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## CONTENTS



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*This issue is devoted primarily to the North Carolina General Assembly. The cover photo shows a brand-new tradition, the ceremonial presentation of their gavels to House committee chairmen. Here Speaker James C. Green gives the gavel to Appropriations Chairman Jimmy L. Love.*

# STATE LEGISLATIVE MODERNIZATION: A PERSPECTIVE

*Herbert L. Wiltsee*

ALMOST A DECADE AGO, in 1966, a leading political scientist observed that "State legislatures may be our most extreme example of institutional lag."[1] Whether this superlative is accepted or not, there is little question that the tempo of legislative modernization up to that time had not kept pace with the growth of the problems facing state government. That lag was increasingly hurtful to the effectiveness of the states and prejudicial to the vitality of the federal system.

In the last thirty years, despite the need for such reforms if our system were to survive, those interested in modernizing our legislatures have had great obstacles to overcome. It is clear from a reading of our early national history that the drafters of the first state constitutions were establishing not a "balance of power" between the legislative and executive branches but the primacy of the former. Most of these early constitutions placed the legislative article first, as the Constitution of the United States did. In nine of the thirteen original states the legislatures elected the governor, and only one—Massachusetts—gave the governor a veto power.

In the nineteenth century, the legislatures fell from grace. During the Jacksonian and later years, including Reconstruction, legislative actions provoked scandals over such matters as land grants, bank charters, imprudent authorization of internal improvements, issuance of bonds that later were repudiated, and private profiteering on building construction. In a challenge-and-reponse sort of way, the citizens of most states revised their constitutions during the last half of that century. In most revisions myriad curbs and restraints were imposed on the legislatures and their ability to act, and the executive branch was strengthened as a check against misuse of legislative authority. Thus we entered the twentieth century—in fact, the post-World War II period—with our legislatures bound by mid-nineteenth-century shackles.

What is the function of the legislature in our system? In 1948 the Committee on Legislative Processes and Procedures of the Council of State Governments, in the first of the nationwide studies focused on state legislatures after World War II, defined the task of the lawmaking bodies as ". . . essentially the determination of broad policies in a clear and decisive way; authorization of organization, personnel, powers, and finances adequate to administer its policies; and review of the effectiveness of those policies and their administration."[2]

As the preceding paragraph suggests, since the mid-1940s many organized attempts have been made to improve the legislatures. The National Municipal League made the first efforts. The Council of State Governments, in existence since the 1930s, has advised state legislators in both national and regional forums and has issued many reports. It also helped to establish the National Legislative Conference in 1947-48 and has provided staff aid to the Conference ever since. Over the intervening years the Conference has spearheaded a broad range of legislative modernization efforts.[3] The American Political Science Association's Committee on American State Legislatures added an important report in 1954. Columbia University's American Assembly in 1955 (on "The Forty-Eight States") and in 1966 (on "State Legislatures in American Politics") drew attention to the need for modernization, as has the federal Advisory Commission on Intergovernmental Relations since its establishment in the latter 1950s. Other noteworthy efforts include the Citizens' Conference on State Legislatures, established in 1965 as a private, nonprofit organization to stimulate popular awareness of the urgency for legislative reform. That organization's 1971 Legislative Evaluation study—which ranked the fifty legislatures according to a yardstick based on structural, procedural, and other factors—received especially widespread public attention.[4]

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1. Alexander Heard, *Introduction to State Legislatures in American Politics* (New York: The American Assembly, Columbia University, 1966) p. 3. Most of the statistical data and computations used in this paper are taken from successive biennial editions of *The Book of the States,* published by The Council of State Governments.

2. *Our State Legislatures* (Chicago: The Council of State Governments, rev. ed., 1948), pp. 1-2.

3. As of January 1, 1975, the National Conference of State Legislatures has superseded the pre-existing National Legislative Conference, National Conference of State Legislative Leaders (created 1959), and National Society of State Legislators (created 1965).

4. John Burns, *The Sometime Governments—A Critical Study of the 50 American Legislatures* (New York: Bantam Books, 1971).

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Although the organizations' recommendations for action and their reports have differed somewhat in variety, number, emphasis, and specificity, the recommendations are remarkably similar, with few instances of outright conflict or difference. In retrospect, it is clear that most of the basic components of legislative reform that have been adopted so widely since the mid-1960s were delineated, tried out by one or more states, and recommended before then.

From 1945 to 1965, several advances were made. For example, the number of states with annual sessions grew from four to twenty. In 1945 only a quarter of the states offered central legislative research and information services, including assistance on interim studies; by 1965, four-fifths of the states did so. Compensation of legislators also increased slowly; the median biennial salary paid in 1945 by the twenty-five states that compensated on a biennial salary basis was $1,200; in 1965 the median biennial salary for the thirty-two states that paid on that basis was $4,800. So there was progress. But it was slower than the situation warranted, and it tended to be "hit-or-miss" rather than systemic. Furthermore, the changes that were made predominantly affected matters on which the legislatures could act without constitutional change. By its votes on amendments during these years, the electorate more often than not demonstrated its reluctance to increase the scope of legislative authority.

Several developments during the 1960s refocused public attention on the states and their lawmakers and enhanced prospects for change. The mandated reapportionment of the legislatures, which resulted in the election of more representative bodies, was one of these. Another was a growing awareness that many federal programs could do little to solve people- and community-based problems without the active involvement of the states in adapting and accommodating to them. Still another was the emergence of new issues affecting consumers, the environment and natural resources, and land use and other matters for which effective use of state powers was essential. Together, these developments produced pressures for legislative reform from without (and a greater public willingness to support and accept reform) and a revitalization from within the legislatures.

The rest of this article concerns the major areas of change in recent years, especially since the mid-1960s. This last decade, it should be noted, is the first in the twentieth century to witness a major trend toward adoption of needed new constitutions. Ten states have new constitutions that have greatly strengthened legislative articles. Significant new legislative articles also have been adopted in a number of other states, including California, Tennessee, and Utah.

## ADEQUATE TIME

The need for adequate time for the legislature to function has been stressed by all recent studies. In 1945 only four legislatures met annually; the rest had biennial sessions, usually limited to sixty days or less. Two approaches to providing more time dominated the years 1945-65: annual sessions, unlimited as to subjected matter; or, failing that, "budget sessions" in the "off-year." By the mid-1960s twenty legislatures met annually – ten used one approach; ten used the other.

Even greater changes have occurred since 1965. Forty legislatures now meet each year. Only four of them now limit off-year sessions to budgetary matters, this approach having proved inadequate. Since 1965 the number of legislatures empowered with flexible authority to meet, recess, and reconvene as necessity might warrant has increased. This pattern, long used in New Jersey and Massachusetts, is now also used by Minnesota, Tennessee, and Vermont.

The recent emphasis on the legislature as a continuous body is a closely related development. This concept does not require more total days of actual session, but it facilitates flexible scheduling of sessions, carry-over of pending bills from one session to the next, and more effective use of the interim between sessions for study purposes. In the mid-1940s only two states carried over bills between sessions of the same legislature (Rhode Island and South Carolina); today about twenty do so.

The "continuous body" concept of the legislature has important implications for strengthening the entire process, but it has had hard sledding in a number of states