the actions of municipal corporations, relief is provided by the stipulations in paragraph 3 of the section.

The proposed new section reflects two basic premises of the Local Government Committee.

1. Strong county government should be encouraged and the county should be viewed as the unit of government most likely to solve areawide or regional problems in Ohio. This view is accepted as part of the Commission's position on local government and is embodied in the county recommendations already adopted by the Commission.

2. Another unit of government should not be created which duplicates an already existing unit.

It is the committee's judgement that an urban township, or urbanized portions of towhships, experiencing problems of a magnitude so great that they cannot be dealt with under existing powers, should be encouraged to seek incorporation and thereby receive municipal powers, or to seek annexation to an existing municipal corporation. If these two approaches are denied them, then they should be able to acquire the tools - structure and powers - necessary to solve their problems.

Background of Section 2:

Townships in Ohio were originally viewed as the basic form of government for rural areas. They were conceived of as administrative units of the county; they were created by the county, their officers were appointed by the county commissioners, and their functions were designated by the county for the purpose of carrying out county duties and responsibilities. Early in Ohio's statehood townships became, and remain today, units of government independent of the county, creatures of the General Assembly rather than the county. The county commissioners continue to determine to some extent, the size and shape of townships because of their role in annexation and in corporation. In many instances, townships and municipal corporations overlap; however, township government and services do not compete with municipal government and services within the boundaries of the municipal corporation.

Townships derive both governmental structure and powers from the legislature. Township officers have not changed since early in Ohio's statehood. Three township trustees and one township clerk are elected at large by township electors for a term of 4 years. They are elected, two at a time, in the odd-numbered years, when municipal officials are also elected. Township trustees are viewed more as administrative officials than legislative, although legislation in recent years giving townships permissive power to perform certain functions places more policy-making decisions in their hands than had previously been the case.

Originally, the main function of township officials was, and still is in many areas of the state, the maintenance of roads. Rural residents had little need of other governmental services. In recent decades, however, and particularly since the end of World War II, as people have moved from the city to the suburb and township population has increased at a substantially greater rate than city population or the population of the state as a whole, township residents in metropolitan areas are no longer self-sufficient but need essential urban services, such as a safe water supply and provisions for waste disposal.

There are approximately 1320 townships in Ohio testimony received by the local governmental committee indicated that the officials and residents of a small number of "urban" townships believe that they lack an adequate governmental structure and adequate powers to meet the needs of the residents. Because of the varying definitions of the term "urban township", the number of such townships in Ohio is given, variously, as 109, 92, 50 and other numbers. There are, according to the 1970 census, 109 townships with more than 5,000 people. (1)

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(1) A good example of both the increasing municipal functions of townships, and the problem of defining urban townships, is the recent enactment by the General

Four courses of action are available to townships or people in unincorporated areas struggling with urban needs: (1) they can seek additional powers, and a different governmental structure, from the General Assembly (powers have been added gradually, as they have been to county government, over the last few years, but no changes have been made in the basic governmental structure); (2) a majority of the property owners in territory adjacent to a municipal corporation can seek annexation to that municipal corporation; (3) a majority of the adult freeholders in an area can petition the county commissioners to incorporate; (4) townships can contract with the county or with a municipal corporation for the provisions of services. Although the power to contract may satisfy most needs for services, it cannot supply the need for ordinance-making power to regulate activities covered by general police powers, which some township officials have indicated that they need. An example of the latter presented to the committee is the power to require registration of itinerant salespersons, in order to protect township residents from unethical sales practices.

Under current Ohio statutes, both annexation and incorporation can be frustrated by a municipal corporation. In the case of annexation, when sought by the property owners of adjacent territory, the municipal corporation to which annexation is sought can, by council action, reject the annexation. In order for a proposed incorporation to take place, every municipal corporation within three miles of the boundary of the proposed corporation must adopt a resolution approving the incorporation unless it has rejected annexation of the same territory within the past two years. Municipal corporations supported the addition of the three-mile rule to the Revised Code in 1967, because they were concerned about losing their own ability to grow and expand their territory if incorporation of the territory on the fringes of the city was too easy. Indeed, municipalities in Cuyahoga county seem to have reached the no-growth point already, because of the pre-1967 incorporations. To what extent annexation or incorporation would be pursued by property owners in urban townships were it not for the potential "vetoes" by municipal corporations is not known.

Constitutional Provisions

The Ohio Constitution contains no basic provisions respecting township government such as are now found for counties and municipal corporations. Townships have had the same form of government and basic powers since early in Ohio's statehood; neither the 1851 nor the 1912 constitutional conventions dealt in any major way with either townships or counties. Until 1933, section 1 of Article X read: "The general assembly shall provide by law for the election of such county and township officers as may be necessary." In 1933, Article X was rewritten. It now provides for county charters, alternate forms of county government, and authorizes the General Assembly to provide for the government and organization of counties. The township provision, although rewritten and separated from the county provisions, was not significantly changed. Section 2 of Article X now read as follows:

> The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have

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Assembly of H.B. 513, which authorizes certain townships to establish a civil service commission for the employment, promotion, and discharge of township policemen and firemen. As originally introduced, H. B. 513 applied to "urban" townships defined as townships with a population of 25,000 or more persons (outside any municipal corporation) with a police or fire department of 10 or more full-time paid employees. As finally enacted, it applies to "civil service" townships (defined as townships with a population of 10,000 or more outside of any municipal corporation), with a police or fire department of 10 employees or more and with a civil service commission created pursuant to the act.

such powers of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.

The section speaks only about the election of township officers. This contrasts with the provisions in the constitution for both county and municipal corporations in which the General Assembly is required to provide by general law "for the organization and government" of counties (Section 1 of Article X) and to pass general laws to provide "for the incorporation and government of cities and villages" (Section 2 of Article XVIII).

Other references to townships and to township officers in the Constitution.

Township officers are elected in the odd-numbered years (with municipal officials) and have even-numbered terms not exceeding 4 years (Article XVII, sections 1 and 2). Section 7 of Article V, which requires direct primary elections for nominations for all elective state, district, county and municipal offices makes an exception for township officers unless petitioned for by a majority of the electors of the township. The Elections and Suffrage Committee has studied these sections but is not proposing any changes in the provisions relating to townships.

Section 1 of Article X permits townships, pursuant to general law, to transfer or revoke the transfer of any of their powers to the county, with county consent. The right of initiative and referendum must be reserved to the people of the township with respect to such transfers. No statutes have been enacted implementing these provisions. Section 3 of Article X, which provides for the powers a county may acquire with a county charter, presently resolves a conflict between county and township powers in favor of the township; the Commission's recommendation on this section, however, would remove this provision.

Just as townships do not acquire a form of government nor substantive powers from the Constitution, they do not acquire tax-levying power. Specifically, they are restricted by Section 2 of Article X to powers of local taxation as prescribed by law. They are subject to the 1% of true value property tax limit of Section 2 of Article XII and to the indirect debt limit of Sections 2 and 11 of Article XII, together with all other political entities which levy property taxes; the authority of the General Assembly to prescribe both taxing power and debt incurring power for townships is clearly supreme. Townships share in the 50% of the income and estate taxes which is required to be returned to specified political subdivisions of Section 9 1f Article XII. The Commission has recommended that this provision be retained in the Constitution.

Section 5 of Article VIII prohibits the state from assuming township (and other subdivision) debts. This section was studied by the Commission's Finance and Taxation Committee, and the Commission report on State Debt recommends no change in this section. Section 6 of Article VIII presently prohibits the General Assembly from passing laws authorizing townships, among others, to raise money for, or lend its credit to, or become stockholder in any joint stock company, corporation, or association. The Commission recommendation would alter this section to permit any local governmental entity, pursuant to law, to engage in these activities.

Townships as places of residence are mentioned in Section 1 of Article V (residency for the purpose of voting) and section 1g of Article II (signer of initiative or referendum petition to indicate township of residence if he resides outside a municipality). They are governmental units to be used in forming Ohio House of Representative districts (Section 7 of Article XI).

Article X

Section 7

The Committee recommends the enactment of a new Section 7 in Article X, as follows:

Section 7. THE LEGISLATIVE AUTHORITY OF A COUNTY, OR ELECTORS RESIDING IN THE UNINCORPORATED TERRITORY OF A COUNTY BY PETITION, MAY, AS PROVIDED BY LAW, SUBMIT TO THE ELECTORS OF SUCH UNINCORPORATED TERRITORY THE QUESTION WHETHER ALL OF SUCH TOWNSHIPS IN THE COUNTY SHOULD BE DISSOLVED. UPON APPROVAL OF A MAJORITY OF THE ELECTORS VOTING THEREON, SUCH TOWNSHIPS SHALL BE DISSOLVED AND THE COUNTY SHALL SUCCEED TO THE PROPERTY RIGHTS AND OBLIGATIONS OF SUCH TOWNSHIPS.

Comment:

Most of the current discussion about townships centers on the problems of heavily populated townships, and the lack of power in township officials. In some areas of the state township residents receive most of their services from the county and believe that the county is just as satisfactory a unit of government as the township to provide these services. In such counties, it seemed to the Committee, it should be possible to discontinue township government. It was pointed out that a provision in the Illinois Constitution authorizes the dissolution of all townships in a county by the voters.

The proposed new Section 7 would authorize the legislative authority of the county (the county commissioners) or electors residing in the unincorporated area of the county to have placed on the ballot the question of dissolving all townships in the county. The General Assembly would determine the number of electors required to sign a petition as well as other matters relating to the submission of the question. The question would be submitted only to the voters residing in the unincorporated area of the county. If a majority approved dissolution of all townships in the county, the county would succeed to the property, rights, and obligations of the townships.

The proposal is intended to make it possible for the residents of a county living outside a municipal corporation to determine by local action to come under one governmental unit--the county. It does not deal with the dissolution of a single township because that can be handled by legislation or, as a practical matter, by contract with other units of government.

Appendix A

Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it ~~shall have~~ HAS been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

A NONCHARTER MUNICIPALITY MAY VARY FROM THE GENERAL LAWS FOR THE GOVERNMENT OF THE MUNICIPALITY, BUT NO SUCH VARIANCE SHALL BECOME OPERATIVE IN THE MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

Section 3. NONCHARTER municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. THE EXERCISE OF ANY POWER OF LOCAL SELF-GOVERNMENT, OTHER THAN LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS, WHICH VARIES FROM GENERAL LAWS SHALL NOT BECOME OPERATIVE IN A NONCHARTER MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

Section 7. Any municipality may frame and adopt or amend a charter for its government and may~~; subject to the provisions of section 3 of this article;~~ exercise thereunder all powers of local self-government. SUCH A MUNICIPALITY MAY ADOPT AND ENFORCE WITHIN ITS LIMITS SUCH LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS AS ARE NOT IN CONFLICT WITH GENERAL LAWS.

Appendix B

Model State Constitution, Home Rule Section 8.02

Section 8.02. Powers of Counties and Cities. A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, not shall it include power to define and provide for the punishment of a felony.

THE OHIO MUNICIPAL LEAGUE 60 EAST BROAD STREET • COLUMBUS, OHIO 43215 • PHONE 221-4349

October 16, 1974

OHIO MUNICIPAL LEAGUE

POSITION ON

The Report of the Local Government Committee of the Ohio Constitutional Revision Commission

LOCAL GOVERNMENT COMMITTEE RECOMMENDATIONS AS TO MUNICIPAL CORPORATIONS

When the Local Government Committee determined to study constitutional provisions relative to municipal corporations, the Ohio Municipal League established as a top priority monitoring committee meetings and reviewing any recommendations. Thus the League's Special Study Committee was appointed. On several occasions the League's committee met with the Local Government Committee to discuss specific matters under consideration. In addition representatives of the Commission and the League staff met several times.

The League's Special Study Committee membership were pleased to find the commission's Local Government Committee a very hard-working group. They meticulously explored every alternative for the fair treatment of municipal government and municipal home rule including exhaustive research papers and open discussion sessions. We are quite satisfied with the approach taken by the committee and impressed by the quality of the work of the Local Government Committee and the commission staff.

Upon reviewing the committee's report on municipal corporations we find that in general they did a commendable job. We found only a few minor procedural matters relative to charters and charter amendments that we would like to have different.

Example: "When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately" (old Sec.9, new Sec.6, Art XVIII)

The League would have preferred that the Constitution resolve this matter in favor of permitting group amendments involving more than one subject but on balance, this minor point is far out weighed by the other portions of the report on municipal government.

The League was particularly pleased that the Constitutional Revision Commission has taken the attitude to not make changes in the area of home rule where problems do not presently exist. Had the provisions been substantively amended many years of court interpretation would lay ahead to redefine and clarify the revision to the home rule powers. As it now stands the cities and villages in Ohio are satisified that the current home rule provisions have been adequately defined through the years by the courts dating back to 1912, and that the case law is now stable.

Representatives of the League will be available to answer questions and request that they be permitted to present rebutal to the commission if necessary before the close of the hearing.

LOCAL GOVERNMENT COMMITTEE RECOMMENDATIONS AS TO TOWNSHIPS

The Ohio Municipal League would like to take this opportunity to emphatically oppose both recommendations for change as to township government (Article X, Sections 2 and 7).

Recommendation #1 (which would permit a) classification of townships b) adoption of alternate form of government by urban townships after annexation and incorporation attempts have failed c) home rule powers) presents two outstanding problems. This section would permit townships to initiate annexation and incorporation proceedings that they had predestined to fail. Quite to the contrary, township trustees should be caused to seek viable annexations and/or practical incorporations. Another problem exists dealing with home rule powers in unincorporated areas. The proposed amendment clearly would not permit township powers to conflict with like county powers. But what about municipal powers that apply in unincorporated areas

(i.e. subdivision regulations for 3 miles outside the municipal boundaries)? At a bare minimum such a proposed amendment should stipulate that municipal regulations applying to unincorporated areas should prevail.

Recommendation #2 (dissolution of townships) really solves no dilemma. Dissolution of all the townships in a county does not effect and is not exclusively the concern of just the residents of the unincorporated area. Rather the county government and the municipal governmental units within that county would be more greatly affected. Thus residents of the entire county should be permitted to vote upon such an issue.

The League does contend that portions of the present constitution relative to townships should remain unaltered. To substantiate this position we present the following reasons:

1. Townships should remain a transition form of government in urban areas. That is, township government should serve those needs of population centers located in unincorporated territory only during the period of transition from rural to urban. After the area is urbanized it should be available to existing municipal corporations by annexation. In limited circumstances, new communities may need to be incorporated as municipal corporations. But the criteria and method of incorporation should be determined by legislative action of the General Assembly, not constitutional mandate.

2. If expanded township powers are needed, then this should be a concern of the general assembly and not constitutionaly mandated.

3. Expanded township powers would only result in a municipal corporation by another name and indeed would bring about a further proliferation of local units of government at a time when consolidation should be encouraged. Expanded township powers would present all sorts of problems in the many cases where cities and villages are within existing townships. Furthermore expanded township powers would practically stop all future annexations of unincorporated territory to existing

municipalities and cause them to suffer economically and socially due to an inability to have reasonable expansion of their boundaries.

4. Giving townships more powers would make the future role of county government less viable. The goal should be to limit local government units providing other than special functions, to municipalities and counties. Please note that on page 39 of the Report the Local Government Committee states as follows:

> *"The proposed new section reflects two basic premises of the Local Government Committee.*
>
> *"1. Strong county government should be encouraged and the county should be viewed as the unit of government most likely to solve areawide or regional problems in Ohio. This view is accepted as part of the Commission's position on local government and is embodied in the county recommendations already adopted by the Commission.*
>
> *"2. Another unit of government should not be created which duplicates an already existing unit."*

5. Townships already have limited powers in most areas including: police, fire, road and street, and various legislative powers such as zoning, etc.; the only powers not granted are utility services and broad legislative powers. Taxing powers of township is governed by the legislature and they may now tax property and transient lodgings (hotel-motel tax on establishments in unincorporated areas). Please note that municipalities have more taxing powers only in the taxation of income and permissive motor vehicle license taxes (where the county has not levied the tax).

Finally, greater powers can be granted by the General Assembly, whether they be limited or more general powers.

Representatives of the League will be available to answer questions relative to our position as to townships and request that they may be permitted to present any rebuttal, if necessary, before the close of the hearing.

Respectfully submitted,

John E. Gotherman
Chief Counsel

JEG:jn

October 16, 1974

Ohio Constitutional Revision Commission
Local Government Committee
May 8, 1975

Inducements and Incentives for Industrial, Commercial, Research and Housing Development.

Generally

The catalog of inducements and incentives used by the states to attract industrial, commercial,research and housing development within their borders in the main involves either some kind of tax concession, or making available loans for the construction of facilities at interest rates somewhat lower than are available through customary commercial financial chanels. In the area of taxation, the list includes:

1. Elimination of the franchise tax, or an abatement of it;

2. Tax credits for new or expanded plants, or the installation of pollution control devices;

3. Tax liability offsets;

4. Elimination of sales taxes on certain items used in a manufacturing process;

5. Loss carry-forward incentives;

6. Elimination or abatement of personal property tax liability on items used in a manufacturing process or held by a manufacturer .

Also used by some states as incentives are tax credits for the development of new products, and the provision of free or subsidized job-training programs, particularly individuals living and/or working in chronic high unemployment areas.

The foregoing can be implemented by states through tax law or social welfare legislation which, if drafted so as not to interfere with such basic constitutional concepts as equal protection, poses no other constitutional problems. However, state or local government participation in the construction or rehabilitation of real property, which by its nature is a long-term process, and involves loans of money or credit, poses different problems for different states and localities arising from such prohibitions in many state constitutions as the lending of aid and credit by the state either to local governments or to private or public associations and corporations, prohibitions against the owning of stock by the state, and prohibitions against the assumption by the state of the debts of local governments. Local governments are often constitutionally prohibited from owning stock in associations and corporations, from joint ownership of property with them, or the extension of aid and credit to them. Many states also have constitutional requirements that at least real property be taxed by uniform rule according to value. Such clauses have often led to court tests as to whether, for example, real property improvements in an "urban renewal area" can properly be exempted from taxation, in whole or in part and for a specified period of time.

State constitutions, including that of Ohio, typically contain some provisions which make exceptions to, or attempt to circumvent, these constitutional prohibitions, particularly for industrial or commercial development, and more recently--but not in Ohio--for low and moderate income housing. The constitutional provisions and legislation which either implement them or is not inconsistent with them, reflect a variety of possible solutions. These solutions include:

1. Low-interest loans, most often from the proceeds of revenue bonds issued by local governments;

2. Loan guarantees by the state;

3. Installation of utilities and roads within a designated area by local government;

4. Real property tax abatements on construction or renovation within the designated area;

5. Economic, industrial and housing development corporations (public and private) on state or local level;

6. "Land banks"; granting of eminent domain powers to nonpublic development interests;

7. Tax increment financing--by which method the increase in real property tax yield finances the renewal project.

No one state has all of these programs. Ohio has some of them but cannot have others absent constitutional change. The reasons are discussed below.

Ohio

Constitutional provisions
Article VIII

Several provisions of the Ohio Constitution shape the tools available in this state for industrial and commercial development with government aid. Housing is not mentioned in the Constitution. Most of these provisions are restrictions either on the state or on local governments to act. These provisions are Sections 4, 5, 6 and 13 of Article VIII, and Sections 2, 6 and 11 of Article XII.

Section 4 of Article VIII states that the credit of the state shall not be given or loaned in aid of any association or corporation, and forbids the state from becoming a stockholder of, or joint owner with, any company or association.

In State ex rel. Saxbe v. Brand, 176 Ohio St. 44 (1964), the Supreme Court determined that the word "credit" as used in Article VIII, Section 4 includes within its meaning not only a loan of money but also the extension of the ability to borrow, and that if the latter were the result of a state statute, there would be a violation of the section even though no debts of the state, either indirect or contingent, were incurred. As the direct result of the Brand case, the people in 1965 adopted Section 13 of Article VIII. This section allows the states and its political subdivisions to make or guarantee loans on real property for industry, commerce,

distribution, and research, "provided that moneys raised by taxation shall not be obligated or pledged . . ." The section specifically exempts loans or guarantees made under this section from any other debt-related provision of the Constitution. The validity of this amendment was upheld in State ex rel. Burton v. Greater Portsmouth Growth Corporation, 7 Ohio St. 2d 34 (1966). It has been widely used since then, and is the constitutional cornerstone of development activity in Ohio. It has obvious limitations, among which are its scope (it does not include housing, for example) and it does not permit the pledge of the faith, credit and taxing power either of the state, its political subdivisions or their instrumentalities.

Section 5 of Article VIII prohibits the state from assuming the debts of any of its political subdivisions or of any corporation. The first part of Section 6 of Article VIII applies the same prohibition to counties, cities, towns, or townships as Section 4 applies to the state.

Article XII

Article XII, Section 2, among other things, prescribes that all real property shall be taxed by uniform rule according to value, and gives the General Assembly the power to determine the methods of taxation and exemptions therefrom. Section 6 of this Article prescribes that the state shall not contract any debts except as provided in the Constitution. Section 11 requires that no bonded indebtedness of the state or its political subdivisions shall be incurred or renewed unless provision is made, in the same legislation, for levying and collecting annually, by taxation, an amount sufficient to pay interest and to redeem the bonds at maturity.

Statutes

Ohio today has essentially three operative methods which permit a municipality to designate, take, and redevelop urban renewal areas, or offer them for redevelopment:

1. Under Chapter 719 (appropriation of property) in conjunction with Chapter 725. (urban renewal debt retirement fund);

2. Under Chapter 1724 (Community Improvement Corporations);

3. Under Chapter 1728 (Community Urban Redevelopment Corporations)

Under Chapter 725, the municipality issues revenue bonds for urban renewal purposes through a resolution of its governing body, and independent of whether or not there exists a separate urban renewal agency.

Under Chapter 1724, a community improvement corporation may issue revenue bonds for industrial, commercial, distribution and research development, as the designated agent of a county, municipality or a county and one or more municipalities. A community improvement corporation also serves as the agent for the receipt of federal program funds for urban renewal, currently the Housing and Community Development Act of 1974, which is discussed later in this memorandum. The urban redevelopment corporations provided for under Chapter 1728, on the other hand, are private corporations, which may be organized for profit or as nonprofit entities, to engage in urban renewal activities. Common to all three approaches is the exemption of improvements in the designated areas for specified periods of time, either 20 or 30 years.

Chapter 725

In 1968, the General Assembly adopted Chapter 725 of the Revised Code. This statute empowers a municipality to issue unvoted urban renewal bonds, repayable solely from semi-annual urban renewal service payments, paid by a developer in lieu of taxes, for a stated period. These payments are equal in amount to what a purchaser would have paid on improvements if there had been no exemption. "Improvements", as defined in Revised Code Section 725.01 (g), are "the increase in assessed valuation after the date of the adoption of an urban renewal plan of each parcel of real property or part thereof included within the boundaries of such urban renewal plan and owned in fee by the municipality on such date or acquired by the municipality after such date." Urban renewal service payments based on the increase in assessed valuation is the principal feature of tax increment financing. The validity of this concept was upheld in Dayton v. Cloud et al., 30 Ohio St. 2d 295 (1972), and it is likely to be the basis for most urban renewal activity in Ohio for the foreseeable future. The main constitutional attack in Dayton was that the partial exemption of real property violates the uniform rule requirement of Article XII, Section 2 "when there exists no physically exempt use." The Court said, however, that "/t/he law is clear that a partial exemption from taxation can be granted upon the basis of the use of property without violating the equal protection clause . . . We find no constitutional prohibition against such partial exemption based on value, so long as it does not otherwise violate the equal protection clause."

The Court also noted that Section 725.02 of the Revised Code states that all improvements to real property in an urban renewal area are thereby declared to be a public purpose, and that "/a/lthough not conclusive, this legislative declaration is presumptively valid."

S. B. 90 of the 110th General Assembly, enacted in 1973, gives impacted cities the power to have "land banks". Section 719.011, which was part of this bill, states:

> Any impacted city, as defined in division (C) of section 1728.01 of the Revised Code, in order to create jobs and employment opportunities and to improve the economic welfare of the people of such impacted city, may appropriate, enter upon, and hold real estate within its corporate limits for either:
>
> (A) The sale, lease, exchange or other disposition of such real estate for use or development for industry, commerce, housing, distribution, or research; or
>
> (B) The construction, enlargement, improvement, or equipment and subsequent sale, lease, exchange, or other disposition of such real estate with the structures, equipment, and facilities thereon for industry, commerce, housing, distribution, or research.
>
> The powers conferred upon impacted cities by this section shall be exercised only after a public hearing and approval by the legislative authority of the impacted city of a plan for the relocation of persons, families, business concerns, and others to be displaced by such exercise, and only in conformity with the general plan for the impacted city, the zoning legislation of the impacted city, and the plan, prepared pursuant to section 1724.10 of the Revised Code by a community improvement corporation organized under Chapter 1724. of the Revised Code and designated

pursuant to section 1724.10 of the Revised Code as the agency of the impacted city, provided such plan has been confirmed by the legislative authority of the impacted city.

Section 1728.01 (C) of the Revised Code defines an "impacted city", in brief, as a city which has at some time had an established metropolitan housing authority or is certified by the director of community and economic development as having a "workable program for community development," including slum clearance and the prevention of blight.

Besides embodying the "land bank" concept, Section 719.011 is of interest because it permits the taking and use of land for "industry, commerce, housing, distribution and research." While there are indications that the Ohio Supreme Court would find housing to be a proper public purpose, if called upon to do so, housing is not a category listed in Section 13 of Article VIII as a purpose for which the state may make loans or guarantees, while all the other categories are. Therefore, should a political subdivision attempt to obtain a loan or guarantee for such a purpose through a community improvement corporation, as is often done for the other purposes enumerated in Section 13, a constitutional question is almost certain to arise. Parenthetically, the inclusion of a "quick-take"provision into Section 719.011 was considered at one point, according to informed sources, but was dropped in view of the relatively recent and severe defeat at the polls of a proposed constitutional amendment to allow"quick-take" procedures for water and sewer easement purposes.

S. B. 20 was principally concerned, however, with strengthening the function of urban redevelopment corporations under Chapter 1728. of the Revised Code. Such corporations, which may be either corporations for profit or not for profit, are private entities. Their operations must be directed toward the acquisition, clearance, replanning, development or redevelopment of a blighted area or a project, in accord with the community development plan of a municipality, under a financial agreement between the municipality and the corporation. Under such an agreement, improvements made in the development or redevelopment of a blighted area are exempt from taxation for a period of thirty years for one, two, or three family residential dwellings and twnety years for all other uses. In lieu of taxes, a corporation pays 7½% of the gross revenues or 2% of the total project cost or project unit cost to a nonimpacted city. In an impacted city, the service charge in lieu of taxes is an amount not less than one-half of the real property tax assessed immediately before the acquisition of the area. Urban redevelopment corporations may not engage in activities competitive with a public utility. They are authorized to accept federal loans or guarantees. The over-all concept of Chapter 1728. is to facilitate the infusion of private capital into urban development or redevelopment by means of a tax exemption incentive. Some observers believe that the 7½ % service payment required of urban redevelopment corporations operating in nonimpacted cities must be revised downward to make such arrangements viable, but this is a legislative matter. The real property tax abatement offered corporations operating in impacted cities, on the other hand, is considered to rest on solid ground, without the need for constitutional change, especially since Dayton v. Cloud.

A provision which was included in an earlier version of S. B. 20 would have extended eminent domain powers to private corporations for Chapter 1728. purposes. It was dropped from the final version as having no chance of clearing the General Assembly.

Prior Commission Recommendations

Ohio's incentives for the construction of commercial, industrial distribution and research facilities consist of real property tax exemptions or abatements for specific periods of time. The ability of the state and its political subdivisions to make and guarantee loans is limited by Section 13 of Article VIII and by Sections 4 and 6 of Article VIII. One area conspicuously absent from Section 13, or anywhere else in the Constitution is housing. Further, while there is an indication, that the lending of aid and credit may be permissible under certain circumstances between governmental entities in Bazell v. City of Cincinnati, 13 Ohio St. 2d 63 (1968), the separation between government, both state and local, and private development interests is still complete. Therefore, these private interests can not avail themselves of the faith and credit of government to obtain loans or to extend their borrowing power, except as specifically authorized in the Constitution. Neither can a municipality, for example, own part of a property which is owned in part by a private corporation, so that the parts when taken together constitute one property, this having been held an unauthorized extension of aid and credit under Section 6 of Article VIII. (State ex rel. Wilson v. Hance, 169 Ohio St. 457 (1959)). The same provision would also likely be held to prevent other arrangements, such as the sale of redevelopment land to a private corporation for an amount less than a municipality paid for it.

In its report on Article VIII, the Commission has made two recommendations particularly relevant to the present inquiry. It has recommended the repeal of present Sections 4 and 6 of Article VIII, and their replacement with new Sections 2 and 4, respectively. New Section 2 would read: "No state debt shall be contracted nor shall the credit of the state be used except for a public purpose declared by the General Assembly authorizing such debt or use of credit." New Section 4 would read: "Except as provided by law, no local governmental entity in this state shall become a stockholder in, raise money for, or loan its credit to or in aid of, any joint stock company, corporation, or association."

New Section 2 would, if adopted, strengthen the ability of the General Assembly to declare what is a public purpose, and would remove the restriction on the lending of the state's aid and credit, and on the state's becoming a stockholder or a joint owner. New Section 4 would permit the General Assembly to enact laws authorizing municipalities, and other local governmental entities to own stock, raise money for, or loan their credit to, corporations and associations. These changes were proposed with the aim of allowing a public-private "mix" for declared public purposes, such as urban renewal.

It should be noted, however, that the Commission did not recommend a change in Section 5 of Article VIII, which prevents the state from assuming the debts of any local government. The committee may wish to review this decision because, especially in a field such as urban renewal, programs could be devised in which the state takes primary financial responsibility. Alternatively, it may be argued that the presence of Section 5 in its present form is to a degree inconsistent with the proposed Section 2, allowing the extension of aid and credit by the state, since it is conceivable that such extension of aid and credit, by way of a guarantee for example, could result in a situation in which the state would have to assume a local government debt which originated because of the extension.

The Federal Program

Under the Housing and Community Development Act of 1974, P. L. 93-383, Congress replaced all earlier categorical grant programs with a $8.4 billion block grant

--the largest of the special revenue sharing programs. Although some of the earlier programs will continue to receive funding for a limited time, the block-grant program is designed to replace such separate ones as Urban Renewal, Model Cities, Neighborhood Facilities, Open Space Land, and Basic Water and Sewer Facilities. The Public Facility Loan Program is completely terminated, so that C. D. funds cannot be used to build city halls, public schools or libraries and similar facilities.

Title 1 of the Act, whose subject is community development, authorizes 100% federal grants, requiring no local share. It does not give the states any administrative responsibility in the flow of C. D. funds to local governments, nor can states preempt or in any way control the direct distribution of funds to local government by H. U. D., the responsible federal agency.

The block-grant program makes a limited amount of funds available for social service purposes closely linked to its main objectives, which revolve around the redevelopment of land or the rehabilitation of structures for housing purposes. The Act enumerates its objectives as follows:

1) the elimination and prevention of slums and blight;

2) The elimininination of unhealthy and unsafe conditions;

3) the conservation and expansion of the Nation's housing stock;

4) the expansion and improvement of community services;

5) a more rational utilization of land;

6) the reduction of the isolation of income groups; and

7) historic preservation

Among the component parts of an application for funds under the Act, must be a "housing assistance plan," which must (1) survey the condition of a locality's housing stock and assess the housing assistance needs of lower-income persons residing or expected to reside in the community; (2) specify an annual goal for the number of dwelling units or persons to be assisted and (3) indicate the general locations of proposed housing for lower-income persons.

Eighty per cent of available funds, distributed under a statutory formula, are earmarked for metropolitan areas, twenty per cent for nonmetropolitan areas.

One section of the Act permits the Secretary of H. U. D. to guarantee or make commitments to guarantee obligations issued by units of general local government for the purpose of financing the acquisition or assembly of real property to be used in carrying out activities eligible for assistance and in respect to which grants have been or are to be made. However, the statute specifically states that "no such guarantee shall be issued in behalf of any agency designed to benefit, in or by the flotation of any issue, a private individual or corporation."

This raises the question of whether, for example, H. U. D. could guarantee or make a commitment to guarantee bonds floated by an Ohio municipality to assemble or purchase real property which is then sold by the municipality. to an urban redevelopment corporation, a private entity which, as previously noted, may engage in housing redevelopment. This point needs further exploration.

The Act clearly contemplates the possible sale of the subject real property by a municipality. It provides, for example, that the Secretary of H. U. D. "shall have reserved and withheld, for the purpose of paying the guaranteed obligations . . . an amount which is at least equal to 110 per centum of the difference between the cost of acquiring the land . . . and the estimated proceeds to be derived from the sale or other disposition of the land . . ." (Emphasis added).

The Act further provides that "the unit of general local government shall have given to the Secretary . . . a pledge of its full faith and credit, or a pledge of revenues approved by the Secretary, for the repayment of so much of any amount required to be paid by the United States pursuant to any guarantee . . ." Perhaps the phrase "or a pledge of revenues approved by the Secretary" provides an "out" here, but certainly no Ohio municipality may pledge its "full faith and credit," that is, its taxing power, beyond the ten mill limitation of Article XII, Section 2, without a vote of the people. Further, if the municipality's pledge creates a "debt", there is a question whether the "debt" falls under the constitutional indirect debt limit, the direct debt limit imposed on municipalities by Section 133.03 of the Revised Code, or whether it might not be an "exempt obligation" under Section 5705.51 of the Revised Code. These questions, too, need further study.

Ohio Constitutional Revision Commission
Local Government Committee
June 10, 1975

Eminent Domain and "Quick-take" in Ohio

The power of eminent domain "is the power of a sovereign state to take, or to authorize the taking, of private property for the public use without the owner's consent." This power is an inherent power of sovereignty, which is not given by the state Constitution, but rather limited by it. Emanuel v. Twinsburg Township, 94 Ohio App. 63 (1952).

Section 19 of Article I of the Ohio Constitution states:

> "Private property shall ever by held inviolate but subservient to the public welfare. When taken in time of war or other exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money: and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money; and such compensation shall be assessed by a jury, without deduction for any benefits to any property of the owner."

At the May 1973 election, a proposed amendment of Section 19 to permit "quick-take" not only in time of war or other exigency and for highways, but also "for the purpose of constructing and maintaining sanitary sewers or water lines by public agencies" was defeated, by a vote of 993,245 to 405, 035.

The power of eminent domain rests with the people, but its execution has been passed to the legislature by Section 1 of Article II, which provides, in part, that "the legislative power of the state shall be vested in a General Assembly . . ." Union Cemetery Association v. Columbus, 10 Ohio Misc. 161, 39 Ohio Ops. 2d 256 (1967). The power is not self-executing, but must be implemented by statutes, which are strictly construed. Without statutory or constitutional authority, a municipality has no right to exercise the power. However, Ohio cities, including charter cities, have been granted the power, State ex rel. Sun Oil Co. v. Euclid 164 Ohio St. 265 (1955) and the Supreme Court has held that the phrase "all powers of . . .self government" in Section 3 of Article XVIII includes the eminent domain power as well.

Except that it must be for a public purpose, there is no prohibition in the Ohio Constitution against delegating the power to private individuals or corporations. Ohio law, for example, has at various times delegated it to bridge and canal companies organized to transport and store various types of fuel, and limited dividend housing companies 19 A O Jur. 2d, Eminent Domain, Section 18. However, no corporation may exercise the power unless it is expressly delegated by statute. Parkside Cemetery Association v. Cleveland, Bedford and Geauga Lake Traction Co., 93 Ohio St. 161 (1915).

While it is clear that the state, by statute, may confer eminent domain powers on an instrumentality of a municipality (as, for example, a rapid transit commission

under Revised Code Section 747.09), there does not appear to be precedent in Ohio for a municipality itself attempting to confer the power either on one of its own instrumentalities, or upon an individual or corporation.

It is clear that the power of eminent domain, whose execution lies with the General Assembly, can be conferred by it upon a municipality or other political subdivision, or its instrumentality. It can also be conferred, to aid in the carrying out of a public purpose, on an individual or corporation, whether such corporation is a profit corporation or a corporation not for profit. As has been pointed out, it has in fact been conferred by law upon limited dividend housing companies, none of which have, however, ever been established in Ohio as far as the staff can determine. (The law granting the power is Section 3735.11, effective February 21, 1967). The power could in all likelihood be conferred on an entity such as an urban redevelopment corporation without the need for constitutional change, if the General Assembly chose to do so. Recent legislative history shows that indeed, the legislature has given thought to doing this, but has rejected the idea.

The current powers of community urban redevelopment corporations are based on S. B. 90 of the 110th General Assembly, which become law in November 1973. As originally introduced, the bill would have enacted a new section, Revised Code Section 1728.14, to read in part as follows:

> "A community urban redevelopment corporation may, to the extent agreed to by the governing body of an impacted city . . . acquire by appropriation . . . any land, rights, rights-of-way, franchises, easements, or other property necessary for the undertaking, and carrying out of a community improvement plan . . . The procedure to be followed shall be in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code."

This provision, however, was deleted from the final version of the bill. The reason for the deletion is not known, although it may have been related to the adverse reaction at the polls to the proposed extension of "quick-take" since the provision was removed from the bill after that occurred.

Parenthetically, the references to Chapter 163. of the Revised Code indicate that, had the provision been adopted, the corporation seeking to acquire property by condemnation would have had to follow the customary method prescribed for the purpose, and would not have been permitted to resort to the "quick-take." As the law now stands, such a corporation can acquire land that can only be acquired by appropriation only by purchase or lease from a municipality, and not directly.

Section 19 of Article I limits the "quick-take" of private property for public purposes to two specific instances: (1) war or other exigency and (2) the building of roads to which the public has free access. In all other instances, the Constitution demands that compensation in money be made before the property is taken. Therefore, while it can reasonably be concluded that the power of eminent domain could be conferred by law upon a private, public, or quasi-public corporation to be exercised for a public purpose, no "quick-take" power beyond that authorized in Section 19 of Article I can be conferred, and the General Assembly could not confer this power upon any individual or business entity for development purposes absent a change in the Constitution. In light of the results on the eminent domain issue at the May, 1973 election, it seems unlikely that the General Assembly would propose and the people would adopt, such a change at this time.

Judiciary Committee

Chairman, Mr. Don Montgomery

First Meeting, May 9, 1973

Last Meeting, October 1, 1975

Minutes begin on page 3652

Research begins on page 4015

Constitutional Revision Commission
Judiciary Committee
May 9, 1973

Summary

A meeting of the Committee to Study the Judiciary was held at 10:30 a.m. on Wednesday, May 9, 1973 at the Commission offices.

Present were Chairman Montgomery, Mr. Guggenheim, Dr. Cunningham, Representative Norris and Mr. Lou Henninger representing Senator Gillmor.

The Chairman opened the meeting by asking Mrs. Eriksson to review the notebook material and a suggested outline of how the committee might approach the subject.

Mrs. Eriksson - The notebooks have been prepared for each member of the committee and contain a number of articles and other materials to study the judiciary. In selecting the materials for the notebooks and preparing the outline we tried to indicate a broad view of what the subject might cover. The notebooks contain a table of contents, a list of the committee members and the outline and then are divided into three parts. The first part contains some general articles and recommendations from a variety of sources covering the whole field of the judiciary. Part 2 contains articles on particular topics and these topical articles are included in the order they are given in the outline. First, court structure and organization; Second, judges. Included, for example, are S.J.R. 10 of the 110th General Assembly which is the current Ohio Bar Association proposal for merit selection of appellate judges. Third, touching on other subjects in administering the system. The present articles contained have to do with juries. Part 3 of the notebooks contain some general reference material including the sections of the Ohio Constitution which are included or could be included in the study and which are referred to on the outline. The reference material also includes the Model Judicial Article of the American Bar Association, the judicial article from the NMC and a model judicial article which has been put out by the Advisory Commission on Intergovernmental Relations. From time to time as we find additional materials which we think are relevant we will copy them and send them to you. Our effort in preparing the materials for the notebooks has been to try to locate materials which present different points of view on each subject. The outline suggests that a study of the system of justice might be divided into three parts--the first part, talking about the courts themselves and how they are structured and organized and what jurisdictions and powers they have. The second part would consider the judges--the main element of the court from the point of view of personnel, talking about how judges might be selected, judicial terms, compensation, removal and retirement of judges, and how vacancies are filled. And the third part would be considered with other elements of how the system of justice is administered. For example, the committee might wish to get into the question of juries which are treated in some sections of the Ohio Constitution, considering the various elements of the system of criminal justice and whether they are included in the Constitution now and whether they perhaps should be. One element of civil trials which is certainly included in the Constitution is the question of claims against the state, which is an area that might be considered by this committee. And a fourth element might be the question of administrative agencies. The Ohio Constitution at present has provision for appeals from administrative agencies, some writers who suggest that the whole system of justice as administered by an administrative agency might be a topic for study.

Mr. Montgomery - The outline suggests that we study the courts first and then the staffing of the courts and then the housekeeping and the administration of the whole

court system, third, and it seems to me that that is a reasonably good way to approach it. The scope of this outline is broad, but it seems that at least we will cover everything. If we want to go into some of these sections in depth, we can do so as we go along, but I don't think we can do less than take a look at the whole field. Then I think we will approach it in the manner this outline proposed with the reservation that we can alter it to make it more or less comprehensive as conditions seem to warrant. So we will take up the courts as our first priority.

The committee agreed to this approach.

Mr. Montgomery - In approaching this problem, we need to discuss the resources that are available to assist us in the study.

Mrs. Eriksson - The Ohio organizations include the Ohio State Bar Association; the Ohio Judicial Conference; the Supreme Court has an administrative assistant (Judge Radcliff). The Modern Ccurts Committee is a committee of the Ohio State Bar Association. That has co-chairmen, Mr. Milligan and Earl Morris, who probably are goind to be the primary experts in Ohio on the Modern Courts Committee proposals. Nationally, we have the American Bar Association, the Institute for Judicial Administration, the National Center for State Courts, and the American Judicature Society. The Ohio Legislative Service Commission has a study in this area, also.

Mr. Montgomery - How about other state constitutional revision bodies? Do we exchange materials with them?

Mr. Henninger - Some of the law reviews around the state might be helpful.

Mr. Montgomery - We might want to invite the editors to a conference some time.

Mrs. Eriksson - For our Local Government Committee, when we had the one day conference, the OSU Law Review did subsequently publish some of the articles from that conference, and perhaps we might consider approaching one of the law schools with this idea--to devote an issue to judicial administration in Ohio.

Mr. Montgomery - We might rotate the assignments so we could wind up with a collection of articles.

Mrs. Eriksson - At OSU, the professors who are most concerned with the organization of courts and judicial selection are Oren Slagle and Professor Wills. They are the experts in this area, on procedures and court matters, and I think at Capital they are Professors McCormac and Sullivan. At Cincinnati, Professor Harper was the consultant for the Court and Civil Rules and I would assume he is an expert on court administration. I don't know about some of the other law schools.

Mr. Montgomery - We could look into that--what talent is available.

Mrs. Eriksson - There are many experts, but if we are to pursue the idea of law review articles in Ohio, we should make contacts with professors here. I do think it would be a good idea to look into the subject of how we can employ the faculty and law review of the various colleges.

Mr. Montgomery - For our next meeting, we could invite one of the professors to give us an overview of the Ohio Judicial System.

It was agreed to contact Professor McCormac for this purpose.

Mr. Guggenheim - As we make this study, we must be careful not to be dominated by the Bar, but to get public reaction to the judicial system.

Mr. Montgomery - This could be a real contribution that we could make--we are probably the only body approaching this area that has lay members. We don't have a date for the next meeting, but the idea would be that we would have Professor McCormac give us an overview for about an hour--and we'll try to have the meeting the morning of the same day the Commission chooses for a Commission meeting in June. That brings us down to the question of a consultant and whether or not we wish to employ one and who that person would be. Ann, would you give a report on the staffing?

Mrs. Eriksson - We can provide research materials for the committee by a variety of ways. I expect to work on some things myself, and Julius will be working on some things. Then we have other persons on consultant contracts already, who are lawyers. One is Sally Hunter who has been doing work for Mr. Skipton's committee and who is primarily the author of the Legislative Service Commission study you received. These are all the possibilities for having various aspects of research done; however, if you want a real expert who would be a person who could offer advice, suggest things that need to be done, and would have a real in-depth knowledge of the Ohio courts system, a special consultant could be employed.

Mr. Montgomery suggested approaching former Supreme Court Justice Robert Leach to ask him whether he would perform this service.

Mr. Montgomery - I have been informed in checking with his firm that he could be available to work with the committee.

Dr. Cunningham - I think it is an excellent idea. I certainly think that that type of expertise can be used by all of us in our deliberations.

The others present agreed.

It was noted that, in considering times for meetings, Senator Gillmor has judiciary meeting Thursday a.m., and Mr. Guggenheim has a staff meeting on Wednesday, a.m.

Mr. Montgomery asked for comments before adjournment.

Mr. Henninger - I'm concerned about including the public point of view concerning court systems.

Mr. Guggenheim - I'd like to get some municipal court judges in here--get a lot of different points of view.

Mrs. Eriksson - All of these groups will receive notices of the meetings.

Mr. Henninger - I think it is important to get a grassroots feeling about the court system.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
June 14, 1973

Summary of Meeting

The Judiciary Committee met in House Room 7 on June 14, 1973 at 10 a.m. Present were Chairman Montgomery, Mr. Carson, Rep. Morris, Rep. Roberto, Dr. Cunningham, Mr. Guggenheim, and Mr. Skipton. Mr. Montgomery opened the meeting by recalling that there had been discussion at the last meeting about the possibility of obtaining the services of Judge Robert Leach as special counsel to this Committee and announced that it was a pleasure to introduce Judge Leach officially in this capacity. He added that he was sure that the experience and knowledge of Judge Leach should be of great value to the Committee in its deliberations and subsequent report to the Commission. Judge Leach expressed his willingness to answer any questions that might come up along the way and indicated a long time interest in participation in judicial reform.

Mr. Montgomery - In addition to the notebooks, which provide excellent background, we decided at the last meeting that it would be a very good idea to have an overview by an expert in this field, and so today we are calling on Mr. John McCormac, former Dean and now professor of law at Franklin Law School of Capital University, to give us that overview. Please take as much time as you wish, Mr. McCormac. We appreciate having you with us.

Mr. McCormac - Thank you. I am glad to be here. And, incidentally, I might say that when I am talking, if any of you have questions, feel free to ask them and I will try to answer them. You are fortunate, also, in having Judge Leach with you because he is in my opinion an outstanding judge of the common pleas court, court of appeals and supreme court and I don't believe that there is anyone who knows more about the judicial branch than Judge Leach.

I realize that in the Committee there are differences in familiarity with the court system and just what takes place, so I thought I might begin by explaining some of the court system and some of the problems as I see them. The judiciary is controlled only in part by the constitution and to a large degree by law. Creation of courts, pay of judges, selection of judges, etc. are primarily outside the constitution. And, as you get into this area, you face the dilemma that the constitution should be relatively brief, that is to say, general and flexible. You do not want to start out with specifics that you can't live with in another 10 or 20 years when the constitutional provision will probably live on.

Another dilemma, as I see it, is where is the power going to be for control of the judicial system...i.e. whether it is going to be in the supreme court or a commission or in the general assembly.

Starting off with the supreme court, the highest court - its composition and jurisdiction are pretty well spelled out by the Ohio Constitution. It is primarily a court with appellate jurisdiction with very little original jurisdiction. The docket in the supreme court is generally under very good control because the supreme court is able to control it. Generally the court can decide whether to hear a case on appeal or not to hear it. Most review by the supreme court is not a matter of right but is a matter of the supreme court permitting the appeal. So the supreme court, even though they have in recent years worked much harder than they did in the past and hear more cases, they can control their docket.

One important new authority that the court has, since 1968, is the making of procedural rules and the superintendence of other courts in Ohio. In my opinion, had it not been for the Modern Courts Amendment of 1968, the courts would really be in chaos today, because since that time under the superintendence rules and under the procedural rules the backlogs and the problems of the trial courts have been helped a great deal. Not enough, but a great deal, because the supreme court still doesn't have complete authority, but the court did get authority to move judges around - to assign them as needed - to put the finger on the trial courts to get them to do the job.

One of the questions that you are going to have to determine concerning the supreme court is whether it should be given additional power in the control of the judiciary. Should the court be flexible enough to handle the variety of problems confronting the judiciary and be able to make decisions that alleviate such problems? In this regard you will also face the question of how much control the general assembly should retain to veto what the supreme court proposes so far as unification of the court system or transfer of judges or other matters in this area of power. Otherwise I would say that the remaining question regarding the supreme court has to do with selection of judges - a matter I will get to later that affects all courts.

Turning next to the appellate courts - in 1912 the state was divided into appellate districts by constitutional amendments. Additional districts have been created, the latest in 1968. They are now created by the general assembly and additional judgeships are also so established. There are 11 court of appeals districts, and their jurisdiction is partly spelled out by the constitution and partly by the general assembly. It is primarily appellate. They are the first appeals court that hear appeals as a matter of right from trial courts in criminal and civil cases. The supreme court of Ohio now has power to assign any common pleas or court of appeals judge to another court of common pleas or appeals if that court is having docket problems. Most of the court of appeals in Ohio have their dockets in pretty good shape, and the court of appeals is not where the problems are in my opinion. In the court of appeals, as you know, three judges hear each appeal. Each court of appeals has at least 3 judges - some have more if the docket is such that 3 cannot handle it. They are, of course, elected, and their pay and so on is determined by the general assembly. The pay of the supreme court and the court of appeals is uniform throughout the state of Ohio. That is not true when we come to the trial courts.

Now for the trial courts. The constitution requires a common pleas court in each county. This goes back to the days when all government was county, and each county, big or small, was required to have a common pleas court with at least one resident judge. Each county is required to have a probate division, the probate division having been created in 1968. Under certain circumstances the common pleas judge and the probate division judge can be the same person. This has happened in a couple of counties.

As far as the trial courts go, the court of common pleas has been one area where there have been problems, in my opinion. More problems than in the courts under common pleas. The trial courts are, of course, the courts of common pleas, the county courts, and the municipal courts along with the mayors courts that have very limited jurisdiction. Mayors courts, municipal courts and county courts are not mentioned in the constitution. It provides for "such other courts" as may be prescribed by law. The general assembly then has created municipal and county courts. When we get to them we will see that they are rather a maze, both in jurisdiction, structure, and so on.

We have a similar common pleas court in each county. One of the problems, however, particularly before the Modern Courts Amendment, was that a small county did not have enough business for a common pleas judge - their docket would be perhaps 3 months or very, very current - while the large counties, particularly Cuyahoga, Franklin and Hamilton would have the same cases that are heard in a small county within 3 to 4 months take up 3 or 4 years for hearing. There is a great difference in case load. This is so even though judges are assigned to other counties, receiving $30 per day.

Similarly, not only do the backlogs differ, but the pay of the judges differs. The pay of the judges varies from $14,000 to $26,000, according to the population of the county. Some law school graduates start out today making more than $14,000. Consequently, you can see the problems in the pay scale. One of the problems that you are going to have to look at with respect to the trial courts is whether there ought to be a uniform pay scale and a uniform method so that their caseloads are approximately equal. There are several methods for this purpose that I will refer to.

The jurisdiction of the common pleas court is completely spelled out by the general assembly, and it has changed from time to time. It is called the court of unlimited trial jurisdiction. It hears felony cases on the criminal side and has unlimited jurisdiction in civil cases. However, it starts at $500 - the top jurisdiction of the county courts - and extends all the way up. Here we find one of the problems is the large area of concurrent jurisdiction. In Franklin county, for example, there is the Franklin county municipal court with county wide jurisdiction having jurisdiction up to $7500. The common pleas court starts at $500 so between $500 and $7500 in virtually all money damage cases the lawyer has his choice of commencing his action in either municipal or common pleas court. In teaching trial practice, I try to teach my students some of the things that they should consider. Some of these differences should not have to be considered, I think, although it is questionable whether the problems are constitutional in nature. Consider, for example: frequently, in the municipal court a $3000 jury case could be heard within 3 or 4 months whereas if you go into common pleas court it will be 24 months. Another problem is that in the municipal or county court, jury fees are assessed against the loser whereas in common pleas court jury costs are picked up by the state, not the litigants. So if you have a questionable liability case where you may well lose, you will take your $3000 case to the overcrowded common pleas court in order to avoid sticking your client with $400 costs in the event that you lose.

These are types of choices that you have in the selection process, and they probably should not exist. You should consider, or at least the legislature should, whether the policy should be uniform concerning payment of jury costs throughout the courts rather than differing in the common pleas courts from lower courts. Also the problem of such a large degree of concurrent jurisdiction which has frequently resulted in the allocation of business to a particular court where one court's docket is current and the other is vastly overcrowded. It should be added, however, that with the supreme court rules, the common pleas courts have done substantially better in solving some of their problems since the Modern Courts Amendment than have the municipal or county courts. Some of the problems are, however, impossible of solution. To make pay uniform, perhaps, would require combining of court functions so that caseload and pay would be equalized throughout the state. Right now the constitution gives a prerogative to counties of under 40,000 to combine judges. They can combine several - probate, common pleas, county judgeships can all be held by the same person. This would perhaps increase a judge's caseload to one that would merit equal salary. The only way that that

procedure can be followed is for the county commissioners unanimously, or ten percent of the electorate by petition, to put the question on the ballot and it must be approved throughout the county. There is no way of requiring this to be done, so consequently court loads are going to differ greatly throughout the state, even with the assignment system. The assignment system helps but does not cure the disparity.

Municipal courts are the next level of courts. They are all created by the legislature. The Revised Code contains almost a full page of descriptions of jurisdictions of municipal courts. Some, as in Franklin county, have countywide jurisdiction so that the municipal court is the only court below the common pleas court, except for the mayors courts. Other counties, like Cuyahoga county, have several municipal courts with jurisdiction over part of the county - perhaps limited to the municipality.

There are also county courts - so that in some counties you mave have 6 or 8 or more lower courts with differing jurisdictions - as to amount, over different territories, etc. These seem to have resulted from political lobbying rather than through the consideration of what results in the best judicial system. All municipal courts have $5000 upper limit monetary jurisdiction and misdemeanor jurisdiction. Some municipal courts - Franklin and Hamilton county - have $7500 jurisdiction, and the Cleveland municipal courts has $10,000 jurisdiction. Many counties have no municipal court. Many counties, particularly the smaller ones, have the county court system plus the common pleas court. The county court has only a $500 jurisdiction plus misdemeanor jurisdiction, and has substantially more limited jurisdiction. As far as the municipal courts are concerned many of them are multiple judge courts. The general assembly specifies how many judges shall be in each court. Municipal judges are both full-time and part-time. The pay of municipal judges varies according to the population of the county which they serve. It varies somewhere between $10,000 and $23,000, the maximum being $23,000 in the more populous counties.

The county court judges are all part-time judges who may practice law in addition to serving on the court. Any new county court judge must be a lawyer - there are several county court judges who are not lawyers, still serving under grandfather clauses.

In my opinion, the problems in the judicial system and the administration of justice have been most severe in these lower courts. Many of these problems you cannot deal with here as part of constitutional revision. But the problem has been that the municipal courts and the county courts have had a low image; consequently, the best people have not been attracted. They have been running a "super market" kind of justice, and the judges don't really enjoy running 400-600 people through traffic court in one day as they do here some days. Pay has been relatively low so that good judges quickly move on to common pleas court or elsewhere. Yet, where the public comes into contact with the judicial system is with municipal courts through traffic, misdemeanor, and the lower type of cases. People see the municipal and county court but rarely see the common pleas, appeals court or supreme court, where generally speaking the needs of administering justice have been better met. It seems to me that in considering judicial revision you ought to consider uniform pay scales and uniform case loads and the means of accomplishing these goals.

Furthermore, you ought to consider seriously one lower court system, which is all that is required by the constitution, with perhaps divisions, so that all

judges are on equal standards, receive equal pay, and handle equal caseloads, although judges could be assigned to specialized areas. These would be traffic, probate, and so on, so that perhaps you can be flexible enough to regulate the caseload and the means of handling cases on a more uniform basis.

There are a lot of proposals, some of which are not material to the outline that you have been furnished. One would be this creation of one lower court system with all full time judges who are assigned out in a specialized way throughout the system. This may have to be subject to variation - judges might get tired of hearing all traffic cases.

The county court, as I've said, is manned by part-time judges and this creates the possibility of conflict of interest. I think with both part-time judges and part-time prosecutors you tend to have persons eager to dispose of judicial business as quickly as possible in order to be able to get on with work that brings in more money.

The mayor's court is the last court in the system. The mayor, of course, is not required to be a lawyer and many are not although they preside over a mayor's court. The ability of a mayor's court to hear cases has been seriously limited by the recent U.S. Supreme Court case - the Monroeville case - that came out of Ohio. Here the Supreme Court said if the mayor has executive duties in the municipality and the municipality derives a substantial amount of its revenue from the mayor's court, he cannot hear contested cases. This does not affect some mayors' courts in Ohio in my opinion but it does affect a great many of them. To many of us connected with the system of justice, including me, the question is a serious one as to whether non-lawyers can conduct a court the way it ought to be conducted since they do not know the rules of evidence, etc.

Mayors' courts have been created by the legislature and are not specified in the constitution. However, you should consider the question of whether anyone should be admitted to the court without the proper qualifications and whether the judge ought to be somebody connected with the municipality which receives the court costs. The dilemma here is that one likes to have convenient justice in the area such as evening court nearby so that people do not have to go clear downtown and take off work, and so on. A highly desirable possibility is that in a one trial court system, a judge could be assigned out to the smaller municipalities one evening a week to hear court with the regular judge. There would be no problems about the judge being able to hear contested as well as uncontested cases in that situation.

That in a quick summary spells out our current court system in Ohio, including something about the jurisdiction and some of the problems noted in your outline.

The next area that is suggested on it is that of judges. The topic having to do with selection of judges is a highly controversial one. You have been given some good materials on this question of how judges ought to be selected. Our constitution, as you know, requires that judges be elected. The method of election is spelled out by the general assembly. We have in Ohio what is called a non-partisan ballot, but it is, in my opinion, a partisan election. The candidates are selected by their political party in the primary and it is only in November that they go on the ballot as non-partisan. Both parties, of course, send out all of their advertising literature and sample ballots for the person that they have endorsed. The constitution would, of course, have to be amended

to change the method from an elective one. You have in your materials a joint resolution that has been proposed that would call for selection by a judicial commission of judges for the supreme court and the court of appeals and would permit the general assembly to provide that method for trial courts but not require it.

No method of selecting judges is guaranteed to get the best possible judges, but I think that recent events in Ohio and elsewhere show that it is virtually impossible, for example, for a supreme court judge to win if somebody spends a lot of money against him unless he has a well known name. Supreme court judges are not selected very much on the basis of what kind of job that they are doing on the court. It is very difficult to campaign for a judge. You cannot talk about political issues or that sort of thing. I've made quite a few speeches on judicial selection; even right before the election if you ask people what they know about the local judges, hardly anyone knows much about the judges running or about their background or anything about their performance. These problems may not be solved by a different method of selection but this is a matter that ought to be very seriously considered. Some of the methods under discussion are described in your materials - such as judicial commissions and so on. It is interesting to note that over 50% of the judges on the bench currently were initially appointed by the governor. When the governor appoints, there are absolutely no guidelines whatsoever. When I was on the board of governors of the Columbus bar, prospective appointments would be submitted to the board of governors for its opinion, and in the case of one person on the bench all eight of the members of our board of governors voted that he was not qualified. Yet the governor still appointed him. And he turned out to be what most of us expected.

Mr. Montgomery - Doctor, are you suggesting that even though the constitution provides for elective judges that in fact we have an appointive process?

Mr. McCormac - The constitution does provide for vacancies - i.e. when a vacancy occurs it is filled by appointment. Many vacancies occur on the supreme court and court of appeals and the governor must fill them.

Mr. Montgomery - To the extent that an incumbent can be more easily re-elected, do we not have almost a de facto appointive process?

Mr. McCormac - We do in the sense that an incumbent has a great advantage in a judicial election. Also, the judges that are on the bench who are defeated are defeated by other people who are running as "judge," because they are often judges of lower courts who then run for a seat on the appellate bench. Judges who are defeated are often defeated by other incumbents. The public doesn't know who is the incumbent for the particular court and who is not. Therefore, we do have a very substantial appointive system based on the governor's appointments, subject to no confirmation by anyone. Governor Gilligan has provided for strictly advisory judicial councils which he consults before making appointments. These would be similar to judicial commissions except with the judicial commission the governor would have to appoint someone submitted by the judicial commission. The current method is strictly optional.

Mr. Montgomery - Is it not a matter of practice in some counties to submit recommendations from the local bar association, which is non-partisan, to the central committee of the appropriate political party?

Mr. McCormac - It differs county by county. Some county chairmen consult the bar

association and follow their recommendations pretty substantially. Others do not. That is strictly a matter of preference.

Mr. Montgomery - Not a very reliable system.

Mr. McCormac - It is not a system that is going to be very reliable probably. This all must be looked at when you are considering whether to change the elective part, and I would be very frank to say that in my opinion, unless explained to the public, the public is very adverse to appointive judges. Most people think that such a revision is not a very politically popular act right now.

The federal system is of course different from what we are generally considering at the state level. There judges are appointed by the president, subject to confirmation by the senate.

(Conversation then ensued as to the fact that in 1937 the people did vote a constitutional amendment that would in effect have provided for the so-called Missouri system of retention, and the publicity basically statewide by newspapers, bar associations, etc. was favorable. There was almost no organized opposition, yet it was defeated by a 3 to 1 vote.)

Mr. McCormac - Yes, and that was in the original Modern Courts Amendment and was taken out by the General Assembly because many people thought that amendment was in itself a great boon to the judiciary and would have been defeated if that portion had been left in. There is a big difference of opinion as to which method of selection is best, elective or appointive, and if the latter, which type is best. One of the problems of an elective system, it seems to me, is that a judge has to raise money to campaign, and increasingly the expenditures are getting greater. It does create, even if not true, an illusion of prejudice if the judge has to go out seeking contributions, and in my opinion, the judge cannot do so through a committee. A substantial contribution to a judicial candidate might well give the donor a feeling of having an edge if the candidate is elected.

Now as to removal of judges - there are a number of constitutional provisions for removal, plus the supreme court may do so under supreme court rule. Rule 6 has a removal of judges provision. Plus Rule 5, which is the disbarment rule that applies to judges as well as attorneys. There was a recent Cincinnati judge who was disbarred and removed from office through the supreme court procedure.

The constitution has a number of methods - some of which I think you will want to eliminate. Impeachment applies to judges - a judge is impeached by majority vote of the house. Actually the officer is impeached at that point but the trial has not begun, and the trial goes to the senate, which by a two-thirds vote may convict. There is another constitutional provision by which the general assembly may establish another method in addition to impeachment, and there is a third method in the provision that calls for concurrent resolution of both houses, two-thirds of each house, to remove a judge from office. Impeachment or the concurrent resolution really are not used to any extent. I think that most authorities believe that a method such as our supreme court method is the only realistic one. At least for lower court judges. And there has been a judge or two removed by this procedure in Ohio for breach of judicial ethics and other misconduct. It seems to me that the constitution probably should provide for this plan or give control to the supreme court as it has under Rule 6. For the supreme court of Ohio, however, that plan would not really work because how is the supreme court going to try one of its own members? Thus, many states that have adopted that method have continued the impeachment provision for supreme court justices.

(The question was then raised about the extent of usage of impeachment. Mr. McCormac said he couldn't recall use of impeachment or concurrent resolution to remove a judge in Ohio. Mrs. Eriksson pointed out that there were early impeachment proceedings, againstone of the first supreme court appointees in Ohio, but the proceedings were not successful. She stated that it was interesting case from the standpoint of history and would be described in a subsequent memorandum to the committee.)

Mr. McCormac stated that the advantages of the supreme court process over impeachment is when a judge has not really been a bad judge but simply has grown senile or incapacitated, impeachment seems unfair. In states where the supreme court has authority to remove by rule the situation often results in resignation which is what is best in the long run for all concerned. A disability provision in the supreme court rule is also a desirable feature. He concluded the subject by repeating that the committee would do well to consider getting rid of some of the alternative provisions for removal. His testimony resumed.

Mr. McCormac - Now as to retirement. The Modern Courts Amendment has a mandatory retirement provision. A judge cannot be over 70 when he takes office, whether by election or appointment. If the term begins fortuitously for him it means that he can serve until almost 76 years of age. Most judicial terms are for 6 years, and if he was 69 when he took office this would be possible.

As far as administering the system is concerned, the use or non-use of juries has been a very debatable item. It has been greatly involved in the court backlog situation. If you try a case to a judge you take a great deal less time than if you try it to jury because you do not have the selection of the jury, argument to the extent that you have before the jury, etc.

The constitution requires that in civil cases the right to jury trial shall be inviolate. There was a question as to whether this requires continuing 12 jury members as were used. The supreme court of Ohio has interpreted to the contrary, and their civil rules provide for a maximum of 8 in civil cases. However, with this provision in the constitution, you could not eliminate jury trials. You can reduce the number, and this has been done, as said. Or, if the parties elect, there can be less than 8, including 1, Since the civil rules there have been 2 or 3 trials where the parties demanded one juror and it was tried to one juror.

(There was discussion as to the three-fourths concurrence in civil cases tried to a jury. Mr. McCormac pointed out that some countries, such as England, have eliminated jury trials in civil cases entirely, except in cases of libel and slander. There was a question about the relationship of the provision making right to jury trial in civil cases inviolate to workmen's compensation cases and no fault insurance, should it be adopted. Mr. McCormac responded that no fault insurance would result in there being not nearly so many cases in court. It wouldn't change the right to a jury if a case went to trial under no-fault. There are, he said, some 50 different plans for no fault in the country, and some provide for going to court if damages go over a certain point and others do not. Workmen's compensation is covered by specific constitutional provision that provides for a jury trial if such cases go to trial. That is a kind of case that did not exist at common law, Mr. McCormac explained.) He continued:

Mr. McCormac - If the general assembly creates a new right after this constitutional provision they can provide for a jury trial as they did in workmen's compensation

appeals and that is when these cases get to court - as appeals from administrative agencies. But, they could also have provided that it was to be tried strictly to the court.

(In the discussion it was noted that many states have so provided.)

Mr. McCormac - The same is true of another item that is included in your outline, and that is claims against the state of Ohio. In the constitution you may want to permit claims against the state like the federal torts claim act or something like that. If you do, there is no constitutional requirement, even if you left the other jury provision the same, that you provide for a jury trial in a claim against the state of Ohio. Actually, the constitution says that the general assembly can authorize by specific legislation claims against the state. If they do, as in the workmen's compensation case, they either provide for jury trial or trial only to the court, under the theory that it is a new right.

(Discussion ensued as to other ways of handling such claims - by special court or commission. The constitutional jury provision only preserves rights that existed at the time of the adoption of the constitution when it says that jury trial shall be "inviolate." If there are new actions, the decision can be made as to jury trial or not. Jury trial right can be expanded but not contracted with this constitutional provision.)

Mr. Roberto - In other words, both the U.S. Constitution and the constitutions of I think all of the states, when they speak of the right of jury trial being "inviolate" do not define that right.

Mr. McCormac - In no constitution is it defined. Many cases - e.g. Louisiana v. Duncan - get into the whole question of what was right to trial by jury. This breaks into two parts : first, the number of jurors, and second, the nature of the case. Historically, for example, in what was called "equity" there never was trial by jury. The question becomes complex.

So far as civil cases are concerned, you could in constitutional revision eliminate civil jury cases. There is one civil jury provision that ought to be removed - one calling for a jury of 12 when a corporation obtains a right of way. Although the supreme court has by decision and rule said that trial by jury doesn't have to mean a jury of 12, for this provision the requirement is specific and it should be removed. Other provisions less specific do not need to be so interpreted - e.g. at one time women were not permitted to sit on juries, so the constitution is not the same anyway. But the court cannot interpret 12 as any less than that.

As I said before, with respect to jury costs, there is a lack of consistency in the state that results in substantial "court shopping." One must consider jury costs, size of docket, quality of judge, etc. among the various elements to be considered in deciding which court to use when, as you frequently do, you have an option of which court to use.

Criminal cases are another matter. The U.S. Constitution does not prohibit a state from eliminating civil jury trials. The U.S. Supreme Court hasn't expressly said that, but it has impliedly said that the 7th Amendment to the U.S. Constitution does not apply to the states through the 14th Amendment. However, the 6th Amendment to the U.S. Constitution provides for jury trials in criminal cases and it has been given limited application to states so that there is only

so far a state can go in criminal cases in eliminating criminal jury trial. Right now our present system is that if the penalty will result in a $50 fine or any imprisonment the person must be given a jury trial if he demands it in a criminal case. The U.S. Supreme Court has said that for a petty offense the U.S. Constitution does not require a state to provide a jury. A petty offense is one in which the maximum imprisonment is 6 months. The Court has also said that a jury of 12 is not required and has authorized a jury of 6. Under our new criminal procedural rules that will probably take effect on July 1 for misdemeanors juries have been reduced to 8 and for felonies remain at 12. The U.S. Supreme Court in a recent decision said that criminal jury verdicts do not have to be unanimous. Ohio's constitution by allowing a 3/4 verdict in civil cases, however, impliedly requires unanimous decisions in criminal cases.

Several states have amended their constitutions and have provided for less than unanimous verdicts in criminal cases. One case involved a 5/6 verdict that was appealed to the U.S. Supreme Court, who said that it was constitutional. So, there is an option, though it is highly debatable as to whether it is advisable or not, of eliminating criminal juries in minor cases (up to maximum 6 months) or of providing for criminal jury verdicts of probably down to 3/4 is the lowest you could go. The supreme court under its rule making authority feels that it can reduce the number, as it has.

Another item in the criminal justice provision that is becoming more hotly debatable every day is continuing the use of grand juries. Our constitution provides that in a felony one is entitled to indictment by a grand jury. The new criminal procedural rules reduce the size of grand juries from 15 to 9 and the concurrence for indictment to 7 of the 9. The constitution does require the use of grand juries. Many think that the use of grand juries and their original basis are antiquated. The original reason was to protect the person in this secrecy from unfounded charges - i.e. having this independent body to ascertain whether there is reasonable ground for an indictment to be issued before it becomes public. There are numerous articles on alteration of grand juries or their elimination that you will probably be looking at because this is an important item in contemporary criminal justice studies.

I note that there is also a constitutional provision concerning comment over a defendant's failure to testify that has been held unconstitutional by the U.S. Supreme Court in the Griffin case from California, so it obviously should be eliminated from the Ohio Constitution.

As far as prosecutors are concerned, there is nothing in the Ohio constitution concerning prosecutors. All that - parttime status, pay, etc. is statutory. Our system has suffered, in my opinion, because of the use of the part-time prosecutors and the unequal pay scale of the prosecutors that has frequently resulted in criminal actions being prosecuted by less than our most talented lawyers. Probably this would not be covered by constitutional provision, but it should be corrected.

Mr. Montgomery - I'd like to comment on that if I might, having been a county prosecutor at one time. The use of special assistants or assistant prosecutors results in a bill to the county that is as great or greater than it would be to employ a full time prosecutor.

Mr. McCormac - This relates back to the time when the basic unit of government was county government, and the county government system is really not a very good

system for many of these matters. This is related to the question concerning the judiciary that units larger than county units may be better. The court of appeals situation, for example, is more reasonable, by having appellate districts, where the load and the number of judges are pretty well allocated to solve this problem.

Mr. Montgomery - Are you suggesting that there is a parallel between the prosecutor problem and the municipal or county court problem?

Mr. McCormac - I think that there is a parallel between the lower court problem and the part-time judge and the common pleas judge who doesn't have enough to keep busy in Adams or some comparable county, and the problem of prosecutors.

Mr. Montgomery - Do you think that it is desirable to build in a career opportunity at the lower level?

Mr. McCormac - I think that ideally this has been accomplished in a few places. Prosecutors should be professional people with professional staffs.

Mr. McCormac - (continuing) - I notice that you have court financing on your outline. A lot of these prospective changes may tie into the issue of financing although I don't know that financing is matter that you want in the constitution. Part of the problem is that the courts are financed partly by the state and partly locally and the local population situation affects salary. It seems to me that there ought to be uniform financing with uniform salaries not dependent upon the revenue that the court produces. There ought, of course, to be uniform caseloads for the people involved. If you have a uniform system, there ought to be a uniform judicial budget to the general assembly, submitted perhaps by the supreme court, that would cover all the courts in Ohio and accomplish this uniformity. In my opinion in Ohio our judicial system is greatly underfinanced, both in the pay of the judges involved and the supportive personnel. We spend a very small percentage for the judiciary in relation to its importance, and we could have a more adequate system with a better financed judiciary. Ohio judges statistically are greatly underpaid in comparison to judges in other metropolitan states. And that is also true with respect to prosecutors and others involved in the justice system.

If there are any questions at this point I would be glad to answer them.

There was some general discussion about the coverage of the Modern Courts Amendment, particularly the problem affecting the municipal court judges and the court decision that prohibited pay increases to municipal judges during term. Judge Leach explained that the problem arose because the original amendment provided for a unified court, to which both municipal and probate judges were opposed, especially regarding the provision that the common pleas clerk would be their clerk. Probate judges were their own clerks, and appointed their own personnel, either as deputy clerks or deputy judges. So from that background a compromise was worked out that switched the probate judgges over to the probate division, but, as explained by Judge Leach, conditioned on the fact that they would still be individually elected and not assigned and also conditioned on the proposition that they would still be their own clerk and personnel. The municipal judges were dropped completely. Unfortunately, the draftsmen didn't pick up the omission with reference to municipal judges and the literal language of the constitutional provision that would in essence authorize a pay increase in term referred to the supreme court of Ohio, the court of appeals court and the common pleas. That picked up the probate judges because they are members of the common pleas bench, but it didn't pick up the county judges or the municipal judges.

Judge Leach continued:

Judge Leach - To show how complicated the issue became, a brother who is a municipal judge with the municipal judges association filed a law suit in the common pleas court of Franklin county which was intended apparently to be a kind of guinea pig type of case and Judge Holden of this court held that because of this history, they were broadly encompassed within the definition of common pleas judge and could get the pay increase. In the meantime Attorney General Paul Brown issued an opinion to the same effect. However, the case finally arose testing out that provision and the supreme court held (parenthetically I didn't participate because my brother represented the municipal court judges, nor did Lloyd Brown) that the literal language of the constitution prohibits increases during term for municipal judges. The next question concerns efforts to recover back increases already paid, and a case has been filed in the last few days in the supreme court on behalf of Judge Gilly, a common pleas judge who had been a municipal judge, to challenge the right of the auditor to start subtracting from his salary pursuant, apparently, to directives of the state auditor. That case will probably be heard this fall. In the meantime the constitutional amendment was defeated - which at least would have made it clear from this point on that municipal judges and county court judges are entitled to increases during term. I think that the amendment can be resolved by this pending law suit which in effect could hold that a judge doesn't have to pay back under the concept that he took under the existing law as then interpreted by the attorney general and the court. There is case law in Ohio that distinguishes between what the law was then and what the law is now is in the same way as has been applied by the U.S. Supreme Court in certain cases. So the municipal judges have a "fighting chance."

(There followed discussion about the suit questioning refunds. It was pointed out that one judge has been overpaid $25,000 or $26,000 and there are 8 or 9 in the same position. Mr. McCormac pointed out that this is representative of a morale problem in the municipal courts and that the committee would hear from municipal judges who are still adamently opposed to the one trial court principle. Mr. Carson spoke of a bill affecting the municipal court of Hamilton county that would unify it with common pleas and call it a district division because the municipal court judges now sit out in the county. This is very important in some of the suburban areas. The bill would up the jurisdiction but retain a jurisdictional difference. He stated that there is now a clerk for both courts so that problem doesn't exist. An important difference, he noted, is that the county prosecutor would prosecute all criminal cases in both courts whereas now the city prosecutor has a staff and operates in municipal court. The bill, he said, has been unanimously approved by the entire municipal and common pleas bench. There is a movement, at least in one county of the state, toward unification.)

It was also pointed out that the municipal courts in the larger counties were less opposed to unification than courts in smaller counties. Mr. McCormac mentioned a bill to provide for transfer of cases to municipal courts for greater flexibility.

Mr. Roberto remarked: I think that the history of this is that Judge Thomas of the federal bench in Cleveland who was a common pleas judge was pretty much the author of that bill, and again by way of background there is a provision in the municipal court act that if you have a counterclaim that can exceed the monetary jurisdiction in the municipal court it is automatically transferrable to the common pleas court. This got to be a cute technique for transfer by the defendant who filed a counterclaim with or without any merit at all, put in astronomical demands, for example, to guarantee that the case be transferred to common

pleas court. Apparently the common pleas judges in Cleveland, with Judge Thomas as spokesman, got the legislature to provide for transfer in effect back and apparently, from talking to the men up there, I get the impression that this is effectively used.

(The statute affecting the municipal court of Cleveland and counterclaims was specifically discussed by the speakers, noting that that court has jurisdiction to any amount in such counterclaims.)

Mr. McCormac - There is a recent case where the counterclaim exceeded the jurisdictional amount where the court said you have a right to look at it to see if there was anything of merit at all in the counterclaim and if not, you do not have to transfer the case.

Ensuing discussion - a question was raised about the positions presently regarding the unified court, noting that apparently municipal judges are still opposed. Are common pleas committed to a stand on this question? How about law professors? Mr. Montgomery asked specifically if there were any other considerations besides the municipal judge position and big city-little city situations that we ought to be thinking about.

Mr. McCormac - Well, I think that the leading authorities on court procedure without exception favor some type of a flexible unitary system where you can assign judges back and forth as needed. The goal is an equal brand of justice for all litigants. The unitary system, whereby internally you do the assignment of judges and allocation of cases rather than having to do it periodically through the general assembly, has great advantages in that the legislature is unable to keep up with the times. In response to your question about who besides municipal judges may object, I would suspect that there may be objection from some counties who want a resident judge right there and do not want him to be serving 3 different counties. Probably some common pleas judges are happier with a lower salary and a relatively lower work load. Although the supreme court may now assign him at $30 a day if it finds that his caseload is small. This is a ridiculously low figure.

Mr. Roberto - One additional point on potential opposition, except for Hamilton county where the clerk is for both the common pleas and municipal court, I think that you will find that everywhere else the clerk of the municipal court is an individually elected person with his own staff and his own political aspirations and so with a strong state association they would obviously be opposed to state unification and they were so opposed back in 1966. As a matter of fact, then the clerks were more vocal in opposition than the judges to the Modern Courts Amendment proposal.

Mr. Montgomery then thanked Mr. McCormac and Judge Leach for their help. He expressed the hope that the committee could call upon Mr. McCormac from time to time for help. He then asked Mrs. Hunter to explain the materials that were distributed to committee members and, in particular, to elaborate upon the memorandum that covers many of the same points of Mr. McCormac's presentation.

Mrs. Hunter then summarized Research Study No. 22 and stated that it is a set of annotations to the sections in the first part of the outline. It is pretty much confined to Sections 1 and 4 of Article IV, and therefore covers much of the material already gone over by Mr. McCormac concerning the trial courts in the state. It also attempts to explain some of the purposes of the amendments that were incor-

porated in the odern Courts Amendment. For example, she said, in section 1 prior to 1968 there was a provision that the judicial power was vested in certain courts and such other courts "inferior to the courts of appeals as may from time to time be established by law." This was changed to "courts inferior to the supreme court" and the reason for this change was to visualize the eventual creation of specialized courts, such as tax courts or courts of claims. This memorandum in other words explains some of the changes in terms of the intent of the drafters of the Modern Courts Amendment. There is also a general description at pages 2 and 3 of the distribution of the municipal courts that points out the wide disparity between counties. Cuyahoga county, for example, has 13 completely independent, autonomously operating municipal courts; 25 counties have no municipal courts at all, but rather are served by county courts. The memo makes the point that municipal courts are increasing and the county courts are decreasing each session of the legislature. This is because the municipal courts' higher jurisdiction can affect the caseload of the common pleas court. Comparisons of the tow courts - county and municipal - are made in the memorandum. She also noted a discussion concerning mayors' courts and the fact that it is not possible to make an accurate count of mayors' courts around the state but that there are at least in Cuyahoga county in addition to the 13 independent municipal courts 33 active mayors' courts. The mayor's jurisdiction is described. There is one police court in the state.

Changes in section 4 she pointed out gave rise to questions because of failure to change the original language after the provisions for a unified county trial court were dropped. These include questions about appeals from the minor courts to the court of common pleas and are explained in the memo. Some changes were inadvertent, because of failure to change the original draft.

This is a review of the trial court situation in Ohio and a summary of some of the questions that have persisted in spite of the Modern Courts Amendment of 1968. It will be followed by a memorandum dealing with the appellate courts - pretty much of a history of appellate courts in the state that hopefully will be the basis for discussion of appellate courts as they have existed from time to time.

A question was raised about what is a police court. It was explained that while there were at one time a number of such courts only one exists today. Judge Leach pointed out that before 1912 all through Ohio we had police judges - similar to justices of the peace with the exception that police judges had criminal jurisdiction only and jp's had some civil jurisdiction.

Mrs. Hunter explained that the other materials distributed deal with unitary budgeting, unified courts in America, and also include Chief Justice O'Neil's message on the state of the judiciary delivered at the annual meeting of the Ohio State Bar Association May 10, 1973. They are to be inserted in the notebooks at part 2. There is also a pamphlet from the League of Women Voters having to do with the court structure in Ohio.

The Committee decided that it was convenient to meet before the regular Commission meeting and that it would be continued next month when the regular meeting is set. Mr. Montgomery announced that the Committee would take up Article IV, Section 3, to be presented by Mrs. Hunter, and that the Committee would also probably have a presentation by some outstanding representatives of the common pleas and municipal bench in Ohio for view about unification of the courts from their various points of view. It is anticipated that the next meeting will last an hour and a half, and will begin promptly at 10 a.m. on July 23.

Ohio Constitutional Revision Commission
Judiciary Committee
July 23, 1973

Summary

A meeting of the Judiciary Committee was held at 10 a.m. on Monday, July 23, 1973 in House Room 7.

Present were Chairman Montgomery, Mr. Mansfield, Mr. Carson, Dr. Cunningham, Mr. Skipton, Mr. Guggenheim, and Representative Roberto. Also present from the staff were Mrs. Eriksson, Mr. Nemeth, and Mrs. Hunter.

Present as guest speakers to the committee, representing the common pleas bench in Ohio, were: Judge Adrian Miller, Wooster (Wayne County), President of the Common Pleas Judges Association; Judge Robert Tague, New Lexington (Perry County); and Judge George Tyack, Columbus (Franklin County). These expert speakers appeared in response to committee invitation, and had been requested to address themselves to questions concerning the trial courts in Ohio. The staff had in advance of the meeting suggested certain questions that might be considered and had also invited further comments on any matters that it was felt should be brought to the attention of the committee. The questions propounded in advance included the following:

How should judicial manpower be allocated throughout the state? According to population? According to caseload? Some combination of the two? Some other factor?

Does the present assignment system work effectively to make the best and most efficient use of judges' time and abilities?

Does the present system of independent trial courts with varying jurisdictions create any problems for the courts? For the litigants? For attorneys?

Should all independent trial courts be united into one trial court, the common pleas? Should various divisions of the common pleas then correspond to the present jurisdictions of the various courts? If so, how should judges and cases be assigned--on a rotating basis or should some judges specialize in certain types of cases? What other arrangements would you suggest?

If unification of the trial courts is desirable, should it be done constitutionally? That is, by so specifying in the Constitution and prohibiting the creation of additional courts at that level.

Should the basic trial court (common pleas) be created on a district system, rather than one per county?

If so, how and by whom should districts be delineated. In the Constitution, by the legislature, by the Supreme Court, by a special body of some type created for that purpose, other?

Mr. Montgomery welcomed members, speakers and guests to the monthly meeting of the Judiciary Committee of the Ohio Constitutional Revision Commission. He recalled that the first topic before the committee is that of court structure and announced that the subject of today's meeting is that of trial court unification and districting of trial courts.

Mr. Montgomery - We have invited three common pleas judges today to respond to the idea of unification of trial courts into one court--specifically the merging of

municipal, county, mayors' and police courts into the common pleas court at either the county or the district level. District assumes something larger than the single county. The three judges present represent a small county having a single common pleas judge, a metropolitan county, and a middle-sized county.

Mr. Montgomery then called upon Judge Tague, representing a small county, Perry County, to make the opening remarks.

Judge Tague - I begin with some hesitancy because of the assumption that the problems of a small county are more miniscule. To a degree that is perhaps correct.

To begin with, in most of the small counties, including ours, there is the common pleas court with general jurisdiction, there is the probate court, which includes the juvenile court, and there is in Perry county the county court with county-wide jurisdiction. We have no municipal court, as such.

Our county court, in my view, inasmuch as the grandfather clause requires that the judge now be an attorney, is being excellently managed and should definitely be consolidated as part of the common pleas court. We have a population of approximately 29,000. The judge of that court, is a part-time judge and it is not fair to him nor to cases brought before him to be categorized as such. In our county, as in other counties of comparable size, I think, the county court ought to be a part of the common pleas court.

In the area of districting--if you were to take away from the trial court the domestic relations problems, it might be feasible to create a common pleas district. So long as it is required that he handle all of the domestic relations problems in addition to the general trial work, I can't see how it can be tackled. Oddly enough--and I think that this is generally true--our domestic relations work has doubled in the last four years. That is appalling, and yet, looking at the Summary published by the Court Administrator at the end of 1972 one would find the ratio of our divorce filings running below that of many of the other counties in terms of population. The judges in some of the bigger metropolitan areas have little contact with these cases except judges in the domestic relations divisions. In our county one must live with these problems until the persons involved leave the county or the children become emancipated.

On the district level I suppose that a degree of expertise would be permitted if a judge simply handled civil and criminal cases, as is done in a metropolitan county. Whether this is fair to the people, it seems to me, is one of the big questions. I have gone back to the 1912 Convention notes. Our own common pleas judge was a delegate to that convention--that is to say, he became the common pleas judge. Apparently the thrust for the changes at that time was a matter of transportation. Hard as it is to believe, transportation is still a problem. It is inconceivable the number of people who when notified to come in for jury service, especially women, say that there is no transportation at all available to them to travel a matter of 15 or 20 miles from the fringe of the county into the county seat. In a one car family, where the husband has taken the car to work, the wife has no way of making the trip. This transportation problem is not one that is encountered in cities like Columbus or Cleveland. But we still have a transportation problem.

Frankly, to summarize, while it may be true that there is some degree of inefficiency in that every judge in a small county is not utilized fully, nonetheless, it seems to me, that this is a matter within the purview of the courts themselves

to work out. I can't see that this matter should be the subject of constitutional change. I have discussed this question recently with a minimum of 8 other judges from smaller counties, including Judge Tom Mitchell from Jackson, Judge Ratcliff from Ross county, Harley Meyer from Hocking county, Carlos Rieker of Morgan county, now retired, Lucien Young of Noble county, also retired, Gale Weller of Morrow county, as well as judges from some of the northern counties. This matter has been stirred around for some time. They are basically of the same opinion that even though there be a disparity of salaries no constitutional change is presently warranted.

A common pleas court of a smaller county is largely, I suppose, a matter of personality. It is fantastic the number of personal calls the judge gets from people. I doubt that Bob Leach had such experiences when he was on the common pleas bench of Franklin county. I receive lots of calls for personal assistance--e.g. for letters of recommendation to various schools, etc. On balance it is my honest opinion that we would be doing a disservice to the counties with a population below 40,000 were the present constitutional provisions changed. This opinion is shared by the others with whom I talked. Our terms have a way to go--mine doesn't expire until 1980--so it is not a matter of selfishness. It is based upon experience.

I do think that county courts should have greater jurisdiction, but this, of course, is a legislative matter, and not a constitutional one.

Mr. Montgomery - Thank you, Judge Tague. We will hear from Judge Miller of Wayne county next and ask questions after all three judges have made their presentations. Will you give us the medium size county view, Judge Miller?

Judge Miller - Our county, Wayne county, has a population of approximately 90,000. There are two of us in the common pleas court, general division, a probate division judge, who was probate judge when the constitution was changed, who has juvenile jurisdiction, and a municipal court of Wooster which has county-wide jurisdiction in all of Wayne county. We have no county court, in the strict term, as it was created when the justice of the peace court was abolished. The municipal court basically does all that work.

The same factor that Judge Tague mentioned--i.e. transportation--applies particularly to that county-wide municipal court. It is approsimately 20-22 miles to the farthest corners of our county from the city of Wooster and the municipal judge has the transportation problem despite local bus lines that serve the Amish community. Yet transportation is a vascillating problem, involving the solvency of bus companies, etc. The Amish do not have automobiles, and we have a sizable Amish population. We do, of course, have a section of the county where the horse and buggy is still a common sight because it is used by the Amish who live in that area.

That municipal court today is overloaded. It has not tried a civil case for two years, as far as I can find out. Its load on the criminal side has increased substantially and d.w.i. cases have increased 100% over two years ago, I would say. I merely give you this information as a preface, to tell you what is happening to a municipal court with county wide jurisdiction in our county. Its caseload is somewhere in the vicinity of 9,000 cases a year, of which I would say 50% are tried. Small claims, of course, has been added to the municipal court by legislation, although that does not, in my judgment, take a great deal of time.

At the common pleas level, last year we had approximately 950 cases filed of

which 495 were divorce and uniform reciprocal support problems. We had a carry-over of about 450 cases, so we had a total of about 1350-1400 cases before us. We have managed to keep the pending caseload at roughly the 400-450 level. In other words, we disposed of approximately what we took in. This does not take into account the fact that when Judge Sharp came to this court 4 years ago I was grossly behind. That is the reason the legislature allowed us to have a second judge.

The probate court has about 1000 juvenile cases a year, of which again I would say about 50 to 55% are traffic in character. I have no statistics on probate matters, but in the sense of their being adversary proceedings or having to hold hearings or having major problems with probate matters, that is a very small number of actual hearings in our probate court. The work of the court is largely administrative.

I can also testify that the domestic relations problem--which we also handle, not having a domestic relations division--is considerable. The figures that I gave you do not include any of the so-called "continuing jurisdiction" problems. For those of you who are not lawyers, I think that it is fair to say that in every case where there are children, once a divorce is decided in the court of a given county, common pleas or domestic relations court, that case is subject to further action with reference to support, alimony sometimes where no children if so reserved, visitation, and change of custody until those children are 21 years old. Even if the legislature lowers that age to 18, the problem will still exist because it involves children from the age of one through eighteen in that case. If there is any child involved in a divorce case, and that divorce is granted, the court has continuing jurisdiction as a matter of law, with the responsibility to try to protect the interest of that child. In relation to society and in relation to either or both parents.

These problems then are endless. And they are not revealed in any statistics. I've not tried to keep statistics on this kind of problem. And the problems can get sticky at times--particularly when you are talking about changes of custody from one parent to the other. The pursuit of support that isn't paid. We have a support bureau and some manpower that works at it, and we have succeeded in raising the level of support payments. The court doesn't have quite as many contempt problems as we used to, but we still have enough. And they represent 55 to 60 per cent of the court's time. The people are emotionally and mentally wrought up, and they need someone who listens.

In this context I am talking about overall caseload. If you are talking about unification of the courts and the creation of a district system, it is my belief in the counties with a population factor above 75,000 that the circuit or district system will not improve the administration of justice. In fact, I think that it would hamper it.

If you tacked on Holmes county with a population of twenty or twenty-one thousand, immediately to the south of our county, into a two-county district, I don't think that you would reduce the manpower requirements. You might aid us by requiring the Holmes county judge to come to Wooster twice a week and work on some of our problems, but I'm not sure that you would help Holmes county very much. It might work, but if you added on Ashland county, immediately to the west, with about 40,000 population, I don't think that you would gain any efficiency. As a matter of fact, I think that scheduling problems and the time spent on administrative matters would be multiplied. I'll give you a reason why I say this. Distance, scheduling in that county, adjusting it into ours, even if you computerized it, you cannot computerize the time of

lawyers, litigants, doctors, or others.

We have at the present time in our county a lack of physical facilities to do our job as efficiently as it ought to be done. Even with two judges, we have only one adequate courtroom in which to try a jury case. We have managed since 1971 to have a second courtroom (about the size of this room) and we use it for hearings and uncontested matters and it has relieved our scheduling problem. But even so, our assignment commissioner is constantly required to consult with us, and our operation is not as efficient as it ought to be from the simple lack of adequate facilities. This is not from failure to press the county commissioners nor unwillingness of the commissioners to help. It's because of a situation where we can't raise two and a half million dollars to build a new courthouse by bonded power because we have tried. The physical space problems that we have may not be peculiar to our situation, but it demonstrates the difficulty of trying to work in facilities that are not sufficient. I haven't seen any survey to show how prevalent is this problem. But I doubt that even within our structure (the middle sized county) districting or circuiting will help us. We can, after all, under the present arrangement use the judge from a smaller county for help. All that we have to do for this purpose is see if that judge has adequate time and ask the chief justice to assign him. And, frankly, we're taking it out of his hide to do it for $30 per day payment to him. That per diem for a judge who goes away on assignment is not fair. As far as I know, however, no change is contemplated.

But we can get help if this is the problem. And part of what we are concerned with is the efficient disposition of litigation within a reasonable time.

As to the other question--unification of the court--it seems to me that if you want to make the courts efficient and your premise is that putting everything in a centralized operation will do so, then probably a legislative, not a constitutional, change is all that is called for under the present provisions of Section 4 of Article IV. You could simply give the common pleas court jurisdiction over all justiciable matters--period. You could simply abolish all courts below it. And, if you wished to create certain divisions and spell out the divisional jurisdictions, you could do so, although I do not believe that it would be necessary. It would be simply a matter of putting sufficient manpower in the common pleas courts to take care of all litigation.

I believe that some specialization of judges is necessary. I do not think that Judge Tague or I or anyone else could go from preliminary hearings, to d.w.i. trials, to small claims court, to first degree murders, to injunctions in labor disputes, to arguments over foreclosures, to automobile litigation of various kinds, involving the bringing in of various co-defendants as can be done under the present rules of civil procedure--all of these complicated problems. With them I do not think that you can take one judge across the board to handle matters of this nature day in and day out. Judicial expertise will be required. I believe that the public thinks common pleas judges are supposed to know everything off the top of their heads--I, for one, disagree with this view.

If you go to unification in this sense and put all the judicial business in one court it could perhaps be done with two or three divisions, such as small claims, etc. I dislike the term "minor division" and would point out that the men and women who serve in the municipal and county courts feel that they are treated inferiorily. And yet more of the general public get their impressions of law and order in the

court from such courts as these. The importance of handling the small matters should not be downgraded in the process of unification. The courts are one way to combat the impersonalization and dehumanization of society in dealing with the law. We also have a factor that is now coming to the surface in very vivid form, and that is our system of corrections, of which the court is a part. If we do go to one court, with divisions, whatever divisions are created, one should not be treated as less important than the other.

Turning to another subject--I think that we have the available tools within the civil rules today to make this work if bigness and centralization are the way to get at it. I have questions about this assumption. However, we do have a referee system available to us in the rules, and it has been used. But, in the middle sized counties, as well as small counties, the problem of finding a qualified lawyer willing to act as referee is an almost impossible one to solve. I do not believe that the court can take a young lawyer out of law school with but a year or two of practice and put him to work on questions involving the custody of children. Maybe if enough money is available this is possible, but I have doubts about the capability of a young inexperienced lawyer in this area and I base this on my own experience in domestic relations work.

I am here talking about factors that are not measurable by statistics. I am saying to you that it is feasible to unify the courts even in the middle sized counties, but I do not think that it is necessary to do so by constitutional amendment. My present feeling is that we should not go forward with any major constitutional revisions at the present time, relating to the districting or the further changing around of the general court boundaries for jurisdiction on a constitutional level. I personally feel that we ought to give a chance to the changes that have occurred since the Modern Courts Amendment was passed (with the possible exception of merit selection of judges at appellate levels). Moving on to creation of a circuit or district court, creating more constitutional courts, or attempting to cut off the power of the legislature to create other courts in the constitution would be unwise. We ought to first digest the major changes that have occurred since 1968 before proposing major constitutional changes in our court structure.

I believe that the disparity between the county courts and the municipal courts has created some friction in some areas, including the disparity in salaries. The county judge is a part-time judge, permitted to practice law, but in many instances is working to the point that his practice has diminished to zero. On the other hand, in a city which his territory surrounds a municipal judge may be working half as hard and be paid twice as much. Such situations do exist and have created real problems. They have come up in the salary hearings that I've attended in the past few months.

As I see it, courts can be feasibly unified, within the present structure, and we do not need a circuit system at this time to make the judicial system in Ohio work better. The assignment of judges still can relieve the basic overload problem.

I want to say one other thing that was raised in the questions presented to us. You are never going to get rid of the assignment of judges. I had the false idea that you could create a district of 4, 5, or 6 counties, keep a judge in each county, and then require them to do all the judicial work in those 4, 5, or 6 counties, irrespective of where they had to go to do it. And stop sending them to Cleveland, and Dayton, Cincinnati and Columbus. That might be more theoretically ideal than

practical, however, because you are never going to get away from the need to assign a judge in a county where the local judge cannot ethically or practically handle business before him. Politics has some influence, too, so long as judges are elected. I think that our present assignment system works pretty well. Its major difficulty is the availability of a sufficient pool of judges and the sad necessity of overload in some of the larger counties. In the middle sized counties there is relatively little occasion to ask for an assigned judge because the local judge ethically or politically cannot handle the case, but some such occasions do arise. In the four years since we have had a second judge we've spent no money on an assigned judge in our county. Prior to that our expenditures for that purpose ran up to $500-$700 a year. I know one county that has spent as much as $3000-$4000 on a $30 a day basis for an outside judge. But also the cases that ethically and properly the local judge cannot hear because the people involved are too well known to the judge. Assigned judges are requested with some frequency for the purpose of keeping proceedings fair, impartial and neutral.

I hope that I've helped and I will be glad to answer your questions.

Mr. Montgomery - Thank you, Judge Miller. Next we will hear from Judge George Tyack from Columbus to give us the view from a large sized county.

Judge Tyack- I am here at the request of Judge Williams of our court and I do want to point out that the comments I make are my own and do not represent an official court view of the matters here under discussion. I cannot speak for the other 9 judges, although I did confer with several about their respective opinions.

With the change in rules affecting criminal proceedings, effective just the first of this month, coupled with the adoption of civil rules a couple of years ago, it may well be that many of the problems that have confronted the courts particularly with respect to backlog and crowded dockets are gradually being corrected. At least this is so in our county.

Some of the questions sent to us concern me. One is the inference that there should be at the county level a one court system. The opinion of those that I talked to, and definitely my own opinion, is that it would be a mistake to abolish municipal courts as such and absorb them into the common pleas court. We are not speaking from a salary standpoint, because I'm sure that municipal judges work every bit as hard as common pleas judges. I should point out at this point that I have been a judge for a little over 5 months although I practiced law for a good many years. Any comments I make may well be reflected by my role as attorney rather than judge because I have found the role of judge to be a very gratifying one, and I have few complaints.

I do, however, think that it would be bad to do away with municipal courts. I am speaking now as a judge of a large city, such as Columbus. The big problem lies in the types of cases that come to each of the sets of courts. They are entirely different. In criminal cases, for example, there are preliminary hearings, held in municipal court. A taint could be attached to a case by the time it got to a higher level if the same judge were in on both aspects of the case. At the preliminary hearing, as you all know, all that is necessary to be shown is that there is "probable cause" to believe that an offense has been committed and probable cause to believe that the particular person has committed it. Usually at the municipal court little evidence, if any, is presented on behalf of the defendant in a felony case. Felonies only, of course, go to the higher court--in this instance the common pleas court.

I think that such a move would be dangerous even in a county with a court of our size, with 10 judges of the court of common pleas. It could be worse in a smaller county where it is feasible that the relationship could be a closer one. Where in a county such as Judge Tague's if there were only one court he or someone close to him would be hearing preliminary hearings and also be sitting in final judgment on the trial. On this question I believe that the opinion of the judges on our court would be negative for this reason.

I have not had the experience with the court that Judge Miller has had. I do feel that the assignment system that is now operative is quite helpful in reducing the dockets in the bigger communities. We have had the advantage of a retired judge sitting by assignment in our county. We've had Judge Tague in our county upon occasion. Considering the fact that we have had some changes in the rules and the procedure is now becoming operative to make a change now, before we have an opportunity to be exposed to the changes we have brought about through the rules, could be injurious rather than helpful. The court in Franklin county is operating smoothly and speaking as an individual, I would hate to see major changes made. I am particularly opposed to consolidation of courts, and if it comes to a matter of finances, I believe that municipal and common pleas judges should be paid on the same level.

I am happy to answer any questions based upon my rather limited experience as a judge and certainly from my extended experience as a lawyer.

Mr. Montgomery - Thank you, Judge Tyack. We will now open the session to questions from members of the Commission.

Mr. Mansfield - Judge Tyack, could you give us some notion of the percentage of cases in which preliminary hearing in felony cases is waived?

Judge Tyack - I could answer that very bluntly. If they have a good lawyers, it is never waived. If they do not have a lawyer, it is frequently waived because they do not know their rights. I think that it is stupid on the part of any defense attorney to waive a preliminary hearing unless it is so obvious that he is going to later cop a plea.

Mr. Mansfield - I would agree with you but could you make an estimate of the number?

Judge Tyack - I would estimate--and this is strictly a curbstone opinion--that approximately 50% go to preliminary hearing. This has probably increased in recent years because of an adequate legal aid system. Attorneys are availing themselves of preliminary hearings as part of discovery proceedings.

Mr. Mansfield - The other question I have I'd like to address to Judge Tague. I gather that Judge Tague sees a somewhat different role for the common pleas judge in a small county, in his relationship with people, than he does for a judge in a large county. In a small county the people are more apt to (a) know the judge; (b) come to him "extralegally," if you please, for advice on a lot of things. Without getting to the question of whether a judge in a small county ought to have to give such assistance, am I correct in assuming that this was one of your points?

Judge Tague - It is largely a matter of personality, I suppose. There is no question but what this occurs.

The Judge then recounted a recent experience in which a widow had called him for advice in a situation in which she clearly needed the services of an attorney. He made this suggestion, and she asked for the name of one who might be competent for the service in question. When the name was supplied, she asked if he would call the attorney for her. Such situations are typical, he said, of what a judge in a small county encounters on a regular basis. Moreover, he is asked for references and to put in a good word for people under a variety of circumstances. Furthermore, according to Judge Tague, he has frequent term assignments to some of the larger counties such as Cuyahoga, Hamilton, and Montgomery counties, where the problems are limited to the legal ones, unlike the matters with which the judge deals in smaller counties. There personal contact is more frequent and requires much time.

Mr. Mansfield - Would you say that the necessity of doing the kind of things you do as opposed to what judges do in larger counties results in more popular respect for the judge? Or in the words of the cliche, does familiarity breed contempt? Does respect depend upon how you handle these matters?

Judge Tague - Well, this is one of those areas that is strictly intangible. It could lead to contempt. Frankly, I do not think that it does. We have had but three common pleas judges in our county (since the 1912 convention, that is)--Judge Price, who served for about 25 years, Judge McGonagle, who served 26 or 27 years and then myself. I believe that the people in Perry county have always looked to the judge for help.

Judge Miller then indicated that he, too, receives some personal requests such as for recommendations and suggestions, but they are relatively rare. They are, he said, a diminishing factor. Judge Miller then continued:

Judge Miller - I want to say one other thing. In counties of our size and smaller the people want to keep their trial judge of general jurisdiction. We want somebody whom we know, locally, and whom we pick. People seem to have an affinity for the judges they elect and want to keep the right to put them in office or put them out if they perform unsatisfactorily.

Mrs. Eriksson then addressed a question to Judge Miller. She preceded it by establishing that the court structure in Wayne county consists of a common pleas court and a municipal court with county-wide jurisdiction. The latter court sits only in Wooster. With respect to the large number of traffic cases, she asked, are many of them transient? Judge Miller replied that a great number are state highway patrol cases. There is in Wooster, he said, a conjunction of major highways where the jurisdiction is dual. He pointed out, however, that there are mayors' courts in Wayne county--in some 16 villages and 2 other cities. One of the latter may not be exercising judicial functions, but the other is, he said, and that happens to be the second largest city in the county--Orrville, a city of about 9000. Many traffic cases occurring within city limits are disposed of in these mayors' courts. Even so, the Wooster municipal court is overloaded, he added.

Judge Miller - If we had three judges in the municipal court of Wooster today, I'm sure that they would be pressed to go outside Wooster and circuitize the municipal court within Wayne county. As a matter of fact the question of whether we should have a second judge hinges in part on whether the court's jurisdiction should be split by creating a municipal court in another city, so that there would be two rather than one municipal court in Wayne county. The present jurisdiction would be divided territorially. I personally do not favor resolving the problem in this manner. I favor

keeping the one court, and have it move out to serve people in other areas, rather than requiring them to come into Wooster. That requires additional facilities, although two of our cities have facilities that they could easily convert for court operation. We could have a circuit municipal court, to a degree, in a county such as ours.

If we went the whole way in Wooster, in the common pleas court, I'm not sure that I would want to venture a suggestion. We might have the same thing--at least in the area of misdemeanors, minor traffic offenses, perhaps even in small claims. It could be worked out that small claims would be heard in one town at a fixed time, another town at another fixed time. There are areas of work of the court that would lend themselves to that sort of arrangement, with the manpower to do it.

I would like to ask Judge Tyack a question from the comment prepared for the committee: Does the present system of independent trial courts with varying jurisdictions create any problems for the courts? For the litigants? For the attorneys? Since he is the most recent practicing attorney, I'd like to ask him whether or not this independent system of independent assignments made any change in the way the lawyers and litigants were affected by the system.

Judge Tyack - One of the big problems that a practicing attorney has is the multiplicity of courts, with the lack of coordination one of the factors. The big problem that he does have in the municipal court of Franklin county is that there is a civil branch, a criminal branch, the possibility of a record hearing, a jury trial, trial by the court--conceivably he can be in five different places in municipal court. We also have a separate domestic relations court with 3 different judges and several referees, so again without an assignment system, as we have in common pleas court, one can be assigned to 3 or 4 different places in that court. Common pleas has both civil and criminal jurisdiction, too, of course, and with the separate assignment system there is a lack of coordination between them. The big problem is that of correlating assignments. I don't think that it would change any if we had only one court. The only improvement would be that they would be all in the same building. This will be somewhat resolved in Columbus with new facilities.

Mr. Carson - I would like to address a question to Judge Tyack. I am from Hamilton county, and we have been interested in unification of our municipal court, which is county wide, and our common pleas court. Our legislation requires the municipal judges to sit out in the county part of the time so we actually can hold court out in the townships and suburbs. We have 10 municipal judges and 13 or so common pleas judges. All 10 municipal judges favor unification into one common pleas court with two divisions. All of our common pleas judges favor this. I wonder why there is such a divergence between Franklin county and Hamilton county on this issue. One reason that this is favored is that it would permit common pleas judges occasionally to help what we would call a district division judge when he is totally overloaded. And vice versa. We also think that it would be easier to get better men on the bench if they were common pleas judges rather than municipal judges.

Judge Tyack - May I direct a question to you. Is this because of economic variance?

Mr. Carson - No, I don't think so.

Judge Tyack - My attitude, and I speak for myself, is the danger of the "preliminary hearing question that I spoke of, and I realize that this is only one facet of the court business - namely felony cases. Another factor is that the municipal court has

such a large volume of what one might call "kangaroo" cases. When we speak of 9000 cases in Wooster, I don't know whether this includes tickets paid in the cafeteria system or whether this is limited to trials.

(Judge Miller indicated that the figure includes everything.)

Judge Tyack (continuing) - Our municipal docket, including traffic cases, is horrendous if you look at it as a total. When you discount the number disposed of by pleas it is not nearly so bad as if they all had to be tried. One thing that would frighten me about unification is that I am of the opinion that the half dozen lawyers who do practice in our court on the criminal side could bring out whole proceedings to almost a crashing halt by insisting upon rights under the new rules--such as jury trials, for example, and the elimination of negotiated pleas, or few of them. The right to have their case presented on information and being set within so many days is another. It could be an impossibility for them to function. If cases from both municipal and common pleas were combined, it would, I think, compound this problem. In our county, the idea of unification is not popular.

Mr. Carson - May I ask another question. Our plan was to have a district division which would have jurisdiction of its own, similar to the municipal court's jurisdiction, and a general division, which would be similar to our present common pleas court in jurisdiction. Jurisdiction-wise, there would be little difference. Would this arrangement still present the preliminary hearing problem?

In the discussion that ensued Mr. Carson clarified the proposal under consideration in Hamilton county. The municipal court name would simply be changed to district division of the common pleas court. That is all that would happen. The jurisdiction would remain the same. Appeals would be unchanged. A question on the right of appeal from municipal court was acknowledged by several participants in the discussion. Judge Leach noting that though the question is not settled at the present time it appears that there is no appeal from municipal court to court of common pleas. Mr. Carson also responded to questions about the plan that there would be internal assignment between divisions. There would be a presiding judge over each division, and these two presiding judges could arrange for exchanges. Judge Tyack raised the question about whether there would be political problems involved in such assignment among divisions. Mr. Montgomery asked if the scheme contemplates one assignment commissioner. Mr. Carson responded that it did and noted that an additional change would be that the county prosecutor would handle all of the prosecutions in both courts rather than having, as at present, the Cincinnati solicitor provide a prosecutor for cases in municipal court. There would be one clerk and one prosecutor to handle all cases. Mr. Carson added that a lot of thought has gone into the idea and a bill has been introduced to effect the change. This is independent of H.B.167 that would make comparable changes in several counties. Mr. Carson also stated that all judges, clerks, and prosecutors were supporting the Hamilton county bill, introduced by Mr. Murdock, and that it also had the support of the county commissioners. Judge Tyack responded that it is felt there is some advantage in having two sets of prosecutors in that cases get culled out at the municipal level. The volume for a combined staff he felt might be tremendous.

Judge Leach - Under present law, of course, the case is brought under city ordinance rather than state statute, and the city gets the fines imposed. The city passes laws that are identical to state law in order to get the benefit financially. This is part of the pattern of the separate municipal court act by which in essence in return for receiving this money a portion of the judge's salary must be paid, in addition to all housekeeping expenses.

Judge Leach then asked under the Hamilton county proposal who would pay the housekeeping expenses of the municipal court.

Mr. Carson - At present the municipal court is a city of Cincinnati court although judges sit throughout the county and are elected county-wide. All proceeds, fines, etc. go to the City of Cincinnati, and the city pays the bills. Another feature of the bill is that there would be a transfer both of income and expenses of the court to the county. The city of Cincinnati is in agreement.

It was noted in discussion that cities have made money on municipal courts.

Mr. Montgomery - When we talk about unification of the courts, aren't we really talking about unification state-wide rather than county-wide?

It was agreed that it could be either way.

Mr. Montgomery - If we talk about statewide unification, we get into state financing. Should we make money out of the court system? Should any subdivision of government regard the court as a money making proposition?

Mrs. Hunter then asked a general question about whether the judges felt that counties should have a uniform set of courts inferior to the common pleas court so that there would not be great differences from county to county. This would avoid duplication of facilities, as in Cuyahoga county with 13 independent municipal courts. Would such a change, she asked, make it easier for an attorney who practices in many counties and who must therefore be familiar with differing structure and differing rules and practices, depending upon the particular structure in an individual county. This would not, of course, be a subject of constitutional revision.

The question was asked as to whether mayors courts would be abolished and the assumption was that they would be. In the ensuing discussion several participants agreed that mayors courts should be abolished because mayors are frequently not attorneys. It was agreed that there would be advantage to having one inferior court. It was also suggested that it might be a good idea to see how the plan for unification works out in Hamilton county before attempting to impose it state-wide. Sufficient manpower remains a problem in some counties, said Judge Miller, as well as making judicial services available throughout the county. It was also agreed by the judges present that the necessary changes need not be made by constitutional amendment. Judge Tague pointed out the practical problem involved in abolishing mayors' courts - i.e. finances.

Mr. Montgomery thanked all three of the guest speakers for the assistance that they had provided. He noted that the study is a long term one and extended an invitation to the judges present to return or communicate with the committee at any time. He noted that the committee is interested in getting a practical view of how the judicial system really works in Ohio and thanked all present for opening new avenues of thought about it. Judge Miller made the concluding comment that statistics, numbers, population, caseloads have a place in making these decisions. But along with them, he cautioned, are the intangible factors, such as: what is the quality of justice in relation to the number of dispositions? Are speed and efficiency the only goals? There is more to justice, he said, than how fast cases are handled or how many cases are disposed of in a year's time. Major changes have been recently made and they ought to be digested, he suggested, before new ones are introduced. The committee devoted some time to discussing the ramifications of the rules of civil

and criminal procedure and the interpretations of them based upon federal and other state precedents. These rules are part of the broad range recent changes, the total effects of which remain to be seen.

Mr. Montgomery summarized what he believed to be the view expressed that it is important to give the Modern Courts Amendment of 1968 a chance to be tried before making additional changes. Judge Miller added that in addition to the new rules, of both civil and criminal procedure, and the rules of superintendence, there is an entirely new criminal code soon to go into effect and that the effect of all these changes in the law cannot be immediately gauged. He also pointed out that the Ohio Supreme Court is presently working on rules of superintendence to apply to the municipal courts, and that this is a monumental project because of the great disparity that exists among these courts.

Mr. Montgomery then announced that for a rounded picture on unification the committee would be hearing from the Ohio State Bar Association's Modern Courts Committee, which advocates unification, as well as the Ohio Judicial Conference, which was instrumental in having the unification portion stricken from the Modern Courts Amendment. He also indicated that a future meeting might be held in conjunction with the Legislative Service Commission's Committee, headed by Representative Fred Young, also studying the subject of Ohio courts.

The next meeting will probably be held in the morning of the date of the next full Commission meeting in September.

Ohio Constitutional Revision Commission
Judiciary Committee
September 28, 1973

Summary

A joint meeting of the Judiciary Committee and the Legislative Service Commission Committee on Court Organization was held at 10 a.m. on Friday, September 28, 1973 in House Room 11. Judiciary Committee members present included Chairman Montgomery, Mr. Mansfield, Representative Roberto, and Senator Gillmor. The Committee of the Legislative Service Commission was represented by Chairman Young, Representatives Celebrezze and Nader, Senator Headley and Senator Corts.

Present as guest speakers to the joint committee meeting were: Hon. William Milligan, U. S. Attorney for the Southern District of Ohio, co-chairman of the Modern Courts Committee of the Ohio State Bar Association; Mr. Allan H. Whaling, Executive Director, Ohio Judicial Conference; and Mr. Coit Gilbert representing Hon. William Radcliff, Administrative Director of the Ohio courts. Also participating in the meeting were Legislative Service Commission staff members Bob Cambridge and Tom Swisher and Constitutional Revision Commission staff members Sally Hunter, Julius Nemeth and Director, Ann Eriksson.

Tom Swisher, staff member of the Legislative Service Commission, was introduced and asked to summarize a staff memorandum on the subject of a Survey of Court Organization in Ohio that was distributed to members of both committees. Highlights of his review of the court structure generally included the following points:

At the apex of the system is the Ohio Supreme Court, primarily an appeals court and the court of last resort in this state but with original jurisdiction to hear what are referred to as the "extraordinary writs" (listed in the constitution) and with important power to prescribe rules governing practice and procedure as well as rules of superintendence for all courts of the state. The extraordinary writs derive from the common law and include such actions as mandamus, which asks the court to compel governmental officials to do their duty as prescribed by law, and prohibition, which is a means of preventing a lower court from proceeding in a particular case by order of the Supreme Court. The other three constitutional writs include: quo warranto (which tests a person's title to public office and also may be used to test corporate powers); habeas corpus (which tests the legality of any form of detention); and procedendo (which is a means to compel a lower court to proceed in a particular case).

The Supreme Court has appellate jurisdiction as a matter of right in cases originating in the courts of appeals, cases in which the death penalty is affirmed, and cases involving constitutional questions. It also has jurisdiction to hear other appeals from the intermediate courts of appeals in cases of felony or in cases of public or great general interest.

The intermediate courts of review in this state are the courts of appeals. The Constitution requires that the state be divided into compact appellate districts, in each of which there is a court of appeals, consisting of three judges. In Franklin county and Hamilton county the district established by law is composed of one county. Elsewhere the number of counties varies, and Table I of the Staff Survey (at p. 6) shows the variations. The Constitution only describes jurisdiction of the court of appeals as follows: original jurisdiction in the writs of quo warranto, mandamus, habeas corpus, prohibition, and procedendo and original jurisdiction in any cause on review as necessary to its complete determination. It is left to the General Assembly

to prescribe the appellate jurisdiction of the courts of appeals. Laws are to be passed giving the court of appeals jurisdiction to review and affirm, modify or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, as well as final orders or actions of administrative officers or agencies.

Finally, the common pleas courts are at the top of Ohio's trial court system and are courts of original, general jurisdiction. Under the Constitution each county has a common pleas court with at least one resident judge.

Below the common pleas courts are municipal and county courts. Both are subject to the requirements of a court of record (both are so designated by statute.) These two sets of courts are roughly equivalent. As far as criminal jurisdiction is concerned, they are essentially the same, both having jurisdiction to hear and determine municipal ordinance violations and misdemeanors.

The territorial jurisdiction of a municipal court extends to the boundaries of the municipal corporation in which it is situated and, by statute, in many cases to both unincorporated and incorporated areas beyond its corporate boundaries. In a number of counties, as in Franklin and Hamilton, one municipal court has countywide jurisdiction. There is no county court in such a county because by terms of statute a county court exists with territorial jurisdiction over that part of a county not included in the jurisdiction of any municipal court. In some counties there are several municipal courts which together cover all of the territory of the county, so that again, the conditions for the creation of a county court do not exist. Cuyahoga county is the extreme example of such a county, with 13 independently created courts.

Although the criminal jurisdiction of the two sets of courts is roughly the same, the civil jurisdiction varies between the two. Municipal courts may hear controversies involving amounts up to $5000 whereas the limit on county court jurisdiction is $500.

Although it can be said that two other sets of courts exist, actually only one set--the mayor's court--plays a significant role. The mayor is authorized to adjudicate certain criminal cases--he is not required to do so--and these are limited to ordinance violations and moving traffic violations occurring on state highways within municipal boundaries. The mayor's court is in essence a traffic court. An accurate count of the number of mayors exercising judicial authority cannot be precise because no central source exists for data on this question, but the best estimate that 639 mayors are operating a mayor's court is based on reports to the Bureau of Motor Vehicles concerning points on drivers' licenses for traffic violations.

The other set of minor courts alluded to is that composed of police courts. A chapter of the Revised Code is devoted to the police court and its functions, but actually only one such court remains in existence, and that is the police court of Ottawa Hills village in Lucas county. It is somewhat of a hybrid court, resembling the municipal court in that it may hear both misdemeanor and ordinance violation cases, and in other respects having the restrictive jurisdiction of a mayor's court--for instance, jury trial may not be had in the police court.

Completing his summary of an overview of the Ohio court structure, Mr. Swisher mentioned the fact that some common pleas court divisions have been created by

statute, and one division--the probate division--was recognized by the Modern Courts Amendment.

Mrs. Hunter, of the Constitutional Revision Commission staff, then reviewed highlights of a memorandum which had been distributed on the subject of minor courts in Ohio. Her main points were as follows:

Major studies have called for overhaul of state lower courts, so there is universal interest in examining courts of limited jurisdiction in the various states. The American Bar Association's Commission on Standards of Judicial Administration has declared that if there are two sets of courts at the trial level, the jurisdictional definition for each level should be the same throughout the state. This is not the case in Ohio. Reiterating what Mr. Swisher had said about lower courts, she pointed out the great differences in structure that exist from county to county--e.g. 34 counties have one municipal court and no county court; 10 counties have more than one municipal court and no county court; 25 counties have no municipal court; and 19 counties have a combination.

Several problems inhere as a result of the continued operation of mayors' courts. Mayors need have no legal training yet according to one attorney general's opinion a mayor may hear a case of ordinance violation where imprisonment is called for if jury trial is waived. The requirement that a mayor certify a jury trial case where there is no waiver to a court of record in the county apparently gives the mayor a choice of forum in counties where both municipal and county courts exist, and he may use this choice as a lever for waiver if one court has the reputation of being tough, the other lenient. The Ward case, decided in 1972 by the U. S. Supreme Court, and emanating from Ohio, suggested that in a contested case the mayor who also has executive functions involving village finances may not adjudicate because of conflict of interest. The ramifications of the Ward case are not altogether clear because of ambiguity in a footnote which attempts to limit the holding to the specific situation before the court, but Judge Leach suggests that State ex rel Brockman v. Proctor is to be examined on the same point. 35 Ohio St. 2d 79 (1973)

The existence of one police court and the presence of an unknown number of mayors continuing to exercise criminal jurisdiction are at odds with the goal of an integrated system.

Territorial jurisdiction of the municipal courts varies greatly. Table A shows courts with county wide jurisdiction and Table B shows which courts have jurisdiction that extends beyond corporate boundaries. A statute allows the judge or judges of any municipal court having jurisdiction outside corporate limits of municipal boundaries to sit outside corporate limits, within the area of territorial jurisdiction of the court.

The number of judges in each municipal court is prescribed by one section of the Revised Code, but another establishes a population formula for the number of municipal court judgeships and declares that when the formula is met any additional judgeships that are warranted by it are "hereby created." But again there are exceptions--specifically in the cases of Barberton, Cleveland, Kettering, and Youngstown. By the 1970 census Youngstown and Cleveland courts would have lost judges because of drops in population. Another exception exists by way of a court decision that held in effect that although under the 1970 census Hamilton county municipal court would have been entitled to 14 judges, when it was created, it was established

with 9 rather than 12 judges and therefore continuing effect must be given to the legislature's intent that the court have three judges less than it is entitled to under the formula. A point stressed in the memorandum is that much criticism has been leveled at basing number of judgeships on population only, without regard to need that could be otherwise demonstrated.

Some municipal judges are full-time, and some are designated as part-time--a designation which simply means that such a judge may practice law in courts other than the one that judge serves. Whether a judge is classified as full or part-time has some general relationship to population, as illustrated by Table A, appended to the memo, but here again, there are great variances and further indicia that the court system developed piecemeal, in response to local pressures at varying times. The Huron court has a part-time judge with a population ratio of one to eight thousand; the Berea judge, also part-time, serves 92 thousand. Conneaut has a full-time judge with a population of but 15 thousand, whereas the judges of Garfield Heights and Willoughby respectively serve 100,000.

The differences in court structure county to county may result in disparate justice. Obviously, the municipal court, with higher monetary jurisdiction, can assume more of the burden that the common pleas court may be experiencing, thereby maybe making its docket less congested and less in arrears. There are subject matter jurisdictional differences between the municipal court and the county court, too. Regardless of money limitations, county courts may not hear intentional tort actions such as assault and battery nor cases in which the title to real estate is questioned. In addition to the diversity that exists as to minor court arrangements in the various counties, a provision in the municipal court chapter of the code, giving municipal courts county-wide powers in enumerated instances, has raised questions and generated litigation. This is discussed at pages 8 and 9 of the staff memorandum.

County courts having more than one judge are divided into "areas of jurisdiction," and each county court judge has jurisdiction within the area allotted. However, a variety of code sections give county court judges county-wide authority--another illustration of the many exceptions and inconsistencies in the statutes governing courts of limited jurisdiction.

It should also be pointed out that some of the subject matter limitations upon the jurisdiction of a county court make little sense today. They derive from provisions that applied to the justice of the peace and were amended only to change the name. The jp was a township, not county officer, often untrained in the law. He operated a court of far less stature than the modern county court.

Although as has been pointed out the criminal jurisdiction and municipal and county courts is very similar, another variation on the criminal side is that the juvenile court has exclusive jurisdiction of all juvenile traffic offenders--i.e. offenders under the age of 18-- adding to the variety of courts hearing traffic cases.

It has been conceded that municipal courts are good revenue producers although not easily documented because of the dearth of statistical information available. Municipalities would lose revenues and there could be a problem of court availability if municipal courts were abolished but their integration into the common pleas court with revised statutory provisions relating to the allocation of fines and forfeitures could meet some of the objections.

The costs of operating minor courts are not easy to report. Judicial and some other salaries are prescribed by law on a population basis (see page 17 of the memo), and in general county courts are supported by the county and municipal courts by municipality and county. Statutes authorize a wide range of officials for the municipal court --e.g. besides clerk, deputy clerks, bailiffs, deputy bailiffs, psychiatrists, probation officers, assignment commissioners, deputy assignment commissioners, typists, stenographers, statistical clerks, and official reporters. Court room and law library accommodations must also be furnished. The duplication of facilities is obvious in a county such as Cuyahoga with 13 separate municipal courts, or Montgomery County with 5 municipal courts and a county court as well.

Apparent faults in the existing law are summarized on pages 18 and 19 of the memorandum. Because both county and municipal courts have some county-wide jurisdiction the opportunity for forum shopping exists. In general this is undesirable. Moreover, jurisdictional exceptions and inconsistencies cause uncertainty and confusion and add to litigation. Duplication of facilities results where there are a number of independently created courts. The number of judgeships ought to be based on need criteria rather than mere population. There should be more flexibility in the structure. Adequate social services are not always available at the lower court levels, resulting in the belief (and at least one study to back it up) that inferior justice is dispensed. One factor that is frustrating about Ohio courts is that lack of structure makes difficult an accurate report on their operations. The mayor's court question is still an important one. It has been argued that the distinction between felonies and misdemeanors is artificial, and that, therefore, the integration of inferior courts into the court of general jurisdiction is a desirable step.

Chairman Montgomery then invited questions and several were addressed to Mr. Swisher and Mrs. Hunter jointly. Mr. Young asked whether or not the question of a combined clerk for the municipal and common pleas court had been examined. Both responded that in the two counties of Hamilton and Portage the clerk of courts serves as municipal court clerk. In response to a further question pertaining to compensation paid to the clerks of municipal courts in varying counties, Mr. Swisher agreed to report later upon the amounts involved. With respect to the Portage County municipal court, he added, the history of that particular court reveals that it actually replaced two municipal courts--one in Ravenna and one in Kent. Although the clerk of courts serves as clerk of the court, deputy clerks man the offices of the court in Ravenna and Kent.

Mr. Mansfield asked if an appeal lies from minor courts to the court of common pleas. There was discussion about the fact that since the adoption of the Modern Courts Amendment the courts of common pleas have been authorized to hear appeals from administrative agencies only. Appeal is now to the court of appeals from municipal and county courts.

Chairman Montgomery introduced Mr. William Milligan, co-chairman of the Modern Courts Committee of the OSBA. Mr. Milligan began his remarks by noting that the Modern Courts Committee had long endorsed the integration of minor courts, such as the municipal courts, into the court of common pleas as a salutary move. Its position has long been one of approving in principle the idea of court integration that would result in the common pleas court being composed of divisions. At the same time, it has opposed expansion of the practice of having judges elected to specific divisions for the reason that such a practice should not be frozen into the Constitution, limiting legislative innovation.

He recalled his prior experience in the study of judicial administration in this state, as chairman of a Legislative Service Commission study committee, that concommitantly with the OSBA committee led to promulgation of the Modern Courts Amendment. As originally proposed by the Modern Courts Committee, the Constitution would have provided for one court of general jurisdiction at the county level--the common pleas court and no other. The legislature "in its wisdom" and for the practical purpose of achieving one important step in court reform chose to revise that recommendation. Therefore the amendment retained the authority of the general assembly to create other courts and provided for integration of the probate court into the court of common pleas.

The view has been expressed by Judge Manual Rocker, spokesman for the municipal court judges, that there is doubt that constitutionally the legislature could create additional common pleas divisions and in this manner integrate courts at the county level. Mr. Milligan indicated that he does not share this doubt and believes that under the Modern Courts Amendment the legislature could on its own initiative bring about some of the changes that are being called for as desirable.

Mr. Milligan then read portions of the minutes of a Modern Courts Committee meeting held on May 18, 1972 in which a proposal was recommended to the Bar Association in regard to court unification. It approved in general that all courts below the court of appeals level should become part of the common pleas court structure; that workload between common pleas judges should be equalized so that all judges could properly be granted equal salary, paid by the state; that jurisdiction of mayors' courts should be transferred to the appropriate common pleas court divisions; that all municipal court judges and police court judges should become judges of the common pleas court, municipal division and county court judges should become judges of the common pleas court, county division; that all judges should serve on a full-time basis; that transferred judges would be elected from and normally sit in the area served. That proposal specifically stated that the legislature from time to time should prescribe the divisions within the various common pleas courts as well as the total number of judges authorized within a county and that special election to divisions should not be expanded beyond the current practice plus municipal and county divisions.

Insofar as S.J.R. 30 is concerned, said Mr. Milligan, the Modern Courts Committee at its meeting of September 8, 1973 endorsed "in principle" the provisions of Issue 3, with direction that the specific language which it employs be subjected to further study. He noted with interest the analysis done by the Constitutional Revision Commission and said that a similar in-depth examination of the provisions of S.J.R. 30 would be undertaken. He also pointed out that while the Bar Association's Executive Committee usually adopts the recommendations of study committees such as Modern Courts this is not inevitable, and it will be another week or so before the OSBA's Executive Committee meets to take action.

In response to a question from Mr. Celebrezze as to whether judges could be freely assigned among divisions according to need, under the provisions of S.J.R. 30, Mr. Milligan responded that the election of a judge to a particular division might cause a psychological problem in that a judge would feel entitled to stay in his own division if elected thereto. The possibility of having a civil and criminal division was mentioned, as was the related problem that might inhere in persuading judges to accept assignment from one to the other. It was also mentioned that a current bill before the legislature would combine the municipal court and common pleas court in Hamilton county only. It was suggested that experimentation in one county may be good

in that if it works, other counties can do the same. Mr. Milligan expressed some reservations about a piecemeal approach inasmuch as it adds to the "hodge podge" already described.

Mr. Allan Whaling described the Ohio Judicial Conference as an organization composed of the judges of all courts in Ohio. Because of its multi-court representation the Conference has taken no formal position on S.J.R. 30 (Issue 3). However, there is strong support for its passage on the part of municipal court judges. Some consideration was given to polling all member judges on the question of support for the issue but this course will probably not be taken. One reason is that a split would certainly result. Some common pleas judges are opposed to Issue 3 because they do not wish to have counties combined--notably those in smaller counties who believe that they would not be elected on a district basis. Mr. Whaling also recalled the opposition expressed by representatives of the common pleas bench who appeared before the Judiciary Committee at its last meeting. Municipal court conference members are reluctant to have opposition to Issue 3 publicized, so a member survey will probably not be undertaken. Mr. Whaling expressed continuing interest in the studies being carried on by both the Legislative Service Commission and the Constitutional Revision Commission.

A question was raised as to whether Issue 3 requires or merely authorizes common pleas districts. Mr. Whaling and others responded that it is enabling only.

Mr. Coit Gilbert was the next speaker to be introduced. He explained that he was present on behalf of Judge Radcliff, Administrative Director of the Supreme Court, who had intended to come but at the last minute was prevented from doing so. Mr. Gilbert indicated that the Chief Justice would not take a position on Issue 3 but that the Supreme Court will carry on its functions of superintendence and working for a good court system, whatever the legislature decided to do about court structure. Presently in process are rules of superintendence that will apply to the municipal courts of the state. Mr. Gilbert noted with pride the successes achieved by the rules of superintendence in reducing case backlog and distributing the caseload at the common pleas level. The collection of meaningful statistics for the minor court level is a goal of importance to the office of Administrative Director. Mr. Gilbert also added that he was pleased to see that committee members have copies of the American Bar Association's Commission on Standards of Judicial Administration, entitled Standards Relating to Court Organization. He said he feels it to be a very good source of information on court reform. Mr. Gilbert also cited studies done in California by Booz, Allen and Hamilton, pointing to unification and indicated interest in this subject on the part of the National College of State Court Judges in Reno. Ron Russell, its director, is very interested in current developments in Ohio, and especially in the proposal to unify the courts in Hamilton County. Mr. Gilbert added that it was his personal opinion that the district system is a step in the right direction.

Julius Nemeth of the Constitutional Revision Commission staff then reported on work in progress by the staff on the question of the activities of other states--particularly constitutional activities--in the area of unifying minor courts, that is courts below the level of the trial court of general jurisdiction. He said that other states seem to be taking one of two approaches to the problem: (1) unifying minor courts at least on a county-wide basis, or if on the basis of less than a county, at least assuring that these courts have uniform and nonoverlapping jurisdiction; or (2) absorbing the minor courts into the trial court of general jurisdiction and creating a "second layer" of judicial officers, often called magistrates,

to handle the types of cases traditionally handled by separate minor courts. As an example of the first approach he cited Florida, whose judicial article, adopted in 1972, specifies the creation of a judicial structure in which the county court will be the lowest unit, and into which all minor courts, including municipal courts, will be absorbed by 1977. As examples of the second approach, he cited the states of Idaho and Illinois. He pointed out that Idaho recently created a Magistrate's Division of the District Court of Idaho (the general trial court) in which division nonlawyer and lawyer magistrates handle certain classes of cases, enumerated by law, akin to those which would ordinarily be handled by separate minor courts. Mr. Nemeth also referred to the Illinois system in which lawyer magistrates are assigned certain cases by Supreme Court rule, within the framework of the Circuit Courts, which are the general trial courts there.

Mr. Nemeth also summarized a memorandum prepared by the staff on state trial court districts in other states, trial court districting being of interest in Ohio at the present time because of the presence of Issue 3 on the November, 1973 ballot. This memorandum was prepared, he said on the basis of a survey of 22 state constitutions, including 11 which have enacted new constitutions since 1945, and 11 picked at random from among those which have amended their judicial articles in recent years. Of the 22 states surveyed, he said, 20 have trial court districts. Most states which have trial court districts require that these be made up of "compact and contiguous territory," with few, if any, references to equality of population. However the Michigan Constitution of 1963 and several recent proposals, he noted, also require consideration of the amount of judicial business in determining district size. County lines most often serve as district boundaries, although at least one state, Alaska, uses state election districts as territorial boundaries.

The power to create, alter, or abolish districts is most often reposed in the legislature, he reported. However, several constitutional provisions written in the last decade recognize that the creation of districts is, to a large extent, an internal matter for the judicial branch to solve in cooperation with the legislature. He cited the example of Article 5, Section 9 of the Florida Constitution, which, in effect, requires the supreme court to monitor judicial manpower needs and needs for change in judicial districts on a continuing basis, and to certify its finding that a need exists to the legislature, and imposes a positive duty on the legislature to act on the court's finding.

The joint meeting concluded at 12:15 a.m. with thanks from both Chairman Montgomery and Chairman Young to committee members and visitors for having attended. Mr. Young announced that on November 2, 1973 the study committee would be meeting in Warren, Ohio, where it would begin examination of the operation of the court system and he invited all present to attend. Mr. Montgomery announced that the next meeting of the Judiciary Committee would be held on October 15, 1973 following the Commission meeting, and that the committee would probably convene immediately following the afternoon Commission meeting. He announced that the committee expects to hear from representatives of the Association of County Prosecutors and that an invitation would be made to county clerks of court as well as to municipal court officials in both of these categories to appear and participate.

Ohio Constitutional Revision Commission
Judiciary Committee
October 15, 1973

Summary

A meeting of the Judiciary Committee was held at 3 p.m. on Monday, October 15, 1973 in House Room 7.

Present were Chairman Montgomery, Mr. Guggenheim, Rep. Norris, Rep. Roberto, and Committee Special Consultant Judge Leach. Present from the staff were Mrs. Hunter and Mr. Nemeth.

Attending as guest speakers to the committee, representing county prosecuting attorneys in Ohio, were: Mr. Bob Wisner, of the Prosecuting Attorneys Association; Mr. William F. McKee, Richland County; and Mr. David D. Dowd, Jr., Stark County. As in the case of the July meeting of the committee the speakers address themselves to questions concerning unification and districting of trial courts in Ohio. Some 20 questions had been suggested by staff in advance of the meeting pertaining to not only the proposals contained in Issue 3 on the November ballot but about operations of the trial court, duties of the prosecutor's office, effects, if any, of the rules of superintendence and questions relating to courts of limited jurisdiction and the division of labor between the courts of limited and general jurisdiction. In addition to specific questions the prosecutors had been asked to contribute any other comments they might have regarding trial court unification and districting, the office and functions of the prosecutor, or other problems amenable to constitutional analysis and, possibly, revision.

Chairman Montgomery opened the meeting by stating that the subject presently under study by the committee pertains to trial court unification and districting and the operations of the minor courts. The views of common pleas judges on the subject were given to the committee at a prior meeting. The committee also has had the benefit of presentations of the Ohio State Bar Association and various experts on the subject of court organization, and has met with a committee of the Legislative Service Commission studying the same subject. He welcomed representatives of the Ohio Prosecutors Association to share their views with the committee on this important subject. The first to speak was Mr. Hanes, representing Darke county, the smallest of the three.

Mr. Hanes: I have gone over the series of questions that was submitted to us. I would like to first of all put the remarks that I wish to make in context by telling you a little about my county. Darke county is one of the largest geographical counties in the state of Ohio. It is 20 miles wide and 30 miles long. It is located approximately 80 miles north of the Ohio River and about 80 miles west of Columbus. It is a rural county, with a population of approximately 50,000 people. The county seat has approximately 12,500 and has, I believe, 14 villages that are incorporated. It has 20 civil townships and we have had industry in the county since about 1950. We have several major firms - Corning and others - and are located about 36 miles northwest of the city of Dayton. A good number of our people work in Dayton and commute back and forth. Our black population numbers about 6 families. I bring this up because it does have a reference to the courts and to the prosecutor's office. We have migrant people who come through the county to harvest tomatoes in season, running from May until October - they are presently leaving about now. This gives you some idea of the geographies of my county.

Court structure-wise, we are one of the few counties in the state of Ohio without a municipal court. We have a common pleas court with a probate and juvenile division, and then our presiding judge, Judge Eley who presides over common pleas court generally. We have two county courts that split the county into a northeast and southwest district. They constitute the lower court. We have a practicing bar of about 22 lawyers - spread out as follows: in my law firm there are six lawyers; one firm has four, another, four and one has three. (Law firms were named.) And then there are several single practitioners who do not practice criminal law as a rule. They are in general older members of the bar who do not care to take court appointments. So, because of this, and because one county judge is located in one law firm, another is in one of the named firms, and my firm cannot do defense work, naturally - because of this there results the practical necessity that all charges originate directly into the common pleas court. It would take several of the other law firms out of the defense business if I were to originate them in the county court. The county courts within the county and my office as prosecuting attorney appear in the prosecution of these cases - they cover all the highway patrol cases that are filed through the highway patrol and all of the misdemeanors that originate under the state statutes.

I try to process in Darke county, as much as I can, all criminal cases at the lowest possible level, referring back to the mayor's court those cases which should be processed under the municipal ordinances. The count that we have been able to make - and I've begun keeping the books this year - in the month of September we filed 18 felony cases and terminated 10; August we filed 10 felonies and terminated 11; in July we filed 16 felony cases and terminated 10. This is the basic average caseload handled by our prosecutor's office.

My staff consists of myself and one full-time assistant as of last November. Prior to that time I operated the office myself with two part-time assistants, one of whom handled juvenile matters, and one of whom handled county court prosecutions of the traffic cases and such other misdemeanor cases as were filed - e.g. assault and battery, a frequent matter brought to us.

The prosecutor's office in a county the size of mine - I call myself a county prosecutor - is regarded as somewhat of a panacea or cure all for all evils. When the other county officials are in doubt, such as the clerk's office as to what action a person should take in a particular situation - they refer persons to the prosecutor's office. There we often refer them on to civil lawyers to handle their legal matters. The prosecutor in a country county such as mine is, of necessity, the chief law enforcement officer of my jurisdiction, and I subscribe to this philosophy. By that I do not mean that I would pretend to be the sheriff or the chief of police of the city of Greenville or do the officer's job in an investigation. But I do deem it to be the prosecutor's duty to see that these things are done. In the larger jurisdictions, for example, their officers have for years been trained in academies before they are issued badges or given a gun and put on a beat. Up until just a few years ago to become a law officer in a county such as Darke the only requirement was the ability to raise your right hand and take the oath. Thereupon you put on the badge, took the gun, and became a law enforcement officer. This system has produced a number of very fine law enforcement officers; however, wht the increased crime and increased law enforcement problems it has become necessary, and the legislature has recognized the necessity, to train these people. This is where in the rural counties I think that the prosecutor must often fill a void and accept the responsibility of being the chief law enforcement officer. This entails leading the department, making sure that training programs become available to them, and, if necessary, teaching classes yourself. Many times in the past five years I have run seminars and recently I had one on the new criminal rules. And I believe that by doing

this the philosophy of the officer can be altered. For example, it is easy to look at the old Miranda ruling (old now) where it says that a person suspected of crime has to be advised of his constitutional rights - to regard such a ruling as one that in effect tied the prosecutor's hand behind his back and made police officers feel that they could not do their jobs effectively. Such an attitude should not prevail, however, because, although it is easy to fall into, it must be remembered that the prosecutor is sworn to uphold the law. So I took the affirmative position that although I may not agree with the Supreme Court, that is the law, and that is what we will follow in Darke county. That kind of leadership coming from me to the officers on the beat is part of the responsibility of being the chief law enforcement officer of the jurisdiction.

Furthermore, the country prosecutor can sit back and say, "Well, I lost this case because you did a very poor investigation. If I had more trained officers, I'd get more convictions." I try, instead, to approach the matter on a case by case learning experience outlook. I utilize what I call in the practice a prosecutor's yardstick - i.e. the questions I ask the officer are: Have you got all the elements? And are they admissible in trial? I stress that we must have the facts that are admissible. I use this method as one to train officers. We have lost some cases, but we have used this technique to train the officers. Not everyone understands this aspect of the job of a country prosecutor and it is my position in this respect that causes me to differ in some respects from my colleagues in the Association. Mr. McKee and Mr. Dowd, by the very populations which they serve and the nature of the office, have to be more administrators than I do.

I have tried to describe to you the way in which I operate in Darke county and why I do so. I have discussed the operation with prosecutors from all over the country. I am concerned about the proper direction for the office of prosecuting attorney. I have talked, for example, with Bill McDonald, who has a county in Nevada. His county has 10,000 square miles, which if you draw a line with interstate 70 from our western border over to Columbus and down to the river, that's about the size of the jurisdiction. It has a population of 30,000 people. I"ve talked with some of the representatives from Oklahoma who have gone to the so-called "district attorney" system and you have to analyze what's in a name. There, they appointed a district/by population and computed by attorney population the district to which a prosecuting attorney is elected. He then appoints an assistant district attorney in each county. They have a circuit court, I believe, although I am not sure of that fact. It may be a circuit or district court - I'm not certain. What they have done, in effect, is to take some of the prior prosecuting attorneys and made them district attorneys. The salary schedule for district attorney is, however, very low, and a district attorney cannot accept any outside practice. The assistant district attorneys located in each county, can still maintain a private practice. So a lot of the district or prosecuting attorneys resigned their positions and were appointed assistant district attorneys so that they could maintain a private practice and maintain a wage and economic position to which they had become accustomed with the private practice. Inadequate compansation has been provided bythe legislature.

Let me give you another example from Oklahoma. I am told that there is a feeling that the legislature and the supreme court made a mistake when they went to the district attorney system in this respect: that they used alone the factor of population, and they made certain that each district attorney had the same population. As a result, the one district, in southeastern Oklahoma, is almost as big as the county that Bill McDonald has in Nevada. Size of the district and travel time required have made it very difficult and inconvenient for the district attorney to function, even though he does have an assistant in each county. So, if you were to considera district attorney system, I suggest that a factor which you should also consider is caseload, and in addition, that

you consider both the matter of distance involved and population. For example, Darke county, as distinguished from Mercer county, has historically had a greater number of cases filed - both civil and criminal - and I don't know the explanation other than this is simply geographically the case and has nothing to do with the law enforcement officers involved. It has been true for a number of years.

I talked to a district attorney in the state of Texas (Oliver Kitsner) who has three counties about the size of Darke county - 20 x 30 - and they are attached in a tier, one on top of the other. He covers about 2000 square miles. In Texas what they did was to establish district attorneys with the district, then leave in each county a county attorney who serves as civil attorney and also serves somewhat as an assistant district attorney. The jurisdiction of the district attorney is criminal only. The county attorney, as assitant to the district attorney, handles the preliminary matters, until Oliver Kitsner arrives. However, the legislature failed to make any provision whereby the district attorney would have any supervision or cont ol whatsoever, either in terms of financing or suggesting how he should run his office - it was left to each county as to how the county office would be financed. The district attorney must pick up loose ends from what someone else has begun, as a result. Mr. Kitsner feels that he has been forced to become less effective than he could be, and I feel that he has a very engaging personality, and that the system has unfortunately hampered his ability to perform. He works out of his car, with the tape recorder, mailing the cassettes back to his secretary, whom he may not see for 2 weeks at a time. These experiences that I have shared with district attorneys from about the United States I feel that I should bring to your attention. Having served on some on the committees of the National District Attorneys' Association, I have had a chance to learn. I used to think that I was a country prosecutor - and I had a big county - and then I found out this 10,000 square mile county and 30,000 population and it makes my county look rather small. It introduces different problems. I feel that a country prosecutor, or one functioning as I do, has an obligation above and beyond the mere prosecution of offenses that occurred. In my view, and what I attempt to practice in Darke county, is that the duties of the prosecutor include trying to prevent crime, primarily in the juvenile delinquency area. I encourage officers to take part in prevention activities and with success that surprises the officers who follow my direction. Getting involved in programs, city and county, really helps to control and prevent crime especially on the part ofjuveniles who are surprised to find that they can respond favorably to the officers who participate in a variety of activities with them.

Another action that we take as part of our view of the prosecutor's office as that of chief law enforcement officer is the responsibility that I accept to assist the sheriff, an independent agency, and chief of police, also independent, within Greenville, in deriving funds from their appropriating authorities, the county commissioners and city council. Both the sheriff and chief are often hampered in getting these legislative bodies to appreciate their problems. For example, several years ago, when I was safety director of Greenvile, the officers were being paid $3660 a year. It took me several years of argument to persuade council that we had to give a $1000 raise - against arguments that the then officers were not worth increases of this size. (Some were not - but how are you going to attract the caliber of people you want for law enforcement unless you pay the salary? Attrition will take care of those who are incompetent, and you will be able to replace with competent people if you have decent salaries.)

Take this same idea and apply it to the office of prosecutor. I work from 50 to 55 hours per week - of which I estimate 35 hours are spent in the prosecutor's

office. The remainder is in my private practice. I receive $10,900 for being a prosecuting attorney in Darke county. I earn in 15 hours somewhere in the neighborhood of in excess of twice what the county pays me. I don't begrudge the hard work -- I enjoy being a prosecutor and am one by choice. I filed the petition, knowing the salary and accepting it. But I do feel that if you are going to attract good, solid people into a full time prosecutor's role, you are going to have to pay an income that is commensurate with what can be gained in private practice.

Chairman Montgomery then requested that questions be reserved until the completion of all three presentations. He also stressed that the committee is interested in not only views about the office held but also how it relates to the present trial court structure. He suggested addressing questions such as "Do you favor full time as opposed to part-time prosecutors? What about relationships to mayors' courts, county courts, egc. How could we best function under a district system?" He called for an expression of views upon all of these and related questions. He commented that Mr. Hanes apparently spoke with some opposition to the district attorney system and noted that this is not a matter of constitutional revision inasmuch as the office of prosecuting attorney is not dealt with in that document. The commission's special interest, therefore, concerns the courts and he reiterated the hope that the prosecutors would give their views about the present court structure and operations.

Mr. McKee: I am sure from what Mr. Hanes has said that he favors the single county court and the single county prosecutor as contrasted to a district arrangement. Briefly, so that you can contrast my experience with prosecution and the courts with that which you've heard, I'd point out some facts. Our population is about 130,000, primarily industrial in the center, surrounded by agricultural areas, so that we bracket the small county and large county. Particularly, we have the Ohio State Reformatory in Richland county and we have the turnpike crime which takes place between Columbus and Cleveland.

We have 4 common pleas judges - 1, probate division, 1 domestic relations division, and 2 what might be called general division. These two alternate criminal terms. We have 3 municipal judges - one is part time in the northern area of the county. We have two full time in the Mansfield area, which comprises the major portion of the county, in excess of 100,000 population. Overall we have good law enforcement officers.

Based upon the experience that I've had inour area, I would recommend a single county court system. This is both from the standpoint of effective court trials and from the area of effective prosecution. In our area, it is such that attorneys from out ofthe county may come in, and yet, just looking at the surrounding counties, it would be impossible for the prosecutor, if he were set up with the courts (and I feel definitely that the jurisdiction of the prosecutor should be the same jurisdiction of the court) for me to go in and effectively prosecute in Wayne or Crawford county. Their problems are different; their juries are different. Part ofthe work in prosecuting and processing the cases is a fair approach to law enforcement. Part of this is necessarily based upon a knowledge of the local law enforcement officer -- their procedures, extent of investigation and how a case should be effectively handled.

I feel that it is further incumbent upon the prosecutor to cooperate with the officials in the civil area. There are close relationships and as an assistant prosecutor for 8 years I encountered matters involving local officials in federal courts. It is necessary, in order to coordinate the courts and the law

enforcement officers, that the prosecutor not only retain criminal jurisdiction but civil jurisdiction, and even though this is not a constitutional matter, I am sure that this committee will be making recommendations that could have a bearing for the future with respect to the jurisdiction of the prosecutor.

Because of the difference which I found within these counties, I feel that if the courts were set up on a district basis and the prosecutor were on the same basis -- a district attorney, so to speak, with assistants in each county, which would be definitely necessary to be even half-way effective in these counties --I don't believe that if you are looking at savings, it would accomplish any. The manpower would still have to be there, and so far as effectiveness is concerned, I don't believe that such a system would be as effective because it is necessary that local decisions be made based upon local knowledge as to what would happen in any given case. And I don't believe someone riding circuit could make those decisions effectively or could have an effective assistant with somebody looking over the assistant's shoulder. If in fact districts were set up from the prosecution point of view, I feel that they would have to follow county lines based upon, if nothin else, venue problems. Any system that would have one prosecutor in one part of the county and another prosecutor in another part of the county simply would not work in an effective manner.

Speaking not on behalf of other county officials, I feel that if any realignment is necessary, it should be upon the basis of county lines, not districts.

The recommendation which I would make based upon observing our courts and courts in surrounding counties is that there would be a common pleas court with lesser divisions. That the judges would run specifically for the upper division- preferably it would be a two-tier system - with judges running for the upper (common please division) and also for the lower division, whether they be so bracketed, and that the judges would be constitutional officials in the establishment of the two tiers. I believe, however, that the superintendence - the control of the courts - should be left with the supreme court and the legislature to deal with the problems as they arise. The lower jurisdiction should be uniform throughout the state, particularly with regard to the superintendence rules.

As to the superintendence rules - at the time that they became effective our common pleas docket in Richland County was current. Our criminal cases were current, our civil cases were fairly current. They have been effective in the common pleas court -- our criminal docket is even more current than it was. The superintendence rules have not been applied to the municipal courts so far, and frankly, our municipal court situation is a mess. The backlog at the present time looks impossible. This is one reason that I believe that if the lower division were a branch of the common pleas court it could get effective supervision on a local level, as well as from the supreme court. Possibly some counties may be looking to assigning judges up, our particular county would be looking to assigning judges down. That way our common pleas judges could sit in municipal court and help clear up the misdemeanor backlog.

Actually, I don't believe that either population or caseload is a deciding factor. I've examined the judicial statistics for Ohio and see that relatively speaking our county has a low caseload compared to other counties of comparable size. The reason for this is that our county is unique in that while we do have a municipal court system, our office handles all felony cases from the inception. When you look at the statistics they are misleading in that once cases get to the prosecutor's office in the counties where the prosecutor doesn't handle cases from inception, you have anywhere from 100 to 200 dismissals and no bills as compared to ours where the number of dismissals and no bills is very low.

When you examine statistics you must keep in mind substantial differences between a first degree murder case and a cognovit judgment. To a large degree statistics alone don't indicate these differences. I believe that freer assignment of judges is necessary - a more frequent assignment of judges by the supreme court with an equal pay for all judges throughout the state, so that the use of the judges could be better balanced and judges from counties without problems could be used in counties that have them. I think that improvement of this system would be preferable to having one ride circuit.

I don't believe in having the judges in special areas - with one exception, and that is in the juvenile area, where I think that the judge can establish a special feel for the work. Specializing in other areas, such as civil or criminal or especially domestic relations tends to have adverse effects upon even administration of justice in my view. Having one judge assigned to domestic relations, as in our county, is a waste of a judge, I believe, and must be frustrating to the individual judge involved. He could function more effectively if he rotated into other areas.

With a court system operating under one common pleas system, there would probably be substantial advantage in having a one clerk system to go along with it. Whether there should be a central clerk or different locations for the clerk would depend upon the needs of the particular county and left to the determination of the local courts. Because local needs would differ, I believe that the county should assume part of the cost of the court system. And yet a substantial part of the financing of the court system should be by the state of Ohio since most of the court business, especially criminal, is for the benefit of the state.

I see little need to change the office of prosecutor - he should retain his present criminal and civil jurisdiction. From our experience in Richland county I would say that the prosecutor should be in complete charge of all felony jurisdiction. I believe that it is more fair to the community, far more fair prosecution, and to the prosecutor himself that these matters initiate with his office. There has been substantial conflict among the prosecutors themselves as to whether all law enforcement, including misdemeanors, should fall within the prosecutor's domain. In looking at our local situation, I would have to say that while I have no desire to undertake that addition misdemeanor prosecution or have that staff, I see that if the manpower could be assigned from our office to the areas of need, that we would have more effective prosecution if it were all under the office of prosecuting attorney. This would include misdemeanors whether the court be municipal or county.

Another matter that has been mentioned is the part time and full time prosecutor. The use of these terms is misleading. Frankly, there is no such thing as a part-time prosecutor in the state of Ohio. They are all full time. This is the job that comes first with the ones I've seen. The question is whether or not the prosecutor should be prohibited from practicing law. I've seen full time prosecutors in other states where practice is limited and find them often in other business - e.g. real estate, insurance. Judges too are engaged in these other businesses. I believe that the prosecutor should be permitted to practice law. What we need are tbughter ethics guidance for the prosecutors - spelling out the areas in which we cannot practice. At the present time a prosecutor cannot defend criminal cases. I think that this should be extended so that he would be prohibited from defending civil cases where such cases are simultaneously the subject of ctiminal civil proceedings, and from handling domestic relations work where there is conflict with the duty to advise in child welfare matters. Potential areas of conflict should be eliminated. Otherwise, permitting the prosecutor to practice on a limited basis by eliminating conflicting areas,

results in a better prosecutor because mainly the practice of law is dealing with people and the more experience you have in this regard the more effective you become. I would eliminate the full time and part time nomenclature. Practice lines should be carefully drawn.

At this point Mr. Norris asked permission to question the first two speakers because of a meeting that he had to attend at 4 p.m. When it was granted, he asked Mr. Hanes how long he had been a prosecutor and whether he could contrast the 35 hours that he presently spends with the time necessary to handle prosecution business 5 years ago. Mr. Hanes replied that he saw little difference and indicated that a time breakdown would be that he spends approximately 40% of his time in the common pleas court, 20 to 30% in the other two lesser courts and juvenile court (a growing area) and that the rest is spent in the civil area, e.g. township zoning cases, advising county officials, conferring with the judge, etc. He continued:

Mr. Hanes: I feel that the country prosecutor is so far removed and yet within the court structure. For example, we have filed through the first of October in Darke county 435 cases - civil and criminal - and we have disposed of 425. We have the two judges that I described. I feel (and I've conferred with the common pleas judge) that a court of general jurisdiction could handle both the common pleas court structure that he does now and in addition to that handle the probate and juvenile. That has been combined in several counties, but the pay would have to be commensurate with the responsibility. Judge Eley has been out of town 16 weeks so far this year - through October 15 - sitting in Dayton, and he has helped them clear their docket down there. I would point out that the court structure and the transfer of judges results in inequities. Judge Eley is paid $30 per day and expenses to go to Dayton. The Montgomery county judge receives $26,000 a year, and so a judge who is down there a solid week is paid $150 plus expenses. Montgomery County is getting four country judges a week for what it would cost them to have one Montgomery county judge. And, if you are going to transfer judges and be concerned about the court docket. there should be greater consideration to the monetary differential. And, of course, visiting judges are given the "hot potatoes" that local judges don't wish to handle and thereofre do not have to answer to their electorate.

Mr. Norris then said that it was his understanding that the demands of the office have grown tremendously in recent years, and Mr. Hanes replied that while the hours hadn't changed much the duties had expanded but that he had become more proficient in handling them. The workload had probably trebled, however, he noted, just in the past five years. Mr. Norris then addressed a question to Mr. McKee that included remarks made by Mr. Hanes regarding both of their apparent opposition to the district system.

Mr. Norris: If the legislature, as the result of the passage of the constitutional amendment, should decide in Ohio's very rural areas to go to a district court system it wouldn't necessarily require having district attorneys, would it? Could you not retain a part-time county prosecutor within each county in that district? Do you see any problem with that misture? Assuming districts that do not split counties, but, for example, a district made up of four counties with a judge riding circuit, why couldn't you still have prosecuting attorneys in each?

Mr. McKee: It is hard for me to say what would work in Vinton county. I believe that with the scheduling and cooperation that we have among our judges

and our office in scheduling grand juries as they are needed whether on regular basis or part time, that to try to coordinate a number of prosecutors with one judge would not work. It probably could be done, but I don't think that it would work as effectively as one office coordinating with one court system.

There was general discussion about how to handle the situation in smaller counties such as Vinton county. Should the judge be permitted to practice law? How can the assignment system be improved? Mr. McKee responded that he could not help but think that a more effective assignment system could be instituted, with all judges being paid the same so that we eliminate the situation where the Vinton county judge goes to Cuyahoga county but makes less than the Cuyahoga county judge. Would there be a problem recruiting a judge in Vinton, it was asked, if that judge knew in advance he'd be spending 80% of his time in Cuyahoga county? As compared to recruiting a judge to ride circuit in 3 or 4 counties? Mr. Norris opined that he thought the latter would be more attractive.

Mr. Hanes: Geographically Darke county is above Preble county, and Shelby county is located to the northeast. One judge died in Shelby county and the judge in Preble county had a heart attack. Judge Eley handled those three counties. He is an unusually experienced trial judge and could not be used as a criteria for all judges but nevertheless it should be pointed out he handled all three counties effectively while still taking assignments in Dayton. I still feel, however, that the little county should have a resident judge with general jurisdiction. Knowledge of the people makes a tremendous difference in the smaller counties.

Mr. Hanes responded to Mr. Norris' hypothetical by stating that it would depend upon the size and area of the circuit as to a judges preference to circuit versus assignment and that some judges in states with circuit courts do not like the practice. He would favor retaining a resident judge even if there were a combining of common pleas, probate and juvenile in some of the less populous counties and a circuit created to be composed of more than one county.

Chairman Montgomery: Isn't it conceivable that the lower tier court could be the local service court rather than the higher tier court?

At this point Mr. Bob Wistner asked for the opportunity to respond to the question that had been posed by Mr. Norris, on an informational basis and not by opinion. For the record he identified himself as executive director of the Ohio Prosecuting Attorneys Association.

Mr. Wistner: As to whether a county prosecutor is consistent with a district court system, I would simply refer you to examples of where it has operated consistently -- in the states of Illinois and Michigan. They both have circuit court systems where the judges are assigned among counties on the basis of caseload. But each county has a state's attorney or prosecuting attorney with combined civil and criminal jurisdictions on a county wide basis. Illinois has a one tier judge system and appointive judges - or elective judges for the felony or serious cases and administrative judges or lower class judge to take care of the municipal court type matters.

Chairman Montgomery then asked Mr. Dowd to make his presentation. Mr. Dowd prefaced his remarks by stating that he had a few copies of his remarks available

for distribution. He pointed out that he had concentrated upon the concept of trial court unification, as opposed to the districting of the common pleas court, primarily, he said, because even if the district route were taken in his county, Stark, would be a district in and of itself. Stark county has a population of 372,000 and is the 7th largest county in the state. There are 5 cities, of which Canton is the largest. Massilon and Alliance are on either side of Canton. It is a diversified county. He continued:

Mr. Dowd: We have six common pleas judges, two of whom by legislative act are specifically for the juvenile and domestic relations branches of the court and they are in no way involved in the general trial

responsibilities of the common pleas court. We have a seventh judge who is the probate judge. In addition, we have three municipal courts - Canton, Massillon and Alliance - and they blanket the county. The Canton municipal court has a jurisdiction in central Stark county with a population responsibility in excess of 200,000. Massillon municipal court is on the western side of the county and now has two judges because its population has gone over the 100,000 limit for one judge. And the remaining municipal court is that of Alliance, with a population of about 50,000.

Having watched our common pleas court and our municipal court operations for quite a few years as, first, an assistant and then as prosecutor since 1967, I have a number of observations that I want to share with you.

The first is that it is my judgment that the major counties of Ohio are drastically under represented from the staandpoint of the number of judges that they have in relation to population. I have attached to my testimony an exhibit that I prepared in February, 1972 and I found that the eight major counties which have a population approaching 6,000,000 - substantially over half - had at that time 76 judges at the trial level. (Only a few have been added in the interim.) The remaining 80 counties, with substantially less than half the population of the state have 107 judges. On top of that , I think it's fair to say that the 8 major counties have 60 to 70 per cent ofthe crime load. I don't know if they have 60 to 70% of the case load because I don't have that kind of data available.

It strikes me that historically the large counties have been at the mercy of the small counties in the allocation of resources. I understand the arguments that are being made to retain the county system throughout the state but I fear that it will be retained at the expense of the major counties. I have to feel an allegiance to those counties, and I might say for the record that I'm here testifying as to my own beliefs and not representing the Association. I am the president this year, and often I find myself in the minority as far as the beliefs of the Association, so I want it to be clear that I speak for myself today.

The second observation that I have to make has to do with the operation of the municipal court, and I agree with what Mr. McKee has said about municipal courts. I would use even stronger language to describe our municipal court system - it is chaotic. With the exception of the Alliance municipal court, which for some reason is in splendid condition. But the Massillon and Canton municipal courts have now situations that have developed from which they cannot extricate themselves. I've attached an article that recently appeared in the Massillon Evening Independent discussing that court with two judges and their absolute inability to deal with the caseload. We happen to have a division of the state highway patrol located right outside Massillon that blankets 3 or 4 counties and the number of arrests for driving while intoxicated runs an average of 10 to 12 per weekend. And I suppose 15 to 20 during the week. With all the other filings of minor criminal matters in that court, despite the fact that they are having jury trials practically all the time , there is no way that they can keep up.

That problem will be compounded the first of the year. The legislature has adopted section 2945.71 of the Revised Code which provides that from the moment of arrest until the moment of disposition of a person charged with a misdemeanor the period of time must be within 90 days. If not disposed of, and this applies to serious misdemeanors, that man goes free. There is no way in which our municipal courts are going to be able to function within that time frame. Now

when they have a jury case for driving while intoxicated in the Massillon or Canton court, it is normally for an offense committed anywhere from 6 months to two years prior. Their backlog is of such dimensions that I don't know what will happen.

In addition, with the new criminal code we have expanded the concept of theft so that Ithink there will be more major misdemeanor trials in municipal court on theft offenses. The $ figure has gone from $60 to $150 so they will have much more of a caseload in that area.

Historically, municipal courts suffer from the fact that they are financed by the municipal corporation wherever located, even though the jurisdiction may be substantially broader. For instance, in Massillon the city council controls the financing of the municipal court. Massillon has 30,000, and the population of the district is 110,000, so 80,000 people in that court district don't even have a voice in how their court is operated. Canton is somewhat the same - with a population of a little over 100,000 and the population of its territory a little over 200,000. Yet the Canton council funds that court. There isn'tcomparable authority in the court fo fix sums to be appropriated for the operation of that court that there is in the common pleas court with respectto the county commissioners. The common pleas court has much broader power to mandamus money from thetreasury to operate the courts. One of the evils that has developed because of that system results in police prosecutors being not enough in number to service the municipal courts - probably paid a niggardly salary on the assumption that they will work part time. That whole system is in dire difficulty in my judgment.

The third observation that I wish to make is that at least in my county, I don't have the luxury of felony as Bill McKee does. I have 3 separate municipal courts, all serviced by police prosecutors - 6 in all - 3 in Canton, 2 in Massillon, and 1 in Alliance. Except where it is a large case brought to my attention at the beginning (such as a homicide) they do the first prosecutorial screening job for the most part. In my judgment, this is all wrong. Yet I can't take over because of the political situation. Police prosecutors are appointed by the various city solicitors, and theyview that as their own domain. To take that over would involve a politcal struggle that I might or might not win.

In any case, I consider the screening of criminal charges, whether they be misdemeanors or felonies, to be one of the most important phases of prosecutorial work. I have no effective control, so we have some cases that come to us to the grand jury that should not have come over and I am certain that there are cases that never reach the grand jury because they have been disposed of at the municipal level without any input from my office.

Mr. Dowd's recommendations are included in a statement which he furnished and which is appended to this summary. He made some supplementary comments.

As to his first recommendation in favor of the integration of the two trial court systems, he cautioned that, at least in his county, the integration of municipal courts would hurt the operations of the common pleas court. Also he pointed out the difficulty of combining vested interests, noting that the municipal clerks are beginning to oppose Issue 3.

An important first step toward an integrated court system would be, in his view, to put all prosecution functions under the county prosecuting attorney even though it would mean considerably more work for that office. Unification

of the prosecutorial function is important to court unification because the prosecutor's function should not be fragmented. Furthermore, he stated, it is his belief that the prosecution of criminal charges would be better handled with an integrated prosecutor.

In the questions and discussion that followed, it was pointed out that many of the problems discussed are susceptible of statutory, not constitutional solution.

Mr. Guggenheim asked Mr. Dowd whether, although he feels that integration at this time in his county will drag down the common pleas court because of the municipal court backlog, does he feel that a unified court is preferable, without regard to the immediate hardship that it would cause in some counties at the outset. Mr. Dowd reiterated the point that his concern is that major counties simply do not have enough resources and have always suffered on this score. He was not, he said, blaming the six municipal judges in Stark county but rather would go back to this initial point that populous counties have suffered from insufficiencies of resources.

The need for more judges was reiterated by the various speakers. Mr. McKee said that with effort the municipal court backlog could be handled but that at present time a request for a jury trial amounts to delay of enormous magnitude. More judges and local supervision and control would help, he stated. Coordination at the local level is essential, he said, but he also felt that if he had to wait for a circuit judge this would not help but make matters worse.

Judge Leach was asked about the status of the rules of superintendence to govern municipal courts. He pointed out that the rules governing common pleas courts were adopted after several months of consultation with affected judges but that the adoption of rules governing municipal courts was quite a bit more complicated and had already involved many meetings with the judges to be affected. Although municipal judges from all over the state have been meeting on the subject for over a year and a half, the rules are still only in process because ofthe enormous disparities in practice and terminology that exist at the municipal court level. It is difficult even to formulate concepts with the great differences in procedure that have been found to exist among the municipal courts.

Financing and the important source of revenue that municipal courts provide to cities are factors that will further complicate unification and this was discussed by speakers and committee members during the concluding portion of the meeting.

Mr. Montgomery thanked the speakers for their presentations and announced that any written statements would be welcomed. He stated to the committee that the next meeting would be the same date as the Commission meeting, November 8, with the committee meeting beginning at 1:30 p.m. The committee will continue its study of the minor courts by inviting representatives of the municipal courts to appear and make presentations.

Ohio Constitutional Revision Commission

Judiciary Committee

November 8, 1973

Summary

A meeting of the Judiciary Committee was held at 1:30 p.m. on Thursday, November 8, 1973 in House Room 7.

Present were Chairman Montgomery, Mr. Guggenheim, Mr. Skipton, Dr. Cunningham, and Senator Gillmor. Also present were: Representative Mallory, Committee Special Consultant Judge Leach; Mr. Allan H. Whaling, Executive Director, Ohio Judicial Conference; Judge William Radcliff, Administrative Director of Ohio courts. Guest speakers representing various associations were as follows: Mr. Alex Barany and Mr. George Vukovich, for the Ohio Municipal Court Clerks Association; Judge Bonford R. Talbert, Jr. of Tiffin for the Ohio Municipal Court Judges Association; and Judge Ray G. Miller from Muskingum County for the Ohio County Court Judges Association. Staff members in attendance were Julius Nemeth and Sally Hunter.

Mr. Montgomery opened the meeting by recalling that the committee has had several sets of witnesses to discuss topics presently under consideration--court unification and districting. He announced that today the committee would hear from three additional associations, noted above, beginning with Judge Miller as spokesman for the county court judges. Mr. Montgomery asked that questions be held until all had spoken.

Judge Miller: At the outset I'd like to say that it is difficult for me to speak for the County Court Judges Association. I have just been elected president of the association in September. When the idea of unifying the courts was first presented at the Judicial Conference, about a year ago, the county court judges tried to discuss the pros and cons of the proposal. No two people had the same idea about it. Therefore, many views which I express today will be based upon personal observation because it is impossible for me to speak for all county judges.

Judge Miller then directed his attention to questions that had been propounded in advance of the meeting and stated that he would like to comment on those which he felt best qualified to speak to. The first point to which he addressed his attention was whether unification, if desirable, ought to be done constitutionally. He felt on this point that the election had settled one point here and that is that the legislature has the clear prerogative to act in this area as a result of the passage of Issue 3. Amending the Constitution for purposes of court unification would be, he thought, unwieldy, and therefore, he approved of the form taken by the new amendment. The county courts, having always been legislative as opposed to constitutional courts, have been organized and reorganized legislatively and not by constitutional change.

One of the questions which had been propounded relates to whether it is preferable to have a court system inferior to the general trial court, or in the alternative, to absorb minor courts into the general trial courts, as divisions.

Judge Miller: My personal feeling is that it is better to have a separate system. Although I recognize the merit to combining courts, I think that if we move too quickly in the direction of creating one trial court, we might create a lot of confusion in the minds of people, who are used to having traffic cases and minor civil matters and misdemeanors heard in a court to which the stigma of being in court is

not so great as it is in a court of general jurisdiction. A person tried on a misdemeanor charge before a county court doesn't feel like nearly so much of a criminal as if he were tried for the same offense in common pleas. There are points to be made upon either side of this question, however, and unification has administrative advantages.

We would also have to keep in mind that there is some danger in proposing to alter the traditional court structure too quickly.

We must also consider attitudes that are prevalent in the smaller counties. In our area--that is to say in the smaller counties surrounding Muskingum, Issue 3 was vehemently opposed. They especially feared districting.

Another matter to be considered is that of arraignment, and our traditional ideas about having probable cause determined before a magistrate as a prerequisite right to his being held for further action. (This matter is the subject of question 18.) Again, I feel that there are advantages to having this done by a separate court instead of by a division of a general trial court.

Another question posed is that of the efficiency of the prosecutor's office. There is no doubt that if there were one court system and all the clerks were located in one place, with a unified docket, that this would be a great advantage to the prosecutor. In our county we have three minor courts, and a common pleas court, probate court, and juvenile court. Only two of those courts are in one location. The prosecutor must use part-time assistants in order to be able to cover all the courts. On many days he and each of his 4 assistants can be found in a different court. On this point, unification would have the advantage.

However, from the point of view of the small county, this is probably not a problem.

Another question is whether traffic offenses should be removed from the judicial arena. Personally, I feel that they should not. Many of these matters are handled administratively now, under the uniform traffic rules, but they are within the judicial arena, although many areas have acted as we have to establish a traffic violations bureau. Most traffic offenses are disposed of in this fashion, under the rules.

At this point, Representative Mallory expressed his concerns about the handling of minor traffic offenses in a criminal manner. He was disturbed, he said, about the frequent reports throughout the state and elsewhere of the handcuffing and jailing of traffic offenders. He said that he hoped great attention would be given to these enforcement abuses because the mishandling of minor traffic offenses can lead to much more serious situations. Judge Miller agreed and said that he had changed some practices that had prevailed five years ago when he came to the bench, whereby migrants were jailed for minor traffic offenses. His rule is that no one goes to jail in such cases. Representative Mallory replied that he still seeks to insure that law enforcement personnel have specific guidelines because the officer is duty bound to enforce laws as they stand. Mr. Mallory said he would call for careful review of traffic offenses and procedures in order to prevent the possibility of abuse. The punishment should fit the crime, he stated, and so long as such practices as handcuffing are tolerated in traffic cases under present laws and rules in any areas, he would press for safeguards for the citizenry.

Then, in concluding his remarks, Judge Miller said that his own chief concern is that there be equal justice wherever one is tried for an offense. It is not guaranteed now, he said, but rather the brand of justice depends upon size of county, court structure where tried, whether the uniform traffic rules are used, and other equivalent matters that should not affect the administration of justice but do.

Judge Bonford R. Talbert, Jr., President of the Ohio Municipal Court Judges Association, was the next speaker.

Judge Talbert: I will approach this subject by setting forth what I believe should be the goals for the judicial branch. I will list the goals first, and then discuss them individually:

A. There should be a full-time judiciary at the trial level.

B. There should be a uniform salary and retirement for the judiciary at all levels and it should be state-supported.

C. There should be a uniform workload for all trial judges. There should be greater use of referees and master commissioners, especially on traffic, quasi-criminal and civil levels.

D. There should be greater use of trained court administrators on all levels of courts.

E. Every effort should be made to retain clerical staffs of courts at their present locations, doing the same duties that they are assigned to do. We should make use of present facilities--court-rooms, clerks, bailiffs quarters, probation officers--and have the judges do the traveling if they are required to sit in more than one location.

F. Prosecutors and public defenders should serve a greater area, such as a district, in order to attract qualified people. Their job would be full time and they would be paid an appropriate salary because of their expanded area, if the legislature continues to provide that these positions be compensated on a per capita basis.

Returning to the goal of a full time judiciary at the trial level--the present system is much diffused with mayors' courts, county courts, municipal courts, both full-time and part-time, common pleas, juvenile, domestic relations, and in at least one area a nonstatutory "family" court. Our public requires a full-time judiciary. Great criticism has been leveled at the mayors' courts. Even for the defendant who admittedly commits an offense and chooses to plead guilty, he still receives inferior justice at the hands of a mayor's court. Facilities of such courts are inferior and facilities are important. It is important to be able to make a plea before a professionally trained jurist, who will see that the rules of fair trial are followed and that fair sentences are given.

If mayors' courts were abolished, as they should be, the use of referees and master commissioners could be expanded. California, for example, has full-time referees and master commissioners. Municipal judges in California receive in the neighborhood of $34,000, referees $29,500 and master commissioners $27,500. All have judicial qualifications. On traffic matters, quasi-criminal and many civil

matters, such as attachments and garnishments, such professionally trained persons can be used on a full-time basis. At the present time court employees work full time--only the judges are part-time. The problem with the part-time judge is that his court is crowded and he is required to work nearly full-time. Yet his salary is a $6,000 one, and he is required to meet certain law practice qualifications. Contra, in some parts of the state, the judge has barely enough to do. Study should be made in order to find out what is actually happening on this level of the judiciary. This same disparity exists within the municipal court judiciary. Many of the latter would become full judges if their courts were made full-time judgeships. Inequities abound. Judge Joseph Singales of Bedford, president of the American Judges Association, is designated by statute as a part-time judge though the population which he serves is nearly 100,000. Some part-time judges serve a population as low as 12,000.

The passage of Issue 3 should cause the legislature to take a look at the present picture and study the operation of the current system. Perhaps a method can be found for determining an equal workload.

Trial judges should sit as such wherever the work exists, and they should be relieved of a number of their administrative responsibilities. Other personnel can handle such matters. Excellent training is now being provided for court administrators, and a look could be given to hiring such trained persons to work within appellate districts. They could work throughout the state, reporting to the Supreme Court, who would retain control of overall operations. At the present time the administrative duties of the Supreme Court are too great to be handled within the present structure, and it should be expanded. It may be that the way to do this is to extend the present office of the administrative director. But the burden should be placed elsewhere than simply within the Supreme Court.

If there is a change in the structure of the court system, I feel that the clerk's office should not be changed--the work has to be done. They should be paid according to work, so that in smaller counties, if municipal and county courts become divisions of common pleas, the compensation of clerks ought to be raised accordingly to accord with their new status. However, such clerks should continue to be subject to the control of municipal and county judges if they are so subject now. If elected, the situation is different--in any case they should not receive a diminution in salary.

If districts are found feasible, in some or all of the common pleas courts, judges should travel in circuit. We have only a portion of the judges we need to handle judicial business now, however, and I do not see how reducing the number of judges can be justified.

The Municipal Judges Association did not meet to take a position on these matters I am discussing today, and I am not speaking for the Association except for what I am going to say now.

The Association's Executive Committee did meet, and stated that they will support the common pleas judges in opposition to any legislation that would reduce the number of judges.

I feel that we can attract better qualified prosecutors and public defenders in the smaller counties if their work at least is given a district scope. Full-time prosecutors with enough work to do on a full-time basis will be superior to scattered part-time officials. It is difficult to get qualified people to run for prosecutor in some small counties of the state, and the legislature should take a look at this problem.

There is a bill pending on the matter of public defenders--introduced by Representative Lehman. In small counties the requirement of counsel cannot be met by the bar nor can it be expected that members of the bar can take criminal cases gratuitously. If all counties had a staff of public defenders, everybody would benefit. It is important, too, that these defenders be local persons.

Next to appear before the committee was Mr. Alex Barany, appearing for Lawrence Walsh, Secretary of the Municipal Court Clerks Association. He is the legislative consultant to the Ohio Municipal Court Clerks Association. He was, he stated, the Association's legislative representative for some 20 years after which he retired but continues to act in a consultant's capacity. Mr. Vukovich of Youngstown, also present, is Mr. Barany's successor as legislative representative of the Association.

Mr. Barany discussed his role as a long-time participant in the consideration of legislation affecting the courts. He said that the executive committee of the Ohio Municipal Court Clerks Association is presently planning a series of meetings to poll its members as to their position on unification and districting.

Mr. Barany: I remember when the municipal courts numbered 12. There are now 108. Evidently the legislature is satisfied with the job being done by the municipal courts.

There are, then, 108 potential municipal divisions, manned by a couple of thousand people, well trained in judicial procedures. We are concerned that these people not be set aside and that their worth be recognized.

I've heard many views about how the courts should be organized--e.g. put the municipal court clerks under the common pleas court clerks--and in all of this the political realities must be faced. We believe that the combining of municipal courts with common pleas could be worked out successfully by using districts for the municipal courts and let the judges and clerks run their own district. Why? It is a well-known fact that most people never see a court but the one in their own locality, principally for traffic offenses. It is important to a person to go before his local court, where he knows the people, knows that they are familiar with the local conditions, and feels assured that as a consequence he will get fair treatment. As a caution to court combining, however, we would point out that the court that is in arrears is the big one.

In Cuyahoga County we have a multiplicity of courts--13 municipal--and 28 judges. Also three elected clerks in that area. There will be a problem to be faced in deciding what to do with these clerks and judges. Uniformity is a great goal, but we must face the fact that it has been difficult to achieve. Keep in mind that in 1951 the legislature passed the "uniform" municipal court act. But uniformity does not exist and is virtually impossible to accomplish. The Columbus county-wide municipal court seems to be working well. The combined court in Cincinnati has problems. For Cleveland, as well as the other metropolitan areas, the best solution will be to have one spot in the central part of the city where the setting of cases and assigning of judges will be handled. Records as to engaged counsel should also be centrally maintained.

Questions will arise about how to handle the situation in Cuyahoga county and elsewhere. Assuming that there will be a common pleas court and some district courts--their placement will require some study. Judges would presumably run in their own districts. In Lakewood the population is about 72,000 and is expected to go up to

76,000. The judge, just re-elected, is busy. Next to Lakewood is Rocky River, which with all the villages and townships over which the court extends has a little over 100,000. The court has two judges, and not enough work for the two, while Lakewood has one judge with more than he can do. Districting could eliminate some of these inequities. That is what we are working on and supporting--the concept of equal districts. Population is as we see it not the single criteria--workload should be a factor in the determination of districts. It is obviously better to have the legislature make the determinations as to workload than to tie such matters to the Constitution.

At our meeting yesterday we tentatively concluded that a good basis for county and municipal judges would be a minimum of 50,000 people. And no part-time judges. As for the use of referees and master commissioners, I constantly remind clerks that the court speaks only through its journal and the judgment of a referee is not a legal judgment unless it is journalized by the court. There is a traffic violations bureau in the Lakewood court, but the judge still signs a journal entry.

In any case the Municipal Court Clerks Association will work with the legislature in seeing to it that a fair and effective districting system is devised. Clerks salaries should be studied also--they are often out of line when a clerk must depend upon a local legislative body. Elected clerks receive 85% of the judge's salary; why should the appointed clerk be treated differently? The Clerks Association has maintained that election is probably the best method of selecting clerks, and this matter, too, should be considered.

Mr. George Vukovich, legislative representative of the Clerks Association, added that now that Issue 3 has been passed the legislature can proceed with the consideration of districting, as discussed by Mr. Barany. He said that he, too, favors such a plan and views it as a means of guaranteeing better supervision by the Supreme Court over all courts of the state. The district court would be subject to superintendence in a way that local courts have not been. The citizenry is not being denied a voice in court structure so long as the legislature makes such determinations, he stated.

Chairman Montgomery stated that while there are many facets to improving the administration of justice, this committee's chief concern lies in the area of constitutional change. While the legislature now has its job as does the court in the area of superintendence and as does the bar, this committee's job is to examine constitutional provisions with a view to making recommendations, he said. He invited help on this aspect of the question. Now that Issue 3 has passed, where do we stand, he asked, with respect to districting and unification? Questions from the committee were invited.

Judge Leach: Would you at this time suggest further amendment of the Constitution or simply wait to see what happens by legislative action pursuant to Issue 3?

Judge Talbert: My position would be that the public has placed the job in the hands of the legislature at this point. They should have the opportunity to study the question. A few years may be required to resolve all questions.

Judge Miller agreed, with the reservation that more than a "few years" will probably be required. Many groups will be working on proposals for statutory revision and the plan will take some time. He reminded the committee that the vote on

Issue 3 in the small counties had been negative. Consensus will take some time, he cautioned. Chairman Montgomery noted that such a phenomenon is always involved in the lessening of local control.

Judge Leach: How would you anticipate the legislature should actually redistrict--on a hit or miss basis, doing something here, then a year or so later doing something there? Or should there be an organized plan?

The judges expressed the view that an organized plan is an important first step, although it could be flexible and subject to change. Judge Leach raised the question of whether or not the uniform municipal court act had not actually evolved on a piecemeal basis rather than by following an overall plan. Judge Talbert expressed preference for the development of a total plan by the legislature, after adequate study of all parts of the state. The mayor's court question must first be resolved, in his opinion.

Mahoning county was cited as a county with great structural diversity--having three municipal courts and four county courts. The combined population of two of the municipal courts does not equal the population of one of the township county courts. Two of the largest townships are served by county courts, and the county court judges have a workload of large size. The municipal courts of Campbell and Struthers are part-time and, of course, the county courts are also part-time. If one compared the volume of work, the county court judges should be paid on the same basis as the Youngstown court because the workload in the county court is no less. Youngstown has three municipal judges. Problem areas such as this one will require solution.

Chairman Montgomery suggested that when an equitable formula does not fit because of caseload and population disparities that exist, because of such factors as the location of an interstate highway, for example, perhaps the legislature could establish a working formula of uniform application and allow the chief judge of the district or another designated official to appoint magistrates or judges to supplement the formula where it did not work. Such a technique has been used in other jurisdictions. In other words, perhaps the best solution is not to add new judges but to add paraprofessionals as needed. He then asked the speakers for their views on financing--i.e. whether the operations of the courts should be state financed.

It was pointed out in response that there will have to be some study as to disposition of fines and costs. If the state is going to pick up the expenses, the state should have a right to share a portion of the revenue. It was also noted that Amended House Bill 578 has taken away the salary discretion possessed by city councils, and such a change was generally heralded.

Mr. Nemeth then summarized a supplemental memorandum on minor courts in Ohio. Its most relevant portion, he said, is that which refers to municipal court financing. Although there is no central statistical source and therefore court financing must be examined on a court by court basis, the memorandum takes a look at the 1972 annual report of the Franklin County Municipal Court for the purpose of getting some insight into the practical problems of financing a municipal court. Although municipal courts are not fee-supported courts, the fact that they do produce revenue for municipalities has to be taken into account before one proposes state financing or any system of districting, he said, and it is clear that municipalities and other units of local government would have to be given new or additional sources of revenue to

compensate for losses which would result from a change in the manner in which funds generated by a municipal court are distributed at the present.

In conclusion, Chairman Montgomery announced that at the next meeting there would be a review of testimony received so far in public hearings by the committee, and also of Issue 3 in some detail, to see what the committee's responsibilities might be in response to it. He announced that the committee would also hear, at a meeting in the near future, from the court director of Illinois. The committee will then move into the appellate system, with a staff memorandum on the subject, and expects to get to this phase of its work in January. The next meeting of the committee will be November 29 at 1:30 p.m. and the meeting with the Illinois court director was tentatively set for 1:30 on December 6.

Finally, Chairman Montgomery noted in closing that he felt encouraged by the public expression favoring some reform in the judicial system, as evidenced by passage of Issue 3, in spite of the fact that it was publicized as a pay raise issue.

Ohio Constitutional Revision Commission

Judiciary Committee
November 29, 1973

Summary

A meeting of the Judiciary Committee was held at 1:30 p.m. on Thursday, November 29, 1973 in House Room 7.

Present were Chairman Montgomery, Dr. Cunningham, Senator Gillmor, Representative Norris, and Committee Special Consultant Judge Leach. Present from the staff were Mrs. Eriksson, Mrs. Hunter, and Mr. Nemeth.

Chairman Montgomery asked Mrs. Hunter to summarize a staff memorandum on the subject of state and local financing of the courts. The memorandum had not been distributed in advance of the meeting, and she summarized its main points as follows:

Mrs. Hunter - The memo is a review of how some other states provide for the financing of their court systems. At the outset it notes that information about the costs of operating courts and about how courts are financed is information that is somewhat hard to come by. As in other areas affecting the operations of courts other than in the federal system there is little available in the way of centrally collected data.

The Institute of Judicial Administration conducted a study in 1969 and found that neither the method of financing the costs nor the costs of operating the courts could be discovered by using ordinary research methods. Instead, a survey of chief justices and court administrators was used. A tentative report was published in 1969, and the memorandum contains some of the findings reported at that time.

The U. S. Advisory Commission on Intergovernmental Affairs, as part of its comprehensive examination of state-local relations in the criminal justice system in 1971, devoted portions of its report to the question of what level of government has the responsibility of financing court operations in the various states. The report points out great variations in the states but also indicates a rising interest in transferring judicial costs to state government. The feeling of experts in the field of judicial administration is that where the court system is a unified structure, it is a logical concommitant for the state to assume the costs of operating the courts. Various advantages that have been cited are: (1) the state is a sounder source of income; (2) county government, which in most states bears the bulk of court operating costs, has limited tax sources; (3) the state is able to make funds available on a broader, more uniform basis; and (4) state assumption of costs removes a source of conflict between courts and local government and tends to foster communication. Consequently, we find that the National Municipal League's model state constitution calls for both a unified court system and state financing, with a provision that permits the legislature to provide by law for political subdivisions to reimburse the state for appropriate portions of court costs.

In its 1969 study, the Institute of Judicial Administration found that by and large the per capita share of the costs of operating the courts paid by local government is appreciably higher than the per capita share paid by state governments. It found that unitary budgeting in a relatively few states appears to be a comprehensive system in which all judicial costs (upwards of 90 per cent) are state-funded through a single budget administered by the judicial branch, ordinarily by the administrative head of the courts. In general, the state's share of the court financing tends to recede as one goes down the judicial hierarchy, and counties usually shoulder the greatest load because they are usually assigned both the major trial court and at

least a portion of the costs of operating the lower courts. Ohio falls into this category. (Table A in this memorandum is a reproduction of the summarized findings of the Institute in its 1969 study. Tables B and C come from the U.S. Advisory Commission on Intergovernmental Relations study.)

According to a report of the American Judicature Society, as of the summer of 1971 the state had virtually taken over the financing of all the judicial costs in the ten states of Alaska, Colorado, Connecticut, Hawaii, Maine, Maryland, New Mexico, Oklahoma, Rhode Island and Vermont. This memo contains a summary of constitutional and statutory provisions having to do with financing. Florida, with its new judicial article effective January 1973, also has a constitutional provision for the state assumption of judicial expenses. For the most part the provisions for state financing are statutory, but in a few states like Florida there is a specific constitutional provision on the subject. Court financing in Ohio is presently a legislative matter.

Also mentioned briefly in this memorandum and discussed at greater length in supporting studies of the A.B.A's Commission on Judicial Standards is the matter of court exercise of inherent powers for financing purposes. Courts, faced with fiscal dependence upon legislative bodies, have in some instances invoked the doctrine in support of judicial fiscal independence and through mandamus have successfully been able to order the appropriation of operating funds. Most of the cases, however, deal with local units of government and do not test judicial independence insofar as the legislative branch of state government is concerned. Nevertheless, it was a case of this sort that in Colorado led to state financing. There, the Colorado Supreme Court held that the court could require that necessary and reasonable expenses be appropriated by county government unless the court's action was so unreasonable as to indicate arbitrary and capricious action. (There was some discussion of how this question has been resolved in Ohio. There are some cases in Ohio but several at least have been decided on the basis of statute. Other cases were noted. Judge Leach pointed out that a distinction has been recognized between power of court to order out of funds generally allocable and the provision in the Ohio Constitution relative to appropriations made only by the General Assembly. Cases in Ohio as elsewhere, it was noted in the discussion, concern the exercise of the court's power with respect to county government.)

Mrs. Hunter - The administrative concept of a unitary budget is to be preferred to further development of inherent powers, according to the ABA's Commission on Standards of Judicial Administration. The financial problems of the court are evidence of management problems in general.

(A question was raised as to whether in states with unitary budgeting the budget is prepared by the supreme court or by another fiscal officer. For most part, in such states it is the supreme court or its administrative officers who are charged with such responsibility, including preparation of the budget, submission of budgetary requests and documents, etc. In many cases this budget document covers not only judicial salaries, but also supplies, equipment and other operating costs, the principal exception being the maintenance of court rooms. In at least one state, Colorado, the budget is presented directly to the legislature by the supreme court.)

Mrs. Hunter then turned to that portion of the memorandum dealing with individual states, to discuss highlights of individual systems for court financing. Her principal points, by state, were as follows:

Alaska - reported state assumption of 93% of total expenditures of operating courts in Table A; unitary budget apparently derives from constitutional provision

for "a unified judicial system for operation and administration;" no specific statute declaring state responsible for costs of operating courts, but provision for transmitting fees and fines to administrative director for transfer to general fund; further provision for division of fines and fees, in that if they result from ordinance violations they go to the political subdivision, except it shall pay to the state administrative director of the court such sums as will pay for judicial services rendered to the political subdivision by the judge or magistrate rendering the services.

The latter provision is of interest because when state assumption of the costs of operating the courts is discussed, along with a unified system of courts, it must be recognized that courts are at present important sources of revenue to political subdivisions. Prior memoranda from the staff have touched upon the subject of local revenue generated by the operation of municipal courts - e. g. one metropolitan city in Ohio realized a gross income of about $3,200,000 in 1972 and had expenses of about $2 million in connection with its municipal court. It was also noted that these figures include traffic fines and forfeitures--collected "cafeteria style," with relatively little court time expended. Mrs. Eriksson pointed out that there are somewhat complicated formulae for traffic fine distribution in Ohio--also noted in the memorandum dealing with minor court financing in this state. Computer allocation is employed in some counties. The ordinances of various municipalities can be involved in criminal prosecutions in municipal courts. Jury costs are involved. Dr. Cunningham pointed out that many of these matters are not in fact the proper subject of constitutional change.

There was discussion about the unit of government responsible for capital costs--usually the county, with provision being made for state help in very few of the states with unitary budget plans. Colorado and North Carolina have special provisions, noted in the memorandum, for reimbursing local governments for capital costs.

It was also pointed out that the Alaska legislation helps cities, but not other units of government. However, there the court system is based upon election districts, not counties.

Colorado - In 1970 by statute assumed the responsibility for funding "the operations, salaries, and other expenses of all courts of record within the state, except for county courts in the city and county of Denver and municipal courts;" Legislation provides that supplies and equipment belonging to the courts of record be transferred to the state judicial department. Legislation also covers a personnel classification plan for court employees, as well as a variety of conditions of employment and transfer from one retirement association to another. Also recognizes the constitutional authority of the chief justice to consolidate clerks of district and county courts in certain counties where there is insufficient judicial business to warrant separate offices; court administrator prepares an annual judicial operating budget, and collects budget request documents from the courts for submission to the executive officer and budget committee of legislature; administrator's fiscal responsibilities and budgetary duties are spelled out in great detail in Colorado statutes; provision exists also for capital construction budget and for state assumption of costs or that portion related to court operations.

In the ensuing discussion it was pointed out that Colorado has gone a long way by statute to assume full costs of operating courts. Questions were raised about the background to this legislative plan. Mrs. Hunter said that many commentators have observed that the constitutional provision and statutes evolved as a result

of the 1963 decision relative to inherent powers of the court to order the payment of expenses, coupled with the effects of a 1965 reorganization of the court system by constitutional revision. Mr. Nemeth observed that the Colorado case (Smith v. Miller,153 Colo. 35) said that counties were responsible for providing court facilities--whatever the court asks for--unless there is an abuse of discretion--a difficult standard to apply. The writer of the Colorado decision, Judge Eriksson, it was noted parenthetically, now lectures on the subject of inherent powers of the court at the National College of State Trial Judges and elsewhere.

Cases involving exercise of inherent powers to require appropriations were acknowledged in Ohio as elsewhere, but the question was raised about what would happen if the county were without funds. Judge Leach commented that a Supreme Court decision of a few years ago held that if there are no funds, there is nothing that can be done about the court's needs for funds. A writ of mandamus was there denied on the ground of physical impossibility. On the other hand, there is case law to the effect that the writ will issue where there is money.

Connecticut - According to 1971 study, the state has assumed 99% of costs of operating courts, only exception being courts of probate; executive secretary to chief court administrator has been established by law and has been given a number of fiscal responsibilities having to do with auditing of all bills for expenses of the judicial department and constituent courts, maintaining of budgetary records, preparation of budget estimates for judicial department, supervising the purchase of all commodities and services for such department, examining procedures and methods used in all constituent courts, serving as payroll officer for the judicial department, supervising the assignment of both judges and court reporters; in general charge of distributing resources as needed, with the plan here for judicial needs being established on a statewide basis.

Florida - New judicial article of constitution provides specifically that all justices and judges shall be compensated only by state salaries; further constitutional provision vesting judicial power in enumerated courts and providing that no other courts may be established; provision that does not have to do with financing but that is interesting in the way of dealing with need for additional judges by requiring that supreme court shall establish uniform criteria by rule for such determination; provision also for court to make recommendations as to need for increasing or decreasing number of judges or changing judicial districts to the legislature, which may accept or alter by 2/3 majority but which has to act upon the court's recommendations; effective January 1, 1973.

It was noted that in Ohio, by statute, the chief judge of the municipal court only has comparable power in being able to name an acting judge upon request of the court and determination of need.

Hawaii - Another state in which state assumes virtually all expenses of state court system; financing provision is statutory; chief justice is by constitution the administrative head of courts and by statute is required to present to the legislature a unified budget for all of the courts and to procure from all courts estimates for their appropriations; also to present budget estimates as reviewed and revised by him to the governor and to the legislature.

Maine - Reportedly a jurisdiction where the state assumes all judicial expenses; 1971 study of Maine courts conducted by Institute of Judicial Administration,

however, noted that of 3 statewide courts, one, the superior court, is financed partly by state and partly by counties; Institute recommended change, embodying statewide master plan, requiring statewide assumption of expenses for personnel, supplies, equipment, libraries, public defenders; some uncertainty exists as to whether IJA's recommendations have been implemented.

Maryland - In 1968-69 not shown as having assumed major share of expenditures for court, but reported to have done so in American Judicature Report; discrepancy is explained by 1970 constitutional amendment reorganizing lower court system; statutes provide for state assumption of all salaries, but silent as to other expenses; additional payments from political subdivisions for judicial salaries are prohibited.

New Mexico - Statutes provide for state financing of operation and maintenance of district courts, including divisions; budget is prepared by administrative officer; specific provision by statute for court facilities in that county commissioners must provide adequate quarters and provide necessary utilities and maintenance service for operation and upkeep of district court, but from the funds of each judicial district. Furniture, equipment, books and supplies come out of the state budget appropriation to the judicial district.

North Carolina - has a single budget administered by the judicial branch, by virtue of statute; administrative office there is given extensive powers with respect to collection of budget estimates and budget preparation; interesting statutory provision for "facilities fee", levied as part of costs to assist a county or municipality in meeting the expense of providing court facilities.

Oklahoma - Recent constitutional amendment for state assumption of costs of operating courts, which provides for state payment of salaries and expenses "unless otherwise provided by statute"--financing provision is this constitutional but with the proviso that the legislature may provide otherwise.

Rhode Island - Provision for state assumption of judicial expenses is statutory; it covers all courts other than probate court.

Vermont - Effected unified court organization by legislation enacted in 1965 and 1967; statutes are not specific on matter of state financing but shown in survey reflected in Institute of Judicial Administration Study (Table A) as having assumed 100 per cent of court expenditures; difficult to establish other than by survey.

Discussion of the summary then followed. Chairman Montgomery wondered if there is a discernible trend toward state assumption of the costs of operating the judicial branch, and Mrs. Hunter said that opinion on that matter, although divided, tends to show a slight increase in state financing. She responded, too, that state financing appears to parallel unification of courts.

A question was raised as to the number of states in which the judicial budget is presented directly to the legislature, as is done in Colorado. Provision is made for submission of the budget to the executive department concerned as well as to the legislature with no indication in the statutory language as to the extent to which such judicial budget, coming from the judicial branch of government, is subjected to regular budget procedures by either. It is not clear, for example, whether the executive budget process has any control over the budget as submitted by the administrative office of the courts. Some statutes call for "review" by the executive branch of government but are no more specific than that as to whether the judicial

budget may be altered by the governor or executive branch review. Judge Leach expressed a doubt that in Ohio under such a situation the judicial branch could mandamus a requested budget because of the constitutional provision authorizing appropriations by the legislative branch only.

Mr. Norris asked if any corollation is evident between jurisdictions that have gone to state financing and the tradition of strong county government. In some states, e. g. Alaska, there is no such tradition. Ohio, on the other hand, has a strong tradition of county courts and county government. This is a point that has not been specifically researched but will be looked at for future response.

As the committee turned to the second item on the agenda--the ramifications of Issue 3's passage--a question was raised as to whether it was an issue that did better in large than small counties. Compilations on the four state issues from the Secreyary of State were obtained and distributed to committee members. Mr. Norris suggested that again the vote would be suggestive of the importance of strong traditions concerning county government.

Mr. Nemeth next summarized a memorandum about references to trial court structure in the Ohio Constitution.

Mr. Nemeth - Here we focus on a much narrower problem. This memorandum merely serves to bring together in one place some of the issues regarding structure to which the committee is now ready to give consideration.

We know that there are only three constitutionally created courts in Ohio, with common pleas the lowest. With the passage of Issue 3 there is now the possibility of creating common pleas courts on a district basis. The Constitution as it existed before required that there be a common pleas court in every county. The section now requires only that there be a common pleas court serving every county. Two or more counties may be combined, with one or more resident judges residing in the district and serving, as the Constitution says, the common pleas courts in the district. This plural use may raise a problem by suggesting that there will be an individual common pleas court identified with each county. This is apparently not in accord with the intent of the drafters.

The Constitution also provides that in a multi-judge court the presiding judge shall be elected from among the number of judges of the court, and the judge having the longest total service on the court becomes the presiding judge in case of a tie vote.

One of the elements introduced by the recent constitutional amendment is that judges will have to be elected specifically to divisions. Until now the Constitution required specific election only to the probate civision. That will now change, and this requirement apparently introduces an element of specialization which is not in accord with principles advocated by the American Bar Association's Commission on Standards of Judicial Administration. (Election to domestic relations divisions, it was noted, has been by statute.)

The judges will be elected by the electors of counties, districts, or as may be provided by law, "other subdivisions", in which their respective courts are located, and they must reside there. This might pose somewhat of a problem because the common pleas court is to serve the entire district, yet there may be situations created by law in which a division of the common pleas court will have less than

county-wide jurisdiction or a judge of a court who has county-wide jurisdiction may be elected by an electorate which is smaller than the total electorate of the county, depending on the way the provision is interpreted.

Mr. Norris - So if a municipal court were made a division of the common pleas court, the judge for the municipal division (e.g. Parma) would still run there (Parma) only.

It was agreed that this is a possible outcome of interpretation.

Mr. Nemeth - Further, if the word "subdivision", which is not defined in the constitutional provision, is interpreted to mean a political subdivision as we now use the term in statute, and the municipal court becomes a division of the common pleas court, then the residence requirement will become more restrictive than it is now. At present, a municipal judge can be a resident of any part of the state within the territorial jurisdiction of his court. He is not limited to residing in the political subdivision in which his court is located.

There is now in the Constitution, also, since a 1965 amendment, a provision that in counties with a population of less than 40,000, laws may be passed whereby the county commissioners, on petition of 10% of the electorate, may place on the ballot the question of whether the common pleas court judgeship should be combined with one or more of the various minor cour judgeships in the county. This particular provision poses another problem. It mentions municipal courts and county courts by name. And it also mentions some specific divisions of the common pleas court. Neither the municipal nor county court nor these divisions, except probate, are created by the Constitution, and they are therefore not constitutional courts as such. Yet, they are referred to here. It may be that at some point in the future, particularly if there is an attempt to do away with any of these courts or divisions, someone may raise a question as to their constitutional status. It could be argued that they cannot be done away with unless the Constitution is changed. Besides that, this provision is unnecessary since passage of the Modern Courts Amendment in 1968, because the validity of the combination of these courts is recognized in the implementing legislation.

Finally, he said, one section regarding structure provides that in order to change the number of judges of the supreme court or the common pleas court or to establish new courts, there must be a two-thirds vote of both houses.

Chairman Montgomery then asked if there were any indicated amendments to supplement the provisions adopted in Issue 3. "Does it do the whole job?" he asked. Mr. Nemeth indicated that he did not think that Issue 3 did "do the whole job"--a matter to be taken up in the final item of discussion at this meeting.

State issue returns were then examined and commented upon. It was suggested that they reflect newspaper coverage in some instances. Mrs. Eriksson asked if there was an indication that the local feeling in favor of having a common pleas court was accompanied by a local feeling of preference for local financing of such a court. The answers to this are now known, although Mr. Norris said that he thought there would be some reluctance to giving up office budget decisions relative to operating costs, not necessarily judicial salaries.

The final item on the agenda was a topical review of a memorandum listing in outline form some alternatives on minor court organization. It lists alternatives which have been presented to the committee by speakers, of which have been adopted

in other states. It is not limited to a listing of constitutional changes that are possible.

Mr. Nemeth - The first point deals with the determination of whether to change the constitutional status of these courts, and if so, how. One question is whether there should be a provision prohibiting the creation of further courts. Florida's Constitution, for example, lists courts (county court the lowest) and prohibits the creation of other courts.

On the matter of unification, there are several possibilities. One would be to combine county and municipal courts. (Other alternative distinctions were listed.) There is the alternative of a single, statewide minor court, as in Alaska. There is also the question of abolishing particular courts--e.g. mayors' courts--in the Constitution.

Under jurisdiction, we have the question of uniformity of jurisdiction. As to civil limits, $25,000 is the highest found, and that is in Wisconsin. There are also the questions of whether the jurisdiction should be exclusive or concurrent.

In the criminal jurisdiction area, there are further choices as to whether to make the jurisdiction exclusive or concurrent, particularly with regard to misdemeanors and ordinance violations. There is at least one court system now--North Carolina--that places exclusive jurisdiction in the minor courts in misdemeanor cases. (This is probably done by statute.) There is another possibility of shifting some of the burdens now on the common pleas courts down to the minor courts and, in fact, making them the "local service" courts. This is now done in Minnesota and several other states, where domestic relations, juvenile, and other like matters are assigned to the minor courts.

There is also the possibility of vesting the jurisdiction over some classes of felonies in the minor courts. Maryland, for example, places the responsibility for certain property-related felonies in its minor courts.

The committee could also consider the possibility of recommending the administrative disposition of some types of cases, as a means of unburdening the minor courts themselves. There is much written about this kind of a solution. Such a solution suggests the use of "parajudges" and has the advantage of flexibility. For example, in New York City parking tickets are disposed of by an administrative bureau within the city department of transportation and most other motor vehicle offenses, except those involving injury to person or property, are handled by an administrative bureau in the state bureau of motor vehicles, with a right of appeal, somewhat similar to appeal under Ohio Revised Code Chapter 119.

Mr. Montgomery noted parallels in the medical profession,where there is an increasing use of paraprofessionals, thereby freeing the time of the doctors for matters which require their particular attention. Such a direction in the judiciary could have advantages, he said. Judge Leach cautioned that increased use of parajudges may involve necessary changes in criminal penalties because of constitutional provisions guaranteeing such rights as jury trial. Considerable changes would be involved in going beyond traffic violations, for example, he said. Practically, except for the rule of the Ohio Supreme Court under the traffic law that requires a court appearance for a second violation (which has received a lot of publicity because of calls for it to be changed) most of the traffic matters that are actually brought to a court are fairly serious, according to Judge Leach. These are the types of cases that you would bring to court and not treat "cafeteria style". Most traffic tickets are handled by "cafeteria," anyway. He said that he was not certain that this concept would alleviate any big case load in metropolitan areas.

Mrs. Eriksson suggested that it would remove administrative burdens from the court structure, and Judge Leach added that it could have the psychological advantage of not having the court be a money-making business. The sometime difficulty of making appeals from administrative agencies was discussed and noted as a factor in deciding whether to recommend such a change.

Mr. Nemeth - As for financing, the same considerations that apply to the general trial courts would apply to lower courts.

The topic on personnel was included in this outline even though judicial selection will be separately treated at a later date.

Mr. Nemeth called special attention to points 5 and 6 under the discussion of personnel. These have to go with the appointment of minor court judges and the selection of a chief administrative judge. When it comes to minor courts, he said, there are several alternatives that are not available, or not in practice in regard to the general trial court. For example, in some jurisdictions, minor court judges are appointed by a higher court. This is the case in Alaska, considered by many to have the best judicial structure in the country. Point 6 points out the possibility of having the chief administrative judge of the minor court either appointed by the supreme court or the common pleas court rather than having him elected from among the judges.

Mr. Nemeth - The next section deals with magistrates. This leads back to the question of parajudges. In the matter of magistrates, the two leading models are Idaho and Illinois. In Idaho there is a magistrates' division of the general trial court. Magistrates are appointed by a magistrates' commission in each district on a nonpartisan basis, with the approval of the district court judges. The magistrates' duties are spelled out by law. In Illinois the situation is different. There the Supreme Court by rule prescribes the type of cases that magistrates may hear. They are appointed by the circuit court judges in all counties except Cook County. In Cook County they are elected by the judges, the reason for this probably being that the positions pay very well and there is a great deal of competition for them.

At this point Judge Leach asked about the election of magistrates by the judges in Cook County. Mr. Nemeth confirmed that they are so selected--by secret ballot of the judges. In the other counties, where competition is less, it is the chief judge who appoints them, he said.

Mr. Nemeth - In Illinois the magistrate's position is considered a stepping stone to judicial office. It has a great deal of prestige and has a constitutionally protected term.

There followed considerable discussion about the flexibility of a plan that includes magistrates. In effect, that officer is a part-time judge, and allows for greater freedom in the disposing of caseloads. Mr. Montgomery observed that the representatives from Illinois would provide valuable information about the system at the next meeting of the committee. Judge Leach noted that magistrates are not so "locked in" as judges--both territorially and salary-wise.

Mr. Nemeth then proceeded to the matter of court clerks, the next item on the outline. One of the questions that must be faced, he said, is whether the committee wishes to recommend the combination of the offices of county and municipal court clerk. Another is whether the clerk should be an elected or appointed official. In some counties, there appears to be little in the way of consultation between clerk

and judge in the preparation of budgets in the two offices, he noted.

Mr. Montgomery - The other matter touched on here--that of forum shopping--brings up the fact that the backlog of cases may result not from the failure of judges to work but the practice of attorneys cornering cases. Too often they are occupied in other courts, and great benefits could derive from a central coordinating bookkeeping agency--that is, a clerking agency. Such an agency could keep on top of the many cases of court congestion and delay.

Dr. Cunningham expressed the view that the office of clerk should not be an elective one.

Judge Leach pointed out, however, that many things are predicated on what has gone on in the past. A question often raised in seminars on judicial administration across the country is, how did the court get to this or that point? Where was it before? Historically, we have had the system of elective clerks in this state, and they have established a political power base, he said. Whether one criticizes this or not, this is a fact of life. The post of the clerk of the county common pleas court is an important political post at the ward and precinct level. The same is true of the municipal clerks. County clerks and municipal court clerks each have their own organization, and there is a cleavage between the two groups. Finally, he said, the ultimate problem is, do we change the constitution in this respect or leave it to the legislature? If the latter, there is bound to be much political infighting. Furthermore, if the committee makes a recommendation, the legislature would be involved in similar infighting in deciding whether to put a proposal on the ballot.

There was general acknowledgement of the fact that here again is a possible dispute between legal theory and practicalities. Judge Leach said that where tradition has not involved an elective clerk there is a tendency to oppose it. On the other hand, he feels that judges are, historically, not good administrators; and might or might not be capable of appointing good administrative assistants. There is something to be said on either side of the issue. The clerk's office is not constitutionally recognized in Ohio. There is, however, specific provision for the probate judge to employ and control a clerk in Section 4 of Article IV of the Constitution, he said.

Mr. Nemeth then pointed out that portion of the outline dealing with the creation and abolition of districts. The committee could, of course, take the position that this is up to the General Assembly. It appears, however, that particularly with respect to local courts, the function of districting could be carried out by the judiciary itself--either by supreme court rule, or by the common pleas court acting under supreme court rule. This would be based upon the proposition that the judiciary is best equipped to know and deal with judicial workloads. At the present time, by statute, the common pleas court does periodically realign county court districts. There is also the possible alternative that county court districts be realignable by the county commissioners, as is done in Minnesota, as an example.

Some of the same options are open regarding subject matter divisions, he said. They could be prescribed in the Constitution or the committee could take the position that the General Assembly should prescribe them. Again, ideally this authority should be in the judicial system itself, according to many writers, he said.

Ultimate administrative responsibility for the minor courts should, also, according to many theorists on court structure, be centralized in one judge, who is responsible to the supreme court itself, he said.

Chairman Montgomery concluded the meeting by asking for comments on Issue 3 and the committee's responsibility to the General Assembly concerning its implementation. He pointed out that any necessary supplementary amendment could well be recommended by the committee. As legislation is prepared, gaps may appear. He asked if any such an area could be identified at this point for committee consideration.

Mrs. Eriksson responded that the committee's direction had been considered by staff and Judge Leach and that it did not appear that at this point any change should be proposed in the amendment made by Issue 3. But there are some things, if the committee wishes to indicate its desire along certain lines--such as its feeling that a truly unified court system would be good, or that a unified two-tier court system should be established (common pleas or district level plus municipal-county level, but with the latter more unified than at the present time). There might be some possibilities for making suggestions, not for constitutional amendment necessarily, but how this might proceed, she said. For example, if this committee favors a unified system, with uniform jurisdiction at each level of courts, it would not be inappropriate to make such a statement at this time. Another possibility is that the legislature will proceed on a piecemeal basis, as far as incorporating municipal courts into the common pleas courts is concerned, if that is what it decides to do. If that looks not to be a desirable way of accomplishing change, it is possible that the committee could suggest that the legislature establish a plan. Broad principles could be enunciated in recommendations to the legislature from the committee.

Further consideration will be given by the staff to committee alternatives of this sort and specific proposed goals will be presented to the committee for it to discuss and adopt or reject, probably at the January committee meeting, she concluded.

The next meeting of the committee will be on Thursday, December 6, 1973 in House Room 11 at 1:30 p.m. The committee's guests will be the Honorable Roy Gulley, Administrative Director of the Illinois Courts, and the Honorable Henry Lewis, an Illinois Circuit Court judge. Chairman Montgomery also stated that the next meeting after the December meeting will be held January 9, with time and agenda to be announced.

Ohio Constitutional Revision Commission
Judiciary Committee
December 6, 1973

Summary

A meeting of the Judiciary Committee was held at 1:30 p.m. on Thursday, December 6, 1973 in House Room 10. Present were Chairman Montgomery, Mr. Mansfield, Mr. Skipton, Mr. Guggenheim, Representative Roberto and Senator Gillmor. Also present were Mr. Allan H. Whaling, Executive Director, Ohio Judicial Conference and Judge Leach, Committee Special Consultant, along with the committee's guest speakers, Judge Roy O. Gulley, Administrative Director of the Courts of Illinois, and Judge Henry Lewis, Chief Judge of the Second Circuit Court of that state.

Chairman Montgomery opened the meeting by introducing the two guest speakers, pointing out that Illinois has in recent years introduced profound changes within its judicial system that will be of great interest to the committee because of parallels between the states of Illinois and Ohio. Judge Roy Gulley was called upon first to give the committee an overview of judicial structure in his state.

Judge Gulley - The background to our present system was the adoption of a new judicial article in 1964, which resulted in the only completely unified court system in the United States. Illinois is the only state to accomplish a single level trial court, with comprehensive administrative authority in the supreme court, exercised by the chief justice. The state has a supreme court, an appellate court, and a single level trial court. For six years I have been administrative director of the courts. For 15 years prior to 1968 I was a judge of the circuit court, our trial court of unlimited jurisdiction. I served in our court system both before and after the reorganization.

Prior to 1964 there was no general administrative authority over the myriad of courts we had. Each judge was an autocrat in his own domain. He did as he pleased about holding court or not doing so. We had J.Ps, town courts, village courts, city courts, county courts, probate courts and in Chicago a superior, municipal and criminal court. Cook County alone had a total of 208 separate courts. Judges were selected in particular districts and were answerable only to the electorate every 4 or 6 years. Most of them had their own clerks' offices. This added to the confusion and inefficiency and made it impossible for anyone to know the status of the state's judicial business. Each individual court had its own clerk's offices, and it was simply impossible to know how many cases were pending. Justices of the peace at the township level acted as their own clerks, and they reported to no one.

Much of the agitation for reform came from the lawyers in the state and general public who were dissatisfied with the operation and conduct of the courts of limited and special jurisdiction. Circuit courts caused some unhappiness too, but the chief problem lay in the inferior courts. It was self-evident to bar associations and other interested organizations that the greatest number of people who came into contact with the court system got there through the issuance of citations for violations of traffic ordinances or other municipal violations, or as a result of what could be considered "minor litigation." Unfortunately, the image of our judicial system was being projected by the judges who had in most instances the least training, the shabbiest courtrooms and the most limited authority. The citizens group who sponsored judicial refrom in Illinois was determined that the upgrading of the judiciary had to start at this lowest possible level.

Our 1964 article, therefore, abolished all courts of inferior jurisdiction, and

left only one trial court--a unified circuit court which had jurisdiction over all justiciable matters. It created an intermediate appellate court, manned by full-time judges, and it placed general administrative authority over all the courts in the Supreme Court. To assist the Chief Justice in his administrative duties the article provided for the appointment of an administrative director and staff. That is the position I now hold.

For the first time this complex branch of government had a manager responsible for running the business. It is big business in our state, just as it is in Ohio. Last year with about 1100 employees we generated an income from fines, fees and costs of between $50 and $60 million. This amount of business could not have been handled by the old system. Gone from our state are the more than 1200 justices of the peace and police magistrates who held court in the back room of the barber or butcher shop and acted as only part-time judges, with no legal training in most instances, and who often marched to a different drummer than do the present associate judges of our circuit court. Two hundred and sixty associate judges now handle all the business formerly handled by all of these largely untrained court officials, and in addition have many areas of expanded assignment. The revenues from fines and costs in traffic and misdemeanor and ordinance violations have more than tripled since the abolition of the peace system in these inferior courts. Gone also are the scaldals which used to erupt from time to time when the fee officer failed to turn in the fines which he collected from the speed trap in his village. Gone, incidentally, are the speed traps. Fifteen-twenty years ago you could expect to be stopped by the marshal in going through many small communities and taken before the local J.P. to pay your fine.

The 1964 article provided that the state would be divided into judicial circuits of one or more contiguous counties. There are 20 such circuits. Cook and LePage are one-county circuits (Cook is Chicago and LePage is Wheaton, just west of Chicago). The remaining circuits are composed of not less than 2 nor more than 12 counties. The article specified no maximum number of circuits and it is therefore flexible to meet future needs.

There is one circuit court for each circuit. This court has unlimited, original jurisdiction of all justiciable matters. By giving general jurisdiction to the circuit courts and establishing only 1 circuit court the article avoided and eliminated the problem of complex and often overlapping jurisdictions and all the legal problems that stem from such complexities.

Our circuit courts have two categories of judges--circuit judges and associate judges. The circuit judges have the full jurisdiction of the circuit court and the power to make the rules of the court. They are elected on a circuit-wide basis with at least one judge being elected in each county. One circuit judge is selected by the circuit judges as chief judge of the circuit. He is the manager of the circuit, with general administrative authority within his circuit, subject only to the overall administrative authority of the Supreme Court. He assigns cases to the other judges, duties to court personnel, and determines the time and place of holding court. The judicial article abolished the various court clerks--an important element of our reform. It amalgamated their function into one clerk's office in each county. The circuit clerk now reports caseload and revenue information to the administrative office. All salaries of judicial officers are paid by the state, and salaries are not affected by amount of fines or costs collected.

Associate judges have the full jurisdiction of the circuit court under the

present constitution. They do not vote for the election of a chief judge, do not share in the rule-making authority of the court and cannot themselves be elected as chief judge of the circuit court. Associate judges are appointed by the circuit judges to serve four-year terms. While they possess the full jurisdiction of the circuit court, there is a limitation on their assignability, which is imposed by Supreme Court rule. It presently prohibits their trying felony criminal cases. I have been urging the Supreme Court for some time to remove that limit on their assignability. This position of associate judge, selected by the circuit judges, to handle by and large the minor litigation in the circuit, is a new position in the United States judiciary. The federal court has recently, based largely on our experience in Illinois, created a judicial office called magistrate of federal court. When we first started in 1964 there were rather severe limits placed on this jurisdiction by statute. We had the happy experience in Illinois of adopting this reform in 1964 by a constitutional amendment relating only to the judicial article of our Constitution. Then in 1970, after 6 years' experience with it, we had a statewide Constitutional Convention which revamped the entire Illinois Constitution. The structure of the court system was absolutely verified as being a good one by the 1970 Constitution. The only changes were to the advantage of the system. One was to take away from the legislature any right to impose any limit on the use of this associate judge division and left it entirely up to rule of the Supreme Court. The Supreme Court, at my urging, immediately took off all the other limitations that had been placed on such judges but left this one--that they cannot conduct the actual trial of a felony case. I urge its removal because we have associate judges in our system who must be lawyers, and who by and large are bright young people. Their service has been invaluable. They are competent and can try all cases.

The chief judge can further limit and determine which matters are assigned to particular associate judges of full circuit judges within his circuit. He can do this within his general administrative authority over the business of the circuit. A judge, by reason of health or competence, may not be capable of handling complicated cases, and the chief judge has the right to put him in the traffic division or divorce division and to assign somebody else to the complicated equity case. He has this control through his assignment powers.

All proceedings in our circuit court are matters of record. An appeal is taken by record to the appellate court. No judge at the trial court level has any appellate jurisdiction whatsoever over any other judge on the trial level. Trial de novo is a thing of the past. But prior to 1964 a clever lawyer could have his case tried several times by various levels of trial courts before he was forced to appeal a losing decision to the court of review.

From an administrative standpoint, it is ideal. The Chief Justice, acting through his administrative office, has overall control over the system. The chief judge of each circuit has administrative authority over his circuit, subject to the Supreme Court's overall control. A case cannot be filed in the wrong court. The flexibility of the judicial article allows each circuit court to be organized according to its needs, population, and location. The larger circuits have divided their courts into divisions. Cook County naturally has the most elaborate system of departments, divisions and districts, but still all the judges are judges of the circuit court of Cook County and all are under the administrative authority of the Chief Judge of the Cook County Circuit Court. It is the largest court system in the world, or at least the United States. That is to say, there are the greatest number of judges working under one administrative head.

Some of the smaller circuits have no need for divisions. All cases, from the smallest traffic violation to a million dollar lawsuit are handled by the same court, and often by the same judge. It is not unusual in a rural area for a judge to hear at 9 o'clock a traffic case, at 10 a divorce, at 11 an arraignment in a murder case, and a partition case or equity matter in the afternoon, as Judge Lewis and I can tell you from experience. Regardless of the size and number of divisions, or lack thereof, there is only one court, the circuit court.

The system gives us unlimited flexibility in the handling of court work, depending upon the size, court work, and needs of a particular community. Our 21 circuits in Illinois vary in size from 150,000 in the 8th circuit to more than 5 million people in Cook County.

The chief judge is general administrative authority and power allows him to determine where courtrooms are located and who is to use them. He assigns judges to specific duties. He assigns duties to the clerks and bailiffs. He determines the hours and days of holding court and controls the judges' vacations. In short, he is the general manager of the business of the circuit. Like the chief executive officer of a large corporation, he directs, controls, appoints, supervises and manages the judicial business of the circuit.

This kind of revision cannot be accomplished without some opposition. The greatest opposition to our reformation in Illinois came from the judges themselves. As a judge myself, I was not overly enthused about the plan. I imagined that it constituted a great threat to my judicial independence. I am happy to admit that I was wrong. What it did was to allow me to become part of a system of which I could be proud. Most of our judges have become strong advocates of the Illinois system. Their judicial independence has not been impinged upon at all in that area where it is most important--the area of litigation and deciding cases. Benefits have far surpassed disadvantages of adapting to a new way of conducting business. We were proud in 1971 when the Consensus Statement of the National Conference on the Judiciary described almost word for word what a model judicial system should be, and we discovered that it was describing the structure of the Illinois judicial system. This statement was adopted at the Williamsburg Conference on the Judiciary, as you recall; it was called by President Nixon and chaired by Chief Justice Burger. The Consensus Statement said that state courts should be organized into a unified judicial system, financed by and acting under authority of the state government. They should be under the supervisory authority of the supreme court and the chief justice should be the chief executive officer. He should be assisted by a statewide court administrator, charged with responsibility for developing and operating a modern system of court management. Judges of a unified court system should be available for temporary assignment anywhere in the state so that judicial manpower can be provided whenever and wherever needed. There should be only one trial court, divided into divisions of manageable size. It should possess general jurisdiction but be organized into specialized departments for handling particular kinds of litigation. Separate specialized courts should be abolished. Only one appeal as of right should be allowed. It should lie only from a decision of the general trial court and it should not be a trial de novo but an appeal based on the record kept in all cases. This is essentially the Consensus Statement of the Williamsburg Conference.

This is an overview of our court system. I will be happy to answer any questions.

Chairman Montgomery then asked that questions be postponed and introduced Judge Lewis.

Judge Lewis - If you are thinking about a change in your court system, I would like to point out a couple of ancillary problems of which you should be aware. They turn out to be important, although you don't think of them in advance.

One of them is the problem of developing an integrated clerk's office as well. We have had problems in this area because we did not make the changes all at the same time. County clerks must be absorbed into the system, as must probation services be absorbed. The secret to success of the system is the single, one trial court and the ancillary services must go along. How the system is to be supported financially is another matter to which you must give careful attention. The problem of judicial conduct and ethics was one of great importance in Illinois. This latter matter received intensive examination in the 1970 Convention. Our judges are virtually in a glass bowl now. This is an item you, too, must consider in your study.

The court administration aspects of our system are vital. The Supreme Court runs the system, and the chief judge has important administrative responsibilities at the circuit level. He assigns judges and handles all reports, financial documents, court reporters--another big area.

No system works without good personnel. Judicial selection becomes an important matter.

That the independence of the judiciary would be sacrificed by our system was an early concern of both lawyers and judges, but if anything, the judges are more independent now in decision making. It was feared that setting up the administrative machinery would interfere with policy making, affecting decisions. But this has not been the case. The system has had no effect on decision making in any area of cases.

In 1966, before being elected judge, I had the opportunity of serving as a state's attorney. In our state that is a kind of key officer in the county and I had to work in all the levels of courts that then existed. In our county, you could have as many as four trials before going for review, and this was a common practice.

Mr. Roberto - Are the circuit court chief judges elected?

Judge Gulley - The chief judge is selected by the circuit judges.

There followed several questions about judicial selection in Illinois, establishing that both circuit court judges and appellate judges are elected. Judge Gulley elaborated:

Judge Gulley - When we first tried to reform the judicial article in 1958, the chief argument was over inclusion of merit selection--the Missouri Plan. It was defeated. We went back to the legislature and had to compromise, whereby judges, when they are first selected, are elected on a partisan ballot. Once elected, they run from there on for retention, on the merit plan: "Should Roy Gulley be retained as a judge of the circuit court for another term?" Ours is a split system. First there is a partisan election. Then the judge runs on his record every six years. When a vacancy occurs--a judge moves to federal court or retires--the Supreme Court has the power to fill his vacancy until the next general election. At the next general election someone has to run--the partisan process then operates.

Mr. Roberto then asked if the clerk's office was included in the Constitution in the judicial article. Judge Gulley responded that it was one of the problems to which Judge Lewis had referred. The 1964 amendment to the Illinois Constitution amended only Article VI, the judicial article. It for the first time mentioned the clerks of the court--a clerk of the court for each circuit. But the 1870 Illinois Constitution, in the Local Government Article, provided that a circuit clerk be elected in each county. The clerk was a local county officer. In 1970, the Constitutional Convention deleted the circuit clerk provision from the local government article deliberately--saying that the clerk was not a local government official. The clerk was mentioned in the judicial article only. And the judicial article says that a clerk shall be either elected or appointed, as the General Assembly shall prescribe. The General Assembly has not yet gone to appointed clerks. Judge Gulley expressed the hope that it will. The 1970 Constitution took effect in July, 1971 and the legislature has had one session since then. Judge Gulley reiterated that he hoped that the legislature would soon make the clerk's office appointive, recognizing thereby that it is strictly ministerial, and further that the budgeting process for the clerk's office will be made part of the administrative budget for all the courts. This needs to be clarified, he said.

Judge Lewis - One of the real problems is that when your boss is the judge and you are elected by the electorate, you have a real conflict about whether or not to spend this money or that money in such and such a way. This is a problem that we must meet.

The two judges then made the point that the 1970 Constitution left much to be implemented by the legislature by law, and the clerk's office provision is in such a category. There are many such provisions that could take as much as 10 years to be considered by the legislature. They repeated that the Constitution had been deliberately so framed in order to be flexible. The approach whereby the Constitution spells out every detail was carefully avoided. Judge Gulley noted that the legislature has been very good about implementing the many provisions that were required, but explained that there were many matters left to law. He was not at all discouraged by progress to date, he said.

Mr. Mansfield - If the incumbent loses on his record, then there is an appointment? (The answer was yes--a vacancy occurs if he receives more no than yes votes.) On compensation--do all judges in the same category receive the same compensation?

Judge Gulley - Yes, our associate judges are paid the same, and the circuit judges are paid the same, except we still have a supplement for the Cook County judiciary. It has been with us for 100 years. (He indicated that it has been a source of discontent.) Our associate judges receive $23,500, and in Cook County they get an additional $4,500. Circuit judges--general trial judges--receive $30,000 and in Cook County receive an additional $7,500.

There was general discussion about the role of the associate judge. Was it assumed that such judges would be young, asked Mr. Mansfield? Was it contemplated that they would be replaced after several terms, he asked?

Judge Gulley - Not necessarily. What has happened--and in the context that we are still young in this system--the associate judge position has become a tremendous training ground for people to go on up to circuit judge. That's what it was designed for, and it has worked out that way. There are of course more associate judges than circuit judges--and there is not a spot for everybody. But a surprising number of

associate judges have moved up to fill vacancies on the circuit court judicial bench. And somewhat to the appellate judge level.

Then, Mr. Mansfield asked, with respect to judicial morale, whether all judges wear robes in Illinois. The response from the speakers was an equivocal yes, including associate judges. At least they do so in 80% of the state. The Supreme Court tells them all to do so. In some rural areas the rule is probably not always followed. A question was asked about magistrates. Judge Gulley pointed out that Illinois no longer has magistrates. He continued:

Judge Gulley - When we first adopted the article in 1964 we created the positions that are appointed by the circuit judges. We called them magistrates at that time. One of the things that the 1970 Constitution was intent upon doing was to further upgrade that position, and so the Convention rejected the name "magistrate." It had the connotation of the old police magistrate. They substituted "associate judge," a term first applied to judges who were amalgamated into the system pursuant to the 1964 amendment. These were the old county and probate judges, who had been elected ever since the state had been in existence. From 1964 to 1970 they were amalgamated into the system. All associate judges now are full-time, and all must be lawyers, like the circuit judges.

On the question of whether there continue to be probate divisions, Judge Gulley responded that in the larger areas the circuit court is divided. A court may have a probate division, a divorce division, a criminal division, a small claims division, but the smaller areas do not have such divisions. Where there is one judge, for example, he handles all matters. The question was then asked as to whether the judge of the probate division in a circuit such as Cook County would sit in any other division of that court. Judge Gulley replied that the judges are subject to frequent switching. They have the same jurisdiction and are capable of moving from division to division. In the larger areas, such as Chicago, however, there is a natural gravitation of judicial manpower to areas in which they like to sit, he said, so the former probate court judge has remained in the provate division under the new system. Judge Gulley also said that as to the less attractive assignments, every judge has to take his turn with them. A few judges might like the criminal division, for example, and stay there indefinitely, but others may simply put in a stint there, and then move on, he said.

Mr. Montgomery - I'd like to ask a question of Judge Lewis. I understand you are the chief judge of the Second Circuit, which is made up of 8 or so counties, I believe. (The number is 12.) Those judges select you as their chief judge. (Correct. The provision is that the chief judge serves at the pleasure of the judges who elect him to that position.) I'd like to have you explain the difference between your rule-making powers and those of the Supreme Court. How does your rule-making power relate to the other circuit courts' rules? That is, is each circuit independent as to rule-making authority?

Judge Lewis - The Supreme Court makes rules that govern all courts. The circuit court also makes rules--in some circuits they are very elaborate. They cannot conflict with the Supreme Court rules, but they may refine them more. The circuit court rules are submitted for approval to the Supreme Court. The rules that may not conflict are the so-called rules of court--such as a rule that requires so much notice on a probate of a will, etc. Rules of assignment are not in this category. I can enter an administrative order in my circuit that Judge "A" will hold court in a certain county, and this order does not have to be approved. We also try to operate by

consensus in our circuit. We have monthly meetings and try to operate on such a basis rather than by order. In this respect we might be entirely different from another circuit. In some circuits, for example, in addition to the rule mentioned with respect to associate judges not hearing felony cases, if the chief judge doesn't want associate judges to hear certain cases, he doesn't let them do so. He does this by assignment. Basically my job is threefold--first, I have to keep everyone happy; second, I make assignments and vacations and handle differences among the counties and their needs both as to judicial manpower and court reporters; third, there is quite a bit of paper work involved--caseload broken down by subject matter, etc. must be reported to the Supreme Court.

Judge Gulley - Here is the provision in the Constitution that gives authority to the chief judge: "Circuit judges in each circuit shall select by secret ballot a chief judge from their number to serve at their pleasure. Subject to the authority of the Supreme Court, the chief judge shall have general administrative authority over his court, including authority to provide for divisions, general or specialized, and for appropriate times and places of holding court."

Judge Lewis added that in any circuit composed of 12 or so counties there are both weak and strong judges. Certain people are better assigned in certain areas, and the chief judge comes to know where a particular judge is best suited.

Mr. Montgomery - It would, I imagine, be very difficult for a chief justice of the Supreme Court to recognize these differences in personnel because of the large number. Where the authority is disbursed into 22 parts it is more successfully handled.

Mr. Mansfield asked about the number of judges in Judge Lewis' circuit, which turned out to be 18. He asked if a judge who is elected in county "X" could conceivably never sit in county "X". Judge Lewis said that this could happen. Although unusual, the chief judge does on occasion move some judges out of a county and others in that same county. Sometimes this is at the request of a judge who has been in one county for a long time.

Mr. Roberto then asked about whether venue is handled pretty much as it was, by county? The response was yes. There is no venue on the judge--he can go anywhere in the circuit. Venue for cases is by county.

Judge Gulley pointed out that judges can't cross circuit lines without an order from his office. He would have to assign Judge Lewis from the second to the third circuit, for example. But within the counties in a circuit the judges have jurisdiction in any of them. Venue is handled by statute. If an accident happened in county "A", the action on which it is based must be filed in county "A".

Senator Gillmor - On election in the circuits, do you elect by counties or district-wise?

In the ensuing discussion it was pointed out that this constitutes a little problem. The "old" circuit judges were elected by circuit. The county judges were elected by county. However, Judge Lewis explained that in running for retention last time he ran in the circuit.

Judge Gulley - We have two classes for purposes of election. We have at large circuit judges and resident circuit judges. The resident circuit judges are elected from a county unit, as in the position that it replaced--the old county judges were

elected by county. The reason for that is the constitutional requirement that there be at least one judge elected from each county. The "old" at-large circuit judges are elected from all 12 counties in the Second Judicial District, for example. Now we have 3 at-large circuit judges and 12 resident circuit judges in the Second Judicial Circuit. When they run for retention, the Constitution provides that they run for retention in all 12 counties, on the "yes-no" proposition. Although elected as a resident judge the judge can still serve throughout the circuit.

Mrs. Eriksson asked whether in case of jury trials the jury is selected from the county rather than from the circuit. The response was affirmative. She continued: Before you revised your system did you have fears expressed that people would have to travel too far either as party to a case or as juror and do you encounter any problems such as that now?

Judge Gulley - Yes, we had a lot of such fears expressed. People in small communities feared losing J.Ps for fear of having to go too far to court. This criticism has mostly disappeared. People do realize that when they want to get married, they have to drive to the county seat for a license, or if they want to pay their taxes they must do so also. And they realize that no county seat in Illinois is farther than 30 or 35 miles from any other place in the county. Much of the opposition has dwindled from that standpoint. What the system gives us the right to do--and it is done in many areas--if there are two centers of population in one county, there is no reason why the chief judge who has the power to designate the times and places of holding court can't have a division of the court set up in both towns. You might find the major litigation being conducted in the county seat, in the nice courtroom, with a traffic division in other communities. The chief judge has leeway. He can rent a storefront in a community or some area that is not the county seat in a populous county and have traffic court operate where he chooses.

It was agreed that traffic court divisions operate at various places. Judge Gulley said that most of the municipalities of any size are happy to furnish a courtroom because the fines stay in the municipality. Hearings rooms in city hall are generally made readily available as a result. In some cases beautiful quarters have been built for the purpose by municipalities--in order to house divisions of the circuit court. In rural counties--where most of the people were complaining when the plan was being proposed--most of the fears have been alleviated. And the fact is, Judge Gulley noted, few people go to court. And of course court is held in every county.

Judge Leach - As I understand it, a judge is elected initially from a county with opposition. If elected, he runs on his record in the entire district. Correct? (Yes) If he loses on his record, and the Supreme Court appoints someone for the interim, then the next election would be back in that county, would it not? (There was discussion on this point. There may be a vacancy in the county under such a circumstance.)

Judge Leach - Assuming a vacancy, the election would be in the county, right? Would this individual who had won in his own county originally but who lost on a "no" vote in the entire district, could he run again back in his county?

It was agreed that there would be no reason why he could not do so. Judge Lewis said that he and other judges running for retention in 1972 were worried about running circuit-wide. All had been elected in counties originally, and felt they had a good county base, but all knew few people outside their own counties.

Because of the difficulties of campaigning, Judge Lewis feels this system to be somewhat unfair.

Judge Gulley - However, Henry won overwhelmingly. Let me explain how this system came about. Originally, in 1964, the election was in the county and the retention was in the county unit. In 1964, if you got one more yes vote than no vote you were retained in office. In 1970, the Constitutional Convention raised the number of "yes" votes you have to have to 60%--60% of the people who actually mark the ballot--but they increased the base to the entire circuit, and I think very wisely. In a small county of say, 200 voters, with a requirement of 60%, an unpopular case just before election could get a judge defeated in a "yes-no" vote. Our statistics have shown since 1964 that there is a 10 to 15% "no" vote on any proposition that calls for such a vote, regardless of the subject--whether it be bond issue or anything else. There is a negative vote.

Mr. Montgomery - I'd like to make one observation. Your selection method is not strictly merit selection and probably less so that you would like to have. The other matter we are discussing is judicial unification and administration. Of the two concepts you hold up the method of court organization as the outstanding feature, is this not correct?

Judge Gulley - Yes, I think that the structure is very important, and that this feature that was present in every state of the union until recent years, of J.P., squire, police magistrate or any part-time dispenser of justice is an ill that needs elimination if we would gain the respect of the populace for the court system. We, or I, am not satisfied with our method of selection. I think that some form of the Missouri Plan will bring about, in the long run, a better quality of judges on the bench. Even though I was an elected judge, I still think that merit selection would be the optimum situation. We had to compromise by this method that allows a lawyer who leaves his law practice to become judge some security unless he fails to do an adequate job. It would take a lot to defeat a judge who runs without an opponent, however.

It was asked whether there is an opportunity for local bar associations to endorse retention. The Illinois Bar Association has an advisory poll run in all elections if requested by the local bar association and it is generally so requested. A rating sheet goes out on an individual judge who is running for retention. Recommendations on this score are made. Illinois is unique in never having lost a judge. Colorado patterned its system after the Illinois system in 1965 and in their retention elections, there on a county basis, they have lost 12 or so judges on a "yes-no" vote. The 1972 election in Illinois was the first that applied the 60% requirement and there were two or three judges who received a 60.3 or 60.4 percentage, so it will happen in our state some day. Defeat of some of these judges would probably have helped our system. To show that it is possible to get rid of a judge who isn't doing a good job would probably have helped our system. If you do not have merit selection in the first place, you do need a strong judicial discipline removal provision. Judge Lewis pointed out that the new, strengthened provisions for judicial discipline and removal have resulted in the weeding out of some inferior judges, sometimes simply by pressuring their retirement. Judge Gulley, who has been a judge for many years, expressed the opinion that judges are reluctant to quit even when they cease to be able to handle the job.

Mr. Roberto - Were there local conditions in Illinois in 1964 that created the climate of opinion to cause the people to accept a unified court system?

Judge Gulley - Yes, but it was not local, but a statewide condition. There was widespread revulsion against the inferior, limited court. There was a growing

feeling that this level of the judiciary, untrained as if often was, had to be eliminated. The proposition carried throughout the state. The rural areas were less against it than the metropolitan areas.

Mr. Montgomery - We've had the official position on this. Fron the consumer or citizen point of view, what has been the result of revision? Is there a time lag in case disposition? Do people think that they are getting a better brand of justice?

Judge Gulley - Of course I am prejudiced, but I think that we are dispensing justice much more evenly and certainly with greater dispatch than ever before. For example, the Cook County Circuit, a tremendous operation, the second largest city in the country within it, had a great variety of courts in 1964. In the law-jury division of that circuit court in 1965, after one year of operation, in order to get an automobile injury case tried you had to wait some 5 years to get a case tried because there was an inventory of some 60,000 cases. After we unified our system, and after I became Administrative Director in 1968, we have now cut that time to about 3 years. I am convinced, and the bar associations and law professors agree if we had not had such reorganization, we would not be about 10 or 11 years behind in Cook County. They are in New York City, Although they do not age their cases in New York City as we do in Illinois--we count ours from the day it is filed in the clerk's office and they have notice pleading there where they don't start counting the age of the case until after the pleadings are all in order and it is ready for trial--but their cases being tried are 9 and 10 years old.

It was also agreed that the three-year delay now present is based on a huge backlog that existed at the beginning of the system. Although currently it would still take probably 3 years after filing before a case is heard, Judge Gulley stressed that this is only true in the law-jury division of the Cook County Circuit Court. Other cases are promptly dispatched. Problems exist only in metropolitan areas. In small areas, said Judge Lewis, there is no delay. There, he said, there is a situation where the circuit is "bar oriented," and the cases move along as rapidly as the lawyer wishes them to do so. The courts are prodding them to move cases along faster than they wish in some cases. There is no backlog.

Judge Gulley - As a court administrator, in comparing notes with people from all other states, I have found that we do not consider a personal injury case as backlogged until it is at least 18 months old, that is, from filing of the case. Assuming that it is filed within 3-4 months of the accident, it takes that much time for discovery and for the case to "ripen" and the actual injuries sustained to be known. It takes that long for a case to be readied in normal course, and we do not worry until after that point. In downstate circuits we have been able to try these cases so fast that the lawyers are upset about it because the case has not had a chance to "ripen."

Judge Lewis agreed, and stated that in his opinion the best judge is that judge who has had extensive law practice--he'd make it a rule that 10 years experience would best qualify one for the bench.

The question was then asked whether there was an automatic division of duties between the judges and associate judges, especially in criminal areas. It was explained that this division is not automatic--it is strictly up to the chief judge. In most areas, omitting the large Cook County court, there is no uniformity in response to this question because the chief judge knows his personnel. You may have an associate judge sitting in the divorce division in one of those or in juvenile.

The only thing he cannot do under the Supreme Court rule, according to Judge Gulley, is try a felony case. Generally speaking, the associate judges are manning the traffic and small claims divisions. In the 9 years the feeling that there ought to be a difference has not entirely disappeared.

Judge Leach - Who determines how many circuit judges and associate judges there will be--the legislature? Is that done from time to time by individual bill, or according to any particular criteria or what is the basis for this decision?

Judge Gulley- The legislature determines, any time there is a bill to create a new judgeship. The number of associate judges is based upon a population formula. A circuit is entitled to one associate judge for each 35,000 population or fraction thereof. The circuit judges are provided for under Chapter 37 of our statutes--and this provides for 3 at-large circuit judges and one resident circuit judge in each county. If there is any attempt to increase the number of judgeships, a bill is introduced into the legislature for this purpose and a judicial note is prepared in my office to justify the increase in the number of judges.

In a 12-county circuit in other words, there is a minimum number of 15 judges. All of these judges are paid by the state. Courtrooms and local court personnel are paid for by counties in which they reside. Court reporters, however, are paid by the state under a statewide system. All salaries and expenses of reviewing courts are also paid by the state. Judge Gulley said, however, that in the trial courts, the facilities for holding trial are paid by the county. There are no referees or masters in chancery--both have been outlawed. The only judicial personnel are judges.

Members of the audience were then invited to submit questions.

Judge Miller, county judge from Muskingum county, asked about the handling of traffic cases. There are no referees in traffic. Circuit judges and associate judges only handle such matters. However, all tickets are filed in the circuit clerk's office, most of them by mail--the state police mail in bond and ticket there --and from that point on it is handled by mail. There is a waiver system on the ticket, and most all of them are handled in this manner--minor traffic cases, at least, and the clerk handles a big majority of such matters. The judge handles a small proportion of such matters--i.e. contested cases and pleas of guilty on what are called "A and B" misdemeanors. Judge Gulley stated that the traffic division of the Cook County court has just been notified that for the sixth straight year it has received the ABA's highest award as the most efficient traffic division operation in the United States. Prior to 1964, there were numerous scandals in Cook County Traffic Court involving thefts of money. That is over--there is no longer a way to steal any money what with numbered tickets and the new system.

Mr. Robert Cambridge from the Legislative Service Commission asked if a caseload study had been conducted to arrive at the 35,000 population criteria for associate judges. Judge Gulley said that he personally had little faith in a system employed in California involving the concept of the "weighted caseload." Hearings in the legislature arrived at the 35,000 figure. It has been eminently successful, and only in the law-jury division in Cook County is there any delay. According to law, a person in jail must be tried within 120 days or the case is res judicata.

The matter of "getting a handle" on what is an appropriate caseload in any particular court was discussed. Mr. Montgomery asked if there were a device used

for distributing judicial personnel, especially for assigning judges from one circuit to another. What is used--is population taken into account? Judge Gulley replied that what is used is the monthly report received from the clerk's offices. What was stressed was the fact that there is a two-way check--within the circuit and over the state at large, according to periodic need. Judge Gulley said that he does take into account the caseload, but that he rejects the notion of "weighted caseload" --a system developed in California that determined how much time is properly allocable to particular kinds of matters. Caseload is thus "weighted." Judge Lewis pointed out that in the more rural areas more time is taken in the argument of motions, so the system is not regarded as a satisfactory one on a statewide basis. Judge Gulley said that he relies upon the opinion of the chief judge in a particular circuit. He confers directly with that person and relies upon his opinion as to periodic need. He added that the system in Illinois was commenced from a statistical base of zero and that Ohio has the advantage of caseload statistics that have been collected for some time by the Administrative Director of the Supreme Court.

Mrs. Eriksson asked if there were any problem in renting local facilities and presenting bills therefor to the county commissioners. Court orders for such expenses have not been necessary in Illinois, and Judge Gulley stated that the legislature in 1964 wisely decided to take over the state payment of judicial salaries (counties having experienced some dire straits on account of limited tax base), leaving revenue (fines and costs) in the county. Otherwise, the legislature would have had to authorize counties to raise more tax moneys. Consequently, counties have been willing to furnish and upgrade judicial facilities. They keep the revenue; it does not go into the state general revenue fund. In branch court situations, the cities get the fines that are the result of arrests by municipal officers and they have also been willing to furnish facilities in coordination with the county board. They charge minimal rents for such purposes.

A question was asked as to whether the legislature has the power to confer jurisdiction on the appellate courts. The answer was negative--the Constitution spells out the fact that the legislature has no power to confer jurisdiction. The Constitution also took away from the legislature any rule-making power. It is vested solely in the Supreme Court. In other words, any provision for appeal directly to the court of appeals from administrative agencies, bypassing the circuit courts, this would be by Supreme Court rule only. This was agreed, except for one exception; the 1970 Constitution provided for administrative appeals in ecology matters would go directly to the appellate court. This is part of the Constitution "until changed by law." The legislature attempted to make such a change but it was vetoed. All other administrative appeals go to the circuit court.

Mr. Montgomery expressed the committee's gratitude to the Illinois guest speakers. He announced that the next meeting of the committee would be held on January 9, 1974. Judge Gulley volunteered copies of a history of the Illinois system which he said would be made available to all members.

Ohio Constitutional Revision Commission
Judiciary Committee
January 9, 1974

Summary

A meeting of the Judiciary Committee was held at 1:30 p.m. on Wednesday, January 9, 1974 in House Room 11.

Present were Mr. Skipton and Mr. Guggenheim. (Weather and road conditions prohibited some out-of-town members, including Chairman Montgomery, from attending. Legislative meetings preempted the time of some of the legislative members.) Staff members in attendance were Mrs. Sally Hunter and Julius Nemeth.

Also present were Judge William Radcliff, Administrative Director of Ohio courts, Mr. Allan H. Whaling, Executive Director, Ohio Judicial Conference, Mr. Craig Evans, Staff Consultant, and Committee Special Consultant Judge Robert Leach. The Ohio Municipal Court Clerks Association and the League of Women Voters were represented by observers.

In the absence of Chairman Montgomery, Mr. Skipton opened the meeting by asking representatives of the staff to discuss some materials that had been mailed in advance of the meeting and others that were made available at the meeting.

Mr. Evans summarized a staff report dealing with the Ohio courts of appeals, touching on structure, jurisdiction, history and organization of these such courts. He indicated that he would capsulize the contents of the report.

Mr. Evans - The portion captioned "History" describes what courts have served an intermediate appellate function in Ohio. Originally, under the Constitution of 1802, appeals were handled by the Supreme Court. Subsequently, district courts were established as the first intermediate reviewing courts, by the Constitution of 1851. In 1883, they were replaced by the circuit courts through constitutional amendment. The circuit courts were the first constitutionally authorized Ohio courts having intermediate appellate jurisdiction and elected judges who did not serve primarily on other courts. In 1912, the courts of appeals were established by Constitution. At the present time, pursuant to the Modern Courts Amendment of 1968, Section 3 of Article IV deals with the establishment of courts of appeals districts, the number of judges, the delineation of original jurisdiction, the statutory explication of appellate jurisdiction, the consensus of judges necessary for decisions in different matters, the certification of conflicts between different courts of appeals to the Supreme Court, and the reporting of cases.

The second topic covered in the memorandum is that of jurisdiction, Mr. Evans said. The courts of appeals have both constitutional and statutory jurisdiction. The jurisdiction is set forth generally in Section 3 of Article IV, and is divided into the two categories of original and appellate jurisdiction. Five of the six areas in which the courts of appeals may exercise original jurisdiction involve cases which are based on the extraordinary writs of quo warranto, mandamus, habeas corpus, prohibition, and procedendo.

Appellate jurisdiction can also be specified by statute, pursuant to Section 3 (B) (2) of Article IV. A point on appellate jurisdiction which Mr. Evans wished to call to the attention of members is that the Rules of Appellate Procedure have abolished appeals on questions of law and fact, under Rule 2, although the statutes continue to refer to such appeals. Such appeals are no longer permitted, however, by virtue of the court rules.

Original jurisdiction set forth in the Constitution deals primarily with the extraordinary writs, as noted, but what is probably the most puzzling aspect of original jurisdiction is the provision of Section 3(B) (1) (f), which states that courts of appeals have such jurisdiction "/i/n any cause on review as may be necessary to its complete determination." This apparently grants to the courts the power to consider some aspects of a case which is otherwise before them and on which they feel it is necessary for them to rule in order to resolve a matter completely. This is a power that is outside of other grants of jurisdiction to the courts, its thrust being that if a matter is before a court of appeals, the court can, by extending the scope of its review "have done" with the case, to save the trouble of sending the case back to the trial court, he said. This grant of jurisdiction is new in that no such power existed prior to the Modern Courts Amendment.

There are almost no reported cases dealing with this jurisdictional grant. One, a Supreme Court case, Baxter v. Baxter, 37 Ohio St. 2nd 168, may be of interest because of its comment on the provision, he said.

Mr. Evans indicated that the report includes a short section dealing with organization and operation of the courts, and an appendix, supplying information about each district court of appeals. This includes information, substantially up to date, on the number of cases pending, an indication of the size of the districts, and the number of judges.

A short section on the judges discusses not only their number and their compensation but also their election and the tenure of present judges. Compensation of such judges has recently been increased to $37,000 from $28,000, in the same legislation that increased the salaries of other judges, he noted.

The financing of the courts of appeals is also discussed, as well as administrative structure, he said. With respect to administrative structure, judges of the courts of appeals have expressed concerns over the definition of which persons are their employees, what the judges' statutory authority is to appoint employees, and by whom the employees are compensated, Mr. Evans said. To be more specific, employees, by statute, must either be "constables" or "official shorthand reporters," the latter being paid from state funds and the former being paid from county funds. As a result, some employees have to be called "official shorthand reporters," be they stenographers or receptionists, and are paid by the state, whereas other employees, such as constables, who serve the functions of bailiffs and assignment commissioners, are paid by the county. Although this matter may not comprise a constitutional problem, it is a matter of court reform in that it seems logical that all employees of these state courts should be compensated by the state, he said. He concluded that he doubted that such a matter should be included in the Constitution, however.

At this point Mr. Skipton invited all visitors to feel free to join the discussion and sit at the table with the committee and its staff. He asked persons in the room to identify themselves for the record, and invited questions.

Mr. Guggenheim said that he felt there would be questions forthcoming when the report has been read and digested and the subject gone into a little more deeply. Mr. Nemeth pointed out that the subject of the courts of appeals and of the Supreme Court had been put on the agenda of this meeting only as a means of laying the groundwork for discussion at the next meeting and succeeding meetings. The principal purpose for today's meeting, he said, was to discuss three models for court unification.

Judge Leach - Before we get to that topic, I'd like to make a comment within the framework of courts of appeals as such. By way of background, if ever we are to consider what alternatives there might be with respect to the organizational structure

of the courts of appeals, I would add that the structure of most courts of appeals in the nation is basically within geographical areas, as in Ohio, with some exceptions. The principal exception, at least the one which receives the most publicity, is to be found in Michigan. Michigan had no court of appeals until approximately 15 years ago. Prior to their institution, appeals went directly from the district court to the Supreme Court. When they organized the Court of Appeals, they established it in Lansing, and all the Court goes out from Lansing within one organizational set-up. Three judges sit on a case, but they go out from this central location. Basically, the judges are elected by district but don't necessarily sit within the same district from which they are elected. Panels vary from day to day and from case to case, as opposed to the situation in Ohio where, independently of an assignment, we have three judges of the court of appeals--the same three--sitting in all cases. Essentially, Michigan has a court which is a mixture--in the elective process it is controlled by district, but in the assignment process it is controlled by a master plan. This involves going out from one location and entails a large staff of law clerks and referees and others, each with an office in Lansing as well as an office in his home community. The budget of the system is terrific. I mention this to call to your attention that this system is the great departure from the basic concept of other courts of appeals. It is being highly praised by its chief judge at various judicial seminars about the country.

Mr. Skipton - You speak of referees and others--I would think that these would be part of a trial court, not a court of appeals.

Judge Leach - Well, they are not referees as such--they are called commissioners, I believe. These are basically law clerks who remain and make a career out of their position. They even have "model opinions" in which the law clerks or commissioners are to capsulize the facts. The point has been made that the chief judge was not elected for his knowledge of English grammar but for the administration of the court and the development of its rules. This is somewhat at odds with the idea in other states, where the concept is that the court is vitally concerned with the fine bits of English grammar, and what they are going to mean in some succeeding case.

Asked if he recommended such a system Judge Leach continued:

Judge Leach - No, but I see the benefit in sending people out by some central assignment. You do in this way eliminate the situation where one court of appeals is overloaded while another court of appeals may have nothing to do, which is true in Ohio today. At least the Michigan system has the advantage of being centrally integrated.

Mr. Nemeth - Did I understand that in Michigan the panels go out from Lansing regardless of where they were elected? In other words, is it possible to have three strangers sitting on the court of appeals in your county, that is, judges whom you did not elect?

Judge Leach - Yes. There is one integrated Court of Appeals,although I'm not sure of the number of judges. Three sit on a panel, and all are assigned out by the Chief Judge from Lansing. The panels are rotated more or less, and the individual three judges who sit on a case in a particular district are not necessarily persons who live in that district.

General discussion followed about the election of courts of appeals judges at large. It was pointed out that in Illinois the Supreme Court is elected by districts

but sits as a unit. Judge Leach reiterated that many states do not have courts of , and in Texas, he noted, there is a whole separate court structure for civil cases and for criminal cases.

Mr. Skipton - The question is, how well are courts of appeals serving the needs of the state as they are presently constituted? What form should appellate courts have in order to accomplish that goal? This paper, I assume, gives us some background to decide that question.

Mr. Evans - I don't believe that it suggests any changes, but, hopefully, it does give the background. And I would point out again what the courts have done on their own to affect their operation--such as to eliminate appeals on questions of law and fact by rule. I think this move was made in order that the courts would better serve the public.

Judge Leach - Parenthetically, that was done by the Supreme Court, not by the courts of appeals themselves, although the judges of the courts of appeals were quite active in the deliberations of the Supreme Court.

Mr. Skipton - Are there courts of appeals having caseload difficulties,

Mr. Evans - Caseloads per district vary a great deal, but except for three, all the courts of appeals districts have the same number of judges. There is thus quite a variance in number of cases pending per judge. It's not strictly accurate to break it down to number of cases per judge, but that seems a legitimate way to get a feel for the differences.

Mr. Skipton - Do we have much circuit riding from district to district?

Judge Radcliff - Yes, there is a great deal of it. We have retired court of appeals judges who are willing to come back to serve, and most judges are perfectly willing to help.

Mr. Skipton - This is statutory and not a constitutional problem.

Mr. Guggenheim asked whether there has been serious criticism of the Ohio courts of appeals. Both Judge Radcliff and Judge Leach agreed that there had not been.

Mr. Skipton - This is what I was getting at. We're really talking about the number of judges per number of cases, plus flexibility in assignment, so that the workloads per judge even out.

Judge Radcliff - There are a great many trial judges who are disposing of 1,000 cases a year. And when you think of that, and then look at a municipal court, which handles, if you count traffic, 5,000 cases a year, then you become aware of the problem. The court of appeals judge, as Judge Leach has pointed out, has the duty to see that his decision is in good, clear English language so that it sets a precedent that will dispose of and control similar cases over and over again. The very nature of his work is more demanding, and more time consuming.

Mr. Skipton - At some point I'd like to get into that point more deeply. How necessary are some of the opinions? Could they be less lengthy? The problem, of course, is the necessity to document all statements.

Judge Leach pointed out that precision in the language is essential because of the use of opinions later and the dangers of quoting from opinions out of context.

Mr. Skipton then invited further comments from visitors. Mr. Whaling pointed out that he felt it should be emphasized that in Ohio there is an absolute right of appeal to the courts of appeals. In Michigan, on the other hand, the right is not absolute, and the Court itself filters out those cases which it feels are most fitting for appeal. The Court there has two ways of controlling caseload--through limits on the taking of cases and through the flexible means of disposing of them. The right to limit cases on appeal there is similar to that possessed by the Ohio Supreme Court. Whereas Ohio has 38 judges for 11 million people, Michigan has either 12 or 13 appellate judges for about 2 million fewer people, so it would appear that they handle approximately half as many cases, he said.

Further appeal to the Supreme Court in Ohio is discretionary, noted Judge Radcliff, except in constitutional cases. Most states, he said, have only the trial and an appeal, which is not as of right but only discretionary, to the Supreme Court. Some states have, as does New York, an appellate branch of the trial court. In Ohio originally, when the first district court was created, the appeal was one to a court made up of the trial judges, Judge Radcliff said.

Mr. Skipton asked if anyone present wished to speak to the need for change in the courts of appeals in Ohio. He was trying to determine, he said, whether the right to appeal is an issue or not.

Mr. Nemeth asked Judge Leach, Mr. Whaling and Judge Radcliff, jointly, whether or not, from their points of view, there are any sections in the Ohio Constitution now which should be modified so as to improve the efficiency of the courts of appeals. Is the present constitutional structure sufficient? Outside of the problem noted by Mr. Evans that the courts are without authority to hire all the kinds of employees for which they might have need, are there other matters that should be brought to the attention of this committee while it is studying appellate court structure, he asked.

Judge Radcliff - I think the state should bear the entire cost of our judicial system and ultimately include the trial courts. The burden should be removed from the counties. This is a change that has to come some time--I don't know how far down the road it may be. As far as organizational structure now, it is sound. There is a court of appeals for every county in the state. The clerk of courts is the clerk of the common pleas court and he is also the clerk of the court of appeals. The only problem is the spread of the economic burden. But it only causes trouble in two or three places. County commissioners buck once in a while on the matter of salaries to be paid to court employees, but that is a minor matter and it is statutory. It should not be handled by the Constitution. The Constitution should in no case provide more than the provision that the entire cost of the judicial system shall be borne by the state.

Judge Radcliff was then asked if having the clerks in the counties will become a problem as courts may increase the use of new Revised Code Section 2501.181 which allows the courts to name one county as the principal seat, and absolves other counties from the responsibility of maintaining physical quarters for the court of appeals.

Judge Radcliff - There may be problems eventually. As in the implementation of Issue

3, should a district court system be instituted instead of a court of common pleas in each county, problems can be expected to evolve. But clearly, they can be solved by statutory means.

Judge Leach - I have one further comment. I think that there is a problem in the administrative sense in that the papers in a given case in a multi-county court of appeals are filed in a particular county and may never reach the judges of the court of appeals until they "arrive" at that county pursuant to an assignment which they have arranged six or seven months before by a schedule filed with the Secretary of State. I think that there ought to be a rule of superintendence from the Supreme Court, requiring the courts of appeals to have read the briefs and papers in advance of argument.

There was discussion on the difficulty of enforcing such rules. Judge Leach felt that there would be compliance if made the subject of rule.

Mr. Nemeth stated that, at this point, he had planned to talk briefly about the internal organization of Supreme Court as provided in the Constitution and also a little about its rule-making powers, which solidified the Court's hold on the whole judicial system. However, considering the hour, he said, it was perhaps more appropriate to defer discussion of the Supreme Court until a later meeting, and to go on now to a discussion of the models of proposed trial courts structures for Ohio.

Mr. Skipton then asked Mrs. Hunter to discuss proposed trial court structure "A", dated January 3, 1974.

Mrs. Hunter - What we have for you are three models that try to focus upon some of the subjects that we have discussed in connection with the operation of trial courts. One model, labeled "A", is based upon the ABA's Standards Relating to Court Organization. The other two are based on the judicial articles of two other states. The idea of preparing these models was not so much to recommend any constitutional or statutory changes but rather to set out some concepts that the committee can either endorse in principle or reject altogether. On concepts endorsed in principle, the next step is to go about implementing the ideals endorsed, and perhaps to make proposals for that purpose to the legislature.

Model "A" perhaps goes furthest in its pattern for revising the trial court structure in Ohio. It is based upon the establishment of a common pleas district court. The district in large counties would probably be a one-county district; in other areas of the state the district would be comprised of two or more counties, as established by law. The territory of the district would be defined by law. All present lower courts (specifically, municipal and county) would be absorbed into this district court.

What is also envisioned here is the creation of functional divisions of the district court. We already have probate divisions established by Constitution, unless otherwise prescribed by law. The other division could be designated as the "general" division. Rather than to advocate the establishment of a number of specific divisions by law, what this model does is to say, let's create a general division and a probate division and have the departmental breakdown in the general division be discretionary with the court, so that it could vary from district to district. This would make subject matter break-down as flexible as possible.

Page 1 of this proposal shows, for example, the possible kind of break-down that one might find in a large county such as Cuyahoga--envisioned as a one-county district. Here, there might be three divisions--not every district court would require the same delineation of divisions. What is suggested here are: general division, probate division, and municipal division, with the latter broken down geographically. Certain subject-matter departmentalization is suggested under each division, as shown.

An alternative is described in the second paragraph on page 2, under which the subject-matter divisions would be created by law. This alternative is not one that is favored under the Standards of the ABA Commission, because it is less flexible. The Standards endorse a flexible system because it is easier to change to meet new needs as they arise.

What is attempted here, for the convenience of the committee, in taking a position on each of the various aspects of the total package in Model "A", is to divide it into sections, designated by Roman numerals, and titles, the first of which begins on page 2 and is captioned "The District Court." The general goals under such a proposal are: (1) that the General Assembly should provide by law that the basic trial court be created on a district basis, called the common pleas district court; and (2) that common pleas districts should be created by law, containing one or more counties, but not crossing county lines. These principles are in accordance with the amendments adopted with the passage of Issue 3 last November. The number of judges would depend upon counties within the district, because of the constitutional requirement that each county have one resident judge. Criteria that might be suggested to the legislature in its delineation of districts would include such factors as population, caseload, area, number of lawyers, availability of transportation facilities, as well as any special local problems.

Under "Comment" is the summarized rationale for the creation of districts in this matter.

The second topic discussed here is the establishment of divisions of the common pleas district court. Generally, the Standards and most modern authorities in judicial reform discourage the establishment of subject-matter divisions by statute and favor a system whereby subject-matter division is a matter of judicial discretion. The discussion on page 4, under the heading "Divisions", suggests functional alternatives, and reiterates the point that not all districts would be expected to require the same functional divisions. In larger counties there would be a special division that would exercise the jurisdiction of replaced municipal and county courts--called the municipal division or bearing another name descriptive of limited jurisdiction. What is stressed here is that, sticking with the use of the term "general division," one could still endorse departmental (subject-matter) breakdowns by the court itself, possibly through an administrative judge.

Topic III,"Jurisdiction," assumes that all district courts would have the same jurisdiction, and lists the reasoning that has accompanied such recommendations in the past. Here again, the committee could decide that as a general goal all district courts, regardless of how they are subdivided departmentally, should have the same jurisdiction. Judges should be mobile, and there should be free rotation to meet the need as it varies in a particular district. There is a notation that mobility of judges within the district may present problems because of the constitutional requirement of election to divisions. It must be pointed out, however, that the Constitution does not require that the judge serve exclusively in the district from which elected.

Under Topic IV,"Judicial Manpower," is the question of whether or not the committee decides to recommend the absorption of the municipal and county courts into the common pleas district courts. There are two possibilities here-simply making minor court judges judges of the new district court, or designating them as deputy judges or some other kind of judicial officers. The committee could discuss what would be involved in either procedure and make a recommendation on this point to the legislature. Advantages of a single class of judges are here stressed, in accordance with ABA Standards.

Topic V, "Administration," discusses administration of the court system. Ohio has, by virtue of the Modern Courts Amendment, as implemented in Section 5 of Article IV, a system whereby the Supreme Court has centralized authority over all courts of the state. It has been noted that the Court has had great difficulty in developing rules applicable to the minor courts. Perhaps the committee may feel that a recommendation in this area would be helpful to the courts--one made to the legislature that could facilitate the development of rules of superintendence applicable to all courts.

Topic VI, "Financing," involves committee determination on the question of whether it chooses to endorse the idea of having the state absorb the costs of operating all the courts of the state. If the minor courts are absorbed under a unified system, it makes even more sense for the state to assume the costs of operation.

These are, as I say, points for discussion. Hopefully, the committee can arrive at a decision on each, and worry about how it is to be implemented later.

Mr. Nemeth asked Mrs. Hunter whether she would summarize the constitutional changes that would be required to implement the model described. She indicated that she had not given separate consideration to this question, but would do so for the subsequent meeting. Mr. Skipton asked if the ABA Standards propose that structures such as this be incorporated into constitutions. Mrs. Hunter said that she believed the Standards describe an ideal system, with as little as possible solidified in the constitution.

Mr. Nemeth indicated that the other two models for discussion are based on the 1972 Florida Judicial Article and the 1970 Illinois Judicial Article. The distinguishing features of these two systems, he said, are that in Florida there is a four-tiered system(Supreme Court, district courts of appeals, circuit courts and county courts)and the Constitution prohibits the creation of additional courts, so that minor courts cannot proliferate as a result of a constitutional prohibition.

In Illinois, the system is a three-tiered structure in which all pre-existing minor courts were absorbed into the general trial court in two stages, beginning with a constitutional amendment in 1964 and culminating with a refinement of the 1964 amendment in the Constitution of 1970.

Mr. Nemeth said that the approach of models "B" and "C" is somewhat different from that of Model "A". These structures are not as detailed as in Model "A". "A" takes an "horizontal look," "B" and "C" more of a"vertical look," having to do with the chain of command from supreme court on down, for administrative purposes.

Mr. Skipton - I do not see the value of pursuing details at this point, but I do believe we did set forth some questions that should be the basis of discussion next time. It would be helpful if the summary would pinpoint some of these questions to help get discussion started at the next meeting. The Commission's next meeting is February 16, a holiday. Although there may be another meeting scheduled before

that, I do believe that we can assume that this committee will also meet on that date in the morning.

Ohio Constitutional Revision Commission
Judiciary Committee
February 7, 1974

Summary

A meeting of the Judiciary Committee was held at 1:00 p.m. on Thursday, February 7, 1974.

Present were Mr. Montgomery, Dr. Cunningham, Mr. Guggenheim, Mr. Skipton, Mr. Norris and Committee Special Consultant Judge Leach. Also present from the staff were Julius Nemeth, Craig Evans and Sally Hunter; participating guests were Mr. Coit Gilbert, Judge William Radcliff, and Mrs. Liz Brownell.

The meeting opened with a review of what had happened at the last meeting, given by Mr. Nemeth.

Mr. Nemeth - Because of weather conditions at the last meeting attendance was not very high. Mr. Skipton chaired. The principal item of discussion was a model for court structure based on the ABA standards. (The model was dated January 3, 1974). A memorandum on the courts of appeals was distributed and summarized by Mr. Evans. Another memorandum, distributed but not discussed, was one dealing with provisions in the Constitution concerning the Supreme Court. Because of the attendance problem, Mr. Skipton suggested that the staff develop a series of questions that had arisen as a result of the discussion about the three models of court structure--one based on ABA standards, one based on the Illinois system, and one based on the Florida law. It was hoped that these questions would serve as the basis of the start of discussion today. The list of questions for this purpose is dated January 24, 1974.

Mr. Montgomery - This will serve as the basis of our discussion. We are trying to come to grips with the trial court structure before turning to appellate courts and administrative matters. We would like to get consensus at this meeting on some of the broader principles. For that reason, we will go through the questions one by one:

General Organization: a. Should all trial courts be unified into a single trial court? What this means in essence is should there be a three-tier, not a four-tiered system? Single trial court structure is in accord with ABA standards and is what Illinois has. Florida has a four-tiered system. What are the feelings of members on this question?

Mr. Guggenheim - I was very impressed by the Illinois system and what we hear about it.

Dr. Cunningham - I think that a single trial court is the approach to take and it should be along the lines of the Illinois system.

It was agreed that such a court would have civil, criminal and equity jurisdiction.

Judge Leach - I'm torn between a lot of things. My thoughts are not completely crystallized on the matter. I think inherent in the whole approach is the matter of financing. If the state financed the entire court system, I think that the single trial court would work. As long as you have laws whereby cities and counties finance and get receipts back from court operations--as a practical matter it becomes almost impossible to have a true single trial court system. And my thoughts also divide a little, although not too much, predicated upon history in Ohio. With

the exception of Cuyahoga county (customarily up there they use the probate court to try appropriation cases)--in most counties basically the probate court is the juvenile judge--and without exception that part of probate which is truly probate is almost administrative rather than judicial. I think that this had something to do with the giving up by the Bar in the 1968 amendment of bringing in the probate courts as part of the common pleas but retaining some separate identity. What was retained was the part of the law that allows the probate judge to be his own clerk of courts, and such other special provisions. All in all, weighing the pros and cons, if the state of Ohio financed the whole deal I think that a single trial court would be ideal. Absent that, I think that it is difficult to contemplate.

Mr. Montgomery - Isn't state financing implicit in the state unified court system?

Judge Leach - Even in Illinois, I don't think that the court system is completely state financed.

It was agreed, however, that complete financing is the ideal, and that the state of Illinois is working towards that goal.

Mrs. Hunter - The cities in Illinois retain the fines from violations of ordinances, and the cities also provide court facilities.

Mr. Montgomery - Does anyone care to be heard on this subject?

Judge Leach - I'd like to hear from Judge Radcliff. He has been on the court of appeals, administrative assistant to the Supreme Court, he has sat on the Supreme Court--he should have ideas on this proposal.

Judge Radcliff - My thinking parallels yours. Ultimately you must remember that to a city and to a county, the municipal court is a source of revenue and it has nothing to do with the administration of justice. But it is a vital revenue source. As long as the city council and the board of county commissioners look on that municipal court as a source of revenue that is bad. Ultimately, the state will have to bear the entire cost. That includes staff and the bricks and mortar for courtrooms, probation departments, jails--all of it--and the city is going to have to find another source of revenue. But of course, cities will also be spared a terrific amount of cost, in the maintenance of both the municipal and common pleas court. But I agree wholeheartedly that until we have state financing we cannot have a unified court system.

Mr. Montgomery suggested that the committee make recommendations for the ideal system, regardless of whether less would have to be accepted.

Judge Radcliff - There is less and less resistance all the time to the idea of the state's taking over the financial burden.

Mr. Montgomery concluded the discussion on this particular aspect of the meeting by announcing that there appeared to be a general consensus in favor of aiming toward court unification, and he stated further that absent members would be polled by mail on this point. At this point, he stated, there appears to be consensus in favor of a one-tiered trial court structure. He continued:

Mr. Montgomery - On to point B, then, Should there be a four-tiered system with a court of general jurisdiction (common pleas--county or district) plus one court of

limited jurisdiction?", I think that we have answered this question in the negative. We shall move on to point C. "Is reorganization of the present trial court structure necessary to achieve a simplified, flexible court system characterized further by concentration of judicial power and responsibility?" I think the answer is obvious, isn't it? It is necessary. Point D: "Should the structure of the state's judicial system be left to legislative implementation, frozen into constitutional provision, or left to the judiciary itself to implement through rule-making powers?" What we are talking about here is should the structure be constitutional, legislative or made by court rule?

Mr. Nemeth - This also presumably covers the question of who creates divisions.

Mrs. Hunter - The question is very general.

Mr. Montgomery - Aren't the three models that we are looking at pretty consistent on which branch of government performs these functions? Structure is for the most part constitution, is it not? Jurisdiction is legislative.

Judge Leach - It may depend upon what you mean by "structure." How much detail this encompasses, for example.

Mr. Nemeth - In the overall scheme structure is constitutional. However, it is possible to leave an out in a constitutional provision--for example, to do what Illinois has done by creating a supreme court, court of appeals and a single trial court and just assume that no other courts will be created. Or what could be done is to do what Florida has done to create a four-tiered structure and forbid the legislature to create other courts. Or we could retain what we have done in Ohio--to designate the three levels of courts that we want in the Constitution and permit the legislature to create other courts. These other courts are, of course, statutory courts, as distinguished from constitutional courts.

Mr. Montgomery - We almost have to limit the power to create more tribunals, don't we?

Mrs. Hunter - Either that or say simply that the judicial power is vested in a supreme court, courts of appeals, and courts of common pleas.

Judge Radcliff - That could be accomplished by removing the language from Section 1 "and such other courts inferior to the supreme court as may from time to time be created by law."

Dr. Cunningham noted that the United States Constitution is even more simplified in its designation of judicial power. He would leave more to statute on the matter of structure. The possibility of removing the courts of appeals and common pleas as constitutional courts was generally discussed.

Mr. Montgomery - I think that the Constitution is going to have to address itself to the subject of districts, however. We do this in other parts of the Constitution--in the creation of counties, etc. I think that we must say that a trial court district can be one or more counties. (It was agreed that this is the substance of Issue 3.)

Dr. Cunningham made the point that this could be done by the legislature, when and if they create courts of that structure. He would again leave more of this

to legislative determination to name and designate, structurally and jurisdictionally.

Mr. Montgomery - Are you saying that the Constitution should not freeze court structure?

Dr. Cunningham - Court designations need not be specified in the document. Any more than the United States Constitution has anything to do with the setting up the federal district court.

Mr. Montgomery - Can Congress create more tiers?

Judge Leach - Under the federal Constitution, yes.

Mr. Nemeth - There is a proposal now to put one more court between the courts of appeals and the Supreme Court, which would not necessitate change of the federal constitution inasmuch as it provides only for the Supreme Court.

Judge Leach - In the whole area of administrative appeals, there have been proposals for an administrative court of appeals. There has been some agitation along that line. As the taxation structure of Ohio grows more complex there has been some call for a tax court.

There was general discussion about court fragmentation. Judge Radcliff cited H. B. 800, that would create a court of claims. He expressed the view that such proposals lead to the horrible mess that you have with many courts. This idea of a court of claims can be criticized--if the state wants to waive its immunity, it should waive it and treat a claimant against the state like any other litigant and let him go into the established courts with his case. He said that he felt such legislation creates a new "monster."

There was general discussion about the provisions of H. B. 800. Judge Radcliff said that the best way is to create the three constitutional courts and not give anyone the power to create any more than that. Detailed structure could be provided by the legislature, but within the framework of the three-tiered unified court structure.

Mr. Montgomery - I agree with that thesis.

There was some general discussion of the Florida type provision whereby the legislature is prohibited from creating more courts, but there was general dissatisfaction with such a provision. Silence was preferred to a prohibition upon the legislature. Mr. Montgomery pointed out that the system under discussion assumed much administrative authority on the part of the Supreme Court of the state, and that this is a matter that the committee would get into more deeply at a later point. He asked for further discussion upon the matter of how much should be frozen in the Constitution on the matter of court structure. Do we leave this open and let the legislature create more courts at will, or do we say that this is the way that it is going to be?

Mr. Skipton - The way the courts are used you had better freeze some of it.

Mr. Guggenheim - There is the choice of following the federal model--to say simply that there shall be a supreme court and such other courts as may be established by law--or to specify but limit to a three court structure, supreme, appellate, and general

trial. It was generally agreed that what had been reached so far was consensus on an ideal--to have a three-tiered system with one trial court of general jurisdiction--leaving implementation and detail to further discussion or legislative discretion. Mr. Guggenheim tended to favor sticking with the principle of a three-tiered system for the present. He would still recognize the right of the legislature to create other courts if they were needed, however. It was agreed that flexibility should not be sacrificed. Cuyahoga county was cited as an example of the need for creating structure according to specific needs. Mr. Guggenheim reiterated that he would not like to foreclose the possibility of creating courts as needed.

Mr. Skipton - I suspect that what we are getting at here is something that bothers me. We throw burdens upon the courts that I wonder whether they should be there. When I read the statistics in the newspaper that such a high percentage of court cases are traffic or intoxication cases--do we really need a $30,000 to $50,000 a year judge to handle such matters?

Dr. Cunningham - What you are saying is that such things should be handled administratively.

Judge Leach - In the Constitution, you could say either that it is or it isn't to be handled by the courts.

Mr. Skipton - We are talking about form and structure and I think that we should give consideration to the matter of what jobs are to be done by the courts.

Dr. Cunningham - But someone held on adjudication of insanity or drunkenness--if he wants out on a writ of habeas corpus, someone in a position of responsibility must hear the matter. And you cannot define this matter in the Constitution. You can say what his rights are and it is for the legislature to determine who has jurisdiction to determine the matter of his rights in a proper case. But as to whether or not he has to have custodial care or be under no restraint whatsoever is another possibility.

Mr. Montgomery - Aren't we getting into the matter of jurisdiction? Certainly this is not a subject for constitutional amendment in any of the models we have studied, is it?

Mr. Skipton - But I am introducing the question that the legislature should take a close look at some of these areas. Because I have been reading all of these court statistics and I am flabbergasted at how much time, money and talent is wasted on such matters. I think that it is a travesty on our resources in this country if we spend so much time on some of these matters. And I believe that if we want to do something worthwhile, we should start looking at how this system works in handling matters of a certain nature.

Judge Radcliff - At the present time the solution is right on the statute books. They can be heard and in most cases these matters are heard by referees. No judge time is involved. In drunkenness and traffic situations. You don't have to change the jurisdictional aspect of the structure of the court.

Mr. Montgomery - This leads us to another matter--as a constitutional matter do we favor magistrates and referees and other para-legal assistance? Associate judges, for example?

Mr. Skipton - I think that this is what I am trying to introduce here. We may be able to agree readily on structural matters in an ideal sense, but the important thing is how is this to work? What happens to the poor citizen who gets caught up in this system?

Mr. Montgomery - I believe, however, that we have pretty much of a consensus here today that there should be three constitutional courts. Further, that we should not prohibit the creation of additional courts. But that we should not have a permissive statement in the constitution to authorize the creation of additional courts. Tentatively, we will accept this proposition. Moving on to E: "Should the proliferation of additional courts be prevented by prohibiting the legislature from establishing courts other than the courts established in the Constitution?" I think we answered that one. Let us move on to the second item--District Courts. "Should the trial court of general jurisdiction be created on a district rather than a county basis?" What is the pleasure of the membership on this point?

It was acknowledged that the Constitution was just amended to allow the legislature to create district courts. Issue 3 so provided. Mr. Montgomery stated that he felt that the people had just spoken in favor of allowing the creation of district courts. But, he asked, do we think that this is a big mistake? It was also agreed that under the new constitutional provision a district must encompass a total county or more than one county--but the division must be made along county lines. A county and a half cannot constitute a district, said Judge Leach. Mr. Montgomery asked for clarification about the question. Mr. Nemeth said that he feels the basic question is whether or not the Constitution ought to say that supposing we have a district court system that the districts must be created along county lines as boundaries? Should this provision be silent on the matter or should it permit the General Assembly to change the makeup of districts. This could be accomplished, he noted, by leaving the provision that districts be created along county lines but adding the proviso "unless otherwise provided by law." He acknowledged that such a solution may be "begging the question." But he also suggested that such a change would give flexibility that is not currently present.

The current provision was read: "Two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law." (Amended Section 4 of Article IV.) It was agreed that counties are implicit in the new language. Mr. Montgomery asked "Do we think that this provision should be different?"

Dr. Cunningham - I would say that given the present system of counties and the distribution of population that we now have that there is no need to raise the question now, given the present structure of the 88 counties we now have.

Mrs. Brownell brought up the point of the Governor's proposal for districts for other bases and asked whether this would affect the committee's feelings on the matter before it. It was pointed out that contemplated and proposed districts are to be made up of counties. Splitting along county lines was acknowledged as an unpopular suggestion. Although it was acknowledged that counties might some time have to be split under the "one man one vote" rule the idea is not popular.

Mr. Skipton - All of this gets back to the matter of whether or not we have state financing of the courts. If we do, the workload problems are easily handled.

Mr. Montgomery stated that he felt that there was committee consensus to stick

with the present constitutional provisions with respect to having districts based upon county lines. The next question, therefore, is: "What branch of government should determine the geographic descriptions of the district court-- the supreme court (as in the ABA judicial article) or the legislature (as in the Ohio Constitution and the provisions of the National Municipal League Model Constitution)?"

Mr. Nemeth - There is a subsidiary question here, and that is even if the power remains with the legislature (as under the present section 4) whether the Supreme Court should be given a formally recognized advisory role in the creation and abolition of districts, and the creation and abolition of judgeships. The Florida provision is a model on this point.

Mr. Montgomery - Let's talk about the basic question first. Who should have the final authority? We can then get to the optional matter of advisory assistance. The present Constitution says that the legislature has this authority. Does anyone favor change?

Mr. Guggenheim states that he could not envision a change that would not involve too much detail for a constitutional provision. Dr. Cunningham discussed the theory of representative government and suggested that under this theory the power should be posited with the legislature. Mr. Montgomery concluded the discussion by saying that he understood the apparent consensus to be to leave it to the legislature to make the final decision. Mr. Guggenheim acknowledged that the whole thing could work more smoothly if handled by the Supreme Court but had doubts. The subsidiary question of an advisory role for the court was next discussed. Both Florida and Pennsylvania constitutions give the supreme courts of those states an advisory role in the creation of districts, said Mr. Nemeth. The Florida provision is lengthy and Mr. Nemeth called attention to the model court structure based upon the Florida plan. It is designated Model B.

Mr. Nemeth - The Florida Constitution, in Article 5, Section 9 provides that the Supreme Court shall establish uniform criteria for the need for additional judges and also for redefining court districts and imposes a positive duty on the court to certify its findings to the general assembly and imposes a positive duty on the general assembly to act upon the recommendation of the court. It also provides that if the Supreme Court fails to make findings, as provided, the legislature may, by concurrent resolution, request the court to certify its findings. In that case, if the general assembly finds that a need exists, it can by a 2/3 vote of the membership of both houses increase or decrease the number of judges or change the districts. But otherwise the recommendation of the supreme court becomes controlling. There is an interplay of forces here. The ultimate decision still rests with the general assembly, but the supreme court is given a voice and probably a greater one under this provision than under any other state constitution. The Pennsylvania provision, which I do not have with me, simply provides that the number of judgeships and the judicial districts shall not be changed by the legislature except with the advice and consent of the supreme court.

There was discussion about the advantage of having the supreme court, with its expanded administrative authority, having authority in this area. As an administrative view the idea met with favor, although Mr. Guggenheim stated that he felt that the provisions read might be guilty of putting too much detail in the Constitution. Mr. Montgomery asked for committee views on whether this should be subject of statute or whether the committee should make a recommendation on the subject to the general assembly. Mr. Montgomery said that he felt that the Pennsylvania system posits a

veto power in the supreme court and in effect lodges final authority in that body rather than in the legislature. Mr. Nemeth pointed out that practical politics would be involved. Since the legislature has control of the purse strings, these matters "balance out."

Mr. Skipton - To me many of these things are subterfuges. It is like salaries in the Congress today.

Judge Leach - I like the Florida concept, but I think that it is overly cumbersome in language. It seems to me that you could accomplish the same basic purpose by some of the language in there but without requiring the legislature if the court doesn't act to order the court to act and then if the court doesn't act in 9 months, action is taken and so forth. If the court doesn't act, the legislature does.

Mr. Montgomery - If we like the idea, couldn't we ask the staff to come up with some simplified alternatives giving an advisory role to the supreme court in this area?

Mr. Guggenheim - I am against complex provisions in the Constitution generally, yet I believe that the Supreme Court might be more sensitive to the needs of the whole court system generally. The legislature is not close to the subject. I have trouble with the constitutional language, however.

Mr. Montgomery - Well, if we agree that it is a good idea to give the court an advisory role (and apparently we do) let us ask the staff to draft several alternatives. Search the rest of the constitutions and see how other states handle this matter. See if we can't come up with a manner to implement it that simplifies the provision and the statement of the court's role.

The next question before us is: "Should the general assembly be empowered to create additional courts?" The answer to that we have decided is "no" but neither should it be prohibited from doing so. Let us turn to item 3--Subject Matter Divisions of the Court & Jurisdiction. "Should further splintering of the court of general jurisdiction be prohibited by removing the constitutional requirement that judges be elected to specific divisions?"

It was agreed that the question was slightly biased. The question was acknowledged as a leading one. The practical problem of getting amendments passed by allowing election to divisions was acknowledged. Mr. Montgomery asked if at this point the committee should recommend change on this score. That is, should we be more idealistic if we have that chance, he asked. Issue 3 requires election to divisions. Divisions do not have to be created under its terms but if they are judges must be elected specifically to such divisions. Mr. Montgomery pointed out that the current provision is somewhat of a limitation on the flexibility on the use of judicial manpower. Mr. Gilbert states that he felt that it would be preferable to have judges elected to a general division and let the chief justice of the district rotate judges, according to need, experience, and particular qualifications. The Illinois system was cited in this regard.

Judge Leach - Under the Rules of Superintendence the judges are forbidden basically to do the very thing that you are advocating by this discussion. Some judges are expert in divorce matters and nonexpert in other matters. The rules of superintendence declare that every other case must be assigned randomly.

Mr. Skipton - Are we involved in patronage problems here? Probate, for example?

It was agreed that this is involved in the question. Mr. Nemeth stated that this is the fundamental question underlying the clerks' offices as well. Judge Leach opined that we should try to avoid patronage considerations, just as we should get away from having courts to produce revenue. Mr. Montgomery acknowledged that this is an area of reform that we should work toward.

Judge Leach - Of course, the argument can be made that probate judges as a separate unit has some legitimacy and that is that as an administrative tribunal, as well as a judicial tribunal, the people speaking in the name of the court, speaking as an alter ego of the court results in having a person speaking in two capacities for the court--that of assigning it as clerk and that of signing papers, thereby acting for the court. And therefore, the individuals appointed by the clerk of courts, another elected official, would not be speaking for the judge, and if you wanted it otherwise you would simply be compounding the number of employees. That was the basic argument made by the probate courts. And it is true that in a sense the probate court is purely an administrative court. When I acted as probate judge for a couple of weeks I rubber stamped many documents every day and before the stamp was made I spent 6½ hours every day simply signing the documents that went through the probate court of Franklin county in two days.

Mr. Montgomery - Well, we have some sentiment for change in the last constitutional amendment. Especially in the matter of specific election to divisions. Change of this sort might be futile, but should we try?

Dr. Cunningham - I have been against electing judges to specific courts for years so such a change would be in accord with my philosophy.

Mr. Skipton expressed reservations about having such flexibility that one would have judges that were not elected within a geographical area. The discussion of supreme court shuffling of judges was discussed.

Mr. Montgomery - There is nothing to say that a judge elected from a county or district must hear the cases that arose in that district.

Mr. Skipton - I am not so much concerned about that as that I am very disturbed about the caliber of the court and I am very disturbed with the selection mechanism. I have much more faith in the elective process than I do in the appointive process. I am not concerned about "anchoring" judges to a district, but I do have concerns about the methods of original selection. I am adamant on this score.

Mr. Montgomery - The constitutional amendment just passed requires that a judge be elected to a specific division--probate or other--do we want to leave that alone or do we want to provide that they need not be specifically elected to divisions and that they could be completely interchangeable in the trial court structure?

Mr. Skipton - I would vote to make them interchangeable.

Mr. Guggenheim - In theory, I agree, but there are undoubtedly problems practically speaking.

Mr. Montgomery - We seem to have a consensus on this point, but with reservations. Let us move on to 3 b. "Can subject matter departmentalization be achieved without constitutional amendment?" No other model treats this subject in the Constitution,

does it?

Mr. Guggenheim - Are we talking about such divisions as juvenile, etc. That is not a constitutional matter, is it?

Mrs. Hunter - What I was trying to get at by this question is, could you under the present constitutional language have subject matter departments without calling them divisions?

Judge Leach - Certainly. And with all multi-judge courts, especially before the individual assignment system, a judge would sit on criminal matters for a while, then equity for a while, and so forth. In a sense you could call these "divisions." There have been historical divisions in Ohio--such as juvenile. There would be really practical problems in abolishing such a division as probate in this state, and I would predict that success against the opponents lobby would be difficult.

It was agreed that areas of the state have such different problems and such different histories that it would be practically impossible to impose an identical system on all areas. There was general discussion on the feasibility and advisability of eliminating the provision for election to divisions. Mrs. Hunter suggested that the system might possibly be more flexible if the Supreme Court, not the legislature, had the control over court divisions.

Mr. Montgomery - Wouldn't we get to this subject more properly when we get to the subject of the administrative authority of the supreme court? We will probably want to "beef up" that provision.

Judge Leach - Part of this problem depends upon one's definition of subject matter divisions. If you mean such divisions as Ohio has conventionally used--domestic relations, juvenile, etc.--the principal recognized divisions--then if I understand what we are discussing, you would abolish all that. And if you abolish all divisions, then I would agree that basically the supreme court under the rules of superintendence would have power, but the Constitution would have to be implemented on this subject to remove any doubt. At the time that the rules of superintendence were adopted, recognition was still being given to these other divisions. In the event of a change, the supreme court could rotate judges in various ways--by lottery, by caseload, etc. Then there would be the matter of criminal and civil distinctions. The only hesitancy I have in this matter is that having been on the Supreme Court I've seen the number of hours involved in developing the rules we now have. It involved actual court time, that took away from court time to consider cases on the merits. The administrative staff would have to be enlarged if some of these recommendations were to be implemented.

Mr. Montgomery - I think that we have a consensus on c. Let's move on to the next question. I'm eager to get through, in a general way, this entire list.

At this point Mr. Skipton asked to be excused. He made clear his position in favor of recommending administrative disposition of certain traffic and related matters.

Mr. Nemeth - As to matter No. 4--if the committee should desire to save time now, perhaps it could be put off until we get to the question of judges on the outline for this study.

Mr. Montgomery - Let us continue. "If minor courts are retained or converted into divisions, should the court or division have exclusive jurisdiction in any area?"

Mr. Nemeth - The idea here, I think is that cases up to a certain monetary limit or criminal cases of a misdemeanor nature could only be tried in one court. There would not be forum shopping, is that correct?

Mrs. Hunter - Well, if the committee decides that it does not favor having another set of courts but rather a division of the general trial, the question evolves: should these divisions have jurisdiction over all matters or should some division of the court have only limited jurisdiction?

Mr. Montgomery - Is the question here--if you have divisions, should they be organized along geographic lines or subject matter lines? Or both?

Mr. Nemeth - I think that the question at hand refers to subject matter.

Judge Leach - However, if you have one general trial court and if you have an election or an appointment, as the case may be, doesn't the question become one not of jurisdiction but of assignment? If this is a matter of assignment you could recommend, for example, that all misdemeanors would be heard in a separate court room by a certain judge at only certain times. It would simply be a matter of division by assignment, wouldn't it?

Mr. Nemeth - Possibly, but I think that there is one other alternative. Supposing in a single trial court you had municipal and county divisions for example, to handle violations of ordinances, etc; it would be theoretically possible to assign misdemeanor jurisdiction to the municipal or county division of the general court.

Mr. Guggenheim pointed out that the matter under discussion seemed to relate to administrative separation within the one trial court. The question is, he asked, whether or not there would be mobility of judges among the various court rooms. But if there is one tier of judges (and if they were all paid equal salaries) the assignment should be flexible. They should all be subject to the same general workload if all are paid the same, was Mr. Montgomery's thought. There was a general discussion about specialization and agreement that especially in the beginning of implementing plans for a single trial court one might expect to have former municipal and county judges assigned on a regular basis to matters formerly within the jurisdiction of such courts. But such separation of authority need not continue once the plan was fully implemented and after some time has elapsed.

Mr. Montgomery - I do not believe that this is a constitutional matter. "Should there be an administrative rather than judicial disposition of <u>most</u> traffic offenses?" Excluding the serious ones." We know how John Skipton feels about that.

It was agreed that other systems should be explored--e.g. New York. Dr. Cunningham pointed out that there should be no due process problems if the person deciding had specified qualifications, such as those pertaining to a court appointed magistrate. There was a tentative conclusion in favor of making such a recommendation.

Mr. Montgomery - "If the committee favors the retention of a court of limited jurisdiction, does it recommend that such court have uniform jurisdiction throughout the state?"

Mrs. Hunter - If you favor keeping the municipal and county courts, should they at least be equal?

Mr. Montgomery - I think that this was answered in our tentative decision to stick with one trial court. The next question is 4 (a): "Should all judicial functions be performed by a full-time judge?" This is pretty basic to court reform.

Mrs. Hunter - It may be that as Mr. Nemeth suggests this question relating to judges is not strictly speaking a question of structure and should be postponed. It was acknowledged that there is some problem of interpretation--i.e. "judicial functions". The New York automobile department was cited as "totally administrative." The hearing officer in such case need not be a "magistrate." Coit Gilbert spoke favorably of the New York system in the regard. Dr. Cunningham cautioned that there should be a reserved right to plead not guilty and appear before a magistrate. Mr. Montgomery concluded that there is consensus that judicial functions should be performed by full-time judges but stated that the committee also acknowledges that there are many cases that could be handled administratively. But that all judges should be full-time judges seemed to be the committee consensus. A trend toward so providing in other state constitutions was recognized.

Mr. Montgomery - I asked the staff to make excerpts of the constitutional changes that have been made in recent years and insofar as court changes are involved, this is one of the main points to be checked.

Judge Leach - I still see the possible use of magistrates. I think that the question would be better stated: "Should all <u>judges</u> be full time."

Mr. Montgomery - We might review the 1972 publication on this point Trends in Constitution Making.

Before adjourning the meeting Mr. Montgomery expressed the hope that the balance of questions propounded could be dealt with at the next meeting. He expressed the view that as to abolition of mayors' courts and police courts there was apparent consensus to do so. He asked the staff to review the decisions made at the meeting with a view to putting further questions to the committee. He also expressed preference for finishing trial court structure, then moving on to structure at other levels. He said that he hoped for a decision on trial court structure before moving on to the court of appeals, and that he anticipated lengthy hearings on judicial selection. A synopsis on the court of appeals would be helpful, he stated, particularly one that pointed up any particular problems. He concluded by requesting the staff to make drafts on matters that had been agreed to on a tentative basis.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
February 18, 1974

Summary

The Judiciary Committee met at 10 a.m. on Monday, February 18, 1974 in Room 11 of the House of Representatives. Present were Chairman Montgomery, Committee member Dr. Cunningham, Judge Robert Leach, Special Counsel to the committee and the Honorable William Radcliff, Administrative Director of the Courts. Staff member Julius Nemeth and staff consultant Craig Evans were also present.

Mr. Montgomery opened the meeting by stating that the committee was studying trial court structure, and at the last meeting, on February 7, the members present had tried to draw some tentative conclusions as to what should be in the Constitution as far as Ohio trial court structure is concerned. He asked Mr. Nemeth to give a summary of these conslusions.

Mr. Nemeth stated that the outline from which the committee has been working divided the topic of trial court structure into six subtopics: (1) General Organization; (2) District Courts; (3) Subject-matter divisions of the Court and jurisdiction; (4) Judges; (5) Judicial Financing; and (6) Practical Considerations--Possible Solutions to Implementation. Mr. Nemeth said that by the end of the last meeting, the committee had gone through the outline to subtopic (4), Judges. Then he listed the tentative conclusions.

Mr. Nemeth - The first conclusion was that there should be one trial court per district. This carries with it the corollary that county, mayors', municipal or police courts should be abolished or absorbed into that trial court. The second conclusion was that the court system should be three-tiered, consisting of the Supreme Court, Courts of Appeals and the Common Pleas Courts. The third conclusion was that the overall structure of the court system should be prescribed by the Constitution, which should also vest the power to create, alter, or abolish geographical districts in the General Assembly, and the power to create, alter or abolish subject-matter divisions within the court system in the Supreme Court, to be exercised under its rule-making powers. A corollary to this is the removal of the mention of specific divisions from the Constitution, and the removal of the requirement that judges be elected to divisions. The fourth conclusion was that the General Assembly should be denied, or not given, the power to create other courts, in the Constitution.

Mr. Montgomery - I'm not sure that's correct. I think we prefer that it remain silent on the subject, don't we?

Judge Leach - That was the discussion, yes.

Mr. Montgomery - We'd have neither a prohibition nor an authorization.

Mr. Nemeth - Then we'd end up with something like Illinois has.

Mr. Montgomery - Yes.

Mr. Nemeth - The fifth conclusion was that Constitution should specify that the Common Pleas Courts could be established on a district basis of one or more counties and that districts should be composed of whole counties. This, in essence, continues the present situation. The sixth conclusion was that all judges should be full-time judges. The seventh conclusion was that the Supreme Court should be given a constitutionally recognized advisory role in the creation and abolition of judgeships and

in the creation, alteration and abolition of judicial districts. There was some discussion of the type of constitutional amendment which we should be thinking of in this regard. And, of course, we have in the past talked about the Florida provision on this subject--Article 5, Section 9--and some concern was expressed that this provision is too lengthy or complicated, and that we should perhaps find a simpler way of expressing this concept in the Constitution.

Mr. Montgomery - The rationale for such a provision is that the General Assembly, with personnel that come and go, is not in as good a position as the Supreme Court, which has continuing supervision of the courts, to advise what the districts should be, how the workload should be measured, and things like this. So we felt that the Supreme Court should have at least an advisory position, even though the General Assembly would have the final say as to how judicial districts should be drawn and how judicial personnel are selected. The trend seems to be to give the supreme courts of all states more supervisory jurisdiction over the whole court system.

Mr. Nemeth - The constitutional points we have just mentioned are the ones on which there seemed to be a consensus among the committee members present. In addition, there was, I believe, a consensus that the question of whether certain classes of offenses--such as drunkenness and minor traffic violations--should be handled administratively rather than judicially is a legislative and not a constitutional one. There was also discussion of the possibility of assigning specific classes of cases to a specific court, as North Carolina assigns all misdemeanors to county courts, but it was concluded that, at least in the three-tier system which the committee envisions, there was no need for a constitutional provision.

Mr. Nemeth stated that a written summary of the February 7 meeting would be prepared and distributed. He then asked permission to list the memoranda which have been distributed to the members touching on the subjects which were discussed on February 7 and at this meeting, in order to make it easier for members to locate factual information they may wish to have.

Mr. Nemeth - The first memo is dated July 2, 1973, headed "Ohio Trial Courts: Number of Judges in Each Court by County." This contains the 1970 census population figures for each county, and the total number of judges, in table form. The number of judges is further broken down into Common Pleas and minor courts.

The second memorandum is dated September 18, 1973, and is headed "Minor Courts in Ohio." This discusses county and municipal court jurisdiction and structure in detail, including the problem of overlapping jurisdictions. It contains two tables: Table A, "Ohio Municipal Courts: Population and Judicial Personnel." This table also shows 1970 population by county, the number of judges, whether judges are full or part time, and population to judge ratios. The table is of particular importance in light of the fact that the committee has tentatively decided that all judges should be full-time judges. Table B. headed "Municipal Courts with Jurisdiction Beyond Corporate Limits," also shows whether or not there are county courts in a given county, and additional municipal courts.

The third memorandum is dated September 24, 1973 and is headed "Survey of Court Organization in Ohio." This was prepared by the Legislative Service Commission. While it is rather lengthy--51 pages-- it gives a good overview of the existing court structure of the state.

The fourth memorandum we wish to bring to your attention again is also dated

September 24, 1973 and is entitled "State Trial Court Districts." This memo focuses primarily on the districting of trial courts in other states. It summarizes the result of a twenty-two state survey and comments on three specific questions on districting, the first of which is the advantage of a single statewide trial court over separate trial courts in every district. The general conclusion is that there is no particular advantage to having a single trial court in the state as long as administrative authority is properly centralized.

Mr. Montgomery - There is no particular advantage to having a single trial court?

Mr. Nemeth - There is an advantage in having a single trial court per district, but not in having a single statewide court, headed by one man.

Mr. Montgomery - I see. All right.

Mr. Nemeth - The second area of discussion in this memo is the bases for trial court districting. The conclusion is that the large majority of states which permit or mandate districting do so on a county-line basis, which Ohio permits now, and which is what the committee has tentatively concluded.

Mr. Montgomery - Counties may be too small, the state is too big. Districts give some flexibility to recognize local or regional differences--they are a compromise.

Mr. Nemeth - The only other basis which comes to mind immediately as worthy of mention at this point is election districts, which are used in Alaska.

The third question addressed by this memorandum is the locus of the power to create court districts. In most states, it's done by the legislature. In a few states, the power is given to the Supreme Court in some form. Examples of the latter are Florida, Pennsylvania, Michigan and South Dakota.

Mr. Montgomery - Is it an advisory role or a veto role or what is it?

Mr. Nemeth - In most instances they have advisory roles, and even in those instances where a constitutional provision indicates that the Supreme Court may define court districts, for example, legislation may circumscribe the power by prescribing the number of court districts and the number of judges, so that what appears to be an absolute grant of power in the Constitution is "watered down", so to speak, by legislation. That seems to be the case in South Dakota, for example.

Mr. Nemeth - The next memo we'd like to recall to your attention is dated October 15, 1973 and is headed "Clerk of Courts and Clerk of Municipal Courts". This memo points out, among other things, that at the present time the salary of the Common Pleas Court Clerk is tied to a population formula. It also points out that the Municipal Court Clerk in districts to 100,000 gets what the legislative authority prescribes--which would be the city council in which his court is located--and that in districts over 100,000, the clerk gets 85% of the municipal court judge's salary.

Judge Radcliff - Except that he can in no event get more than the Clerk of Courts in the same geographical area gets. This can create some anomalous situations.

Mr. Nemeth - This memo also points out another anomaly, and that is that in most districts under 100,000, the municipal court clerk is appointed. In all districts over 100,000, he is elected. But even in some districts under 100,000--where under the general rule he would be appointed--the statute makes exceptions, and makes the

office elective. So we have a situation with very little consistency.

Mr. Montgomery - Is this constitutional material--that is, whether the clerk's office should be elective or appointive?

Mr. Nemeth - Neither the Clerk of Court's office nor the office of the clerk of a municipal court is constitutional in Ohio, so it isn't a constitutional question in that sense. However, under some circumstances, the question of whether a clerk's office is elective or appointive might become a constitutional one. For example, as I think Judge Lewis pointed out when he spoke to us, in Illinois there is a constitutional provision which says that the legislature shall provide by law either for the election or the appointment of clerks and other nonjudicial officers of the Circuit Courts. So, in Illinois, it is a constitutional issue.

Mr. Nemeth - There is a second memo dated October 15, 1973 and entitled "The Prosecuting Attorney and the Municipal Prosecutor." Attached to this memorandum is a table which shows the number of judges, population per judge, filings per judge and terminations per judge, in Common Pleas Courts in 1971. Particularly relevant here are "filings per judge," because this type of statistic has to be available in applying a formula we'd like to bring to your attention--the Iowa formula for the creation of district court judgeships. Basically, this formula provides for one district court judge per 40,000 population, plus one judge per 550 filings excluding misdemeanors and small claims in districts which have a city of 50,000 or more or one judge per 450 filings in districts which don't contain a city of that size. The formula is based on the assumption that judges in rural districts, which tend to be geographically larger, tend to travel more and that allowance has to be made for this. According to Iowa officials, the formula is doing the job it was intended to do.

Mr. Montgomery - Is this statutory or constitutional?

Mr. Nemeth - It's in the statute. However, a constitutional provision is related to it, and that is that Iowa has an appointive system for selecting judges. If this formula were implemented in Ohio, the appointive system should probably also be adopted. While it may not be absolutely necessary, it would certainly be an easier system within which to work in applying the formula. The example we have chosen to illustrate how this would work in Ohio consists of four counties--Allen, Columbiana, Licking and Richland--with populations in the 100,000 range. Two of these have cities in the 50,000 range--Lima in Allen County and Mansfield in Richland County. As you can see from the table in front of you, when the 40,000 population factor and the 550 filings factor are used in these four counties, the number of common pleas judges produced by the formula and the number of common pleas judges these counties actually have is the same. When the 450 filings factor is applied to Columbiana and Licking counties, as the formula would require, these counties are each entitled to one additional judge.

Judge Radcliff - In Licking County, is that because Newark is less than 50,000?

Mr. Nemeth - Yes. I believe Newark is about 40,000 to 45,000, but it is below the dividing line, and Licking County therefore illustrates the impact of the formula quite well.

Mr. Montgomery - In general, this formula introduces caseload as a factor to guard against improper allocation, though. The fact that it works out the same in these examples is no reason not to use it, because if you went through the 88 counties,

I'm sure you'd find some that would really change.

Mr. Nemeth - I'm sure that's true. However, one thing the Iowa formula apparently does not take into account is the effect of population density on filings, and these may be a basis for doing so in a highly urbanized state such as Ohio. This would have to be researched before any suggestion or recommendation were made.

Mr. Montgomery - But in any event, this isn't something our committee would deal with, except as a possible suggestion to the legislature.

Judge Leach - Just so we coordinate the rationale for these different kinds of courts, what kind of filings are we talking about in Iowa? Do they include misdemeanors--traffic offenses and so on? Does Iowa have a minor court? In other words, what is meant by 450 or 550 filings?

Mr. Nemeth - I believe that everything is filed in the District Court there, which has a Magistrate's Division. But the statute (Iowa Code Section 602.18 (2)) excludes misdemeanors and small claims in the application of the formula for the creation of district judgeships. Misdemeanors and small claims are heard in the Magistrate's Division, as I understand it, and this division is normally staffed by magistrates, who belong to a different group of judicial officers than district judges, and who are chosen by a different method.

Mr. Montgomery - Is this done on a continuous basis? How do they arrive at population figures?

Mr. Nemeth - It'd done on an annual basis and when latest Census figures are not available to determine population, figures are taken from state health department computations.

Another memo we'd like to bring to your attention is the "Supplemental Memorandum on Minor Courts in Ohio", dated November 8, 1973. Its main value is to illustrate with one particular example, which is not atypical, how municipal courts make money for the cities they're located in. This fact is a very real practical consideration when we talk about absorption or consolidation. Some provision to keep "local" money "local" may very well have to be made.

The next memorandum is entitled "References to Trial Court Structure in the Ohio Constitution", dated November 29. Among the provisions discussed I particularly would like to point out Section 15 of Article IV, which requires a 2/3 vote of both houses "to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the common pleas court of any county, and to establish other courts."

Judge Radcliff- Apparently, you need a 60% vote the first time you increase the number of common pleas judges beyond one.

Judge Leach - It's peculiar. It doesn't say what you do if you increase them from 26 to 27.

Judge Radcliff - The General Assembly has always proceeded on the assumption that a bare majority is sufficient. Apparently, there's never been a case on this.

Judge Leach - This might be taken completely out of the Constitution. It's archaic.

Mr. Montgomery - Once we get a format as to what ought to be said, we're going to have to go through and do some "scratching."

Mr. Nemeth - The last memo I want to mention is "State and Local Financing of the Courts," dated November 29, 1973. This presents a good general discussion, plus specific statutory and constitutional information, on the dozen or so states which have assumed all, or a large share, of the financing of their judicial systems. We'll talk about this subject later today. Now, we're ready to pick up the outline again.

Mr. Montgomery - I think we got to question (d) under the heading "Judges": Should there be provision for magistrates or associate judges within the court system?

Mr. Nemeth - We should remember that both in Illinois and Iowa, the associate judges or magistrates are appointed. If an attempt were made to set up these offices by legislation in Ohio today, there may be a question of the power of such individuals to exercise judicial functions, because the Constitution requires judges to be elected.

Mr. Montgomery - Aren't we almost up against the proposition that if we have an elective system, we have to make provision for appointment of some parajudicial personnel like associate judges or magistrates or referees, to provide some flexibility?

Judge Radcliff - We have that in referees, but they can only recommend, they can't make a determination.

Mr. Montgomery - Still, they can handle a lot of work. Now, if we have an appointive system where new judgeships can be created whenever and wherever needed, we may not need the added flexibility of associate judges and so forth. So we take either one road or the other, whichever is politically acceptable. The trend seems to be toward the appointive system.

Judge Leach - I'm sure there are states which allow retention elections, but still allow an initial appointment when they create a new judgeship. The Ohio Constitution, at least by interpretation, forbids the initial filling of a judgeship by anything except election.

Mr. Montgomery - And it's the initial appointment, it seems to me, that is important in getting the work done, not the fact that someone is elected to be retained. That wouldn't affect handling the workload. It almost seems that we have to answer the question of whether we want an appointive or elective system first.

Mr. Nemeth - Of course, in Illinois they still have an elective system for circuit judges. But the associate judges are appointed, and the authority for this is in the constitution.

Mr. Montgomery - Well, what I'm saying is that if we're going to "bless" what we now have in our Constitution, we'd almost be bound to authorize the creation of some parajudicial offices. How else are we going to get the additional judicial manpower? And I kind of like the Illinois approach--with some part-time judges worrying about their futures, it may be the expedient thing to name them as associate judges.

Mr. Nemeth - But when in 1964, they named those part-time judges as associate judges, they still had a third class called magistrates.

Mr. Montgomery - Those 1964 associate judges--they were mentioned in the constitution and had judicial functions?

Mr. Nemeth - Yes, although they did not take part in all functions, I believe--like rule-making.

Judge Radcliff - And they didn't try the really serious crimes, and were limited as to dollar jurisdiction in civil cases.

Mr. Montgomery - What do you judges think about this?

Judge Leach - Just at first blush, it would seem to me that if you create these, you're creating a minor court--a fourth tier in a sense. It's hard to answer. I feel that a more intelligent answer will come about sometime, because the Supreme Court is getting ready to enact rules of superintendence for municipal courts. I've been of the opinion for a long time that when that's done, we can find out exactly what the situation is, and until that's done, it's hard for me really to make an intelligent appraisal of what should be done.

Mr. Montgomery - Judge Leach, are you saying that if the municipal courts were well supervised, a four-tier system might be good for Ohio?

Judge Leach - I'm saying it might be if the whole system were consolidated. The trouble today is that each minor court is completely individualized, and created by a special act of the General Assembly.

Mr. Montgomery - So if you have good statistics, you still can't manage them because they're not the same.

Judge Radcliff - They go their separate ways. I think it can be done, but because of the number of people and cases they deal with, it will be tremendously difficult to write rules of superintendence. The idea is ultimately to have every court operate exactly the same, so we know what we're doing.

Mr. Montgomery - But if you could choose, you'd still like to see a three-tier system?

Judge Radcliff - The sooner courts of limited jurisdiction are abolished, the better off the administration of justice will be.

Mr. Montgomery - So if we were really idealistic, we'd want our judges on some appointive basis, the creation of new districts by the recommendation of the Supreme Court to the General Assembly, and no associate judges. Then the question remains, do we want magistrates or referees to do the "unimportant" work?

Judge Radcliff - One major factor is the apparent unwillingness of the people of Ohio to embrace the appointive system for the judiciary. So far, they have shown every indication that they are not willing to do it.

Mr. Montgomery - But they have recently passed two judicial amendments. That's encouraging.

Judge Leach - I think 90% of the success of the 1968 amendment can be attributed to the denomination of that as the "Modern Courts Amendment." Ninety-nine percent of its provisions were good, but still it was its name that caused its passage. If therewere an amendment allowing the initial appointment of a judge, coupled with some other judicial amendments, a lot of good could be done, because it would create a more flexible system, in which we wouldn't have to create a judgeship way in advance of an election so that you can get it filled at an election.

Dr. Cunningham - I think, as you pointed out, that first we must determine whether we're going to appoint judges or not. After we get over that, the assignment of temporary or additional work is just a matter of administration. The Model State Constitution simply says that the legislature shall provide by law for the appointment of judges of inferior courts, for their qualifications, tenure, retirement and removal. It's for the legislature to determine, not the Constitution.

Judge Leach - Appointment or election?

Dr. Cunningham - It says appointment, and alternately election.

Mr. Montgomery - If we say we want a three-tier system, and associate judges are defined as a fourth tier, we can't possibly recommend them and be consistent. So I guess we would tentatively have to conclude that we do not wish to recommend the creation of associate judgeships.

Mr. Nemeth - In Illinois, I think they still consider theirs a three-tier system.

Mr. Montgomery - But as was pointed out, if you give them separate jurisdictions, it is a fourth tier.

Mr. Nemeth - The difference between Illinois associate judges and Ohio municipal judges is that the associate judges work very closely with the circuit court judges--which isn't necessarily the case with municipal court and common pleas court judges in Ohio.

Mr. Montgomery - But don't you create part-time judges?

Mr. Nemeth - No. They can be removed, of course, but Illinois associate judges have a constitutionally guaranteed four-year term. This dignity was one of the points that was supposed to make the positions more attractive.

Mr. Montgomery - Wasn't this put in as a political expedient?

Mr. Nemeth - That I don't know.

Mr. Montgomery - Maybe we ought to pass this one pending our discussion of judicial personnel, to see what we come up with on the question of election or appointment.

It was agreed to table the matter.

The committee then took up the discussion of judicial financing. Mr. Montgomery asked what the preferred agency was for the preparation of the judicial budget, and Mr. Nemeth said that there seems to be a trend to lodging this function in the judicial system itself. However, even in states where this is done, ultimate fiscal control remains with the legislative branch, and while courts have, over the years,

sometimes relied on the inherent power concept in attempting to gain funds the best long-range solution stressed by most experts is the development of an attitude of mutual respect and cooperation.

Mr. Montgomery asked Judge Radcliff to comment on the Ohio situation.

Judge Radcliff - Well, there's the classic fight of the juvenile judge and the county commissioners over a detention home. The statute says you can't put juveniles in with adult prisoners. These fights are going on all over the state. Once in a while, there are fights between common pleas judges and the county commissioners or the county auditor. There is constant bickering between municipal courts and city councils and county commissioners. The relationship between the Supreme Court and the Courts of Appeals, which are largely budgeted and paid for by the state, and the legislature, is good. They respect the separation of powers, and we respect their rights. While there are a few members of both houses who will always give you an uncomfortable hour or two, they usually end up by giving you what you ask. If judicial budgeting were completely centralized, this relationship might deteriorate a little, but I wouldn't think so. Of course, neither the legislature and the courts like to surrender their area of power very gracefully, but I think in the final analysis, judicial costs will have to be borne by the state, and the battle, if any, will be here in Columbus. However, we must remember that cities and counties have gotten so used to that municipal court-generated revenue that they look upon it as income.

Mr. Montgomery - Are the disposition of fines and the financing of the courts divisible subjects, as far as you're concerned?

Judge Radcliff - Absolutely.

Mr. Nemeth -But I think provision can be made for the political subdivisions to reimburse the state for the cost of providing judicial services, and to permit fines from violation of city ordinances, for example, to stay "local", as they do in Alaska;

Mr. Montgomery - I think it would be a lot easier to sell a unified judicial budget to everyone if we didn't have to disturb the disposition of fines, because, like it or not, too many units of government look on it as a taxing mechanism rather than as the court system dispensing justice.

Mr. Nemeth - On the other hand, it's also true that some reform of distribution is called for--it's a chaotic system.

Mr. Montgomery - But that would be legislative.

Mr. Nemeth - Yes. This probably isn't a constitutional question, although it certainly does affect the judiciary.

Judge Leach - At the same time, under the three-tier concept, it would be politically impossible to bring municipal courts into the common pleas courts, and have the counties continue to finance the common pleas court, which they do today (except for part of the salaries of the judge), and have the municipalities reap the revenue on the fines as they do today. That's why, eventually, the state will have to finance them, not the cities or the counties.

Mr. Montgomery - And the state is going to ask, where is the money going to come from?

Judge Radcliff - The General Revenue Fund -

Mr. Montgomery - Don't you think they're going to insist on part of the fines?

Judge Leach - They could accomplish the same thing indirectly by charging back the cost of operation for the benefit of political subdivisions, like they do in Alaska, as has been pointed out.

Mr. Montgomery - All right, I do think we have a tentative conclusion of financing. Do you agree, Dr. Cunningham?

Dr. Cunningham - Yes, I think so.

Mr. Nemeth - And the things under the heading "Practical Considerations" on the outline are the things we have just talked about.

The committee then returned to a discussion of what a provision which gives the Supreme Court advisory power on judgeships and judicial districts should contain. It was concluded that such a provision for Ohio would probably have to be drafted "from scratch." Mr. Montgomery said that what he liked best is the approach now used with the Civil Rules, for example, where the Supreme Court makes a Rule and submits it to the General Assembly, and if the General Assembly doesn't act to the contrary within a certain period of time, the Rule stands. We're used to that, he said. Judge Radcliff said that the procedure has worked excellently for the Rules, but he didn't know whether the General Assembly feels "set upon" by it.

Judge Leach - Under the Civil Rules, there are certain dates specified. For the purposes we're talking about, I'd have a certain number of days specified, instead.

Judge Radcliff - That's the way the Federal Rules are constructed. Congress has 18 months from the time the Judicial Council submits a Rule to act negatively, or it goes into effect.

Mr. Montgomery - Let's construct something along what we have in the Civil Rules. That's as near to giving absolute authority to the Court as one can come. The separation of powers here dictates a weakening in favor of the courts.

Mr. Evans then again reviewed Research Study No. 29, on the history, structure, and jurisdiction of the Courts of Appeals. He suggested that discussion of what changes the committee might like to see be delayed until the committee had heard from some members of the Ohio appellate bench, and received information on the courts of appeals in other states, both of which events are planned. The committee members present agreed. As Mr. Evans reviewed the memorandum, discussion developed concerning the meaning of Section 3 (B) (1) (f) of Article IV, which confers original jurisdiction on the Court of Appeals "/I/n any cause on review as may be necessary to its complete determination." Mr. Montgomery asked what this means.

Mr. Evans - What this means is perhaps a question. It has been involved in a limited number of reported cases. In 1971, the Supreme Court rendered a decision in Baxter v. Baxter, Judge Leach being the author of that opinion.

Judge Leach - There the Supreme Court said that under the Rules of Appellate Procedure, the Courts of Appeals now have the specific power in appeals on questions of law--

appeals on questions of law having been abolished by Rule 2--where the trier of fact was a single judge as opposed to a jury, to go ahead and grant the judgment that should have been entered, when they find that the lower court judgment is against the manifest weight of the evidence, or if there was error in the admission of evidence, for example. In the case of a jury, they still have to remand it. In Baxter, the Court said that this provision of the Constitution had to be read in conjunction with the Rule, and that this was not carte blanche authority for courts to go ahead and do what they wanted to.

Judge Radcliff - Here's the strange thing: in questions of child custody, the trial court retains continuing jurisdiction, and in the past, the only thing the higher court could do was to reverse and remand. But in the Baxter case, they applied the last few words of this constitutional provision, and corrected an error that the trial court had made in awarding the custody of the child. Instead of sending it back down to let the same judge maybe make the same mistake again, they entered the judgment the trial court should have entered. That's where it expanded their jurisdiction.

Mr. Evans - The error was an error of law.

Judge Leach - Parenthetically, in discussion with some of the authors of the Modern Courts Amendment as to what this means or where it came from, nobody seems to know.

Judge Radcliff - There was some "boilerplate" that stayed in the draft, and nobody seems to know where it came from.

Mr. Montgomery - But it obviously makes some sense. It's a shame to repeat a lot of judicial process when it's obvious what should be done and that someone should do it.

Judge Leach - I agree that it makes sense, in a limited form. But if you carry it to the extent that at least one Court of Appeals has attempted, it makes the Courts of Appeals trial courts, basically--the law and fact appeal type thing.

Mr. Nemeth - When I first read this provision, I thought it was intended to be the substitute for the law and fact appeal. Obviously, that's not quite correct.

Judge Radcliff - The law and fact appeal should never have originated. The law contemplates one trial and one appeal, not two trials and one appeal.

Judge Leach - Of course, until 1937, the appeal from the municipal courts to the common pleas was completely de novo.

At the conclusion of the meeting, Mr. Montgomery announced that the committee would meet in March on the morning of the day when the Commission meets (March 14). He said that the committee should have some draft provisions on trial court structure to talk about then. Also, he said, he hopes that the committee may hear from some members of the appellate bench at that time, such as the President of the Association of Court of Appeals Judges and the judge with the longest period of service on a Court of Appeals.

The meeting adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee

March 14, 1974

Summary

The Judiciary Committee met at 10:00 a.m., Thursday, March 14, 1974, in Room 7 of the House of Representatives at the Statehouse in Columbus. Present were Chairman Montgomery, and committee members Dr. Cunningham, Mr. Guggenheim, Representatives Norris and Roberto. Also present were Judge William Radcliff, Administrative Director of the Courts, Mr. Allen Whaling, Executive Director of the Ohio Judicial Conference, Julius Nemeth of the Commission staff, and Mr. Craig Evans, Consultant to the committee. Guest speakers were the Honorable J. Thomas Guernsey, Judge of the Third District Court of Appeals, the Honorable Joseph D. Kerns, President of the Ohio Judicial Conference, and the Honorable Horace W. Troop, President of the Association of Court of Appeals Judges.

Chairman Montgomery stated at the outset that the committee was beginning its study of the structure of the Courts of Appeals, and had invited three prominent members of the appellate branch to express their views as to how the present constitutional provisions regarding these courts are working, and what suggestions for change they might have. He asked Judge Guernsey to speak first.

Judge Guernsey - Let me say that the observations I will make here are my personal ones. I have not discussed my being here with any other appellate judges, and I do not represent any other appellate judges.

Since the Modern Courts Amendment, which became effective in 1968, we have had a Constitution which is workable for the Court of Appeals, and one we can live with. Nevertheless, over the years, a person does get some ideas on some things which he would change, if he had the opportunity to make changes. Along those lines, I have some thoughts in several different categories. The first one is jurisdiction. The jurisdictional provisions of the Constitution in regard to the Courts of Appeals are good and they are workable. We on our Court don't have any great trouble with them. We do have some reservations about our jurisdiction as far as the high prerogative writs are concerned. You will find as you study the Courts of Appeals and the Supreme Court particularly, that they are often burdened with habeas corpus actions, mandamus actions, and procedendo actions, which are filed by inmates of penal institutions, and other institutions, like Lima State Hospital, which are partly penal and partly not. A lot of these writs are filed repetitively. They will file one this month and be turned down, and they will be back to the court three months hence. I noticed in the paper that the federal courts are having the same problem, and the U. S. Judicial Council proposes legislation which would limit the right of habeas corpus. You might consider limiting this right, but that's not my proposition here this morning. I would propose that the Supreme Court and the Courts of Appeals be given the constitutional right to transfer original jurisdiction cases involving the high prerogative writs--the Supreme Court to the Courts of Appeals and the Common Pleas Courts, and the Courts of Appeals to the Common Pleas Courts--in instances where the efficacy of the writs would not be lost. I think those writs generally belong in the trial court, except in unusual cases, and I think it should be left to the discretion of the Supreme Court and the Courts of Appeals whether they will transfer such cases to the respective lower courts.

Some of the things I'm talking about this morning are not necessarily constitutional. They may be either constitutional or legislative, depending on where you want to put them. But I'm talking about them because you may wish to make them constitutional.

Mr. Montgomery - Of course.

Judge Guernsey - A few weeks ago we had a situation where a municipal court judge allegedly refused to settle a transcript of proceedings or a transcript of evidence. That put a stop to the appeal "right now." And we couldn't find any way to make an order to that trial judge that he settle that transcript. The only solution we saw was for the attorney for the appellant to file a separate action in mandamus in some court. I think we should have jurisdiction to order a trial judge to complete the procedural steps necessary to effect an appeal. That could be constitutional jurisdiction or, of course, it could be statutory.

Judge Radcliff - Of course, it would depend on the appellant's attorney, but procedendo would seem to lie in that particular situation. Wouldn't that be a place for a high prerogative writ?

Judge Guernsey - No doubt such a writ would be appropriate, but it would require a separate action in a separate court. And the whole appeal comes to a stop until that is straightened out.

Mr. Montgomery - The Supreme Court didn't have a Rule of Superintendence to make the trial judge do it?

Judge Radcliff - No, because this was in a municipal court. Rules of Superintendence haven't been promulgated for them yet.

Mr. Montgomery - Skipping back to your first point, on the prerogative writs, do you think the Courts of Appeals should have any original jurisdiction?

Judge Guernsey - Yes, the Supreme Court and the Courts of Appeals should continue to have such jurisdiction, particularly with writs pertaining to lower courts, but there are many, many cases which come to our Court which could be handled as well or better by the trial court. The court in which the case is filed should have the discretion to transfer cases involving the high writs, if the efficacy of the writ would not be lost.

Mr. Nemeth - That's done in several states now, isn't it?

Judge Guernsey - Yes, I think it is. In our Court, of course, the problem arises primarily in connection with Lima State Hospital, but other courts have similar problems.

Mr. Montgomery - Is there no final determination in habeas corpus?

Judge Guernsey - No, habeas corpus is never res judicata, and it shouldn't be. Take Lima State Hospital--a man who is insane this month may be sane next month as far as the doctors are concerned. There is always the possibility of change in circumstances.

One of the biggest problems for courts nowadays is to keep up with their dockets. We don't have any particular problem because our docket isn't as big as some of the other courts. But there is some problem state-wide in that respect. The Constitution does provide for the assignment of judges from district to district, and this feature has been used to cut the backlog, particularly in some of the larger cities. The assignment of judges is fine. But every time you want to assign

a judge, you have the problem of finding one who can conveniently go to the place to which he is assigned, and paying for his expenses. It seems to me that there could be some provision in the Constitution whereby, instead of merely assigning judges, cases can be assigned from district to district, subject to the consent of counsel, and subject to the action of the transmitting court and the receiving court, and provided the assignment would expedite its disposition. In other words, why can't we move cases around instead of judges?

Mr. Montgomery - Why hasn't somebody thought of this before?

Judge Guernsey - I think this probably could be done now, by consent. But, it seems to me it would be broadened by having a constitutional amendment.

Mr. Montgomery - Has this been done in any other state?

Judge Guernsey - I don't know.

Judge Troop - I believe in Michigan.

Judge Guernsey - In Michigan they have an integrated court.

Mr. Montgomery - Let the lawyers do the traveling instead of the judges.

Judge Troop - I don't think they'd object to that.

Judge Guernsey - Provided they didn't have to go too far, I don't see why they should. Don't misunderstand me, we're not looking for work in the Third District. But last year, we had 287 cases filed, and Cincinnati had 867 cases filed, and I can see that we could handle some of their cases, and that they couldn't.

My next topic is administration. I believe that there should be a constitutional requirement that the most populous county in each district be designated as the principal seat of the Court of Appeals, and requiring that the court maintain its headquarters at that principal seat. Most of the Court of Appeals in Ohio do maintain a headquarters office. But I know there's at least one district that doesn't, and anyone who deals with them may have a difficult time finding them. Also, in that situation, they have to transfer files back and forth from one judge to the other judge. For the efficiency of all the courts, they should have central seats.

Mr. Montgomery - Along that line, do you believe that the time of the itinerant court of appeals is gone?

Judge Guernsey - That gets into another area. As long as judges are tied up in politics, they should be able to move about, just to keep themselves known. That is one reason we shouldn't abandon travel. But most cases could be heard, and I think in fact are heard, where the court maintains its headquarters. There are exceptions, of course. For instance, in our district we also have the Marion Correctional Institution, and we often get cases involving inmates there. When we have three or four of those, it's much easier for the Court to go to Marion, than it is for the Superintendent to bring those inmates to Lima. So there are still

other reasons why a court should have the flexibility to move to other counties.

Mr. Evans - Would you favor a separate clerk's office for a Court of Appeals?

Judge Guernsey - I understand there's a bill in the legislature to provide for that. My immediate impression is that it would not be helpful in a multi-county Court of Appeals. There are several reasons for that. The first is that it would be troublesome for counsel. The court does not need the file until it is ready to hear the appeal, but counsel does, for writing the briefs and any negotiations prior to the hearing. It's much easier for counsel to see the Clerk of Courts at the county seat instead of having to travel perhaps 100 miles to see a file. Another thing is that clerks now are used to handling the dual job of being Clerk of the Common Pleas Court and the Court of Appeals. Another is the problem of expense. To whom would the costs of a separate office be charged? Another thing, if we now have a problem with a case that's filed with us, many times the clerk can look at his Common Pleas Court record and solve our problem. But when the clerks are different, as with a municipal court, he may fail to file the notice of appeal, and we have no way of knowing that a case is on our docket, or whether it should be on the docket. There is a lack of communication. So there's nothing that I know of which would be gained by changing the present system. But there may be other arguments which I'm not aware of in favor of putting the clerk's job all in one office.

The next item under administration is the matter of employees. Courts of Appeals have been operating for years under statutory authority to hire only court stenographers at state expense, and court constables and bailiffs at the expense of the counties. We have no general authorization to employ all personnel to carry out our functions. Without it, we have no specific authority to hire law clerks or file clerks or any administrative clerk that might be necessary to our operation. We get along because there have been various ruses adopted. I don't think that should be, and each court should have the authority to hire all personnel necessary to carry out its functions. Of course this isn't necessarily constitutional, but we haven't been very successful in getting the legislature to do anything. I bring it up with the thought that maybe it should be constitutional.

I also believe that all costs of equipment, personnel and operation of the Courts of Appeals should be borne by the state, including reasonable rent or compensation to the county of the principal seat for the space provided to the Court. I can't see any reason to prolong this situation we've had for years that the county of the principal seat has usually borne much of the cost of the operation of the courts. It doesn't make sense. The Court of Appeals is not a county court, it's a district court, but the legislature has not recognized that.

My next item deals with the judges of the Courts of Appeals, and here I am particularly interested in attracting a competent judiciary. I think the time has long passed for Ohio to recognize that there should be some plan--such as a modified Missouri Plan--for the appointment of the judges of the Supreme Court and the Court of Appeals. We see almost at every election that competent judges are removed from the bench by the fact that their name doesn't have quite the political significance of another name. That harks back to a couple of years ago when we lost three judges from the Supreme Court. I don't state that the ones who replaced them aren't competent, but I know very well that the ones who were defeated were very competent. I think that a judge who best performs his function should have some job security.

I think we all can do a better job if we get politics entirely out of the judiciary. It's not an easy thing to go out and ask favors of lawyers who are going to come before you, and whom you have to "knock down", so to speak. Any time you have one judge out campaigning, the efficiency of the entire court suffers. And we have to be campaigning all the time because the Court of Appeals doesn't get that much publicity. People don't know the judges, and the only way they can keep themselves known is to campaign during their term. Of course, there are ethical considerations. According to the Code of Judicial Ethics we aren't supposed to engage in partisan politics except during the year when we're running. This is an artificial situation. So I think it's high time that we recognize that the best situation would be that we adopt a modified Missouri Plan, at least for the Supreme Court and the Court of Appeals.

Next, I have just a thought on the matter of using retired judges, which I thought of in connection with the political situation. The Constitution provides for use of retired judges, who have retired essentially because of the 70-year age limit. Well, if we had an appointive system, I can see no problem with that. But as long as we have a political system, where judges are elected by the people, the judges who decide cases for the people should be the ones who have been elected by the people. A retired judge is assigned to a court by the Supreme Court--and I'm sure they're very careful about assignments--but still I can foresee a situation where a retired judge serves long after the time he should. The retirement provision, of course, was designed to eliminate those judges who are not qualified to sit. At the same time, it "took with it" and "takes with it" many qualified judges. But by virtue of the fact that we can use retired judges on the Court--where do you break it off? But, as I say, this is just a thought.

Judge Kerns - Also, when one retires, it doesn't take long to forget--or not to keep up with current developments. I don't see how we can expect to take a retired judge and throw him into the fray, the same way as a judge who lives with it every day. I don't see how he could possibly be current.

Judge Guernsey - That's in the picture, too, absolutely. He also may not have the facilities available--library, office and staff. It sometimes makes a difference.

However, if the provision to use retired judges stays in the Constitution, some authority, statutory or otherwise, should be provided that they are paid their actual expenses incurred while sitting on the Court.

The Constitution has a provision for assigning Court of Appeals judges to the Pleas Court. I'm opposed to that. I can't see any reason or necessity for it.

Judge Radcliff - Is it demeaning?

Judge Guernsey - It's demeaning if you go into Common Pleas Court and you don't know what you're there for. A Court of Appeals judge is used to working in one way, a Common Pleas judge in another. I don't see why there should be a provision in the Constitution whereby a Court of Appeals judge should be required to serve in the Common Pleas Court. Unless he's had unusual experience, he's probably not as experienced as another Common Pleas judge would be in that category. Another thing, if a Court of Appeals judge is assigned to a Common Pleas Court in his district, he can't sit on that case on appeal.

Judge Radcliff - We don't assign within the district.

Judge Guernsey - But you might run into that case, sometime. At any rate, there's no benefit in the provision, so why have it in the Constitution?

Judge Radcliff - Well, we do have a few retired judges who are willing to do it, and there's no requirement that they do it. It's with their consent.

Mr. Montgomery - Is this a big enough problem to be dealt with in the Constitution?

Judge Guernsey - No, looking at it that way, I don't think so.

The next item I have is that there should be mandatory pay review for all judges, every four years at the most, by a pay commission, with the legislature having only veto power over recommendations. I understand Pennsylvania has a system like that. The pay commission which worked on recommendations for our last pay raise was beneficial, I think, to the judges, the state, and the legislature. It gave some excellent administration to the question of pay which wouldn't otherwise have existed. This approach also takes some of the political problem out of the matter of pay, too. In the alternative, there should be a formula for determining judicial pay tied to the professional income of lawyers. Judges should not be second class citizens for any reason in regard to pay.

More adequate provision should be made for judicial retirement. When judges retire at age 70, under the Constitution, they ordinarily can't go back to the practice of law. If they do, they can't make enough to live on and have to fall back on their retirement pay. The present retirement formula, although in some respects very generous, may be insufficient to support the judge, and his wife, in the manner to which they were accustomed before retirement. If they don't have other assets, they do sometimes run into problems.

Judge Guernsey next commented on rule-making authority. He noted that the Constitution gives the Supreme Court rule-making powers over all courts of the state. He said that, for the most part, the rules adopted so far have worked out quite well, and that there had been recommendations from committees of judges, lawyers and others before these rules were adopted. He expressed the view that there should be a provision requiring continuous review of the rules for purposes of determining if amendments are needed. Judge Radcliff said that a committee for this purpose had recently been appointed .

Judge Guernsey suggested that there should be a provision creating commissions for this purpose consisting of Supreme Court, Court of Appeals, and Common Pleas judges (depending on the courts affected), to draw up rules, so that these courts could provide input for rules which affect them. He also said that clerks should have some means of providing input, since they are often the most familiar with practical problems. Judge Guernsey also cautioned against excessive requirements for, and reliance upon, judicial statistics. He said that while the lower courts are not "vassals" of the Supreme Court now, he believed that lower court judges should have a certain amount of independence in the way they run their courts, and that this could become a greater problem in the future, as more and more administrative authority is centralized in the Supreme Court.

Judge Guernsey then commented on the Michigan Court of Appeals structure.

Judge Guernsey - I know that in your discussion you will consider other constitutional systems. One system that comes to mind, and one which you are probably acquainted

with, is the Michigan system. I caution you not to be oversold on the Michigan system. The Michigan system has only twelve appellate judges, and it is an integrated court. By that I mean its judges have responsibility for cases any place in Michigan. They sit, I think, in four different courtrooms in Michigan. They have a Chief Justice--they call him a Chief Judge-- who is over the entire court. One reason I caution you about that system is because it isn't a very workable system--for one thing, it's a new system. Michigan had no appellate court before its latest constitutional revision, about 1965. It's a system which has taken a lot of money, and they have had money because they've had a Chief Judge who used to be a legislator and who was formerly a Lieutenant Governor. He has been able, always, to finance the Michigan Court of Appeals to carry out any of its functions. He's never had any problem with the legislature, and as a consequence, Michigan appellate judges have been paid, from the beginning, five or six thousand dollars a year more than any other state in the Union. The Court is also affected because they have clerks who carry out many of the functions which we would consider judicial functions--acting on motions and things of that nature. I wouldn't ask you to model a constitutional provision on a situation where we would be reposing judicial functions in clerks, when they should be carried out by the judiciary.

Another problem to which I have no satisfactory answer--in Ohio, if one court makes a decision which is in conflict with the judgment on the same issue by another court of appeals, we have a provision in the Constitution that the second case may automatically be appealed to the Supreme Court as a conflict case, and the Supreme Court then has to resolve the conflict. I don't know how Michigan does it, if this panel of three decides an issue one way this week and that panel decides the issue the opposite way the next week--in an integrated court there can't be a conflict which requires that it go before the Supreme Court. So I caution you about adopting any system that would work like the Michigan system. I don't think it would be workable in Ohio.

I do think that in your deliberations, you should clean up the "loose" language of the last constitutional amendment dealing with courts. I'm referring to S.J.R. 30, adopted in the latter part of last year, as I recall. I point out particularly Section 4 (A), which creates the courts. It would permit Common Pleas Courts in a single county or in multiple-county districts. Then we go to Section 6 (A) (3), which provides for the election of judges from "counties, districts . . . or other subdivisions". There is no creation of subdivision courts, but there is a provision for election of judges of a subdivision court. There's no definition of what a subdivision shall be--whether it would be a subdivision less than a county, or just what it is. That concludes my remarks.

Mr. Montgomery - Who defines subdivision?

Judge Guernsey - The legislature.

Mr. Nemeth - I don't know, but I suspect that what was intended there was a reference to such things as municipal divisions of Common Pleas Courts. The court itself could not be less than county-wide, but I'm not sure the drafters didn't intend election to divisions like a municipal division to be from areas less than a county.

The next speaker was Judge Kerns.

Judge Kerns - I recognize many of the same imperfections which Judge Guernsey refers to, but would like to comment specifically on the suggestion with reference to delegating original jurisdiction in mandamus. With reference to mandamus, we've had some problems, but it's just a "hazzard of the trade". Most of those cases come up in habeas corpus. Our district has London Prison Farm. The post-conviction statutes have helped us, but as frequently happens, when a post-conviction case is filed in the trial court, the trial court has to have a hearing. If he has other work to do, it's easy to set that case aside because the fellow is in the institution and you have to make arrangements to bring him back, and so forth. The result is that the person who is locked up files a mandamus action to try to get the trial judge to move. In our district, when that happens--and it happens infrequently--we merely call the trial judge on the phone and call it to his attention. When he has a hearing, we dismiss the mandamus. Another reason /the habeas corpus provision/ shouldn't be tampered with is that you might run into problems with the federal Constitution if you limited a man's right to file a habeas corpus. This is the only thing, as I understand it, which might have a reference to the /Ohio/ Constitution.

Some of the other things that were mentioned do interest me, though. In reference to a principal seat for a Court of Appeals, I don't, frankly, agree with Judge Guernsey. There is some difference of opinion on this. When the bill went through the legislature, it went through as easily as any bill ever did--no one even commented on the bill. It was defeated on Tuesday and passed on Wednesday. I called the Governor and tried to get it vetoed, because, although it doesn't interest me personally, it does have some far-reaching implications. For example, if two judges in Canton were at odds with a judge in Delaware County, they can make the Canton court the principal office and put the judge in Delaware County out of business. I think it would also, for all practical purposes, eliminate the possibility for lawyers in about sixty counties to ever be elected to the Court of Appeals. If you have a district such that one county has half the population, over a period of time, all the cases would be heard in this one county, so that all the activity around the Court of Appeals would be in that county. The smaller counties know very little about the Court of Appeals now, and they will know even less if there isn't a Court of Appeals which goes to the county. So, over a period of time, a judge who lives in the most populous county is going to have a definite advantage.

But the most important thing is that it takes only about 20 to 22 days to go to our 12 counties twice a year. It seems to me that transporting the files back and forth from the counties to Dayton, and the expense of that, would outweigh this. Also, if you employed a lawyer from Delaware County to argue a case up in Stark County, for example, it's going to take the lawyer one day, and maybe two days, to go up there to argue one case. If he could walk over to the county courthouse, it would take only about an hour. So, if he charges by the hour, the lawyer would have to get about 30 times as much to argue a case in Stark County as to argue a case in Delaware County. When you weigh some of these things, perhaps there are some implications to that bill which haven't been considered.

As to the rule-making power, I was chairman of the committee that wrote the Appellate Rules, and I think the rules, for most purposes, were adopted as presented to the Supreme Court.

One rule (adopted by the Court on its own) refers to the making of a comment on every assignment of error. This caused some discussion among the Court of Appeals. Well, some districts have always done that, others didn't. I think there should be some discretion in the Court of Appeals. I think the Rules should be amended to

eliminate at least criminal cases from that requirement, for this reason: In a civil case, the litigant has some money invested.in the appeal. In a criminal case, a man can get a free transcript and a free lawyer, so he has no reason not to appeal, even though the fact of the matter is that he has no case. So you have to appoint a lawyer to make a ham actor out of himself--to talk about a case that doesn't exist. Then the Court has to write about several assignments of error, and it's more difficult to write about nothing than to write about something. I think at least in a criminal case, the court ought to have some discretion.

With reference to the Common Pleas Court and the Court of Appeals working interchangeably, that's a personnel matter. Frankly, I like to get into a trial, but we have the second highest population per judge in the state and the second highest caseload per judge.

With reference to statistics, I agree with Judge Guernsey--they don't mean much. It takes more time to dispose of one "good" case than it does to dispose of five "self-ejectors".

Mr. Nemeth - Judge, would you change your opinion on travel if we went to an appointive system?

Judge Kerns - I doubt very much that I would, because many of the things I mentioned would apply as fully to the appointive system.

Mr. Montgomery - The present system does let the people know that there is a Court of Appeals and that justice is being performed.

Judge Kerns - Not only that, but, for example, yesterday I finished a case that involved about $900. Now, if the lawyer was being paid $35 an hour . . .

Judge Troop was the next speaker.

Judge Troop - I have only impressions of my own, and I believe your major interest this morning is the matter of structure. My interest in that began when our court was allotted two more judges. At the time, several of us on the Court had the strong feeling that one would be enough, but those who lobbied for the change presented statistics, and you can make a strong showing if you prepare properly and manipulate what lies behind the figures. To me there is only one significant backlog figure--and that is the number of cases that have been heard and assigned for decision. That is the total responsibility of the Court then, and nobody else's. Whatever else is put in by way of figures amounts, in some instances, anyway, to surplusage--a build-up of figures to present to the legislative committees to say "we have to have so many judges to get them down." That's a particularly significant thing in the big centers of population, and certainly that's a big factor in Cuyahoga and Hamilton Counties. Our volume here in Franklin County is larger than ordinary particularly because of the presence of state government agencies. Our volume is tending to increase now, we're in a one-county court, and that's a peculiarly favorable situation, but perhaps what we can get done in a one-county court may raise some suggestions as to what's possible in the districts. One of the things that I think definitely ought to be changed is the requirement that a judge on assignment has to go to a county. Most certainly, I think he ought to have a choice as to whether to go. I also believe in two things: I think there must be centralization of administration. That, I think becomes a real necessity. There is an advantage to administrative centralization and I think we've proved that over and over in a one-county district. The other

thing that, it seems to me is absolutely essential is flexibility--and I think Judge Guernsey's suggestion of shifting cases is moving in the right direction. But that takes a focal point--somebody has to keep his finger on the volume of material building up. We have an assignment commissioner who is a lawyer, and saves us no end of trouble. We ought not to have to spend our time doing the weeding. We are paid as judges, and any measure that we apply obliges us to use our time--and our staff's time--efficiently. So, getting that central point--one within the district perhaps--is one of the best things that we can do. If we preserve the district system--and I presume it would be political suicide to talk about anything else--there should be somebody within the district to check the status of cases, and somebody at a central point who shifts cases from one district to another. And eliminating the paper work the judges have to do would tend to eliminate the inefficiency of the system.

There was discussion of the difficulty of achieving centralization in a large multi-county district.

Mr. Montgomery - Do any of you have law clerks?

Judge Troop - Yes. We have one. Many courts do.

Judge Guernsey - No, because we prefer to do our own research. I can see the time coming when law clerks will do research for us, but as long as we can do our own research, that's one way we learn.

Judge Troop - I'd rather give up my law clerk than the assignment commissioner, though, as far as the efficiency of our operation is concerned.

Mr. Montgomery - What do you call your law clerk?

Judge Troop - It's a position the state pays for.

There was further discussion of the sources from which Court of Appeals employees are paid across the state. It was agreed that variations exist, due to the statutory restrictions now imposed.

There was also discussion of the desirability of letting the Supreme Court determine the number of judicial districts. The consensus seemed to be that although this may be ideally desirable over the long run, such a procedure would create practical problems as long as the Court of Appeals has a political--that is, elective--basis. Among these would be the problem inherent in a judge's having to build "new political fences" every time a district was changed, and the possibility of a residence problem in such a situation. Also, as long as the present financing situation exists, and the state does not bear all the costs of the Court of Appeals, budgeting problems might result. It was agreed, likewise, that the General Assembly would not lightly surrender its present power in this area.

There was further discussion of the rule-making power, and Judge Guernsey expressed concern that, while the Supreme Court has power to adopt procedural and superintendence rules, the possibility exists that some of the rules adopted might affect substantive rights of litigants, which would be beyond the scope of the power granted by the Constitution. Judge Radcliff pointed out that it would be extremely difficult, if not impossible, ever to have "perfect" set of rules, but that at least the possibility exists for amending them. He expressed the opinion that one of the

great contributions of the Modern Courts Amendment of 1968 was to re-establish the inherent rule-making power of the courts, which they had lost to the legislature, by default, for about 125 years, which burden the General Assembly bore nobly for all those years.

Chairman Montgomery thanked Judges Guernsey, Kerns, Troop and Radcliff for sharing their views with the committee.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
April 17, 1974

Summary

The Judiciary Committee met at 10 a.m. on Wednesday, April 17, in Room 10 of the House of Representatives in Columbus. Present were Chairman Montgomery, and committee members Dr. Cunningham, Mr. Guggenheim, Representative Norris, and Mr. Skipton. Also present were Judge William Radcliff, Administrative Director of the Courts, Mr. Allen Whaling, Executive Director of the Ohio Judicial Conference, Mr. Coit Gilbert of the Office of the Administrative Director, and Judge Robert Leach, Special Consultant to the Committee. Also present were Mr. Craig Evans, Consultant to the Committee, and Mr. Julius Nemeth of the Commission staff. Mrs. Elizabeth Brownell represented the League of Women Voters as an observer.

The topic of discussion was Draft #1 on trial court structure, dated March 14, 1974.

Mr. Montgomery pointed out that the draft under discussion at this meeting was the first one the staff had put together based on prior discussions of the committee. He pointed out that the draft, while it covered most major constitutional provisions regarding trial court structure, did not cover all of them, and that some matters, such as the method of selecting judges, would necessarily have to be decided at a later time, as the committee's deliberations progressed. He then asked Mr. Nemeth to read the proposal for a redrafted Section 1 of Article 4, which read as follows:

> "The judicial power of the state is vested in a JUDICIAL DEPARTMENT CONSISTING OF A supreme court, courts of appeals, AND courts of common pleas, ~~and such other courts inferior to the supreme court as may from time to time be established by law.~~ ALL EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID BY THE STATE FROM THE GENERAL FUND AS PROVIDED BY LAW. ALL JUDGES SHALL DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES."

This proposed section was then discussed.

Mr. Nemeth: The reference in the first sentence to inferior courts created by law would be stricken because of the committee's decision to recommend a three-tier system, in which all the courts would be listed in the Constitution. The addition of the reference to a "judicial department" in the first sentence really doesn't add a substantive point as such -- except for the fact that putting the phrase in may give additional emphasis to the recognition of the judiciary as a separate, co-equal branch of government.

Mr. Montgomery: There are a few references to the "executive department" in the Constitution, aren't there?

Mr. Nemeth: Yes, I believe so.

Dr. Cunningham: Why deviate from the term "branch"?

Mr. Nemeth: There's no particular preference for one word over the other. However, to me the term "department" conveys a somewhat more definite concept than "branch".

Mr. Montgomery: We should be consistent. If the Executive Article uses "branch" shouldn't we? But Section 1 of Article III says "The executive department shall consist of..." Does anyone have a strong objection to the use of the phrase "judicial department"?

Mr. Norris: Nothing strong, I just don't think it adds anything.

Mr. Nemeth: The second sentence of Section 1 is self-explanatory, and is new material. The only comment I would like to add here is that the phrase "provided by law" is intended to make it clear that, in the future as in the past, the general assembly would have the final determination as to fiscal matters, and this should not be underestimated as a control.

Mr. Montgomery: It's not clear now, is it? Isn't there some disagreement as to whether a court can order funds from county commissioners, and so forth?

Judge Radcliff: There has been some litigation on the county level.

Mr. Montgomery: This would make clear that the courts, on their own initiative, would have no authority to requisition money.

Judge Leach: Going back to the use of "judicial department" - one of the questions I have which might give rise to some possible litigation is that, in a broad sense, the clerks of the courts are members of it. Are they included?

Mr. Montgomery: I would think all the judges and all personnel would be covered by the term.

Judge Leach: Of course, the proposal would abolish the lower courts , but you'd still have the clerk of the common pleas court and the clerk of the court of appeals. Is it the intent that the state pay the salaries of deputy clerks and so forth or is it not?

Mr. Nemeth: The proposal certainly looks toward that day.

Judge Leach: This can't be approached in a vaccuum. We either include them or keep them out.

Mr. Norris: Let's assume that one of the divisions of the common pleas court is the major's court, under a different name, perhaps. The proposal means that even if a mayor's -- or magistrate's court -- operates only within a city, its expenses would be paid by the state.

Mr. Montgomery: What do other states do?

Judge Radcliff: In Colorado, they pay everything.

Judge Leach: As I understand it, most states pay the salaries of the judges and a few of their chief assistants, but they still have some pattern by which localities pay at least parts of the court's offices and house the court's offices, and so forth.

Mr. Nemeth: In Colorado, I believe there are provisions for contractual arrangements between the state and localities as to certain facilities. In Alaska, the state charges back to the localities the actual costs of providing judicial services.

Judge Leach: I don't think we can solve this right now, but I do think we have to remember this has to be tied back in.

Mr. Montgomery: The "cleanest" way would be to go all the way. Probably from that, some departures and compromises will have to be made.

Mr. Nemeth: The third sentence of Section 1 is also new material. This is also self-explanatory.

Mr. Norris: I've got problems with that. One is, I'm not so sure this is something we should have in the constitution. This gets down to the kind of thing that ought to be solved by the Legislature.

Mr. Montgomery: Is there any constitutional reference now to part-time or full-time judges?

Judge Radcliff: No, it's statutory.

Mr. Norris: My second objection is, it's going to be awfully difficult, especially in rural areas, to set up any trial court system with divisions and require full-time judges. You may be able to get them eventually, but there's got to be at least a transition period. We have quite a few part-time courts, and there's going to be a rough transition period in consolidation.

Judge Radcliff: There are over 100 part-time judges, exclusive of mayor's courts.

Mr. Nemeth: However, a provision such as this is not unusual. For example, the new Illinois Constitution contains it. And, as the schedule attached to this draft indicates, there would be provision for absorbing these judges into the common pleas courts.

Judge Leach: Not the mayor's courts.

Mr. Nemeth: Excluding mayor's court judges. The only requirement would be that those judges who are part-time now would have to be full-time once they became common pleas judges. These judges would have the choice of resigning or not seeking office, before the transition occurred, or getting a full time job as the consequence of the transition.

Mr. Norris: Well, again, I think this is the kind of a judgment that is better made by the Legislature and whoever is making the decision on what divisions to create. I think it's the direction we're moving, but there would be a tremendous raid on the treasury if these part-time judges all of a sudden became full-time.

Mr. Montgomery: Well, if the districts were properly drawn, we'd lose a lot of them.

Mr. Norris: I have problems with this in the Constitution.

Mr. Montgomery: Well, this is pretty basic. You don't disagree that we should work toward full-time judges, but you don't want to put this in the Constitution. Dr. Cunningham, what do you think?

Dr. Cunningham: There's much to be said about expecting full-time judges, particularly, as you say, in rural areas. And I agree it does not have to be in the Con-

stitution. The Legislature can determine that. It would be terribly rigid if you put it in the Constitution.

Mr. Montgomery: Judge Leach, how about you?

Judge Leach: I have mental reservations about the transposition from where we are today to this constitutional provision. If the public demand was toward that, and the Legislature accomplished most of it, then to change it again wouldn't bother me. But if, hypothetically, this were passed tomorrow, there would be almost judicial chaos.

Mr. Montgomery: Illinois apparently did it successfully.

Judge Leach: There was some chaos. I was talking to a man who was then a county judge in Illinois and was taken into the system. Later, he was "dumped" when they reduced the number of judges back down, and he's now practicing law in California.

Mr. Montgomery: The question isn't whether we should have full-time judges, but whether we should require this in the Constitution.

Mr. Guggenheim: I gather everybody agrees with the principle of full-time judges. It seems to me that if such a requirement has the potential to create administrative chaos, that's not really our problem. If we decide the principle is important enough to include in the Constitution instead of leaving it to the Legislature, the problems will just have to be worked out, and that's all there is to it. There are ways to write constitutional language so that it doesn't take effect immediately, so that part doesn't bother me. The basic question is whether we believe this to be an abiding principle to be put in the Constitution or whether we want to leave it up to the Legislature. I think it depends on our conviction as to whether there should be exceptions, because if we really think this is an immutable principle, it ought to be in the Constitution, and if not, then we ought to leave it to the Legislature.

Mr. Montgomery: Mr. Norris, I think you're suggesting there should be some flexibility.

Mr. Norris: Yes. We may wish to retain part-time judges for a long period of time. Obvious examples are in areas like the present mayors' court jurisdiction, or maybe small claims jurisdiction.

Mr. Montgomery: Do any of our guests have comments?

Judge Radcliff: I think this is a philosophical question that should be left to the committee.

Mr. Norris: Let me give you an actual example of the problem involved. It's embodied in the judge's bill we just passed out of the House Judiciary Committee which is now in the House Rules Committee. This abolishes mayors' courts, but then replaces them by really following this concept, by requiring that municipal judges ride circuit to all those communities that had mayors' courts. Municipal judges were all for the bill until that happened to them, because they feel it's beneath their dignity to move around to hear these $100 ordinance cases and cases about barking dogs. But this is the way we have to take care of these cases, unless we want to require the people charged with "barking dogs" to go down and sit

all day in the central city in order to plead guilty in municipal court. The House Judiciary Committee felt there was room for this kind of jurisdiction in the suburbs, but the only solution there is to have municipal judges ride circuit, and to me that's a tremendous waste of manpower. It's better than abolishing such jurisdiction altogether, but it's a tremendous waste. This could be taken care of very easily by a part-time magistrate hired by a city council who would hear these cases for three hours once every two weeks.

Mr. Skipton: My top-of-the-head reaction is to agree with Mr. Norris that much depends on what authority we end up giving the legislature to create courts. Maybe, with the types of courts they wish to create, they don't want this requirement.

Mr. Montgomery: We'll be recommending a three-tier system. This would pretty well restrict the Legislature from creating more courts, I would think. Well, can we take a straw vote? We have five members present. Will all those who feel the requirement for full-time judges should not be a constitutional requirement, please raise their hands? (Four members raised their hands). I think this is significant, and we'll keep the vote open until the next meeting. I think we should take straw votes as we go along, and then have a committee vote on the final draft.

Mr. Montgomery asked the staff to delete the last sentence in Section 1 of the first draft from the second draft to be prepared.

Mr. Nemeth: From Section 1 we go to Section 4, since Section 2 refers to the Supreme Court and Section 3 refers to the Court of Appeals, and neither of these courts is the subject of discussion today. Section 4(A) would be rewritten as follows:

> "There shall be a court of common pleas and such divisions thereof as may be established by law PURSUANT TO RULES PROMULGATED BY THE SUPREME COURT serving each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. In the interests of the fair, impartial and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving ~~the common pleas courts of~~ all counties in the district, as may be provided by law RULES PROMULGATED BY THE SUPREME COURT. Judges serving in a district shall sit in each county in the district as the business of the court requires. In ~~counties or districts~~ COURTS OF COMMON PLEAS having more than one judge ~~of the court of common pleas~~, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the common pleas court shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court, INCLUDING THE AUTHORITY TO PROVIDE FOR DIVISIONS, GENERAL OR SPECIALIZED, AND FOR APPROPRIATE TIMES AND PLACES FOR HOLDING COURT."

Mr. Nemeth: The concept of the first sentence, of course, would be to give the power to establish divisions in the common pleas court to the Supreme Court under its rule making authority, to be implemented by the presiding judge of each common pleas court, as appears in the last sentence of Section 4(A).

Mr. Montgomery: This is a basic change, emphasizing the independence of the judicial department.

Judge Leach: Supposing the Supreme Court says "we don't want the presiding judge doing it, we want somebody else doing it"-- would they be authorized to do so? If we don't intend that, why not put the reference to the presiding judge in the first sentence? And, of course, right now, because of the history of the Modern Courts Amendment, there is the administrative judge of the common pleas court. But I come back to my original question, supposing the Supreme Court for reasons good or bad says we don't want the presiding judge doing it, would they have that authority?

Mr. Nemeth: I don't believe the Court would under this concept.

Judge Leach: Then why not tie it down by saying "as may be determined by the presiding judge pursuant to the authority given by the supreme court"?

Mr. Nemeth: Of course, part of the reason this draft section reads the way it does is because it isn't a complete "rewrite" of the existing section. This was the way we conceived of putting these things into the Constitution with a minimum of "word working", so to speak. There may, of course, be better ways to write them in, but that depends then on how extensively the committee wishes to rewrite the existing section.

Mr. Montgomery: You don't disagree with what it says, Judge Leach, you disagree with the way we say it, don't you?

Judge Leach: I'm simply raising some questions. Another thought I had, if you tie the two together and say "the presiding judge may do so and so", suppose the Supreme Court thinks there should be divisions in County "X", and the presiding judge says "I'm not going to do it", you have a lot of problems there, in that sense of the word. Can he be required to do it? These are the questions that arise when constitutions have to be interpreted.

Mr. Montgomery: The idea, I think, wasn't to have decentralized administration, it was to have centralized administration of the judicial branch in the Supreme Court.

Judge Leach: Here, it would be decentralized in the sense that each presiding judge would determine whether there was or was not a division.

Mr. Nemeth: Well, I think there was also a thought that some of these matters regarding organization should be left local, because the local situation is best known by those who live in it, and that not all things should be determined by the Supreme Court.

Mr. Montgomery: Even though they should be approved by the Supreme Court. There has to be a final authority. The staff can draft language to that effect, certainly.

Mr. Nemeth: The language in the last sentence is, frankly, Illinois language. They've got it and it's working there.

Mr. Montgomery: Do you have any language suggestion, Judge Leach?

Judge Leach: No, not at the moment.

Mr. Norris: As the legislative representative to the committee, I suspect that I would oppose this grant of authority. The promulgation of rules of practice is certainly a proper area for action by the Supreme Court, and that was granted to them by the Modern Courts Amendment. I was a sponsor of that. But here we're not really talking about rules of practice in the courts -- we're talking about the Court doing what is really a legislative function, that is, determining what bodies of local government are doing to handle the people's business. This gets pretty far afield, especially when you consider the fact that the Supreme Court's method of promulgating rules are not really suited to doing the public business. It doesn't have open hearings, and so it's not really a proper forum for this sort of thing. I assume you have some consensus of the members of this committee to go in that direction, but I thought I'd register my protest.

Mr. Montgomery: The thought was, Mr. Norris, that the continuing monitoring and supervision of judicial business by the Supreme Court wouldn't give it a better "handle" on needs for judicial manpower and things like that, rather than the intermittent and sporadic attention that any Legislature can give them -- and there are political considerations, too.

Mr. Norris: I think to a point I agree with you. I've always favored more centralization in the administration of the court system, but here, this isn't really administration. I just don't think the creation of divisions is suited to the judicial branch of government. That's what the Legislature is for -- to determine local needs, to compromise opinions, and to take testimony. Another problem is, I don't know how the Court is going to have time to hear cases. Here, we load them down not only with matters of internal administration, but drawing district lines and determining where the case-load is and so on.

Mr. Montgomery: That's another problem -- you have to have manpower in the Supreme Court to do that.

Mr. Norris: Which, again, tends to point out that it's not a proper function of the Court. If we load these people down, they're going to look partly like the executive department and partly like the legislative department. That's not deciding cases and controversies. Beyond that, another objection I have, even if the committee accepts that concept, is that I don't see any involvement of the General Assembly in this process. Under the Modern Courts Amendment, the Rules of course are subject to legislative oversight.

Mr. Nemeth: The involvement comes under Section 5(D) of this draft.

Mr. Montgomery: Which has the same rationale as is used now for procedural rules.

Mr. Norris: Does it involve a negative procedure or an affirmative procedure on the part of the General Assembly?

Mr. Montgomery: If the General Assembly doesn't do something, the Supreme Court rule stands.

Mr. Norris: As a minimum, we need to allow the same kind of review we have now under the Modern Courts Amendment, and I think we ought to consider changing the General Assembly's role from a negative role to an affirmative role. One of the

most traumatic experiences I ever had as a legislator was the row the Legislature and the Supreme Court got into over the criminal rules. That was our fault in the Legislature for making this a negative procedure. What this means is that every time the Legislature and the Court disagree, we are mandated to be locked in combat, and I really felt that -- it was very clear. The Supreme Court took sides and they got rough, and the Legislature took sides and the Legislature got rough -- and that's a pretty disgusting prospect. What that whole thing taught me was that it would be better to have the Court submit rules to us, subject to our amendment and approval.

Mr. Montgomery: Then you're always compromising.

Mr. Norris: Oh, they'd still have 99% of the rules just exactly as they submitted them, but we'd all get out of this "locked in combat" role, which I thought a very bad situation for both branches of government. We won, but it wasn't anything to be proud of. So, that's a mistake I think we made with the Modern Courts Amendment. Sincerely, I believe the Court would still get 99% of what it suggested, verbatim, because the initiative is always with the Court, and for the Legislature to build up a body of good will is, essentially, to let the Court have what it wants, except in very bad problem areas. But today it's so negative -- we have to "go to war" before we can get any changes. It doesn't make any sense.

Mr. Montgomery: Would you agree that the Supreme Court is in a pretty good position to recommend districts, divisions, and things like that? Would you go for an affirmative arrangement?

Mr. Norris: Well, certainly that would be better. If we had such a recommendation, I probably could support it. We'd still have the problem of overburdening them with administration, but at least that way the rules would be open to public debate.

Mr. Montgomery: You might want to redo the procedural rule section,too, then. Hww do other members of the committee feel about this?

Mr. Skipton: I am quite reluctant to leave it to the Court to decide about divisions. I like things more fixed than that. Judges are influenced like anybody else -- they are "political animals", and there have been so many examples lately of headlines staring at us about how capricious judges can be. "I don't like Judge X, so let's vacate that division and create a different one." -- that's not something I'd like to see.

Mr. Montgomery: You think divisions and districts and so forth should be dealt with by the Legislature?

Mr. Skipton: I don't mind it having some form of review such as we've been talking about. But it seems to me that if you can change things from one term of court to another - that's not good.

Mr. Norris: That brings up a point which just occurred to me. It would be possible for the Supreme Court to promulgate a standing rule instructing that presiding judges may create or alter divisions, and it could be done term by term. It wouldn't necessarily have to be part of a complete review, promulgating a rule and drawing the lines and telling the presiding judges to implement it. The language in the draft is pretty darn broad.

Mr. Guggenheim: I must say I like the idea suggested by Mr. Norris, that is that the court come forward with a plan which would be reviewed by the Legislature. One of the central problems today is court backlog,. and I don't believe the Legislature is in as good a position as the courts to try to allocate labor. I like the idea of the courts coming up with their own plan for improving their administration, but I would not take everything away from the Legislature for the reason that was suggested.

Dr. Cunningham: I have always felt that the court should promulgate its own rules, subject only to a veto on the part of the Legislature, and if the Legislature doesn't take action, it becomes a rule of law as the rule of the court.

Mr. Montgomery: But this is extending rule making beyond its present concept of procedural rules. Would you go along with a change from a negative to a positive vote for the General Assembly, providing the Supreme Court made the original recommendations?

Dr. Cunningham: I am not ready to adopt completely Mr. Norris' suggestion of the affirmative. I think that the negative is adequate at this point.

Mr. Montgomery: We have three members of the committee who feel we should deal with it on an affirmative basis, so the staff will rewrite that section.

Mr. Norris: Just a suggestion - I like the use of the word "plan" -- in other words, the Supreme Court can submit a plan for such and such -- something a little broader than "rule".

Judge Leach: May I add a word here? The way I see it, we've been talking about three different aspects of a common problem. One is the number of judges, without any change in the court at all - like, how many common pleas judges shall there be in Cuyahoga County?; the second is the creation of a court into divisions; the third is combining courts into districts. Even at the risk of having to change the Constitution quite a bit, it would seem to me that somehow these aspects should be subdivided, because I can see that someone might want to authorize the Court to act without the intervention of the General Assembly in one area and not in another, and so forth.

Mr. Norris: The Court is probably better qualified to suggest the number of judges than the Legislature is, but as far as I'm concerned, all three could be suggested.

Mr. Montgomery: Judge Leach, you're saying that you don't object to a rewriting of the section to make it readable and logical.

Judge Leach: Yes.

Mr. Skipton: I also have a problem with this. It says "There shall be a court of common pleas and such divisions thereof..." Does this mean that every county has to have the same number of divisions?

Judge Leach: No.

Mr. Skipton: Does there have to be a separate judge for each division?

Mr. Nemeth: I don't believe it's the intent of the section to specify things like that.

Mr. Montgomery: Well, I think the Illinois experience has shown that there should be flexibility.

Mr. Norris: We could end up with subdivisions--"Common Pleas Court, Municipal Division, Small Claims Subdivision," and we sure wouldn't want this to require that we have to have a judge who sits only in the small claims subdivision. Mr. Nemeth says that's not what we intend, but maybe we better have the language to make sure that we don't require it.

Mr. Norris: Do we need Section 4(C) at all?

Mr. Nemeth: That may be redundant to some extent. Going on, there would be no change in Section 4(B), relating to the original jurisdiction of the common pleas court. Section 4(C) is in the draft as follows:

> "~~Unless otherwise provided by law,~~ There shall be ~~a probate division and~~ such ~~other~~ divisions of the courts of common pleas as may be ~~provided by law~~ ESTABLISHED PURSUANT TO RULES PROMULGATED BY THE SUPREME COURT. ~~Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.~~ "

But there would not necessarily be a need for (C) at all, because the concept could be incorporated in (A).

Mr. Montgomery: All right, how about Section 5(A) (1)?

Mr. Nemeth: This section would be rewritten as follows:

> "In addition to all other powers vested by this article in the supreme court, the supreme court shall have superintendence over all courts in the state, INCLUDING SUPERINTENDENCE OVER THE PREPARATION OF A UNIFIED JUDICIAL BUDGET FOR ALL COURTS. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court."

This would, of course, expand the rule-making power of the Court.

Mr. Norris: Does that contemplate that a common pleas judge in Delaware County submits a budget?

Mr. Nemeth: To the Administrative Office of the Court.

Mr. Montgomery: Well, if we're going to have state funding, something like this is going to be necessary.

Mr. Nemeth: There would be no change in Section 5(A)(2), relating to the appointment of the Administrative Director, and there would be only one change in Section 5(A)(3), namely the removal of the last sentence, referring to rules adopted for assignment of judges to courts established by law, because there would be no such courts. The provision would be amended as follows:

"The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or any division thereof or any court of appeals shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of such assignment. ~~Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.~~"

There are no changes in Section 5(B), relating to the making of procedural rules and so in, in this draft.

Section 5(C) would be amended by removing the last sentence, referring to courts established by law, which would no longer exist:

"The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or the courts of common pleas. ~~Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.~~"

There would be no changes in Section 6(A)(1) and (2). (1) refers to the election and lengths of terms of Supreme Court justices, and (2) refers to the election and length of terms of Court of Appeals judges -- that is, there would be no changes, assuming that judges would continue to be elected. If the committee decides on another recommendation, these provisions would have to be changed or deleted.

Section 6(A)(3) would be changed to some degree for purposes of clarification. It would be amended as follows:

"The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties~~;~~ OR districts, AS THE CASE MAY BE, ~~or, as may be provided by law, other subdivisions~~, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or a division thereof shall reside during his term of office in the county~~;~~ OR district, AS THE CASE MAY BE, subdivision in which his court is located."

Mr. Norris: Do we need to retain the word "subdivision"? When we drew this, I guess we were thinking the General Assembly might create a district court that ran over a couple of counties, and then we'd elect two judges, one in each county.

Mr. Nemeth: There's no definition of "subdivision" in the Constitution for this purpose.

Mr. Norris: Well, what is meant there is something smaller than a district.

Mr. Nemeth: As it is, "subdivision" would be out completely.

Mr. Norris: Yes, but I'm wondering whether we don't need to keep it there for flexibility.

Mr. Nemeth: I think it was the consensus of the committee at one point that judges should be elected either county-wide or district-wide.

Mr. Norris:I remember now, "subdivision" was put in to take care of Cuyahoga County. If we made municipal divisions of the common pleas court, then they would have to run county-wide instead of just in Parma and places like that.

Judge Radcliff: Cuyahoga County has thirteen municipal courts. Lorain County has five.

Mr. Montgomery: Would "subdistrict" be a better term than "subdivision"?

Mr. Norris: Yes, that would be alright.

Mr. Skipton: Isn't district defined somewhere?

Judge Radcliff: No, but the provision is in there someplace that no district shall be less than a county.

Mr. Montgomery: Then we ought to take care of it someplace.

Mr. Norris: I think it's something we ought to look into. If there was a valid reason for having put it in in the first place, we would not want to withdraw all that flexibility. My suggestion would be that we call Tom Swisher, who did this for us. He may remember another reason for it than I do.

Judge Leach: If you had an area less than a county, you'd have to call it something else. They came up with "subdivision", but didn't define it.

Mr. Norris: "Subdistrict" would make more sense and it would be self-defining, but I'd feel more comfortable about it if we really knew what it's for before we take "subdivision" out of there.

Mr. Skipton: I have another point. It says "The judges of the court of common pleas and the divisions thereof shall be elected..." Why couldn't we just say "The judges of the court of common pleas shall be elected...", and delete the reference to "and divisions thereof"? Is that an inference that there has to be a separate judge for each one of these divisions?

Mr. Nemeth: I think our feeling in preparing this draft was that we'd like to see the reference to divisions removed, but we didn't see a sufficient reason to make a point of it.

Mr. Skipton: Everytime something is put in, someone says it has a meaning.

Judge Radcliff: This was just put in.

Mr. Guggenheim: This is surplusage, isn't it, and it poses problems in interpreting.

Mr. Nemeth: It appears to have been surplusage even when it went in.

Mr. Montgomery: The consensus seems to be that it be eliminated.

Mr. Nemeth: On the next point, there's no change in Section 6(A)(4), which prescribes that the terms of office shall be fixed by law. And the only changes in Section 6(B) would be deletion of references to courts established by law as follows:

"The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, ~~and of all courts of record established by law,~~ shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, ~~and judges of all courts of record established by law~~ shall receive such compensation as may be provided by law. Judges shall receive no fees and perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for judge, for any elective office except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void."

There would be no change in Section 6(C), which contains the mandatory retirement age provision.

Now, we get back to Section 5(D), a new provision and a problem section. It reads:

"THE SUPREME COURT SHALL ESTABLISH BY RULE UNIFORM CRITERIA FOR THE DETERMINATION OF THE NEED FOR ADDITIONAL JUDGES EXCEPT SUPREME COURT JUSTICES, THE NECESSITY FOR DECREASING THE NUMBER OF JUDGES AND FOR INCREASING, DECREASING OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS. IF THE SUPREME COURT FINDS THAT A NEED EXISTS FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR INCREASING, DECREASING OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS, IT SHALL, NOT LATER THAN THE FIFTEENTH OF JANUARY, FILE ITS FINDINGS AND RECOMMENDATIONS IN REGARD TO SUCH NEED, WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY DURING A REGULAR SESSION THEREOF. _____ DAYS FROM THE FILING THEREOF, ANY SUCH RECOMMENDATION SHALL BECOME EFFECTIVE AS A RULE PROMULGATED BY THE SUPREME COURT, UNLESS PRIOR TO THAT TIME THE GENERAL ASSEMBLY ADOPTS A CONCURRENT RESOLUTION OF DISAPPROVAL. FAILURE OF THE GENERAL ASSEMBLY TO ADOPT A CONCURRENT RESOLUTION OF DISAPPROVAL AS PROVIDED IN THIS SECTION ON A RECOMMENDATION TO INCREASE THE NUMBER OF JUDGES ON ANY COURT, CREATES A VACANCY ON THAT COURT IN SUCH JUDGESHIP WHICH SHALL BE FILLED BY APPOINTMENT BY THE GOVERNOR. A SUCCESSOR SHALL BE ELECTED AT THE FIRST GENERAL ELECTION WHICH FOLLOWS MORE THAN THIRTY DAYS AFTER SUCH APPOINTMENT, FOR A TERM OTHER THAN A TERM WHICH IS THE SAME AS THE TERM OF ANY INCUMBENT JUDGE ON THE COURT ON WHICH THE VACANCY OCCURS, AS THE GENERAL ASSEMBLY MAY PROVIDE BY LAW. NO RECOMMENDATION TO DECREASE THE NUMBER OF JUDGES SHALL VACATE THE OFFICE OF ANY INCUMBENT JUDGE OR SHORTEN HIS TERM. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW FOR THE IMPLEMENTATION OF ANY RECOMMENDATION OF THE SUPREME COURT WHICH BECOMES EFFECTIVE AS A RULE PURSUANT TO THIS SECTION. ALL LAWS, TO THE EXTENT THAT THEY ARE IN CONFLICT WITH SUCH RULES, SHALL BE OF NO FURTHER FORCE OR EFFECT AFTER SUCH RULES HAVE TAKEN EFFECT."

From the discussion we have had this morning, this provision will be completely rewritten, and probably also renumbered in the next draft.

Mr. Nemeth said that portions of this proposal reflect the influence of the provision of the new judiciary article of the Florida Constitution, and portions reflect an attempt to engraft the procedure outlined in the Ohio Constitution for the adoption of procedural rules by the Supreme Court. He expressed the view that such a provision would in all likelihood be unworkable, because the rules which the Supreme Court might adopt under it could not be self-executing, in that the Legis-

lature would always have the final say on any question involving finances, and this would , in all likelihood, tend to set up a situation of conflict between the Court and the General Assembly. He said that since the committee's decision this morning to give the General Assembly a positive role in regard to matters covered by this section, there was no point in discussing it further.

The committee also discussed a proposed schedule, the details of which will have to be reworded in accordance with the committee's decisions at this meeting.

Mr. Montgomery asked the staff to prepare a second draft on trial court structure, to be discussed at the next meeting. He also said that at that meeting, the committee will review the sections relating to the Courts of Appeals, and the testimony it has received, in order to try to come to agreement on what changes, if any, it may recommend in regard to these courts.

The next meeting of the committee was set for Tuesday, May 14, 1974, at 10:00 a.m.

Ohio Constitutional Revision Commission
Judiciary Committee
May 14, 1974

Summary

The Judiciary Committee met at 10 a.m. on Tuesday, May 14, 1974 in Room 10 of the House of Representatives. Present were Chariman Montgomery, Committee members Mr. Roberto, Dr. Cunningham, Mr. Guggenheim and Mr. Skipton, as well as Judge Robert Leach, Special Counsel to the Committee, and the Honorable William Radcliff, Administrative Director of the Courts. Staff representatives present were Ann Eriksson, Julius Nemeth, Craig Evans, and Sally Hunter. Mrs. Elizabeth Brownell attended as an observer for the League of Women Voters, Tom Swisher, of the Ohio Bar Foundation, was also present as an observer as was Clara Hudak for the Ohio Legislative Service Commission.

Mr. Montgomery opened the meeting by reading a communication from the Honorable Paul M. Perkins, judge of the common pleas of Carroll County, informing the Committee that a new council for local judges has been formed. He read the letter as follows:

> "In the April, 1974 issue of the Ohio Judge we read of the work of your subcommittee with respect to court operations and trial court structure. I also understand that some tentative drafts may be obtained from your office. I am enclosing a two-page questionnaire which gives information as to a new state-wide organization, the Council for Local Judges. As you can see, this Council is independent of the Ohio State Bar Association and any judicial association. Since the passage of Issue 3 and since we have discovered in Senate Joint Resolution 10 that the constitutional right to elect judges locally would be replaced by a legislative grab bag, the new organization as determined to represent its members in the small counties independent of any other judicial or legal organization. Therefore, I am requesting that invitations to participate in this process be issued to the officers of the Ohio Judicial Council for Local Judges of which Mr. John Wolf of Ironton is the president. Oh behalf of the Council I would also like to have all tentative drafts now being considered by the Commission or the judicial subcommittee and that relate in any way to trial court structure, districting of courts, or changes in the Constitution respecting the election of judges."

Montgomery: He also encloses a memorandum of solicitation to other local judges to join the Council which I won't read. They want to be informed. Inasmuch as their interest runs not only to structure but also to personnel, I think that it would be better to delay inviting them until we get to the subject of personnel, at which time they can also be heard on what we have done with structure, if that meets with your approval.

The Committee agreed.

Montgomery: You will recall that at the last meeting we went through a tentative draft, called Draft No. 1. Allen Morris was here and expressed some concern about who should make final determination on divisions of the court, districting, and numbers of judges. Where the division between the Supreme Court and the

General Assembly should be, with reference to these matters. And there were other matters which we asked the staff to reconsider. We are ready to start through again. I feel the staff has done an excellent job in interpreting our concerns and in the general redrafting of this article - so Julius, if you will please, go through this with us line by line.

Nemeth: Section 1 would now read: "The judicial power of the state is vested in a JUDICIAL DEPARTMENT CONSISTING OF A supreme court, courts of appeals, and courts of common pleas." What was removed from this section was the phrase "and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." In Draft No. 1., this section also had a reference to the expenses of the judicial department being paid by the state from the general fund and to all judges devoting full time to the performance of judicial duties. The matter of financing and the matter of full-time judges have been transfered in Draft No. 2 to Sections 8 and 7, respectively.

Montgomery: Are there any questions on Section 1?

Nemeth: We now move to Section 4(A). Here there has been a minor change made. The references to "divisions" have been deleted in the second draft. These references have been stricken on the basis of the Committee's decision at the last meeting. The other changes in 4(A) and (C) are as follows: the references to the creation of divisions by supreme court rule and the authority of the presiding judge of the common pleas court with regard to the creation of divisions are deleted from this section. The Supreme Court's authority with regard to divisions is transferred to the first paragraph of Section 5(b) and is treated in the same manner as the Court's authority with respect to rules of practice and procedure. This means that the General Assembly would have a veto power over them and they would be submitted to the General Assembly in the same manner as procedural rules are now.

Montgomery: This is a basic change in our philosophy. The last time we suggested that not only the initiation of recommendations but the creation of districts and numbers of judges and divisions of the court all be set by the Supreme Court. In view of the debate that we had at the last meeting, we felt that it would be better and that it would track better with other constitutions to allow the Supreme Court to make recommendations as they do on rules with regard to divisions of the court by to leave the territory and numbers of judges to the legislature. That is a basic change from last time.

Nemeth: A further change in Section 4(A) is that the reference of the authority of the presiding judge in regard to the creation of divisions is deleted from here. It is contemplated that the presiding judge's authority in regard to this matter is adequately covered by the last sentence of Section 4(A), i.e., ". . . as prescribed by rule of the supreme court." There was some concern expressed at the last meeting about the language regarding the presiding judge's authority, which was in Section 1. That has been deleted and we believe that his authority - whatever the Supreme Court would choose to give him in this area - is covered by the foregoing

phrase. This would leave the Supreme Court free to assign this duty to the administrative judge, for example, if it chose to do so. It would no longer be mandated that the duty be assigned to the presiding judge in the Constitution, although the Court would still have the option.

Montgomery: Is there any question on this page - which I have numbered 2 on my copy?

Nemeth: In addition to the change described above in regard to divisions, Section 5 (B), the next one we are concerned with, has been modified as follows: The words 'and procedure' have been inserted after the words 'local practice' in the second paragraph of Section 5 (B). This makes the language of the second paragraph parallel to the language of the first paragraph regarding the Supreme Court's authority in this area, the thought being that this would more clearly distinguish between procedure rules and rules relating to the creation of divisions. With regard to the former the common pleas courts would continue to have the same authority they have now to promulgate rules not inconsistent with Supreme Court rules. But in regard to the latter - i.e. the creation of divisions - the common pleas courts would not have authority independent of Supreme Court rule --even to create a division which is not inconsistent with what the Supreme Court recommends, in other words. Futhermore, we have divided the authority to create divisions from the Supreme Court's authority in regard to determining the number of judges and the number of districts. This latter subject matter was covered in Section 5 (D) of Draft No. 1. This has been transferred as a separate provision to the last paragraph of Section 5 (B), which is on page 4 of Draft No. 2. The authority in regard to this matter has been reduced to being merely advisory. This is a strong departure from the first draft, in which this power was in the nature of rule-making power.

Mr. Nemeth was then asked to read the new provisions line by line.

"THE SUPREME COURT SHALL ESTABLISH BY RULE UNIFORM CRITERIA FOR THE DETERMINATION OF THE NEED FOR ADDITIONAL JUDGES EXCEPT SUPREME COURT JUSTICES, THE NECESSITY FOR INCREASING OR DECREASING THE NUMBER OF JUDGES AND FOR INCREASING, DECREASING OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS. THE SUPREME COURT SHALL ANNUALLY, BEFORE EACH REGULAR SESSION OF THE GENERAL ASSEMBLY, FILE WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY A REPORT CONTAINING ITS FINDINGS, IF ANY, THAT A NEED EXISTS FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR INCREASING, DECREASING, OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS, AND ITS RECOMMENDATIONS, IF ANY, IN REGARD THERETO. THE GENERAL ASSEMBLY SHALL CONSIDER SUCH REPORT, AND ANY FINDINGS AND RECOMMENDATIONS IT MAY CONTAIN, AT THE REGULAR SESSION FOLLOWING THE FILING OF THE REPORT. NO DECREASE IN THE NUMBER OF JUDGES SHALL VACATE THE OFFICE OF ANY JUDGE BEFORE THE END OF HIS TERM."

This would make the Supreme Court's role in this area strictly advisory, but it would impose a constitutional obligation on the General Assembly to consider whatever findings and recommendations the Court filed each year. This would in all likelihood establish a more orderly process of communication between the Supreme Court and the General Assembly with

regard to judicial needs without putting them in a "locked in combat" role, a fear that was expressed at the last meeting. This is a considerable step away from the original concept and considering the views that were expressed at the last meeting, we felt that this was the strongest provision that would be accepted at this time.

Montgomery: Is there any discussion on this?

Mr. Roberto: I agree that this is probably the minimal acceptable approach. Although I was not at the last meeting, I understand the many problems involved in trying to establish a unified court system, and I think that this is at the least a step in the direction that you were trying to achieve in the first draft. The various groups -- such as the rural judges we've heard from -- are going to have trouble with the unified court approach, anyhow. I think that we are going to have to be practical about some of these troublesome areas.

Montgomery: Is there anyone else who wishes to be heard on this matter? Does this pretty well state our position?

Leach: Moving back a bit -- to the provision authorizing the Supreme Court to make rules governing the establishment of subject matter divisions in courts of common pleas "(AT THE OPTION OF EACH SUCH COURT)," and for the assignment of judges thereto. I assume that the language in parethesis is something we should discuss - it should be removed or stay in, I take it.

Nemeth: Thank you for bringing this to my attention, Judge Leach. The material in parentheses does require a decision on the part of the committee as to whether the creation of divisions would be strictly a function of the Supreme Court pursuant to its rule-making authority or whether the presiding judge or the court of common pleas as a whole should be given some say in the matter of the divisions which are established locally. There was some concern, I think, expressed at the last meeting that permitting a say so by the local court would lead to some form of anarchy - although this term wasn't used, of course. This is a policy question that the Committee must decide. If it is decided that common pleas courts ought to have an input then this section should perhaps be rewritten to make it more definite as to what is intended. We left the language as it is, in a shorthand form, so that we could discuss this question.

Mr. Montgomery asked Judge Radcliff and Judge Leach, as former local judges, if they had comment.

Leach: It seems to me that if we are going to delegate that power to the Supreme Court, the local courts shouldn't be able to refuse to follow the rules. I would hesitate to tie down the Constitution by allowing a local court to object to a division and refuse it. If no provision at all were added on this point, it would allow the Court to draft rules that did have some flexibility between counties, depending upon need. And I think that this is part, too, of the concept of the Court drafting some sort of criteria for need of judges and also perhaps for need of divisions. I think that is would be tying down the Constitution awfully finely to say specifically that the local court can reject the division. Further problems suggest themselves - e.g. in the case

of multi-judge courts - who makes the decision, who speaks for the court.

Roberto: I was going to speak to the same point. I don't think you get very much in the way of a unified court if you leave the option at the local level. As a practical matter, when the Supreme Court exercises any rule making authority the Court doesn't do it unilaterally. It is a give and take proposition, with all of the local court organizations and local courts being given a chance to be heard. It isn't as though the Supreme Court were imposing rules so much as it is a process by which all courts participate in the rule-making - isn't that correct? Aren't they playing a role now?

Montgomery: It depends upon whether the glass is half empty or half full. There are some judges who feel that the rules are being imposed upon them, I think, and others who feel that they have a part in it.

Radcliff: All superintendence rules have been adopted, as you point out, after input first from the courts, to find out what the problems were. Then the Court drafted rules, then the courts looked them over and discussed whteher the rules would meet the problems. The statement Mr. Roberto made applies particularly to the rules of superintendence. Those are ones over which there is no veto and it is important that everybody be considered. I think that to put an option in here is an invitation to organized disaster.

Other comments were invited by the Chairman. He said that the provision would therefore be deleted, in the absence of comment to the contrary.

Nemeth: I'd like to bring up a minor point here. The beginning phrase in (B) is "The supreme court shall prescribe rules of practice . . . " The beginning phrase of the second sentence is now "The supreme court may make rules..." I was wondering if we should not change the word "make" to "prescribe", in the second sentence, to make it parallel.

The change was agreed to.

Eriksson: Did you have prior discussion about the fact that one provision is mandatory and the other is optional?

Nemeth: Yes. The Supreme Court's power to make rules about divisions would not be mandatory. If it chose not to do so, the creation of divisions could be continued on the same basis as it is by statute.

Montgomery: Is that a good arrangement, do you think, or should we make it mandatory?

Radcliff: To give them the option gives them the opportunity to proceed in an orderly and without too hasty fashion.

Montgomery: Let us then move on to page 5 and Section 6.

Nemeth: Let's look at Section 6 (A) first because there are some deletions there to consider. The references to "divisions" are removed as are references to "subdivision." At the last meeting, there was general agreement that the substitution of the word "subdistrict" for "subdivision" was preferable from the point of view of definition. That is, it is probably easier to define

"subdistrict" from a reading of the Constitution than it is to define "subdivisions." Mr. Morris pointed out that the reference to subdivisions here was inserted, to the best of his memory, to accomodate the possibility that some judges of the common pleas court would be elected from an area smaller than a district, which has to be at least as large as a county. This was for the purpose of, in effect, continuing municipal courts under another name under a revised a structure (because there were many judges who did not want to run county wide). There was also the desire to keep the flexibility in the Constitution for such arrangements, while at the same time deleting the references to subdivisions as such. I have since the last meeting had a conversation with Mr. Swisher, who tells me that Mr. Morris recollection is essentially correct. However, he is of the opinion that the insertion of the word "subdistrict" in place of "subdivision" would probably cause as many problems of interpretation as were solved because "subdistrict" isn't defined either. It was suggested that perhaps it would be more appropriate to refer to political subdivisions instead of "subdistricts." Or perhaps a phrase such as "political subdivisions or portions thereof." It is possible that something less than an entire political subdivision would be included in a municipal court or magistrate court district in the future, and this would add flexibility.

Mr. Nemeth: No matter what we use that may be the outcome. Also, Mr. Swisher suggested in the last sentence of 5 (A)(3), instead of saying that the judge must reside in the subdistrict from which he was elected, that it should perhaps say that he must reside within the territory which the court serves.

Montgomery: Shouldn't this be better handled by implementing statute? The statute could define "subdistrict."

Leach: I think that we are meeting ourselves coming back. Part of the present problem, as I see it, is that the term "divisions" could be construed as subject matter divisions - probate, juvenile, domestic relations, etc., or it could be construed as geographically less than the county -- a geographical division or subdivision, as a substitute for mayors' courts, municipal courts and so forth. It seems odd to me to say that we are having <u>three</u> courts, consisting of the Supreme Court, Court of Appeals, and Court of Common Pleas, and then to recognize by inference the concept of a subdivision which is less than common pleas or some part of common pleas, especially when we are going to provide for salaries of common pleas judges to be paid by the state. Are we going to have a man who is elected from the entire county receiving the same salary as one who is elected from a part of the county? On page 3 of the draft we talk about the Supreme Court making rules governing <u>subject matter</u> divisions of courts of common pleas -- again, probate, juvenile, etc. -- then we come to this provision and whether we call it subdivision, subdistrict, or what you will, it seems to me to run counter to the idea of a single common pleas court. With than a county and would to continue to be elected from that area, I think that the Committee is either going to have to fish or cut bait. You must make a determination of what direction you are going.

Nemeth: May I add a quote here? I also find this section somewhat inconsistent with a new Section 7, which we haven't talked about yet, which talks about the appointment of magistrates. Is these sections now stand

in this draft, you would have not only judges of the court elected from an area smaller than the district itself or a county which the court serves, but you would also presumably have part-time magistrates, and I don't think from an administrative point of view this would be desirable.

Mr. Nemeth pointed out that the provision on magistrates was added to deal partly with this problem and with the problem of jurisdiction over minor matters. He said that the provision immediately before the Committee (Sec. 6 (A) (3)) was one of a fundamental, policy making nature and could not be glossed over.

Montgomery: Any more discussion on this?

Eriksson: On this point I think that Judge Leach has raised the point of whether we want to continue this concept of having a portion of the court that is geographically smaller than the entire court, which is undoubtly the reason the provision was put in here in the first place. Do you want to continue that concept? If the fact that subdistrict isn't defined anymore than subdivision is the problem, probably you would want to consider, in lieu of going back to the word "subdivision" (which, even with "political" added,has problems) you might want to amend the section relating to creation of districts by the Supreme Court to add "subdistricts" to make clear that "subdistrict" is geographical. This is if you want to continue the concept. That would give you as much of a definition of district as there currently is of "district".

Judge Leach was asked about his initial point.

Leach: The present constitutional provision talks about divisions of the court. This could be construed as meaning something like probate division (created by the Constitution itself) i.e. a subject matter division, or it could be construed to be a geographical division, or a combination thereof. A municipal court, for example, is where less than a county is covered a geographical division, and by having at the prsent time somewhat reduced jurisdiction, it involves a limited subject matter division. Section 5 recognizes the right of the Supreme Court to make rules governing subject matter divisions but says nothing of geographical divisions. My point is simply this. If you are going to -- as a temporary expedient, upon the establishment of a new constitution, with a grandfather clause type of thing-- take the persons who have been elected municipal judges and make them common pleas judges, that is one thing. It is temporary. But if in essence you are going to provide for continued election of persons to the office of "common pleas judge" in an area of, say, Shaker Heights, as opposed to some other judge who is elected in Cuyahoga County, there will be a complete inconsistency, especially when it comes to state paid salaries, and the rest. Right now, under the present Constitution, we recognize a lesser court than a court of common pleas. Here we seem to have agreed that we are going to have <u>one</u> trial court - the court of common pleas. I can see the temporary device of moving someone over as an administrative solution, but to me it seems an anomaly to <u>continue</u> to elect individuals from a different area. Unless you are going to have two divisions in common pleas court, and different salary concepts, too.

It was pointed out in discussion that in Cuyahoga county there are 13 separate municipal courts. They are elected by 13 areas and under this proposal would

continue to be -- from Parma, from Shaker Heights, from Cleveland Heights, etc. Judges would be called judges of the "court of common pleas of Cuyahoga County" but would continue to be elected form the smaller areas from which they are now elected i.e. Shaker Heights, etc. Would judges elected county wide and those elected from Shaker Heights have the same title, duties, compensation - all of these questions were raised as problems involved in this decision. Judge Leach reiterated that a decision about which way to go must be made first. Judge Radcliff pointed out that the 13 judges on the municipal court of Cleveland are voted on only by the voters in the city of Cleveland. That is a population of 800,000. There would be 26 regular common pleas judges now who are subject to the whims of the almost 2½ million residents of Cuyahoga County. He added that to integrate or not is a major policy decision. Mr. Skipton suggested that the "brave words" about a unified court were here being tossed into the ash can.

Guggenheim: What do they do in Illinois?

Radcliff: In Illinois they elect judges from districts, but Cook County is an entirely separate entity. Downstate Illinois has judges elected by districts - even the Supreme Court is so elected. But judges themselves exercise the same jurisdiction statewide and are paid the same salaries statewide. They live within their respective districts.

Leach: And within one district they do not have two judges -- one elected from the district and one elected from a smaller area -- both on the same court.

Eriksson: There might be one other way to get around the problem and that would be to permit a district to be less than a county. You would still have an entity but as the present Constitution is written a district cannot be smaller than a county.

Leach: I could be wrong, but I understood from the Illinois judges when persons were moved from the JP situation into a kind of circuit court, they moved them over originally but once they wer moved over they did not continue to be elected in the small area. They were moved over totally. There was subsequently a re-evaluation and the number was cut down. In Cuyahoga County, for example, under a similar situation, all of the judges of the municipal court of Cleveland and of the suburbs as well as the judges of the court of common pleas, and of juvenile and of probate would all become common pleas judges. There would conceivably then be a re-evaluation of the number of judges at some points and it could be cut back. This proposed provision seems to carry the connotation that even though they move over, assume the same duties and receive the same salary, they continue to be elected in a small district -- some would, that is.

Radcliff: Lorain county has 5 municipal courts. There are 4 or 5 in Montgomery county. Stark has three. Mahoning has several. Franklin and Hamilton counties are the only 2 urban counties without problem because the municipal courts there are county-wide.

Mr. Skipton then moved to amend Section 6(A) (3) in the second and third lines to delete or "SUBDISTRICTS," and in the next to the last line to delete "SUBDISTRICT" with the appropriate changes in punctuation and addition of "or" between "counties" and "districts" in the first instance and "county" and "district" in the second. The motion was seconded by Mr. Guggenheim. Mr. Roberto

then asked if the change means that all of the judges in Cuyahoga County will have to run county-wide. He noted that he could sympathize with judges of some of the smaller communities there now who will never be elected judge. Judges are likely to be elected from these parts of the county with greatest political clout, he observed. It was pointed out that a similar result would occur in rural areas where counties are combined into districts. The center of population has the votes. If three counties are combined into a district, therefore, three judges will be selected in the main from the populous town. The only alternative would be proportional representation. There was discussion concerning the definition of "district" - that it is made up of one or more counties, and is there fore larger than a county.

Mr. Guggenheim: Why do we have "counties or districts" - could we use the term "districts" only, without "counties."

Montgomery: What about that idea? Would that be better? It keeps alive the question that every county ought to have ajudge. Julius, is there a reason not to delete the reference to counties in Section 4?

Nemeth: The concept of a district as it is defined now is that is something larger than a county, and such a change would perhaps be interpreted by some as meaning that all common pleas courts would have to be organized on a district basis. I don't think that this is intended, is it?

There was discussion about whether Section 4 requires one resident judge in each county and it was agreed that it does not. This was the consequence of Issue 3. There further discussion on the question of whether counties need be mentioned in Section 6, based upon the supposition that a district could be composed of one county. But it was pointed out that the Constitution defines district as being composed of two or more counties.

Roberto: I think that you would have courts of common pleas for districts and courts of common pleas for counties, unless you were to deem each court of common pleas as a court of common pleas for the district.

It was finally agreed that the present language should be retained.

There was discussion about whether the compensation of all common pleas judges should be the same. It was agreed that any such decision should be postponed until after equalization of population. It was also agreed that to attempt to deal with this question by way of a schedule (to take care of an interior before change over) would be virtually impossible because a specific date could not now be set. The discussion next turned to Section 7 as proposed in Draft No. 2. Mr. Nemeth read the section. It would authroize the appointment of magistrates, who would be attorneys and who need not devote their full time to the performance of judicial duties. The number of magistrates and their compensation would be prescribed by the supreme court pursuant to its superintendence powers. He noted parallel provisions in Hawaii, North Carolina, and Alaska.

Some discussion centered on the use of referees under present law. The use on a full time basis in common pleas and municipal courts is authorized by law. Mr. Nemeth said of Section 7 that he was confident that it does not mandate that salaries of magistrates be paid by the state. (It had been noted

that referees in municipal courts are paid in the same manner as are municipal judges - 3/5 from the municipality and 2/5 by the county.) He said that he felt that the payment of magistrates would fall under the provision in proposed Section 7 that the General Assembly would provide by law how other expenses are to be paid. Only judicial salaries are there mandated to be paid by the state.

Montgomery: What is the term of a county court judge?

Radcliff: Four years. All other judges have six year terms.

Montgomery: Would there be anything wrong with fixing a four year term for magistrates?

Radcliff: I don't think that it should be fixed in the Constitution.

Skipton: I'm a little concerned about formalizing this in the Constitution anyway. The closer you keep it to the present system, the better off you will be, I think. This will probably create as many part-time judges as full-time judges, who will become permanent fixtures, serving terms co-incident with the appointing authority. I don't think that there is any question about it. You are not talking about appointing someone here or there to take care of excess caseload or anything like that. You are creating a new class of judge.

Montgomery: This is what Illinois calls the associate judge, isn't it?

Radcliff: They have both magistrates and associate judges. These would be magistrates.

Montgomery: How do you feel about Section 7 as written?

Skipton: It bothers me, for example, that the provision reads: "The number of magistrates who may be apointed by <u>each</u> court of common pleas. . . shall be prescribed by law." I think that this means that the legislature is going to have the same kind of problem that it does now determining the number of judges with people coming before it arguing the need for this many here and another number there. There will be the same jockeying over the number of magistrates as you have over the number of judges right now, I am afraid.

Montgomery: Gentlemen, before we started the meeting, I revieved this question with Julius. It seemed to me that if the Supreme Court was being asked to render an advisory opinion to the legislature on the need for the number of judges, to be consistent and to avoid a legislative grab bag situation, we should at least let the Supreme Court take the inititative on the numbers of magistrates. It is still going to be a legislative matter, but if they are, in effect, judges, why don't we treat them consistently and handle them both the same way. We could go back to page 4 and write that into the new Section 5. We would not have to change Section 7 at all for this purpose. At least that way there would be a rational determination by some body. You would be going into this thing with some logic and order.

Nemeth: Although I am not speaking against such a provision, I don't think that it will satisfy the present part-time judges now because it does involve a different manner of selection. It's no longer election, but rather by appointment. Also, it would put those part-time judges in a different classification. They

would be judicial officers, but not judges.

Montgomery: Yes, but without such a provision as Section 7, they have nothing. When you have a full-time judiciary mandated, without such a provision as this one, you are going to have greater oposition to the idea.

Skipton: I fear that we are getting into a maze here just recognizing and trying to cope with what we see to be the political problem.

Radcliff: John, what we are talking about is that there are 35 part-time municipal judges in Ohio and I think 61 or 62 county court judges -- that is the total number of part-time judges at the present time. Less than 100.

Montgomery: Now those people will all serve out their present terms?

Radcliff: Yes, no term will be abolished until the end of it.

Montgomery: Then they have the option of becoming a magistrate for a similar period and maybe at a better salary, right?

Nemeth: Except that there is no guarantee that they would be because the selection method would change.

It was agreed that there are no guarantees for another term in any case. It was also agreed to insert in Section 5 a provision for number of magistrates to be recommended by the Supreme Court, in order to furnish the General Assembly with a guideline on this matter. The Supreme Court's authority under Section 5, it was reiterated, is advisory only.

Skipton: I don't wish to argue the point, but this may be the time for us to say now whether or not we would consider a different basis for the selection of the judges. In other words, whether or not we are going to say that the creation of judicial districts will be based upon population -- e.g. 1 judge per 100,000 people - which I don't believe we have seriously discussed.

Montgomery: We will get into that.

It was also suggested and agreed that Section 7 would be improved both as to style and clarification if the second sentence were made into two separate sentences, the first to end after the expression "prescribed by law," with deletion of the "and" that follows.

Montgomery: We are ready for Section 8. We have a half an hour, so I think that we can finish this up and decide what to do next.

Nemeth: The new Section 8 is also partly from the former Section 1 in Draft No. 1. It concerns who shall pay for what .

Mr. Nemeth read this section:

> "THE SALARIES OF ALL JUDGES AND ALL OPERATING EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID FROM THE STATE GENERAL FUND AS PROVIDED BY LAW, AND ALL OTHER COSTS AND EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID AS PROVIDED BY LAW. THERE SHALL BE A UNIFIED JUDICIAL BUDGET PREPARED UNDER THE SUPERVISION OF THE SUPREME COURT AS PROVIDED BY LAW."

This section is somewhat more flexible than the original statement in Section 1, which was: "All expenses of the judicial department shall be paid by the state from the general fund as provided by law." Some questions were raised here in regard to some offices, such as clerks offices, and whether or not these were part of the judicial department, and whether or not it was the intent of this constitutional provision to require that expenses of the clerks offices be paid by the state. Section 8 was drafted so that this would not be required. It makes clear that all that would be required to be paid be the judicial salaries and the operating costs of the court itself, such as secretarial help, the law clerks, and probation officers, who are directly attached to the court -- these things would be paid by the state. But certainly as long as the clerk's office remained a separate elected office it would not include the expenses of the clerk's office. The General Assembly could, of course, at some future time decide to abolish that office as an elective office and make aother provision for it. But the Constitution right now would not mandate that the expenses of the clerk's office be paid from state funds.

The section would provide that all other costs and expenses of the judicial department shall be paid as provided by law. Even if the clerk's office is now considered a part of the judicial department - and I think that is debatable - the General Assembly would be free to provide as to how this is to be paid for.

Montgomery: Isn't there a way this could be re-phrased. There is a lot of repetition of "provided by law." Can't the first two matters be combined into one?

Nemeth: Well, no, the reason we have it separated is that we wanted to make clear that the salaries of judges and the operating costs of the court itself would be paid "from the general fund as provided by law" - obviously it has to be provided by law. But we didn't want to say that the other expenses of the judicial department would have to be paid from the general fund. They would still have to paid "as provided by law," but the source of the payments would be up to the General Assembly to determine.

Roberto: With regard to the clerk's office -- the way I read Section 1 it now defines judicial department as consisting of a supreme court, courts of appeals and courts of common pleas. Julius you mentioned that the clerk's operation may or may not be part of that department.

Nemeth: Well, in view of what we have written we believe it is not. But, there may be some who would argue with that.

Roberto: But does the expression "all other costs and expenses" clarify the matter?

Nemeth: Do you think that we should remove what follows that - i.e. "of the judicial department."?

Roberto: If you could refer to supporting agencies or something like that.

Montgomery: It <u>implies</u> that judicial department includes more than judges.

Eriksson: I agree that there is some confusion here. It would be possible to remove the second phrase and to find some better way of defining the operating

expenses of the judicial department so that it would be clear that they excluded the clerk if that is the intention--but I am not so sure at this point how to suggest that. In other words, if you simply remove the phrase "AND ALL OTHER COSTS AND EXEPNSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID AS PROVIDED BY LAW," you are not removing anything that is essential because it would be implicit that the only things you are requiring to be paid from the state general fund are the things you are specifying. The other things would have to be paid as provided by law, anyway.

Montgomery - Should we simply drop the second clause then?

Eriksson - I still think that there may be some confusion as to what all operating expenses of the judicial department included. If the intention is to exclude the clerks, I am not too sure how to say that.

Skipton - You don't want to do it here anyway, do you? You go back to Section 1 for definition.

Montgomery - Why can't we delete the second clause and put a period after "as provided by law"? It gives us only confusion and is going to be handled by statute anyway. Could we drop it?

MR. Nemeth and Mrs. Eriksson agreed that the second clause of the first sentence could be dropped, but that there is still a problem involved in defining "operating expenses." That is, as to whether the clerk is or is not a part of that.

Judge Leach - One way to solve the problem might be getting back to Section 1, which vests judicial power in the judicial department. Obviously the clerk doesn't have judicial power. Also in staff notes, which I think have a great input into interpretation, it could be specified that this means the court and its immediate employees. That is, bailiff, probation officers, secretaries, etc. That, plus the judicial power argument, and there would be no doubt about it.

Montgomery - Would the word "direct" help here? That is, "direct operating expenses."

Nemeth - When we wrote this second phrase in here, we had in mind such costs as costs of capital construction, for example, which would be an expense of the judicial department, but we don't know if we would want to mandate that that type of expense be paid by the state general fund. For example, it may be that the General Assembly would decide that the best way to handle this type of expense is to have the counties construct the office buildings and to have judicial departments then rent or lease them.

Eriksson - We could forget about "operating expenses" and simply provide that the salaries of judges and all personnel directly responsible to judges shall be paid from the state general fund. That would eliminate other operating expenses which might be included in this expression--such as pencils, stationery, and a lot of things like that that would be operating expenses. What we wanted to exclude here, as Julius says, are the capital facilities and things like that. That would be more restrictive than this, but it would clearly specify whose salaries are paid by the state.

It was agreed that this represents one way of approaching the problem. However, Mr. Nemeth pointed out, that one problem judges have from a practical point of view is that they can't convince county commissioners to give them the office facilities

and office equipment that they think they need. It was pointed out, however, that the removal of the salary burden from the county might help.

Skipton - Why don't we simply say that the salaries of all judges and the expenses of the judicial department shall be paid from the state general fund?

Judge Leach - By "all expenses," aren't you opening up the matter for interpretation?

Skipton - What I am saying is that this brings it back to what the "judicial department" is.

Montgomery - And that is, judges and direct personnel.

Skipton - Anytime anyone defines that--then . . . I don't like "operating."

It was agreed that "all operating" should be deleted (it is ambiguous) and that the second phrase, "and all other costs and expenses of the judicial department shall be paid as provided by law" should be deleted. The budget provision--the last sentence in Section 8-- was retained as proposed. Mr. Montgomery read the section aloud as changed and asked for a motion on the changes. Mr. Skipton made the motion and Dr. Cunningham seconded.

Montgomery - This takes us over to Section 23--a repeal, I guess.

Nemeth - This is a section that allows counties of less than 40,000 to combine various judgeships in one individual. It would need modification even if not repealed because it still talks about the judge of the probate court, for instance, but further than that, this whole section now would not serve any purpose. As a matter of fact, it would be contrary to the concept of a three-tier court system, without or with magistrates. If the basic premise is adopted that we should have a three-tier court system, then there is really no need for this provision.

Judge Radcliff - That will affect five counties--possibly six--Noble county is in the process. Five counties have conducted elections under this section, and have combined common pleas and probate courts. But few people are involved here.

Montgomery - Well, that concludes the draft. I think that we have made real progress today. Are you ready to express your opinion on the second draft?

Skipton - I have one question--we've acted upon this now--what effect does it have on present law with respect to provision for court rooms and that sort of thing?

Nemeth - I would have to research the question of effect upon existing laws.

Judge Leach - We've raised some problems in a sense, relating to what are "expenses." There will be questions relating to "state general fund" and "as provided by law." One approach is that until the legislature provides by law it means nothing anyway. A battle can still be raised about expenses--does it mean all expenses? If so, then is a new court house included in the broad sense of the term?

Nemeth - To that extent the word "operating" would have been helpful, because although difficult to define here, I think the word "operating" in accountant's language has a rather settled meaning. I think it would exclude capital construction.

Skipton - But that changes with definition of law. In the oil business that is subject to tax laws, etc. What I am getting at is that there are existing provisions dealing with the provision of these facilities and whether or not we have, in fact, changed things.

Montgomery - I'm sure we have, but we haven't disrupted things purposely. We've tried not to, but the legislature will have to do some reconciliation.

Skipton - But we ought to know in our minds what matters we believe we have affected.

Nemeth - This is one subject we might ask the Legislative Service Commission to research, using a computer search, perhaps. I have no doubt that a change of this magnitude would probably require the effective date of perhaps the whole article to be delayed several years so that the General Assembly and everybody can get ready for the switch-over.

Montgomery - Are you suggesting we undertake such a study?

Skipton - Yes, I believe that our report should say something about this. Just as it has been suggested that we point out our intent, and just as it has been pointed out what the probable effect is upon existing municipal judges. We should show that we are aware of these perhaps far-reaching effects.Nemeth - We will make a start--and with proper contacts we can make sure that we have covered everything.

Mr. Montgomery, noting good attendance, asked the pleasure of the committee on the draft before it. He asked if there were a motion to approve it, not necessarily as a <u>final</u> report but as a report on the trial court structure. Mr. Skipton so moved. Mr. Guggenheim seconded, adding that it was being adopted "as amended." Adoption was unanimous.

Montgomery - Julius, where are we next? Should we go into court of appeals structure or should we go into personnel selection?

Nemeth - Our original thought was that we would finish structure first. From a structural point of view, the remaining matters are less complicated. We have had a number of suggestions for change with respect to the court of appeals sections.

Mr. Nemeth indicated that the staff would prepare a memo giving a run-down on materials already received by the committee on the topic dealing with court of appeals structure. It would be a list of references, he explained.

Mr. Montgomery then asked Mr. Nemeth to write a separate memo, to be sent out before the next meeting, and to include all suggestions for change presented to the committee with some evaluation as to their constitutionality and the pro's and con's of accepting them or not. We will take a stab at drafting a court of appeals section next time, he said. He also stated that with committee permission he would work with Mr. Nemeth to come up with a tentative draft, incorporating some of the more substantial recommendations and working with Special Counsel, Judge Leach.

It was agreed to have the next meeting at 10:00 a.m. on Tuesday, June 4, 1974. A subsequent meeting is planned for June 17 at the same time, 10:00 a.m. before the Commission meeting, although for that meeting Mr. Montgomery indicated that he would have to ask someone else to chair the meeting because he will be unable to attend.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
June 4, 1974

Summary

The Judiciary Committee met at 10:00 a.m., Tuesday, June 4, 1974, in Room 11 of the House of Representatives. Present were Chairman Montgomery and committee members Mr. Guggenheim and Representative Roberto. Also present were Judge William Radcliff, Administrative Director of the Courts, Mr. Allen Whaling, Executive Director of the Ohio Judicial Conference, Committee Special Consultant Judge Leach and Mr. Robert Manning of the Ohio State Bar Association, as well as staff representatives Eriksson, Nemeth, Evans, and Hunter.

Chairman Montgomery opened the meeting by announcing that because of light attendance and the fact that one member would have to leave early, it was not likely that votes would be taken on matters scheduled for the day's agenda but that he hoped that the draft and memorandum on the court of appeals could be discussed and the views of persons present could be aired. He asked Mr. Nemeth to begin with an explanation of the court of appeals structure draft No. 1.

Mr. Nemeth - The first sentence of proposed Section 3 (A) states that a court of appeals shall consist of a minimum of three judges, instead of absolutely requiring that a court consist of three judges. If the need exists for additional judges, the General Assembly could so provide. The second sentence in the section, allowing laws to be passed increasing the number of judges, becomes unneeded. In the third sentence, the requirement that three judges hear a case is continued as at present, but an option is added permitting the parties to agree to submit a case to two judges. The third sentence in the present section has an ambiguity in it anyway to the extent that it provides that where there are additional judges, three judges shall participate in the hearing. This leaves up in the air the question of what happens where there are only three judges.

Mr. Montgomery - How is it determined that there shall be three or more than three judges?

Mr. Nemeth - The draft pertaining to the court of common pleas, specifically in Section 5 (B), gives the supreme court the power to make certain recommendations, in particular as to number of judges. Thus the supreme court could make a recommendation on this matter and the General Assembly could act upon it. Section 3 (A) and Section 5 (B) would take care of the number of judges, and because this section provides for a minimum of three judges, there would be a clear implication that the court of appeals may consist of more than three judges. There could be any number from three on up.

In the third sentence in Section 3, we have put in a new provision making it optional for the parties to agree, prior to hearing, to submit a case to two judges. This was a recommendation contained in the 1968 American Bar Foundation study of the federal circuit courts. I am not certain whether it was adopted there or not. I do think that it would be one way--and an appropriate one--to cut down on man hour judicial needs. This is not mandatory in any sense of the word. The provision could also have an additional use in an emergency situation where the third judge on a three judge panel was, for an unforeseen circumstance, absent from the hearing. The hearing could still proceed, provided the parties agreed to submit the case to the remaining two.

Mr. Montgomery - Is it necessary to provide how many must concur to render judgment?

Mr. Nemeth - This is taken care of in Section 3 (B) (3), which states that a majority of the judges hearing the cause shall be necessary to render judgment. In the case of a two judge panel, a majority would be two judges. So that question, in our opinion, is covered.

The next sentences in Section 3 (A), having to do with a presiding judge of the court of appeals, prescribe a method for selecting a presiding judge for the court of appeals that parallels the provision applicable to the court of common pleas and the selection there of a presiding judge. At the present time the method for selecting the presiding judge of the court of appeals is not constitutional. It is statutory only.

Judge Radcliff expressed the opinion that the statutory provision governing the court of appeals works well. Specifically, it provides that the judge having the shortest time to serve and not serving by appointment serves in the capacity of presiding judge. During the last two years of the judge's term, he is presiding judge.

Mr. Nemeth - The problem is that this particular provision does not take into account either ability as an administrator or acceptability to colleagues. If judges elect one judge as presiding, they have some measure of esteem for that judge and believe in the capability of the judge to administer.

Judge Leach - I might add that in the 10th District the present statutory provision has been ignored for some years. Ever since 1969, the court has elected Judge Troop as presiding judge even though under the statutory test he could never serve as presiding judge except for a month and ten days.

Judge Radcliff - There is a necessity in the 8th District and the 10th District to have some provision because there are 6 judges in one district and 5 in the other. A rule of the court of appeals provides for a chief justice in the court of appeals of Cuyahoga county.

Mr. Nemeth - There are several constitutional ways in which the selection of a presiding judge could be handled. One would be to have him appointed by the chief justice of the supreme court, which, from an administrative point of view, might be good, but may not be acceptable for other reasons. Another method would be to have the presiding judge of the court of appeals appointed by the governor. This is done in New York, for example, where the governor appoints the presiding judge of the appellate division in each of the judicial districts. There are other alternatives than this one. We selected this method because it already has a precedent in the Ohio Constitution.

Chairman Montgomery invited comments from the committee.

Mr. Guggenheim - When I read this one, I felt that it sounded pretty good.

Mr. Montgomery - From the alternatives it appears to be the most logical one.

Mr. Nemeth - In Ohio the provision regarding the election of presiding judge of the common pleas court has led to the creation of the post of administrative judge. This creates somewhat of an anomaly in that the presiding judge is the first among equals, so to speak, for some purposes. Another judge--administrative judge--is responsible for administrative detail.

Mr. Montgomery - Is there that much administrative work in the court of appeals to justify an administrative judge?

Judge Radcliff said that he doubted if there is that much work in some districts. He said that Judge Leach, having served on a multi-judge court of appeals, might have some specific views about the need for administrative supervision.

Judge Leach - No. However, I would elaborate a little on my disagreement with Judge Radcliff on the question of presiding judge. Our experiences on the court of appeals differed, leading us to different positions. The statute provides that the judge of the three judges who has the shortest term is the presiding judge. To a degree it is rather a political matter in that the judge is known as the presiding judge when he comes up for re-election. In a five-judge court or six-judge court, as in Cleveland, or in my philosophy in any court of appeals, the presiding judge should be the man whom the judges select as their presiding officer. Passing the position around as judges come up for re-election is not the right pattern in my view.

Mr. Montgomery asked Judge Radcliff to express his point of view.

Judge Radcliff - Columbus and Cleveland are unlike the rest of the state. Cincinnati may be a little different from the rest of the state but very little. By rule the courts have solved their own problems. Cleveland has a presiding judge and a chief justice. Columbus has a presiding judge and that is all.

Mr. Montgomery then asked Mr. Roberto (who had just entered) if he had a view as to how presiding judges should be selected. He indicated that he and Mr. Guggenheim preferred selection by the other judges to the other alternatives that Mr. Nemeth described. He also noted that Judge Radcliff expressed the view that the present statutory method of selection based on length of remaining term has worked well in all districts other than in the metropolitan districts of Columbus and Cleveland. He also pointed out that in Judge Leach's point of view the present statutory scheme is without reason--the presiding judge ought to be selected by the other judges.

Mr. Roberto indicated that he had no strong feelings on the matter at this point. Judge Leach suggested that the General Assembly has no right to say how the presiding officer should be selected.

Mr. Nemeth - The next topic in Section 3 (A) is the selection of a principal seat. The suggested language is: "A COURT OF APPEALS SHALL SELECT ONE OF THE COUNTIES IN ITS DISTRICT AS ITS PRINCIPAL SEAT, AND SHALL MAINTAIN ITS OFFICE AND ORDINARILY CONDUCT ITS BUSINESS THERE. IN THE INTERESTS OF JUSTICE, the court MAY CONDUCT BUSINESS in ANY county IN ITS district. Each county IN THE DISTRICT shall provide a proper and convenient place for the court of appeals to hold court, AS PROVIDED BY LAW."

The language here borrows to some extent from the principal seat statute. Under the provision, the court would be compelled to designate one of the counties as its principal seat, although there is no reference to the "most populous" county in the district, so that would not be mandatory. The court could choose to sit in the most populous county but it could choose any other county in the district. It could select a county based on closeness to geographical center or closeness to general distribution of population in the district, for example. There are a number of legitimate factors for not selecting the most populous county. The court would have discretion. A seat could be selected, then changed if a majority of the court wanted to do so.

Mr. Montgomery - How is it done now?

Mr. Nemeth - At the present time there is no requirement in the Constitution that the court maintain a principal office. There is only a requirement that the court hold sessions in each county of the district as the necessity arises.

Mr. Montgomery - This appears to be an area of major change--whether a principal seat should be designated, and, if so, how.

Mr. Nemeth again explained that at the present time there is no provision in the Constitution which requires a court to designate a place within its district as the place where it has its office and ordinarily sits. It was agreed that the court by tradition does designate such a place. In the 3rd District, for example, it was noted that Lima was designated as the principal seat to which attorneys are asked to come. Mr. Nemeth pointed out that in most instances, not exclusively but in most instances, attorneys are requested to come there to make oral arguments.

Mr. Evans - The statutory provision for a principal seat now is permissive.

Judge Radcliff - It is permissive, and it has never been used. It is new. This is the matter that concerns Judge Kerns.

Mr. Evans - The statute allows the members of the court by majority vote to designate a county as a principal seat. If they do, the county commissioners of the other counties are liberated from the requirement of providing office space and are required to contribute to the expense of the principal seat.

It was pointed out that the statute is permissive whereas the proposed constitutional language is mandatory.

Mr. Nemeth read the statute:

"R. C. 2501.181. (A) A court of appeals may select one of the counties in its district as its principal seat.

(B) The board of county commissioners of the county selected as the principal seat of a court of appeals shall provide and maintain the books, supplies, and facilities required to be provided under section 2501.18 of the Revised Code. The expenses of operating the court, including the cost of providing and maintaining books, supplies, and facilities, and including the compensation of one or more constables appointed pursuant to section 2701.07 of the Revised Code, shall be borne by all counties in the district. The share of such expenses required to be paid by each county shall be proportionate to the population of each such county compared with the total population of the district, according to the latest federal decennial census. The auditor of the county selected as the principal seat of a court of appeals shall, annually, calculate the share of the court's expenses owed by each of the other counties in the district, and shall issue his warrant for the proper amount to the treasurer of each such county. The share of each county shall be paid on such warrant into the treasury of the county selected as the principal seat of the court.

(C) If a court of appeals selects a county as its principal seat as provided in this section, the other counties in the district shall not be required to provide separate books, supplies, and facilities for the court under section 2501.18 of the

Revised Code. When the court in the interests of justice temporarily conducts business in a county other than the county constituting its principal seat, such other county shall provide the court with such facilities as it needs at the time for the proper conduct of its business."

Judge Radcliff explained that the legislation was passed at the request of the 1st District court of appeals, which was having a disagreement between Butler and Hamilton counties. Since its enactment, no one has used it. Therefore he questioned putting it into the Constitution on a mandatory basis.

Mr. Montgomery - What in fact happens, Judge?

Judge Radcliff - The statute provides presently that the county of the residence of the judge provides him with an office, books, and stationery. The court then travels around the circuit sitting in the common pleas courtroom of a particular county. No headquarters is needed. There is a court of appeals for every county in the state of Ohio under the present arrangement. The clerk of courts in, for example, Mercer county, is the clerk of the court of appeals for Mercer county. This suggestion is at odds with the idea that there is a court of appeals for every county of the state.

Mr. Montgomery - Deposit of records would be one reason for designating a principal seat.

Judge Radcliff - This would represent a full circle. Formerly, each judge was paid a portion of his salary by each county in the district. In a district with 15 counties, for example, each judge received 15 checks once a month. Finally the salary of the court of appeals was made payable by the state. This represents return to an arrangement whereby each county contributes to the logistics of the court operation, when the trend is for the state to bear the entire costs of all the courts in the state.

Mr. Montgomery - Is it desirable to have a central headquarters?

Judge Radcliff - I do not think that there is any necessity for it. There is a clerk's office in each county of the state.

Judge Leach - I think that it should be optional, so that each court, for reasons peculiar to that court, could have a principal seat. This can be done under the statute. To say that they "shall" in the Constitution will create lots of problems.

Mr. Nemeth - Do you think that if we leave it optional the option will be exercised?

Mr. Roberto - I can't think of any persuasive reason why we should mandate a central office and involve everyone traveling great distances, at the convenience of the judges, no doubt. But I would be concerned about the next step, as I see it, where each court would want its own clerk, bailiff, and other personnel. This would create an additional staff that I am not sure is needed. I think that I tend to agree with the arrangement whereby the clerk of the courts serves as the clerk of the court of appeals in each county. The judges are required to ride circuit, and I have difficulty understanding the advantage of having a central place and requiring everyone to travel to the court.

Mr. Montgomery - However, cases in small counties, I think, are rather infrequent.

Anytime you handle something just occasionally you are unfamiliar with it the next time. I suppose that you could get more efficiency if you could get more volume of clerk activity in one spot. The efficiency argument would probably not apply in larger counties where I suppose that there are more cases appealed.

Mr. Nemeth - At least one district in this state has interpreted the present provision to mean that if there is only one case filed in a county, the court is compelled to go there to hear it. The judges go there in accordance with a calendar that they file with the secretary of state. A case will not be moved from one county to another for hearing. This could involve months of unnecessary delay for the litigant. And it also results in a waste of time and expenditure of money on travel. The State of Ohio as far as the staff is able to determine is the only populous state in the Union which still requires its court of appeals judges to ride circuit. Others all have permanently designated seats--either one seat for the entire state or three or four designated around the state. They do not go from county to county The court of appeals in these states is viewed as a district court and a representative of the state, not an extension of local government. Perhaps Ohio has more court of appeals judges now than we need. The problem is that they cannot do their work because they are restricted by the organizational restraints placed upon them either by the Constitution or by statute. They cannot do their work in the sense that the workload is not properly distributed.

Mr. Roberto - But with three judges for each district, the only way to solve that problem is to eliminate some of the districts and create a larger district. I am attracted to the idea that judges are required to ride circuit and that litigants can appear in their own counties. I am not familiar with the problems created by a single case in a county but it would seem simpler to transfer that case to the adjoining county instead of centralizing the court in a single county.

Mr. Montgomery - Some flexibility might be in order. What might be right for one district might not be right for another. Perhaps taking out the mandatory aspects of the principal seat provision would be a middle ground. The reasons for riding circuit are not as obvious as they used to be.

Mr. Nemeth - I think that the option would be with the court even under this provision. It would no longer be mandatory for the court to go to each county as the necessity arises.

There was discussion about the feasibility of making the principal seat provision permissive. Mr. Nemeth expressed the view that in such case the provision would be likely to become a nullity in view of Ohio's history as far as the organization of the court of appeals on a district basis is concerned. Judge Radcliff opined that such a position ignores political realities, however, involved in judicial selection. Judges are elected in counties and the only way in which judges are going to be elected is to go to counties where the voters are and let themselves be seen. The point was made that most courts would permit case transfer.

Guests were asked to contribute opinions. Mr. Whaling commented that Judge Kerns, in his presentation to the committee, expressed dissatisfaction with the statutory provision. His problem is to some extent a political problem in that he is headquartered in Champaign county in Urbana and the operational center of the district is in Dayton, which is not the geographic center of the district. Selection of judges and retention of judges, to some extent, should go hand in hand with evaluation of where the court should be held, he added.

Mr. Evans - However, I think that it is important to know in this context that there are states that do not have traveling courts, as it were. Each of the other 22 states with intermediate appellate courts have courts that do not travel. There, too, judges are elected and are elected from geographic districts from which a judge must solicit votes although he does not hold court in each of the several counties within that district. I am not saying that the argument raised here is not perfectly valid but apparently it has been overcome in other states.

Mr. Montgomery - As long as everyone would be faced with the same situation, what advantage or disadvantage would there be?

Mrs. Eriksson - I imagine that we would have to examine actually where the judges are elected from in those other states to see how it works.

There was general agreement that decision on this matter would be postponed. Mr. Guggenheim said that at this point the permissive arrangement appeared to him to have advantages. Mrs. Eriksson pointed out that if "shall" were changed to "may" the provision might as well be eliminated from the Constitution. She also observed that the provision as written--i.e. the court would "ordinarily conduct its business" in the principal seat--is not mandatory and the court could travel if it chose to do so. It could still conduct business in any county in the district. If the court felt that it was to its advantage to continue to ride circuit, it could do so. She suggested bracketing the two sentences if decision is to be postponed until a later time. Mr. Montgomery agreed.

Mr. Guggenheim then asked to go back to the preceding provision to inquire what happens if a case is heard by <u>two</u> judges and they do not agree. The staff replied that the appeal would have to be reheard in this situation. Mr. Nemeth then returned to a discussion of the draft.

Mr. Nemeth - The next change in the draft ties in with the option of selecting judicial panels. Section (B) (3), last sentence, would be amended to delete the word "three" from the provision for concurrence. The change is not substantive. If the cause were heard by three judges, concurrence by three would be required, but if it were heard by only two, concurrence by two would be sufficient. The next addition is the addition of a division (D) in section 3, reading as follows:

"EACH COURT OF APPEALS SHALL APPOINT AN ADMINISTRATOR WHO SHALL ASSIST THE PRESIDING JUDGE AND WHO SHALL SERVE AT THE PLEASURE OF THE COURT. THE COMPENSATION OF THE ADMINISTRATOR SHALL BE PRESCRIBED BY LAW, AND HIS DUTIES SHALL BE PRESCRIBED BY RULE OF THE SUPREME COURT PROMULGATED AFTER CONSULTATION WITH THE PRESIDING JUDGES OF THE COURTS OF APPEALS. A PERSON APPOINTED BY A COURT AS ADMINISTRATOR MAY BE EMPLOYED BY THE COURT IN MORE THAN THAT CAPACITY, AND THE COURT MAY EMPLOY ADDITIONAL PERSONNEL, AS MAY BE PRESCRIBED BY SUPREME COURT RULE, NECESSARY TO CARRY OUT ITS FUNCTION."

The provision is self-explanatory. The basic concept of having an administrator assist each presiding judge would be to take the administrative detail work off his shoulders. Such a person would prepare statistical material on the courts for the supreme court. Since in some districts there would not be sufficient justification for having a full-time administrator the provision allows him to be employed in some other capacity also. His duties would be prescribed by supreme court rule but the Constitution would provide that such rules could be promulgated only after the court had consulted with the presiding judges. The presiding judges are the ones with whom

the administrators would have to work so it seems appropriate to give presiding judges a role.

Mr. Montgomery - This follows the rationale of the centralized location and district creation, rather than viewing the court as an instrument of local government.

Judge Leach - I don't think that the creation of the administrator is necessarily dependent upon the establishment of one central headquarters. The two provisions aren't necessarily interdependent.

Mr. Nemeth - They are not inextricably tied together as such. There would be a use for an administrator even if there were no central office.

Mr. Montgomery - The provision is mandatory. Does this mean that one would have to be appointed in a district where not necessary?

Mr. Evans - I think that what is mandatory is that some person be designated to assume these functions which the court would prescribe. It is quite conceivable that the person might devote only a portion of his time to these administrative duties.

Mr. Montgomery - In some instances perhaps the clerk of courts of the most populous county would get the job?

This was tentatively agreed to. The administrator could be anyone on the court of appeals staff. Mr. Nemeth expressed doubt that the clerk of courts, who is a separate elected official, could simultaneously be an employee of the court of appeals. There might be a conflict of interest there, he thought.

Mr. Montgomery - What is done now?

Judge Radcliff replied that courts have administrative personnel bearing other job titles. For example the administrative assistant to the court in Franklin county might be constable or court reporter. He expressed agreement with the concept that courts of appeals should be able to have administrative personnel paid as such. He agreed, too, that the need for an administrator is particularly pressing in metropolitan areas. He questioned the mandatory aspect of the provision.

Mr. Montgomery - What kind of justification is there for the mandatory language?

Mr. Nemeth - It would impose a uniform system of employees and an established order of administrative responsibility from the supreme court on down. There would be one person in every district to whom the administrative director of the supreme court could look for certain information and for the fulfilling of certain functions. We have heard some testimony to the effect that some of the judges, because of their position as presiding judges, have to devote time to administrative detail (such as filling out reports for filing with the supreme court) with which they would prefer not to be bothered.

Mr. Montgomery - But each judge could decide whether administrative matters were cutting into his time, could he not?

Mr. Evans - But by the provision that the person can do other things the job need not be a full-time one.

Judge Radcliff- No reports are required of the courts of appeals. Reporting is done by the clerks.

There was general discussion about reporting requirements. Statistical reports are filed by the clerk of courts, according to Judge Radcliff. The chief justice can require and has required additional reporting as part of investigations of backlog. But this is not done on an annual basis, he explained. Mr. Guggenheim indicated that he preferred to defer to persons more expert in the field. He questioned whether expense could be a factor if the provision is mandatory and an administrator is not required in every district. It was pointed out that the administrator could serve many functions--e.g. as secretary to the judge or in other capacities as needed. It was agreed by all that every court would need an employee.

Mr. Nemeth - This committee has discussed in the past the value of being able to monitor work load--of every appellate case, for example--and of being able to report to the supreme court where the workload is the heaviest so that the supreme court can shift cases from district to district. It we adopt such a concept, then in the future I think that there would be more administrative detail.

Mr. Guggenheim said that he supposed that judges would want their own employees for such a purpose and that he could understand their preferring their own secretaries for the purpose over the clerk of courts. The clerk of courts, he said, might or might not have the judge's interests at the top of his calendar, so that the judge's preference on this score would be understandable.

Mr. Montgomery - Maybe we're having trouble with terminology here. Maybe we don't have to call him administrator. That connotes to me someone who manages something. What we seem to be talking about is more or less an executive secretary. Someone should be designated to keep what records are required by statute and supreme court other than the judge himself.

Mr. Montgomery suggested that for the moment the discussion should no longer be pursued. He indicated that he believes there are two sides to the question.

Mr. Montgomery then asked Mr. Nemeth to capsulize the provisions of Section 5 for the benefit of the committee and participants at the meeting. The general subject of the section, it was noted, is transfer of cases, and Mr. Guggenheim in particular had some questions about requiring consent of the parties. His concern, he said, was the purpose of the section. If it is designed to alleviate inequitable workloads, his question was whether consent of the parties should be required.

Mr. Guggenheim had to leave, and Chairman Montgomery said that Section 5 would be reviewed and a record made for all committee members. He stated that on June 17 two mandatory propositions would be up for decision--i.e. a mandatory central office and a mandatory administrator. And a decision on Section 5 (D) can also be made at that time, he said.

Mr. Nemeth - Section 5 (D) would provide for the possibility of the supreme court and the courts of appeals transferring their original jurisdiction cases downward--the supreme court to the court of appeals and common pleas courts and the courts of appeals to the various common pleas courts within their district. This section would also provide for the possibility of transferring court of appeals cases from one court of appeals district to another court of appeals district. All this would be done upon application to and approval by the supreme court. The way the provision is

drafted, it would require not only the consent of the receiving court but also that of the parties. This is a constitutional provision that is still rather new and rather rare. Most of the states permit transfers from one court to another or from one district to another by statute, if they permit it at all. There are a good number that do. Many of them require the consent of the parties. But a provision such as Section 5 (D) goes beyond that. Constitutional provisions incorporating this type of flexibility do exist in some of the more populous states, as a means of managing the docket. Both New York and California, for example, have provisions permitting the transfer of cases from one court to the other or from one district to the other. In neither of those states is consent necessary. For comparison, I'll read the present California provision, which was incorrectly identified in the memorandum that accompanied this draft as Art. VI sec. 4 (C). It should have read Art. VI, sec. 12. This section 12 of Art. VI reads as follows:

"The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction."

The predecessor section of this one, the section 4(C), enacted originally in 1928, was interpreted to give the Supreme Court absolute discretion. It needs to give no reason for transfer. There are as many variations on this theme as there are states which allow it. In New York, not only is it possible to transfer appellate cases from one court to another but the supreme court (the trial court there) can transfer cases from one court to the other. Again, this can be done without the consent of the parties involved. In New York the court of appeals handles the problem quite differently. Here is Art. VI, section 4 (g) of the New York constitution:

"Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments, at a meeting called by the presiding judge of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination."

The reaction to the New York provision on the part of participants at the meeting was one of general disfavor. Mr. Nemeth explained that section 5 (D) of the Draft was not based on a comparable provision elsewhere. Mr. Montgomery noted that Judge Guernsey had suggested the idea of transferring cases, not just judges, and that the committee had liked the flexibility that such a suggestion afforded. He invited comment from members and participants.

Mr. Manning - I'd simply like to say that if you leave the matter to the consent of the parties, I don't think that it will work. I think that if the idea has validity the power should be vested in the supreme court.

Mr. Montgomery - What authority is there now to transfer cases with consent?

Judge Leach - Judges are transferred now. As a practical matter, however, the Constitution provides that in addition to all powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Pursuant to that, the supreme court adopted rules of superintendence for the common pleas courts and pursuant to that they have just proposed rules of

superintendence for the municipal courts. They have never actually adopted superintendence rules for courts of appeals but they have the power to do so. It seems to me that the court could adopt the substance of 5 (D) from time to time by rule. The court could adopt rules and change them for great flexibility. I think that to put these proposed provisions into the constitution is to defeat the broad flexibility of the existing language.

Mr. Nemeth - As written, this section provides that transfers would be accomplished by application made to the supreme court, under its rule making powers.

Judge Leach - However, the present Constitution has, in effect, delegated to the supreme court broad power to adopt rules within this general field of superintendence. This would take away the broad power and tie the court down to specifics in the case of a transfer.

Mr. Montgomery - Do you think that the present power is broad enough to cover transfer of cases?

Judge Leach - Certainly, if the supreme court chooses to adopt a rule on this matter.

Mr. Montgomery - Without consent?

Judge Leach - Yes.

Mr. Nemeth - Would it have power to transfer original cases downward? If the interests of justice required?

It was agreed that what was being talked about here are the original writs. Judge Leach said that he believed that transfer down from supreme court to court of appeals, for example, would go beyond the rules of superintendence. It was agreed that this involves a problem of conferring jurisdiction.

Mr. Montgomery - Aren't these cases the troublesome ones?

Judge Leach - However, if cases are transferred from the supreme court to the court of appeals and they are under the Constitution appealable as of right to the supreme court, the result is an exercise in futility and delay.

There was some discussion about the original writs, using habeas corpus as an example. Some expressed the view that for the supreme court to send cases down to the court of appeals or common pleas court and have the same case come back up to the supreme court as an appeal on the record accomplishes nothing more than appointing a referee in the first instance to make a record. Judge Leach pointed out that legislation was adopted several years ago, at the behest of the judges from Cuyahoga County, to allow the transfer of cases from common pleas to municipal court. This was adopted as a device to remedy backlog and delay in common pleas court. He said that it was his understanding that the legislation has not worked because by the time the cases are examined for purposes of transfer many could be decided. There has apparently been no use of the statute in areas other than Cuyahoga County.

Mr. Montgomery pointed out that here the group was discussing "vertical" transfer, and he asked if "horizontal" transfer creates any problems. It was pointed out that there are disparities in the degrees of conscientiousness on the bench. Judge Radcliff pointed out that the industrious judge has his own work current, and is willing to

serve on assignment. He had reservations about substituting transfer of cases, he said, because cases might be transferred to a county where a backlog exists. The system would not be without its problems. He also pointed out that a change of venue under the rules of procedure no longer requires consent of the county where the case is sent. As a result, he said, he had seen cases sent from a county where the court had a backlog to a county in worse shape. Visiting judges had to be employed in such situations.

Mr. Montgomery - Do you think that the idea of case transfer has any merit?

Judge Radcliff - I do, but I think that case transfer requires the exercise of great care.

Mr. Nemeth - Even if a provision such as this one were incorporated in the Constitution, the possibility of assigning judges would still be there.

Mr. Montgomery - If the possibility of horizontal transfer already exists, is there a need for such a provision? This is the question we are probing.

Judge Leach - I think that from the caseload standpoint, the ability of the court today to assign a judge to hear a case or add to the number of judges sitting on the court of appeals or to have two panels, coupled with the power of the supreme court, as yet unexercised, to adopt rules of superintendence providing for lateral transfer, should handle the problems. I think that the supreme court has such power. As for vertical transfers--i.e. from the supreme court to a lower court--I do not see the value inasmuch as cases can be appealed anyway. I can understand the problems discussed by Judge Guernsey relative to habeas corpus and that sort of thing because as a member of the supreme court and court of appeals I would have been happy to have been able to dispose of such "cats and dogs"--but they are going to come back up on appeal. I am afraid that if such a provision as 5 (D) is adopted there are going to be certain courts which will transfer all of these cases. The results could be bad both politically and judicially.

Mr. Montgomery - It seems to me that a better case can be made for transferring cases at the appellate level where you have the choice of transferring one case of transferring three judges.

Judge Radcliff then spoke of the use of retired judges, pointing out that in the 9th District Court of Appeals in which most of the caseload is in Summit county, there are two judges who had to retire on account of age. They sit on the court regularly, he said. This helps the court in that district because the judges live in Akron and no traveling is required.

Mr. Montgomery asked for staff comment.

Mrs. Eriksson - Judge Leach mentioned that some courts might perhaps abuse the power of transfer, but it should be noted that this provision requires that it be done pursuant to supreme court rule. As I read the provision, it does not permit the court itself--either appellate court or common pleas--to make this decision except pursuant to supreme court rule and supreme court order.

Judge Leach - Do you mean a general authorization or a specific directive as to each individual case transfer? (The response was specific.)

Judge Leach indicated that if so, he felt that the supreme court would be overburdened to the point of not being able to handle its own caseload.

Mr. Montgomery then asked staff to summarize from the transcript of these proceedings the pros and cons of the three items of controversy. He announced that the next meeting of the committee would be on June 17, 1974 at 10 a.m. He added that he felt that the discussion had been helpful and that the draft was useful for discussion purposes. Mr. Nemeth added that of the proposals under discussion most have been tried in one form or another in other states.

Mr. Montgomery then asked for ideas of topics for future meetings. It was agreed that a couple of items concerning the supreme court and called to the staff's attention by Justice Herbert would be presented to the committee. Mr. Manning indicated that he would review Bar Association files for material on supreme court structure. There was a general consensus that there are no major changes to consider in this area.

At the next meeting the committee will reconsider the court of appeals, whatever is brought to its attention concerning supreme court structure, and possibly begin with judicial selection.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
June 17, 1974

Summary

The Judiciary Committee met at 10 a.m. on Monday, June 17, 1974 in Room 10 of the House of Representatives. Present were Mr. Guggenheim, who chaired the meeting at the prior request of Chairman Montgomery, and Mr. Skipton, Mr. Mansfield, and Dr. Cunningham, as well as the Honorable William D. Radcliff, Administrative Director of the Courts, Mr. Robert Manning of the Ohio State Bar Association, Bar Association Consultant E. A. Whitaker, Director Eriksson and staff members Mrs. Hunter and Mr. Nemeth.

Action on the minutes of the last meeting was postponed until the next meeting because they were not available.

Mr. Guggenheim called the committee's attention to a letter dated June 6, 1974 from Judge Joseph Kerns of the Second Appellate District in which the judge expressed reservations about the proposal for mandating creation of a principal seat in each appellate district. Judge Kerns' proposal would instead make creation of a principal seat optional; on the other hand it would require rather than permit the court to conduct business in every county of its district. Mr. Guggenheim invited comment on the letter.

Mr. Skipton - What is the status under present law? Don't appellate courts have one county in which they meet on a regular basis?

Judge Radcliff - No, the Third District is the only one where this is true. The rest of the courts ride circuit.

Mr. Skipton - If you wish to communicate with the court, to whom do you write a letter?

Judge Radcliff - To the presiding judge. It can be sent to any county in the district and the clerk of courts will see to it that the presiding judge receives the letter.

There was some discussion about the relationship of the clerk of courts to the court of appeals. The question was raised about whether the clerk in each county acts on behalf of the court of appeals and to what extent the proposal for a court of appeals administrator would replace the clerk with such an administrator. Judge Radcliff indicated that if there were a single principal seat and an administrator there, a transfer of responsibility could take place. At the present time, he explained, the clerk of courts, as an elected official, has statutory duties, one of which is to act as clerk of the court of appeals. He stated further his belief that ultimately clerks will have to be appointed by the court and that their clerk-type duties would relate to certificates of title and issuance of licenses. He said that there are disadvantages to having completely independent official handling the business of the court.

It was agreed that the body of Judge Kerns' letter should be incorporated into the summary of the proceedings of the meeting (it is attached hereto), but that the merit of his criticism would be covered in the discussion of pro's and con's of matters covered by Court of Appeals Draft No. 1, concerning which the committee had a memorandum before it.

Mrs. Hunter proceeded to discuss this summary of the pro's and con's as these evolved from the meeting of the committee on June 4, 1974.

Mrs. Hunter - At the last meeting there were four matters that were discussed but upon which decision was postponed. This memo summarizes the discussion at the last meeting. It is hoped that at this meeting the committee will be able to reach a decision on some or all of these matters.

The first point relates to the method for the selection of a presiding judge in the court of appeals. At the present time, there is no constitutional provision for the selection of a presiding judge. The provision is statutory. The present statutory method is for the elected judge in each district who has the shortest period of time left to serve in his term to be presiding judge. The proposed change would be to incorporate language similar to the language governing the common pleas court into Section 4 and would provide that the judges of each court of appeals elect one of their number to serve as presiding judge. Some of the points mentioned in favor of putting such a provision into the Constitution were that the present statutory method of selecting a presiding judge takes no account of the judge's administrative ability or of his willingness to assume administrative duties. Nor does it take into account his acceptability to other judges on the court. A second point in support of incorporating such a provision is that selection should be governed by constitution--and that the proposed provision has precedent in the present Constitution. The examination of how some other states have handled this include the popular election of the presiding judge of the intermediate appellate court, or the appointment of such a judge by the supreme court chief justice or the governor. Of these alternatives the change incorporated in Draft No. 1 seems to be more logical, and the most consistent with the Ohio Constitution. It was also brought out in the discussion last time that the present statutory provision for selecting a presiding judge in each district has not been followed in at least one area of the state. These three points were made in support of including provision for selection of a presiding judge in the Constitution.

On the other side, it was mentioned that the statutory provision works well, that only in the court of appeals of the Eighth District and the Tenth District--Cuyahoga County and Franklin County--is there a necessity to have a special provision, because one district has five judges, the other six. In these two districts, it was pointed out, selection can be controlled by local rule. It was also mentioned that there is little work of an administrative nature in most districts and that therefore there is no imperative need to incorporate in the Constitution a provision for selecting a presiding judge.

Mrs. Hunter then invited other comments as to whether a provision relative to the selection of a presiding judge in each district ought to be included in the Constitution.

There was discussion about one purpose of the statutory provision-- giving status to the judge with the shortest remaining term--and a question was raised about whether this practice would not be likely to continue. If so, it was noted, it would be optional, and not mandatory. A judge's colleagues would be responsible for according to the presiding judge selected that honor. At present, the attainment of the position is automatic, by statute. Discussion of the fact that the present statutory arrangement is sometimes ignored explored the reasons for such a situation--i.e., that when a law is too restrictive, it is ignored with impunity. Mr. Nemeth indicated that he believes it desirable to set up a constitutional framework that is flexible enough so that provisions such as these are not ignored.

Mr. Mansfield moved to adopt the proposal for the selection of presiding appellate judges.

Mr. Skipton seconded.
Adoption of the proposal was unanimous.

Mrs. Hunter - The second change in the proposal considered last time was to add constitutional language requiring the court of appeals to select one of the counties in the district as its principal seat, and to maintain its office there and ordinarily to conduct its business there. At the present time, there is a statute which allows the court of appeals to select a county in its district as its principal seat. This is a relatively new statute. The present Constitution provides that the court shall hold session in each county of the district "as the necessity arises." The provision on travel would be changed from a mandatory to a permissive one. In other words, the court would still be permitted to travel from county to county, and the provision would read as follows: "In the interests of justice, the court may conduct business in any county in its district", rather than to require that the court shall hold sessions in each county of the district. But the selection of a principal seat would be required.

One of the arguments made in behalf of this proposal was that such a proposal would, in the long run, result in more effective use of judicial time and in improved court administration. One office in the district would have the responsibility of checking the status of all appellate cases in the district, and administration at the state level would be improved by the improved ability to monitor the overall workload and determine the need for assigning judges or transferring cases. The present provision in the Constitution that the court shall hold sessions in each county has been interpreted in at least one district to mean that the court is compelled to go to a county even if there is only one case filed there. One idea of having a centralized office would be to promote the transfer of cases, which, hopefully, would result in savings of time and money.

Mr. Nemeth - In the district alluded to, the court not only goes to every county where there is a case filed, but the movement of cases is not permitted. The court files a calendar with the Secretary of State once a year, as required, and then does not take up cases in any other order except as specified on the calendar. A case in county "X" may be ready for hearing in January, let us say, but if the court is not scheduled by the calendar to go to that county until June, the case waits from January until June for resolution. The number of courts that operate in this fashion is not known for certain.

Mr. Mansfield - Do I understand correctly that the court of appeals has no power now to schedule a hearing on a case that has arisen in a county other than that in which the court proposes to hear it?

Mr. Nemeth - By agreement of counsel, I believe that a case can be transferred.

Mr. Mansfield - There is some leeway then. I think that there is merit to Judge Kerns' suggestion. That is, as I understand it, he would have the selection of a principal seat permissive instead of mandatory, but he would require the court to sit in every county in its district.

There was discussion about the fact that the latter portion of the Kerns proposal is already in the Constitution. That is, the court is required to "hold sessions in each county . . . as the necessity arises." The meaning of the clause "as the necessity arises" was questioned. Apparently, it has meant "whenever a

case is filed in a county" to some although a divergence of opinion among appellate judges was recognized.

The statute authorizing designation of a principal seat has apparently not been used. Mr. Nemeth said that in one district a central place has been designated, but whether the designation was made pursuant to statutory authority is not clear. The Third District Court of Appeals sits in Lima, but the action has apparently been based on custom. The Court on occasion travels--for example, in the case of the Marion Correctional Institution it may at times be easier for the Court to go to the Institution than for litigants to go to the Court. The arrangement is, however, apparently informal in nature.

Mr. Nemeth - No court in the state has used the statute to designate a principal seat, to our knowledge. One of the consequences of making a constitutional provision on this subject permissive is that it will be used little if at all. Only a constitutional mandate is likely to result in significant centralization.

Mr. Mansfield - However, I fear that if designation of a principal seat is mandatory, desire to travel will be reduced.

It was agreed that travel would be reduced but that case disposition would be expedited. Mr. Mansfield asked if courts of appeals have lagging dockets. Judge Radcliff indicated that only one court--the First District Court in Cincinnati--has significant backlog problems. The statutory provision on principal seat designation was enacted in large part at the behest of the First District, he noted. The aim was to pass part of the costs around the district and relieve Hamilton County of part of the financial burden. It was the hope that, in this way, more law clerks could be hired and the staff increased in order to cope with the backlog. Cuyahoga County, too, has lots of cases, but also lots of judges, he said. (It has six). Mr. Mansfield noted that as a practitioner he had heard of few problems involving getting cases heardon time in the court of appeals, as opposed to common pleas court.

Mr. Nemeth - As a sidelight perhaps it bears bringing up again that among the states which have courts of appeals (and about half of the states do) Ohio is the only one where judges still ride circuit. In the other states either the court meets in the capital city or else it meets in several designated cities around the state. No other state constitution directly or by implication requires courts to touch every county.

Judge Radcliff - Mr.Chairman, may I give you a little history. The first intermediate appellate court in Ohio was established in about 1879. It was a District Court, composed of the trial judges sitting en banc--virtually reviewing their own work. The next step was the creation of the Circuit Court. In 1912 the system was reworked again, and it was decided that instead of a district court or circuit court, a court of appeals for every county was to be preferred. The proposal for a principal seat would be reversal of the position adopted in 1912. Of course, in 1912 the state had about one-third the population that it does today. Travel was more difficult, and it was easier for three judges to go out for ten cases pending in various counties than it was for the parties and the relatively few attorneys to travel to the court.

Mr. Mansfield asked Judge Radcliff how the appellate judges feel about the present system. Judge Radcliff said that it was his view that, in general, the

judges are satisfied with the system. Mr. Guggenheim asked about the purpose of both portions of the proposal--i.e., one having to do with a centralized office and the other eliminating the requirement for riding circuit--specifically, if both are aimed at improving efficiency of the court of appeals. Discussion on this point reverted to the possibility of making the constitutional provision for a centralized seat permissive instead of mandatory.

Dr. Cunningham - That would bring the parochialism of today's time and needs into the Constitution. I would favor centralizing the court--having one county designated as depository for records of the court. I endorse the regional court concept.

In the ensuing discussion it was further pointed out that Ohio has one of the lowest ratios of population to number of court of appeals judges. It was suggested that thirty-eight such judges (as created to date) may be an excess number in statewide terms, but that the constitutional framework prohibits the use of judges in the most efficient manner. Mr. Nemeth suggested that the questions before the committee are ultimately related to the matter of judicial selection, since the main reason for the popularity of the present system appears to be the opportunity to travel about the district for election purposes. It was agreed that if the method for selecting judges were changed to one based on appointment, the urge to ride circuit might dissipate. Mr. Guggenheim suggested deferring decision on centralization and travel until the question of selection was settled. The committee agreed.

There was discussion of the advantages and disadvantages of having the clerk of courts serve as clerk of the court of appeals and the general conclusion was that a regional clerk would end disparity of practices and introduce uniformity; but, on the other hand, the local clerk apparently provides more convenience to attorneys.

Mr. Mansfield repeated his reservations about lessening public convenience and public preference by changing the system.

Mr. Skipton - We have to keep in mind service to the public. But I am disturbed by the reported situation in which the court of appeals says that until it reaches county "X" on its schedule, regardless of the importance of a case, it is postponed for hearing because of the court's travel schedule. That bothers me.

Mr. Mansfield - It bothers me, too. But if I understand correctly, there isn't anything to prevent a court from correcting that. It's simply poor administration.

Mr. Guggenheim asked if there were consensus on either matter--(1) required centralization and (2) changing circuit riding from a mandatory to a permissive provision.

Mr. Skipton - I would not have a provision such as this one in the Constitution unless it had direct effect upon the quality and amount of justice rendered to the people. If it would not have such effect, I would not favor including it.

Mr. Mansfield - If we change the principal seat provision to a permissive one, we will simply be repeating the already existing statutory provision, is that correct? (The response was affirmative.) I would have no objection to incorporating the statutory provision into the constitution, but I hesitate to make it mandatory.

Mr. Nemeth - There is some question, of course, about whether the General Assembly had the authority to pass that legislation in the first place, in view of the present

constitutional framework.

Mr. Mansfield - I can understand that such a question exists, and to that extent I can see some merit in incorporating it into the Constitution, inasmuch as the legislature may have been without power to do what it did in enacting the statute.

Mr. Mansfield also said that he endorsed both points in Judge Kerns' letter--that he would have principal seat designation permissive and traveling mandatory.

Dr. Cunningham - My feeling is that we should centralize the location of the court once the area within which it functions has been determined. I favor the mandatory position for purposes of administrative centralization and the administration of justice in the broader sense.

Mr. Nemeth said that if the committee consensus is that there ought to be a constitutional provision on this point and that it should be permissive, then perhaps a language change is in order, but that he had a question whether the travel provision in Judge Kerns' suggestion is more clear than what is presently in the Constitution. This is something that could be further considered, he said.

Mr. Mansfield stated that he thinks that an interpretation of Judge Kerns' suggestion is that if a court exercises its option to designate a principal seat, it should be compelled to travel to the other counties. He repeated his concern about taking the court away from the people.

It was also agreed that although deferring decision until after judicial selection is considered might help, it would not affect Mr. Mansfield's concerns.

Judge Radcliff was asked for his personal opinion. He replied that he is committed to the notion of having the court in every county, particularly in rural areas of the state. He sees this system as bringing government to the people. He also stated that he has no objection to authorizing a court to select a principal seat and cited as examples of courts already very centralized--the Sixth District Court in Toledo, the Fifth District Court in Canton--(where two judges of that court live), as well as the courts in Columbus, Dayton, Lima, Cleveland, and Akron. In the Ninth district, for example, he said, there are four counties--Lorain, Wayne, Medina, and Summit--but most cases are submitted in Akron by litigants who do not want to wait until the Court comes to one of the other counties. It is Judge Radcliff's view that the ills that the proposal would correct are not as bad as they could be because the system is pretty effective as it is.

Mr. Guggenheim - I would like to move on. The question apparently is whether we want to put the statutory provision into the Constitution, particularly in view of the fact that there might be a question of the constitutionality of the statute. The mechanism might be of some value to particular courts.

Decision on the question was deferred until after the question of selection is disposed of, with the staff being instructed to investigate the possibility of a provision that would be permissive.

Mrs. Hunter - The next point discussed at the last meeting was putting in the Constitution a provision that would require the appointment of an administrator in each court of appeals. Specifically, the language in the proposal before the committee

would allow that person to serve the court in other capacities, so that there could be a part-time administrator. This is in recognition of the fact that not every court of appeals district would need a full-time administrator. The constitutional provision proposed would also provide that the administrator's duties would be prescribed by the Supreme Court through its rule-making powers and that the Supreme Court would be required to consult with presiding judges of the court of appeals on rules affecting the administrators' duties. At the present time the courts of appeals have no constitutional or statutory authority to appoint an administrator. In fact, statutory authority is limited to the authority to appoint court reporters and constables. Personnel for the court are designated as either court reporters or constables although they might be--and frequently are--carrying out administrative responsibilities.

Some of the points in favor of putting a provision in the Constitution for an administrator for each court of appeals are: (1) that such a provision would provide a means of standardizing reporting practices and other office functions; (2) that a mandatory provision such as this would impose a uniform system of court employees throughout the state and an established order of administrative responsibility from the Supreme Court on down to one person in every appellate district to whom the Administrative Director of the Courts could look for information; (3) that the presiding judges would be relieved of administrative detail. It was pointed out that it is anticipated that administrative responsibility on the part of the presiding judge will increase as recommendations are carried out for overall monitoring of the workload of the appellate courts on a state-wide basis.

The point mentioned against a provision for making the appointment of an administrator mandatory was that although there is a need for administrative personnel, who should be hired and paid as such (not as constables or reporters), this need is primarily confined to the metropolitan areas. Therefore, making a provision mandatory would be inappropriate. It was also pointed out in the discussion that at the present time the reporting from the court of appeals to the Administrative Director of the Courts is done by the clerks of courts and that in general this has not been an undue burden. One of the points made in the discussion was that there may be an inaccuracy in calling such a person an "administrator". There was recognition of the fact that judges need an executive secretary or some such officer whose duties might well be administrative in nature. But it was troubling to some participants in the discussion to require that there be an "administrator" because the term connotes a manager. This may be a matter of phraseology so that if there were some general consensus that there ought to be such a person in each appellate district, perhaps the terminology question could be resolved by rewriting, it was concluded. Perhaps the committee would at this time like to discuss the general question of requiring some kind of administrative personnel in every appellate district.

Mr. Mansfield - What do the courts do now in metropolitan districts? I am under the impression that in our district, the Ninth District, there is a separate clerk for the court of appeals.

Mr. Nemeth - There can't be one.

Mrs. Hunter - But there certainly is an administrator in many districts--going under another designation.

Judge Radcliff pointed out that there has been a secretary in the Ninth District for years, called a court reporter. It was pointed out that there might be specially designated deputies having responsibility for the court of appeals files. Mr.

Mansfield said that case filing in the Ninth District is not done in the office of the clerk of courts but in an independent office attached to the Court of Appeals. It was pointed out that such a situation demonstrates the inconsistency existing from district to district. The practice in the Ninth District, it was agreed, has probably evolved from custom, because there is no statutory authorization for a separate clerk's office. The court employees in question are paid in part by Summit County, with the major contribution coming from the state, said Judge Radcliff. The mechanism for designating employees, he explained, is for the court to prepare a journal entry to that effect--making someone a court reporter, for example--which entry is sent to the Administrative Director. The "clerk" in the Ninth District is apparently a court reporter.

The addition of such a provision for an administrator to the Constitution was questioned as unnecessary surplusage.

Mr. Nemeth - Countrywide, the business of court administration is an emerging profession. There is an increasing realization that a court functions on two levels, one of them--the reason for its existence--being to dispose of cases, and judges alone are responsible for that and should be free to devote a maximum of time to that. The other level of a court is that of being a business. A court system, in order to be run most effectively, in the opinion of many who have studied judicial problems, should be run in a business-like manner. Those persons who are responsible for the business end of the court are, or should be, court administrators. Sometimes persons occupying such positions are untrained in court administration. Many others are so trained, however, and there are a number of programs around the country for such training, including at least one endorsed by Chief Justice Burger himself, namely the Institute for Court Administration in Denver.

Mr. Skipton asked who writes rules for and oversees the courts of appeals. It was pointed out that in Ohio at the present time the Supreme Court promulgates rules for the Courts of Appeals, and supervises them.

Mr. Nemeth - But I do not think that at the present time the Supreme Court could designate by rule that there shall be an administrator.

Mr. Skipton - I'd rather provide that the Supreme Court has power to prescribe some of these things than to say "there shall be an administrator." That to me is putting legislative material into the Constitution.

Dr. Cunningham - It should be statutory. There should be a court administrator of the Supreme Court and an administrator of each of the districts of the court of appeals. And there should be an administrator of each court of common pleas. But the constitution provision should be limited to an authorization to provide for the administration of courts.

It was pointed out, however, that the office of Administrative Director of the Courts is a constitutional one. And it should be, according to Judge Radcliff. But there was opposition from committee members to trying to be more specific with respect to other aspects of the administration of the various courts. Dr. Cunningham said that he felt creation of specific offices and enumeration of administrative duties should be the subject of statute, not the Constitution.

A question was raised about the need for administrative personnel. Judge Radcliff stated that he believes the need to be greatest at the trial court level, where the business of the court is varied and involves many responsibilities of a

diverse nature. The need is not so great at the appellate level, in his view.

Mr. Skipton - I would prefer the writing of one general provision that covers all courts in the state.

There was sentiment to authorize, instead of mandate, appointment of certain court personnel. It was agreed that blanket authority would not necessarily be limited to administrators but could extend to other court personnel as well.

Dr. Cunningham - It is up to the legislature to determine by what names employees shall be called--whether constables, reporters, or what.

Mr. Guggenheim - There seems to be agreement that what members favor is a general authorization for the appointment of administrative personnel.

Mr. Nemeth - Is it the consensus that such authorization should be a matter of Supreme Court rule?

There were expressions of preference for making this a matter of Supreme Court rule, not statute.

Mr. Nemeth - This will pose difficulties if the present method of financing is continued. But if state financing is adopted, it would seem to be the logical approach.

Dr. Cunningham - Once the Chief Justice and the Judicial Council (or whatever body stands in loco parentis to the courts) set forth the judicial budget, it would be up to the legislature to appropriate the money.

Discussion followed about the present methods of court financing. Inasmuch as the Supreme Court and courts of appeals are state financed, Mr. Guggenheim asked whether it would not be possible to write an authorization for these two court levels, regardless of what changes are made at the trial court level.

Mr. Nemeth - Yes, but if we put in the kind of provision that seems to have emerged from this discussion, that provision will cover not only these courts but all courts.

Dr. Cunningham - Precisely. It should do so.

Mr. Guggenheim - Don't we have a proposal for changing the financing of the common pleas courts--one that would relieve the counties of the burden of supporting the courts and place the burden upon the state?

Mr. Mansfield - How are costs borne now? As I understand it, common pleas courts are supported substantially by the counties at the present time. Is there any reason to change that?

Mr. Nemeth - If there is to be a unified judicial budget, the components of which would originate locally but ultimately be channeled to the Administrative Director's office, and presented by either the Administrative Director or the Chief Justice to the legislature, then I could see a number of reasons for changing the method of financing. It would be much easier for the Court to deal with a General Assembly which controls all of the money that the Court is talking about, than to write a unified judicial budget, part of which is financed by local funds and part of which

comes from the state. So there would be a reason to change financing if the concept of a unified judicial budget is to be carried out. I think that the committee has in its past deliberations concluded that it wants to recommend a unified judicial budget.

Mr. Guggenheim - As I read the committee's wishes expressed today, there is a desire for a constitutional provision saying that there may be appointed administrative personnel for the courts, at all court levels, as may be determined by the Supreme Court. Couldn't the financing question be taken up independently of this?

Mr. Nemeth said that he did not have the trial court draft before him but that he believed the matter had already been covered by the committee. Mr. Skipton agreed. Also, the concept of a unified budget has already been endorsed by the committee. The staff was directed to proceed with a redraft along the lines of the committee's wishes with respect to administrative personnel. Mr. Guggenheim then asked Mrs. Hunter to continue the summary of points discussed at the last meeting.

Mrs. Hunter - Finally, the fourth point under discussion was a provision that would allow the Supreme Court to transfer cases arising under the original jurisdiction of the Supreme Court and of the courts of appeals (mainly the extraordinary writs) to lower courts--except for cases where the Constitution vests original exclusive jurisdiction in the Supreme Court. The transfer provision would also allow transfer of cases from one court of appeals to another with the consent of the respective courts and the parties. Transfer of cases would be accomplished by specific directive of the Supreme Court, in the proposal before the committee.

One point made in favor of the proposal was that to allow the transfer of cases as well as the assignment of judges--which is not precluded by the proposal--would give the court system greater flexibility by increasing the alternatives for equalizing the caseload around the state. A second point made in behalf of the provision was that to allow the transfer of the original jurisdiction cases not only relieves some of the burdens on the appellate court but cases transferred to the common pleas court are heard, in the first instance, in a forum better suited to the exercise of original jurisdiction. Thirdly, the provision would not foreclose assignment but increase administrative alternatives. Finally, the power to transfer would be exercised pursuant to specific directive of the Supreme Court pursuant to rule, and this aspect of the proposal, it was felt, would minimize the chances for its abuse.

A point made in opposition to including the transfer provision in the Constitution went to the requirement that the parties would have to consent to any transfer. There appeared to be unanimity of objection to including this consent requirement, based upon the fear that it might make the provision unworkable. Judge Leach expressed the view that under the constitutional provision giving the Supreme Court general superintendence over all courts of the state, that court may adopt superintendence rules for the court of appeals that could incorporate a provision for transfer of cases, at least from one court of appeals to another. In his view it would therefore not be necessary and would be undesirable to specify the Supreme Court's authority to do this because it is already included in the broad power of superintendence over all courts of the state. This point would not extend to the portion of the proposal having to do with transfer of cases from appellate to trial courts, however. The two matters should be considered separately.

It was also felt that if the transfer of cases from the appellate courts down to the trial courts is allowed, this will not accomplish anything in the long run

because the cases are bound to come back up on appeal, and this provision simply allows the insertion of another step. Under such a view, it might be better for the Supreme Court or court of appeals to handle the matter in the first instance. It was also suggested that if the proposal as written requires the Supreme Court to direct the transfer in each instance, this might overburden the Supreme Court, so that this aspect of the provision ought to be reconsidered.

Mr. Skipton - What is the problem in this state that the provision attempts to solve?

Mrs. Hunter - This provision addresses two problems. Judge Guernsey expressed the position that the original jurisdiction cases clutter appellate dockets, and there should be authority for the appellate court to transfer these cases to the trial court level.

Mr. Skipton - Is the original jurisdiction conferred by the Constitution?

Mrs. Hunter - Yes.

Mr. Skipton - Is this not working at cross purposes? Why not repeal the jurisdiction provisions?

Mr. Nemeth - There is a good deal to be said for leaving original jurisdiction in an intermediate appellate court, particularly with regard to its supervisory powers over the lower courts. But the feeling was expressed before the committee that in some original jurisdiction cases, such as habeas corpus, perhaps the common pleas court is a more appropriate forum because the common pleas court is more attuned to the reception of evidence, and so forth. Courts of appeals are used to working with prepared records and briefs. In some instances, justice would be served if an appellate court were permitted to transfer an original jurisdiction case down to the common pleas court.

Mr. Mansfield - Was any thought given to changing the numbers or kinds of matters in which the court of appeals has jurisdiction?

Mr. Nemeth - There was no suggestion in this regard.

Mr. Mansfield - I'm not inclined to believe that it is great inconvenience for the court of appeals to call in a court reporter and take testimony.

Mr. Nemeth - Some courts have had problems. For one thing this is not only because of the lack of a ready court reporter, but because some court of appeals judges have had no trial court experience and are not comfortable with the situation where they are the court of first instance.

Unfamiliarity with the rules of evidence was cited, but Mr. Mansfield said that he doubted that the reasons cited were legitimate. These are extraordinary remedies, he said, and then asked if the court of common pleas has any jurisdiction in regard to them at the present time. Common pleas courts have habeas corpus jurisdiction but not jurisdiction in the high prerogative writs, Mrs. Hunter said. It was also pointed out that even though common pleas courts have habeas corpus jurisdiction, if the habeas corpus writ is filed in the court of appeals, the court of appeals now has no choice about handling the matter. Judge Radcliff pointed out that special masters are appointed for purposes of handling these matters and that the Supreme

Court does not take testimony.

Judge Radcliff said that he had no objection to lateral transfers but that he questioned vertical transfers. Mr. Mansfield agreed, but asked if that couldn't be done now. Judge Radcliff indicated that lateral transfers cannot be made at the present time. Mr. Guggenheim then asked about requiring consent of both the courts and parties in transfer cases. There was general agreement that consent of the parties should not be required if the provision is to have meaning.

Mr. Mansfield - I think that Judge Radcliff makes a good point. I think that we should keep the lateral transfer provision but drop the requirement for consent of the parties.

Mr. Guggenheim asked if there were any disagreement with that position. No objection was voiced.

Mr. Guggenheim then asked Mr. Nemeth to continue on with the agenda before the committee. Mr. Nemeth said that the discussion on Supreme Court structure would be postponed in the interests of time. Then he distributed Research Study No. 36, having to do with judicial selection and briefly summarized its contents. This is the next major topic that the committee will consider.

Mr. Nemeth - This memorandum summarizes the five currently used methods of judicial selection. Some states use gubernatorial appointment, and some require the subsequent approval of the legislature, or one house thereof, or some body specially created for the purpose. A second method is legislative selection, in which the legislature designates who shall be judges. A third method is nonpartisan election, in which judicial candidates are prohibited from being formally associated with a political party on a general election ballot (although they are sometimes nominated in partisan primaries--as in Ohio). A fourth method is partisan election. A fifth method is the appointive-elective method, which has also come to be known as the merit plan or the Missouri plan. Missouri was the first state in the union, in 1940, to adopt it by constitution. It should be pointed out that the Missouri Constitution does not mandate merit selection of all judges. It merely permits the legislature to enact enabling legislation, and pursuant to this the people of Missouri have chosen to select all Supreme Court judges and court of appeals judges on the merit basis, and in two metropolitan areas the trial courts are selected on this basis.

The appointive-method plan seems to be the trend. In the last 25 years, there hasn't been a state which has changed its method of selection to anything but the appointive-elective method. The memorandum points out the states which now use this method, either in whole or in part. It also touches upon the history of judicial selection in the United States and in Ohio. The last portion of it (pages 4 through p. 10) discusses the pro's and con's of the various alternatives.

Mr. Nemeth also distributed copies of the Fall 1973 Cincinnati Bar Association Journal dealing with judicial selection. Mr. Mansfield said that he assumes that there are variations on the Missouri plan and Mr. Nemeth assured him that there were and that the variations would be discussed. The history of the plan and its authorship in Ohio were discussed. Mr. Skipton asked if the material to be considered would cover the ethics of advisory groups, and Mr. Nemeth said that this topic is not included in the judicial selection memorandum.

Finally, Mr. Nemeth asked for suggestions of people to invite for the purpose of addressing the committee on the subject of judicial selection. Many people have already made contact with the office, he said. Dr. Cunningham suggested a pro and con presentation from the Ohio State Bar Association.

Mr. Mansfield raised the question of bar association polls and whether or not it is felt that such polls and the endorsements that result are effective. This is a matter that varies from community to community and from state to state, according to Mr. Nemeth. The memorandum touches upon this subject with respect to Missouri, he said. There, the state bar takes periodic polls of its members concerning fitness for office of incumbent judges and the results are published. It is believed that such bar polls have quite a bit of effect on the outcome of retention elections there.

The next meeting of the committee was tentatively set for July 8, 1974, at 10:00 a.m. in House Room 10 at the State House.

Court of Appeals of Ohio

SECOND APPELLATE DISTRICT

JOSEPH D. KERNS
PRESIDING JUDGE

URBANA, OHIO 43078

JUDGES:
CALVIN CRAWFORD, DAYTON
JOSEPH D. KERNS, URBANA
PAUL SHERER, DAYTON

COUNTIES
CHAMPAIGN
CLARK
DARKE
FAYETTE
GREENE
MADISON
MIAMI
MONTGOMERY
PREBLE
SHELBY

June 6, 1974

Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Gentlemen:

In perusing a proposed draft of Section 3(A) of Article IV of the Ohio Constitution, which was apparently prepared by the Judiciary Committee of the Ohio Constitutional Revision Commission, I noted the following suggestion:

> "A court of appeals shall select one of the counties in its district as its principal seat and shall maintain its office and ordinarily conduct its business there. In the interest of justice, the court may conduct business in any county in its district."

This edict apparently stems from the notion that everything bigger is better, but after some experience with the garden type of mini-bureaucracies which have grown to infest government in recent years, it seems to me that the following language would be more conducive to efficient administration and uniform application:

> "A court of appeals may select one of the counties in its district as its principal seat and may maintain its office and ordinarily conduct its business there. In the interest of justice, the court shall conduct business in every county in its district."

At one time, the Supreme Court was required to visit every county in the State at least once a year. Manifestly, this would be impossible at the present time. However, there is no valid reason

for widening the gap between appellate judges and the people they are elected to serve.

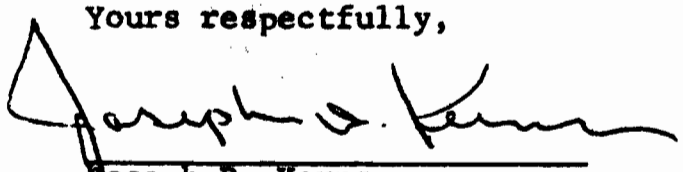
The economic and geographic accessibility of appellate courts is indispensable to equal protection of the law, and we hope that any proposal which, in effect, would render it unlawful to maintain an office or conduct ordinary judicial business in seventy-seven (77) counties of the State of Ohio will be exposed to public scrutiny and debate before being given any serious consideration by the Ohio Constitutional Revision Commission.

At the present time, the suggested constitutional change would directly affect only four of the eleven judicial districts in the State, and "riding circuit" in those districts actually amounts to only one or two days per year in each of the outlying counties. From the standpoint of time, a great deal more can be accomplished with the dockets in those counties through personal visitation than might otherwise be possible through the needless transportation of records and interminable correspondence.

Furthermore, the expense and inconvenience to the residents of those counties, which would necessarily emanate from the adoption of the suggested proposal, would far outweigh the slight inconvenience caused the judges who might be required to visit those counties from time to time.

As a practical matter, the proposed change is worthy of a thesis, but at this time, we merely request that the observation that the amendment is only "change for the sake of change" be given careful and objective consideration.

Yours respectfully,



Joseph D. Kerns

Ohio Constitutional Revision Commission
Judiciary Committee
July 8, 1974

Summary

The Judiciary Committee met at 10 a.m., Monday, July 8, 1974 in Room 11 of the House of Representatives. Present were Chairman Montgomery and committee members Mansfield, Guggenheim, Roberto, Norris, Skipton and Senator Gillmor. Also present were Judge William Radcliff, Administrative Director of the Courts, his assistant Coit Gilbert, Legislative Service Commission representatives Clara Hudak and Don Robertson, Ohio State Bar Association representatives Robert Manning and E. A. Whitaker, League of Women Voters representative Elizabeth Brownell, and staff representatives Nemeth, Evans, Hunter and Director Ann Eriksson. Speakers included attorney John C. Wolfe, President of the Council for Local Judges, from Ironton, Ohio, John A. Lloyd, Jr., member of the Cincinnati Bar, and Kathleen L. Barber, Professor of Political Science at John Carroll University, Cleveland, Ohio.

Chairman Montgomery asked Mrs. Hunter to summarize a short memorandum on judicial terms of office that had been distributed just prior to the meeting.

Mrs. Hunter - This short memo sets forth the provision in the Ohio Constitution on judicial terms and gives some information about other states and the length of terms of judges of various courts. We felt that we should have some information before us regarding tenure because of its relationship to selection and removal, topics to be discussed today. Briefly Section 6 of Article IV provides that the judges of the supreme court, court of appeals, and common pleas court be elected for terms of not less than six years. Section 2 of Article XVII, on elections, says the same thing and that judges of other courts shall be elected for such even number of years not exceeding six years as may be prescribed by the General Assembly.

There is a short history here on the length of terms in Ohio. Under the first constitution, that of 1802, judges were selected by the legislature for terms of seven years. The term was changed by the Constitution of 1851, which designated the terms of common pleas and supreme court judges as five years. In 1905, when Article XVII was adopted, it provided that terms of judges should be such even number of years, not exceeding six, as may be prescribed by law. In 1912 the judicial article of the Constitution was amended to conform with Article XVII and the terms of judges were increased to six year terms.

The table shows terms of judges in the 50 jurisdictions for the court of last resort in each state, the intermediate appellate court in the 23 states that have such a court, and the major trial courts. We find from examining the table and the breakdown that accompanies it that a six-year term is fairly common for all three levels of the judiciary in the various states. However, for the court of last resort, 35 states have supreme courts or courts of last resort with terms that are in excess of six years. Twelve have eight year terms and ten have ten year terms. Of the intermediate courts, ten of the 23 have six year terms. Twelve states have intermediate courts with longer terms. As for the major trial courts, in almost half the states (24) the prescribed term is six years.

The Model State Constitution recommends an appointive system of selection, or, in the alternative, a variant of the Missouri plan. Its provision calls for an initial term of seven years under either alternative which the drafters say provides an opportunity to release judges who could not be dismissed on charges but who, nonetheless, are not thought worthy of a life term, or retention under the Missouri plan.

Mr. Mansfield then asked about mandatory retirement, and Mrs. Hunter indicated

that a longer memorandum would be coming forth that deals with Section 6 more completely and that will discuss mandatory retirement in Ohio and elsewhere. That memorandum will also include a compilation of provisions on judicial compensation in the various states.

Prior to introducing speakers, Chairman Montgomery, noting a quorum present, asked for and received unanimous approval of the minutes of meetings of June 4 and June 17, 1974. (A motion to this effect was made by Mr. Mansfield and seconded by Mr. Skipton).

Mr. Montgomery - This is the meeting in which we have scheduled opponents of the merit system and/or of retaining the present, elective system. We will now hear from Mr. John Wolfe, who is President of the Council for Local Judges, from Ironton.

Mr. Wolfe - By way of introduction, I am John Wolfe from Ironton, Ohio. I am a practicing attorney, primarily engaged in trial work and President of the Ohio Council for Local Judges. This Council is a bipartisan group formed just after the beginning of this year primarily concerned with the implementation of Issue 3, which passed last year, and which removed the right of the counties to have an elective common pleas judge. Our stated purpose is to preserve the right of the people in counties to elect and maintain their own common pleas judge.

I think that you all received a copy of the committee's report, Research Report No. 36, so graciously sent to me as well. I would like to comment briefly on some of the items contained therein.

One of the questions that arises under the elective system is whether or not the judge makes a social decision. In some instances that is true, but who says that this is bad? Judges have always done equity for the benefit of the people. Who are the courts for? They are not for practicing attorneys, and they are not for the legislature. The courts are for the people, and to redress grievances among them. A judge seeking to do equity may tread on the fine line dividing black and white law, and yet do benefit to the most people. One of the comments that has been made is that an appointive judge is freer of influences upon his decision making. But I am sure that you are all familiar with the fact that one can be sworn to do anything, but once you remove the right of the people to replace a judge with someone that they think might better serve the interests of the county or community, you remove some check that you have in the elective system. If you eliminate the elective system, the only controls you have over a judge are the technical controls, where it can be proven that he has breached some ethical tenet that he is required to comply with. Judges have been and will be defeated at the polls. It is not necessarily a political matter. I speak from experience. My home county is over 60 per cent registered Republican, and the common pleas judge for 19 years was a Democrat. I don't think that the people took into consideration any more than that judge's decisions and what they signify.

One of the problems that arises in the discussion of this question deals with the awareness by the people of their judges. I cannot speak for metropolitan areas because I am not familiar with them, but I do know that in most rural counties the people of the county are aware of their judge--through the media know his name and what he is doing. They know enough to make a decision as to whether they favor him or do not favor him. They say that one of the problems in judicial elections is that the middle or working class pay no attention to who is running for judge because this race is not considered important. I do not think that this claim is

necessarily true. When a judge's decisions come to the point of favoring or disfavoring any group, people become aware and motivated insofar as removal is concerned.

The Missouri plan about which there is much talk has some serious drawbacks. They say that only one judge had been removed under the Missouri plan. But the Missouri plan is only in effect in the metropolitan counties of Missouri with regard to trial judges. It has never been implemented in the rural counties. The major trial judges of these areas are elected from the areas they serve.

The appointive system has drawbacks that some of you may not be aware of. Someone has to be recommended before a judge can be appointed. One of the problems here is that ofttimes a qualified, competent trial attorney will be ignored, as will be the people similarly situated. One factor here is that an effective trial lawyer doesn't make too many friends and buddies, and when a bar association has to make a recommendation, it has a tendency to pick a candidate from the middle, who is friendly to everybody and who has not litigated to the extent that on various occasions he has antagonized various members of the bar. Therefore, I think that the people are just as aware, or more so, of knowing the capable trial attorneys who comprise the class from which judges ordinarily come, i.e. the people who have had practical trial experience.

The appointive system, as opposed to what we have now, has some drawbacks. But let me put the question to you this way: What is wrong with the elective system as we have it now? I repeat, I cannot speak for the metropolitan areas because I do not practice there. I have done trial work in nine different rural counties in the southeastern section of the state, and I am not dissatisfied with the judges before whom I've practiced. I found impartiality by those judges. So, why are we talking about replacing a system that is working well and effectively?

I do not know if you gentlemen have had the opportunity to see the results of the poll of the judges of Ohio. The judges were opposed to a complete appointive system 93 to 39. They were opposed to an appointive system at county option 166 to 77. Yet some of the arguments for the appointive system are directly related to the judge--that is, the objection that judges have to go campaigning every six years. Judges evidently do not think that this is too much of a burden. How much of a time loss is there? I submit in most cases very little because the judge who is presiding and is currently holding office, if he is doing a good job, in 99.9 times out of 100 won't be replaced by politics or for other reasons as long as he is protecting the interests of the people.

Under the Missouri plan, where a judge may be removed by referendum, it isn't surprising that only one has been removed. The only determination is that the judge up for retention is unsatisfactory. There is no choice in what you get. So how does the electorate know whether or not they will get something worse? Why vote for a change when you don't know what that change will be?

The legal mistakes that are made are corrected on appeal, but the political and social errors that are made within the court are only corrected through election. Because I submit that the present system is working well, I would ask the committee to think carefully before considering its replacement with a system that has so many serious questions.

Mr. Montgomery - Thank you, Mr. Wolfe. Do members of the committee have questions?

Mr. Mansfield - Mr. Wolfe, as a matter of information, the poll of judges to which you referred, does that cover all judges, or all common pleas judges, or what group does it cover?

Mr. Wolfe - The questionnaires were mailed to 540 judges of all classifications and 345 replied.

Mr. Mansfield - I have another question. Having practiced law for some time and conducted a good number of trials, I am curious about your conclusion that a good trial lawyer makes enemies among his colleagues.

Mr. Wolfe - Not so much "enemies," but I do think that there is a certain resentment. The successful trial attorney may be unaware of the feelings of the organized bar--sometimes they are based on envy or simply distaste over defeat in the courtroom. I don't think that these are outward animosities. But they affect a secret ballot on who is to be recommended for a judicial post. Subconsciously they affect the vote.

Mr. Mansfield - The only evidence I've seen of that sort of attitude is where by coincidence a successful attorney is disliked.

Mr. Wolfe - A common pleas judge has made the statement to me that if selection required endorsement by the bar association he might not have made it. He predicted that he might not have gotten 40 per cent of the bar vote, and after some consideration, I agreed with him.

Mr. Norris - I was interested in your discussion of the Missouri plan as it operates in that state, where you say there is a split between populous counties and nonpopulous counties.

Mr. Wolfe - That is pointed out in Research Report No 36, page 3: "As of this date, Missouri voters have adopted merit selection for all Supreme Court and Court of Appeals judges, and locally for the trial courts of the two metropolitan centers of the state, Kansas City and St. Louis."

Mr. Norris - You made the point which I think is persuasive that in rural counties, as for <u>trial</u> judges, people have some idea about the judges for whom they are voting, at least as compared to metropolitan counties. Do you think that the same argument applies at the court of appeals level? For example, we have multi-county districts.

Mr. Wolfe - I think that it is more difficult for the electorate to be aware of the qualifications of the appellate judges because you keep increasing the size. The largest appellate district, for example, is 11 counties. I agree that in this situation it is difficult for the people to be aware of judicial qualifications. And I think that perhaps in Cuyahoga or Franklin county it is difficult for the electorate to be acquainted with the performance of the judges. For one reason it is difficult for the media to keep track of the judges. Whereas in our county and other rural ones what a judge does is regularly reported in the press.

Mr. Norris - I have noticed that in multi-county appellate districts representatives of small counties have no chance of being elected. One fine trial judge whom I know tried several times to be elected to the court of appeals without success for this reason. He might have a chance for success under an appointive system.

Mr. Guggenheim - Mr. Wolfe, how do you feel about the federal system? Do you think it would be improved by having an elective judiciary?

Mr. Wolfe - I prefer to defer to Mr. Lloyd, who has had considerably more practice before the federal courts. I think that the people would be better served by elected federal trial judges if there were some way to reduce the geographical area from which the judge is selected. The lawyers in the upper half of my county have to drive 170 miles to get to our federal district court and in the meantime they pass two federal district courts--one in West Virginia and one in Kentucky. This effectively limits federal practice in my county. I haven't studied the federal system in depth, but I do think that the security of life time tenure makes federal judges less receptive to--less aware of-- the needs of the electorate of the country.

Mr. Guggenheim - But isn't the purpose of making them appointive to make them less apt to be swayed by temporary political situations?

Mr. Wolfe - Yes, I agree, but we get back to my question: whom should courts serve, practicing lawyers, or the people?

Mr. Guggenheim - Am I correct that you are not necessarily 100 per cent for electing all judges and that you are primarily talking about geography.

Mr. Wolfe - I am talking primarily about common pleas--first level trial judges. I think that it is more difficult for the elective system to work the larger the district.

Mr. Montgomery then asked for additional questions, asked Mr. Wolfe to remain for questions at the conclusion of all witnesses, and introduced Mr. John A. Lloyd.

Mr. Lloyd - Mr. Chairman and members of the committee, by way of identification so that you can understand my background. I practice law in Cincinnati. I am a partner in a very large law firm. Most of our practice is business practice. I do nothing except handle litigation. I suppose that my practice is 75 to 80 per cent federal, although I just finished a week long trial in a state court.

Recently--June 19, in fact--I was arguing in front of the 6th Circuit Court of Appeals for whom I have great regard. Let me say parenthetically that whatever I say is not based on a resentment against any judge, state or federal. My observations are general and reflect I hope the experience and philosophy developed through experience with the whole judicial system. As I say, I was before the 6th Circuit Court and made arguments before the same panel on two different days. I was appealing on behalf of the Bengals a decision in favor of the World Football League. One member of this distinguished panel said to me, "Mr. Lloyd, do the Bengals have any 'no-cut' contracts? Tell us what a "no-cut contract is." And I came close to doing what would have been bad practice, if not worse, by saying "Only federal judges have 'no-cut contracts'".

But I say to you, notwithstanding the great respect I have for the federal judges that I know and have dealt with, I have gone on record in the Cincinnati Bar Journal as being in favor of the elective system.

I don't distinguish between the appointive system, as in effect in the federal system, and the merit system, where theoretically one can be put out of office. I understand the differences--that under the Missouri type plan there are agencies appointed by the governor to make recommendations for judicial appointments and that under the Missouri plan each judge runs against his record, and is theoretically susceptible of being put out of office. But when I say that I don't distinguish

between these systems it is because an appointive system is an appointive system and I have lived long enough to know that you can do just about anything you want to with a commission--rig or stack it or whatever--so if the governor is going to appoint the judges, you might as well let him do it. Examination of the operation of judicial nominating councils, as created by executive order, and now in operation for about 3½ years, makes one point clear--(and by this I'm not intending a sour grapes observation because some of the best judges and public officials are Democrats) but every time that nonpartisan nominating council has recommended someone for judge it has always been the best qualified Democrat in Hamilton county. That is simply recognition of the facts of life.

I don't think that running against your record is worth anything but window dressing without an opponent. So, I don't distinguish between the two systems. Nor do I believe that it is realistic to think that you can remove politics from judicial selection. You shouldn't try. Politics has a role in government and a definite part to play in the selection of judges, and of all public officials. The real question, I suppose, is whether you have the politics of a small clique or the politics of the electorate generally. If I were a member of that clique I might feel otherwise, but I will have to opt for the voters because I think that this is where I am going to find myself.

The theory of the federal judiciary--the "no-cut contract"--is that you elevate a man to some higher level of existence by not making him accountable to anybody. I do not aspire to that place in the social legal hierarchy. I am a trial lawyer and intend to make that my life's work. I am not after a judicial appointment, and I have not ever been a judicial candidate, nor do I expect to be.

A federal judge once told me that he felt that the judiciary ought to be removed from all human temptations, and I thought about that a great deal. I tend to think that this idea is absurd. When one talks of the qualities of the judiciary one speaks of the qualities possessed by all men. That is to say, judges, like other men, have their biases and their prejudices, all based on their experiences and backgrounds. Holmes said a long time ago that the prejudice of a judge has a lot more to do with case outcome than the syllogism. Who wants a locked-in prejudice for life? I would not have that in any place of employment if it can be avoided.

I have written an article on this, and it is my brief. But in the years since I wrote the article I have thought about the matter and have concluded that what we are witnessing today is the simultaneous emergence of two mutually incompatible phenomena in the judicial area. The first is the trend toward the life-time appointive system. The other, equally clear to me, is the emergence of the dominant force of the judiciary in the remolding for the foreseeable future of the social order in the United States. Think about the impacts of decisions of the U. S. Supreme Court in legislative reapportionment and school desegregation cases. I have had experience in both kinds of litigation and am presently representing the Cincinnati Board of Education is a desegregation case. My point is that nine men are very casually and very thoughtfully remolding the social order in material and perhaps irradicable ways. They exert more influence over the lives of the people of the United States than do all members of the Congress and everyone in the executive hierarchy combined. I used to think that this was desirable--when I had the image of nine Oliver Wendell Holmeses, all-knowing and all-fair. What I now see is the development of a "judiocracy"--an autocracy of the judiciary. I think that what we are going to have to decide is whether or not we want this. I am not talking about any

one decision of the U. S. Supreme Court--rather I am talking about the all-encompassing impact of the decisions of a handful of men who are not accountable to anyone.

I would take issue with my brother from Lawrence county on one point. As a matter of emphasis, I do not think that it makes quite so much difference how our trial judges are selected. I have come to the position that I would have the U. S. Supreme Court stand for election every four or five years. The more important the court and the more power it has, the more important it is that it be an elective court. Unless we are ready to discard the system and conclude that popular government won't work, then I think that we ought to come to grips with the fact that judges ought to be accountable. It does no good to emphasize the power of the ballot box with respect to state legislators, congressmen, everyone in the system, in fact, if a few men with "no-cut contracts" are going to make the rules and establish the basic guidelines within which the social order is going to operate. Thank you.

Mr. Norris - One of the arguments for the Missouri plan that I hope holds some water is that it will assist in recruitment. The reason for that is obvious-secure tenure. In Franklin county we have had considerable difficulty recruiting what members of the bar would consider to be top people to seek judicial positions. We have had cooperation from the political parties, but attorneys don't want to give up their practice for uncertain tenure as a judge. What kind of experience in recruitment have you had in Hamilton county?

Mr. Lloyd - I have been active in Republican politics in Hamilton county and involved in recruitment. The trouble we have has nothing to do with elective office--it has to do with salary level. A person making $100,000 a year is not going to be any more interested in taking a position for $35,000 if it's a life time post. That's an extreme example, but the nub of the problem. Good judges who get on the bench don't really have to worry that much about being re-elected. Nor do they have to campaign very hard.

Mr. Mansfield - Mr. Lloyd, it seems to me that your presentation raises some very basic questions. John Marshall and his colleagues settled Congress some years ago, and we will soon see if Justice Burger and his colleagues will settle the executive branch. What I want to know is, are your remarks addressed to the U. S. Supreme Court, or are they equally applicable to courts of appeals, to state supreme courts and courts of common pleas? I guess that what I am trying to say is this: we all in our time have taken cracks at the jury system, and yet no one has offered a better substitute so far as I'm concerned. It'd rather my fate rest in the hands of 12 of my peers than in the hands of one man. There are of course gimmicks for getting around poor verdicts as those of us with the experience know. Aren't you attacking the validity of the supremacy of the judiciary in general? As opposed to, say, peoples' courts?

Mr. Lloyd - When I speak of the wielding of an unwholesome amount of power by judges who are responsible to no one, I suppose that the corollary to this is that we would be better off if the U. S. Supreme Court presided over a uniform system of law as apex of the legal system than we are in the system we have, in which it prefers to avoid what I call legal questions to free itself to be concerned with sociological and philosophical questions.

Mr. Mansfield - Wasn't this always true but not articulated until Brandeis came along? Weren't they inevitably tied in with the social problems?

Mr. Lloyd - Yes, of course. Parenthetically I would prefer a system of federal common law that is uniform throughout the country. But my chief concern is that at a time when we are greatly concerned about irresponsible judicial power is not the time to consider junking the elective system in Ohio.

Mr. Mansfield - That may be, but underlying your presentation is a belief somehow that you can have a country that is run by law and not by men, and I question this.

Chairman Montgomery thanked Mr. Lloyd, asked him also to stand by for questions later, and introduced Kathleen L. Barber, Professor of Political Science at John Carroll University in Cleveland.

Professor Barber - Thank you. I would like to start out with a couple of remarks about judges as policy makers, a matter that was of concern to Mr. Lloyd. I think the conventional wisdom is that judges decide cases; good judges decide them rightly; bad judges decide them wrongly. And we don't often examine the assumptions in this rather simple model of judicial behavior. My argument is that the hidden assumption is that justice is ascertainable--that there is some kind of standard by which you can say that this is just and that is not just. And that if judges were not in politics that they would always make right decisions. Therefore, we will take the politics out of judicial selection and judges will do right. This goal is going to be accomplished by putting judicial selection in the hands of lawyers, who are, of course, infallible. Under the Missouri plan, we ask the bar association who should make decisions for us.

I am going to try to take these assumptions apart. I am taking a different position from either Mr. Lloyd or Mr. Wolfe. I think that our present system is very bad. I think that the Missouri plan is very bad. Both for political reasons. What I will ultimately advocate is the federal plan of gubernatorial appointment with senate confirmation.

I would argue that there are two criteria by which we pick a selection plan for judges. One is accountability, which both Mr. Wolfe and Mr. Lloyd have spoken about--that because judges make policy, we need some kind of accountability in the selection system. If we look at cases--such as an unemployment compensation case--it is not always clear who is right and who is wrong. We can look at questions of public aid for parochial schools, obscenity standards (how we decide whether "Carnal Knowledge" is obscene in Ironton or in Cleveland, Ohio)--all of these things involve values. And it is obviously clear that people have to be involved in the selection of judges in some way.

I think that a distinction has to be made between trial courts and appellate courts, because trial courts affect justice far more broadly in terms of quantitative impact. Certainly, 95 per cent of the cases in the judicial system are decided finally in the trial courts. Somewhere betwen 5 and 7 per cent of cases are appealed, so that appellate judges are dealing with a small selection of cases. But qualitatively they are much more important. And the real policy making decisions are made in the appellate courts, so that I think that the Ohio State Bar Association's advocacy of the Missouri plan for appellate judges only is misplaced. If it is a good thing, it would apply to the trial courts, and we ought to ask shouldn't appellate judges be elected, as Mr. Lloyd suggested, because they are the ones who are making policy, on important policy making questions. So for this reason I think that we have to demolish the assumptions on which our bar associations are advocating the Missouri plan.

The other important criterion is independence, because we would like to believe that the judges are impartial in the decisions that they make. It is important that they have some independence to make a decision once they reach the bench.

Turning now to the disadvantages of the present system of judicial selection--I think that I would look first at the campaign pressures that are placed on judges. I do not agree with Mr. Lloyd and Mr. Wolfe that these are not serious. I think they are very serious, primarily from the view of a large metropolitan county. In Cuyahoga county, the campaign pressures on judges are fierce. First of all, they have to run in a partisan primary, where they have to promise in order to run in a partisan primary that they will uphold the principles of the party. This may be improper for a judge to do, and yet our state laws require a judge to make this acclamation when he signs up to run in a partisan primary. He is committed to uphold the principles of the party, and yet the party gives him little help in the election. Very seldom does the party give money to a judicial candidate. The most it will do is to give an endorsement sometimes in the judicial races and publish the pictures of the judicial candidates in a newsletter that goes out to registered voters in the party. This isn't very significant help. This leads me to the second problem with campaign pressures, and that is campaign finance. The code of judicial ethics forbids judges from taking money from lawyers, and lawyers are the most interested people in the question of who staffs the bench. So what happens is that lawyers' spouses give money to judicial candidates, and when you have a fund raising party in Cuyahoga County for a judicial candidate, you have the party often sponsored by the spouses of prominent lawyers in town. That makes the whole question of lawyers not giving money a fake and hypocritical and therefore, I think, very bad.

The third problem with partisan primaries and elections in general is, what are the issues upon which to run? What kind of issues can a judge discuss when he goes around to the ward meetings? And a judge in Cuyahoga county <u>does</u> have to go to ward meetings, whether he is a Republican candidate or a Democratic candidate. He is introduced at all of the ward meetings, and he is forbidden by the canons of judicial ethics from making certain promises. He cannot say, for example, "I will give you aid to parochial schools," or "I will not give you aid to parochial schools." He can't even say "I will give you more convictions," if the mood of the day is law and order, or "I will give you more acquittals," if the mood of the day is permissiveness. There is virtually nothing a judicial candidate can say except "I believe in better administration of the courts." And then they end up with "My name is . . . , and remember the name", because it turns out that in a nonpartisan elective system, the only clue that is meaningful to the voter is the name. And so the important thing for the judicial candidate to get across is <u>name</u>.

I think more serious is the nonpartisanship of the judicial ballot. Much as we may criticize the partisan election of judges in the primary, the nonpartisan elections are worse. The lack of the party name on the ballot deprives the candidate of any opportunity to communicate the significance of his election to the voters. Parties of judges do reflect values, just as they reflect the values of legislators and executive branch members. It is now well documented in social science research that the policy preferences of judges are best measured by party affiliation, particularly in economic cases. There are many studies that show that Democratic judges tend to favor one type of party, Republican judges tend to favor another type of party. So that the correlation between party affiliation of the judge and the litigant favored is the strongest of any characteristic of the judge. The effect of the nonpartisan ballot is to deprive the voter of any clue that would enable the voter to cast a rational ballot--that is, one that is in his interest, if you define voting rationally as voting in your own interest. You can't do it if you only know the

names Brown versus Brown, for example, and don't know who is Lloyd Brown and who is Paul Brown and how to decide which will make the better judge. We have documentation that the nonpartisan election in Ohio has a partisan bias to it, and this, too, is well documented.

In the 1960's the results are clear that the Republican Party was the dominant winner in judicial elections. This is not widely known by voters. It has not been publicized. As a matter of fact, from 1960 to 1970, 3 out of 4 winning appellate judges were Republicans in the state of Ohio (courts of appeals and supreme court). In the Supreme Court of Ohio there were 14 Republicans elected in that decade and 2 Democrats. When we look at the appointment by the Governor and the subsequent election when the Governor appoints for an unexpired term, we find that Republicans are favored in the election for the unexpired term. In the 1960's Governor Rhodes appointed 13 judges to the bench when someone died or retired. Twelve of those 13 were elected in subsequent elections. Governor DiSalle (these studies were made before Governor Gilligan came into office) appointed 7 Democrats to the bench to fill unexpired terms, and 6 of those 7 were defeated when they ran as incumbents. So, there is a partisan bias to the way the nonpartisan election works. The reason for this has to do with the turnout of voters. I've never been able to get enough money from anybody to do a cross section sample of opinion of the electorate--I'd like to do that-- but I have some hypotheses about this. We know from analyses about voting behavior generally that upper class, better educated voters are more likely to vote and to vote all the way down the ballot. To vote the judicial ballot requires not only voting to the end of the partisan ballot but taking a separate piece of paper which is nonpartisan and voting that also. My hypothesis is that the better educated voters, who tend to be Republicans in Ohio because they tend to have higher incomes, are the ones who tend to vote the judicial ballot. This factor of electoral participation is what accounts for the extraordinary success of Republicans in the nonpartisan election. When you compare it with the partisan ballot, you find that the major statewide elections in the state were fairly evenly divided between Republicans and Democrats. This is a very competitive state. President, governor, senator, and in the days when we had a congressman at large--we found these offices divided relatively evenly between the two parties, but the judicial ballots were not. There is also much more contesting of races in the Republican primaries than in the Democratic primaries, which suggests a realistic recognition that Republicans are more likely to win the election, and we find higher participation in Republican primaries than in Democratic primaries when judicial offices are being filled. I think that this is a very important inadequacy of the nonpartisan election system--that is, that it does not work nonpartisanly. If we believe in true nonpartisanship, we don't get it through a nonpartisan ballot.

Now I'd like to turn to what I view as the disadvantages of the Missouri plan. I won't go through the method by which the Missouri plan is operationalized, but I would point out that the Missouri plan is very complex and it is very difficult for the average citizen to understand how the judges are selected. In Missouri, the average person doesn't really know quite how the panels work. Someone referred to the rigging and stacking of panels--that they are rigged and stacked in Missouri is well documented in the studies of Watson and Downing of judicial selection in Missouri. There is a two-stage selection process. First you have to select the nominating commission, which means, how will you choose those who will advise the governor? Here we have the institutionalization of a private interest group in the public selection process. Namely, the bar association is cued in officially to how the judges are to be selected. In this institutionalization of private group access what we find is that the bar gets politicized. What happened in Missouri--again I

refer to the Watson and Downing study--is that a two-party system has developed in the bar of Missouri, where there are plaintiffs' lawyers, who generally practice in small firms, tend to be Democratic in party affiliation, and have lower incomes, advocating one set of candidates for the judicial nominating commission, and the large law firms who do largely corporate practice and who are largely Republican in affiliation, who tend to be educated in prestige out-of-state law schools, campaigning for other members of the nominating commission. You have contested races. I argue that the Missouri plan politicizes the bar, and this is a disadvantage in that you get the bar involved in political ways in the selection process.

There is a Republican bias again. As in the nonpartisan election system, you get a Republican bias in recommendations through lawyer endorsements. This may lead to Republicans advocating this system, but that doesn't make it nonpartisan, any more than the nonpartisan election is truly nonpartisan. I did a study of the endorsements by the bar associations in Cuyahoga county of judicial candidates, and found that over 80 per cent of the candidates endorsed were Republicans. Over 80 per cent were also incumbents, and at first I thought that because there was a tendency to endorse incumbents, that was why so many Republicans were endorsed. But I did a separate study on the endorsement of nonincumbents and found a disproportionate number of the nonincumbents were also Republican. So there is a bias built into the system in the Missouri plan as well as in nonpartisan elections.

Finally, the contingent election in the Missouri plan--that is, the election to retain the judge when he runs against his record. This, I think, is advocated by the bar associations as an appeasement of the people. The word "appeasement" is my own word and not that of Glenn Winters. But I do want to read to you what Glenn Winters said in article in the Duquesne Law Review in 1968, referring to this method, which I think is a public relations device. He wrote: "The chief role of the noncompetitive election tenure in the future will be a reassurance to people, who are steeped in the elective tradition, that in adopting a merit plan they are not actually giving up everything but are still retaining an essential part of the elective system and just getting some needed help in the hard part." I think that that is a very patronizing statement to make about the electorate, and it does indicate that it is not considered a real part of the plan. That is, it is not a substantive contribution to judicial selection. He goes on to say, "This is bound to be a decreasing role as more and more states switch to initial selection by nomination and appointment, and I think ultimately it will be dropped." So I think that in talking about elective retention for an appointed judge the bar association is simply attempting to make us feel better if we like the elective system to begin with. Therefore, I think this is a bad thing, because it is not squaring with the people in what it is really trying to do. This is an unfortunate aspect and one of the disadvantages of the Missouri plan.

What I would advocate that we do in dealing with the disadvantages of both nonpartisan election and the Missouri plan is to adopt the simplest of all, the original plan of the constitutional convention in 1787--the gubernatorial appointment with senate confirmation. I noticed in the research memorandum that you have about judicial selection, this was more or less set to one side with the comment that there hasn't been much talk in recent years among the states about executive appointment and senate confirmation. I would just want to point out that this plan of executive appointment and senate confirmation is alive and well and living in America. In fact it has been used in the federal judiciary for 200 years, and I think by agreement of most lawyers it produces what is the best judiciary in the country. I'd like to quote a Cincinnati attorney, an old friend of ours, Robert Hilton, Jr. who wrote to me and said,

"It is generally conceded by lawyers that the federal judiciary is infinitely superior in competence and fairness to local and state judges." So I think that this is an acceptable means to lawyers. It has the advantages of simplicity and clarity so that the voters can understand how their judges are selected. It provides the two criteria that I suggested earlier--accountability and independence. The accountability is provided through the indirect control that the people have through electing the appointing agencies. For an example of this, I would point out to you that President Nixon (then candidate Nixon) campaigned in 1968 on a law and order platform and he did go to the voters with the promise that if elected he would change the decision tendencies on the Supreme Court, and he has done this. So there is an indirect accountability in the appointment by an elected executive. There is also independence, which derives from the life term of the "good behavior" term. I would stress here that there are several ways in Ohio for removing judges who are not performing adequately, through legislative removal, through popular initiative, and through impeachment--an old-fashioned method that is coming back to some degree of respectability.

Finally, I would argue that good appointments are good politics. This has always been true. An executive who appoints good judges gets credit for them at the polls and, therefore, it is incumbent upon him to look for well qualified judicial candidates and make good appointments that the people will value.

In conclusion, I was looking at one of my favorite books thinking about the federal method of selection. Alexander Hamilton, James Madison, and John Jay wrote The Federalist Papers back when they were trying to get the Constitution adopted by the state ratifying conventions. New York state at that time had a method for selecting judges somewhat like the Missouri plan--that is, there was a nominating group who nominated judges and shared the power with the governor. Hamilton, in advocating the plan in the federal Constitution, said that he favored the power of nomination being unequivocally vested in the executive. I won't read the lengthy argument but I would like to point out a few excerpts. He said: "The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate." And I think that would be true in the state of Ohio, as it is true in the state of Massachusetts where the appointive plan has been in operation since the original state constitution was adopted. The reverse of all this--Hamilton goes on to write about the manner of appointment in the state of New York, where the Council of Appointment consisted of three to five persons--and he says: "The censure of a bad appointment, on account of the uncertainty of its author and for want of a determinant object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost." And this is what I believe would happen with the Missouri plan. There is an "unbounded field for cabal and intrigue" in the nominating commissions, which are selected by the governor and the bar, and all idea of responsibility is lost. The people don't know who is responsible for the appointments, and the appointments are made without any clear line of responsibility. My final objection to the Missouri plan is that lawyers want to get their kind of judge on the bench and that lawyers look at the world through client-colored glasses, as Watson and Downing said in their study of the Missouri plan. This is the difficulty with giving lawyers formal access to the nominating commissions.

Chairman Montgomery then invited questions.

Mr. Mansfield - It seemed to me that in the first part of your presentation you were advocating getting back to the people, and yet in your final conclusion you get

control by the people only indirectly, and I think it would be very unusual for a gubernatorial candidate to be elected because of his power to nominate judges. So I don't see how executive nomination with confirmation by the senate gets the process closer to people, which I thought you advocated. A second point I wanted to raise--I am under the impression that California judges can run on ballots of both political parties.

It was pointed out that the cross-filing system is no longer in effect in California and that Kentucky has such a system.

Mr. Mansfield - Would such cross filing be some answer to your observation that most judges are Republicans? Someone may be a Democrat by registration but believe that it well may be that Republicans are smarter.

Professor Barber - Well, they are better educated. Not as individuals, but across the board. If we take the characteristics of the electorate, we find that people with upper incomes tend to be better educated and they tend to be Republicans in Ohio. Therefore, the electorate does not reflect the partisan division in the judiciary. But the system in Kentucky of cross-filing would not deal with the problems that I see, the disadvantages of the present system, with campaign pressures. In fact, I would argue for return to the partisan election if it were not for the difficulty of judicial candidates running in campaigns. The pressures of which I speak may not be such a handicap in Ironton or in some of the smaller counties. In a large metropolitan county it is a handicap. And it is very demeaning to the judges who have to go out on the electoral circuit. So I don't think that cross-filing will deal with the problems I see.

May I reply to your first point. I agree with you that what I am saying looks contradictory, but I think that it is an attempt to deal with the disadvantages of judges having to go out and campaign and the disadvantages of the very diffuse kind of appointment system under the Missouri plan, where nobody understands quite how it happens. The panels get loaded, stacked, or rigged, they meet in secret, and no one know quite how this works but somehow they come up with a recommendation. The people can't really hold the governor responsible because he can always say, "Look, I only had the three choices that the nominating commission gave me. I couldn't go out and simply find the best qualified person. I had to work from the panel." So I think because of this you don't get responsibility. And I think, from the example of the modification of the Supreme Court, the indirect accountability is relatively clear. When people vote for President, they're not just looking at the Supreme Court and those appointments, but that is one of the things they take into consideration. And I think with the governor the same thing would be true, if he had the power of appointment. People would be looking at the kinds of appointments the gubernatorial candidate is going to make.

Mr. Mansfield - Do you really think that?

Professor Barber - I really do. Those who think about it at all, in listing the qualifications of gubernatorial candidates are going to consider the kinds of appointments that candidate would make.

Mr. Mansfield - I would think that that particular power would be last on the list.

Mr. Montgomery - I'd like to ask the panel as a whole a question. What political abuses, after a judge is elected, have you observed? Is patronage abused in the

state of Ohio by judges who are elected on the so-called nonpartisan ballot?

Professor Barber - I'd like to speak to that just because we are having a controversy in Cuyahoga county right now about bailiffs. As you may know, the Ohio Supreme Court has told the judges to get rid of their relatives. The judges in Cuyahoga county are now busy exchanging bailiffs. The nephew of Judge A goes to Judge B and the nephew of Judge B goes to Judge A, and so on. That is the way they are responding.

Mr. Montgomery - Is this type of abuse more dangerous than abuse in deciding cases? Where does the greater danger lie?

Professor Barber - In terms of service to the people, I don't think that it's terribly important except that some bailiffs may be very inefficient although related to the judge. But it deals more with the efficiency or inefficiency of the courts rather than values of the judges and their responsiveness to the people. I defer to the lawyers who are more experienced than I.

Mr. Wolfe - As I see it, as long as the judge knows that there is going to be an election, whether in 6 years or less, after an unexpired term, he is more conscious of favoring an element or group than he is when he is not subject to re-election. I disagree 100 per cent that the quality and quantity of law in the federal courts under the appointive system is better than what I've seen in the common pleas system.

Mr. Montgomery - After a judge is elected with the endorsement of one party or the other, does he tend to become independent?

Mr. Wolfe - I think so in most of the counties in which I've had the opportunity to work. The only two metropolitan counties in this group are Franklin and Stark county. I can't take issue with what the judges do or how they run their courts. I have always been treated with respect. Perhaps Mr. Lloyd could speak to the federal system.

Mr. Lloyd - I've never been treated unfairly by any judge. I think that I've seen some bias, but it has always been philosophical, and never the result of corruption.

Court employees and patronage were the subjects of some discussion. Mr. Lloyd suggested that patronage excesses can be found in bankruptcy proceedings in federal courts where certain lawyers handle almost all of the business that comes out of bankruptcy courts. He said that he feels that is the only area where flagrant patronage abuses can be found. Professor Barber asked if comparable patronage doesn't exist through state probate courts in guardianship, trustees and executors of estates. There was general agreement that such matters do go to selected and favored lawyers and in response to a question from Mr. Montgomery the view was expressed that the patronage goes more on an individual basis than on a party basis.

Mr. Montgomery - Is the retention election compatible with what you advocate?

Professor Barber -Not with what I advocate. I have tried to indicate that I think the retention election is a fraud in the Missouri plan. I agree with Mr. Wolfe and Mr. Lloyd that when you put up a candidate against nobody, that is not an election.

Mr. Montgomery - You would have service for life then?

Professor Barber - I would prefer service during good behavior. I think that there are good ways in the Ohio Constitution and in the statutes for removing a judge for conduct involving moral turpitude and other offenses.

Mr. Skipton - What are the objective standards for viewing the work of a judge? What I've heard so far is subjective. Are there objective standards--such as the number of times a common pleas judge is reversed, or what?

Mr. Wolfe - I'll try to answer that. No. I think that the only way ability is developed in this area is when a pattern develops. Within a particular pattern or mold of cases there may be instances in which there are black and white legal errors. They can be pointed out to the electorate. Those aren't the sorts of things for which a judge can be removed under any system. Because, how do you establish he has breached any ethical standards rather than made an error of law? But if you believe that mistakes have been made, the electorate can be informed of the pattern and under the elective system the judge can be removed. With all due respect, I take issue with the gubernatorial appointive system. Yes, perhaps the governor is answerable to the electorate for his appointments, but my question is, who is the judge answerable to once in office?

Mr. Lloyd - The question brings to mind Mr. Justice Stewart's answer to the question concerning hard-core pornography--"I don't believe I can define it, but I know it when I see it." This is a little bit about the way I feel about a bad judge. What is wanted in a judge, it seems to me, is general judicial ability and temperament. You want the judge to work. You want him to dig and study. If you go in with a great memorandum of law you want the judge to read it. You want the man to be essentially fair--you don't want so much error on your side that you will be reversed. That about sums up what you want in a judge.

Professor Barber - I think that it's a great theory that the electorate knows legal error when it sees it, and that when a judge stands for election having made legal errors the electorate will turn him out. I'm not so sure that this is the case, at least in a large metropolitan county. The voters don't really know the judges who have made legal errors, and those judges are reversed on appeal. I think that we count on our appeal system to teach the judges how to behave. I wish the voters could find out about legal errors. In a multi-judge county it is very difficult to do so. They are virtually invisible because the papers are so full of more visible things than such errors.

Mr. Skipton - I would make one more observation. I thought that Mr. Lloyd made a good point when he said that the major difference between federal judges and other judges is the rate of pay. And this may be one of the reasons people are inclined to say that federal judges are better than common pleas judges. But do we really expect that judges at all levels of the judicial structure should be equally good?

Mr. Wolfe - I'd like to make one more response. In instances where you have blatant legal error, you have appeal. Where there is a pattern of favoritism, you can only vote judges out of office.

Mr. Montgomery then thanked the participants and announced that the next meeting of the committee would be on Tuesday, July 23, 1974 at 10 a.m. The committee will hear from some proponents of the appointive-elective system, including Mr. Glenn R. Winters, Executive Director of the American Judicature Society, attorneys John J. Duffey and Bruce I Petrie, members of the OSBA Modern Court Committee, and possibly Mr. Philip Moots of the Governor's office.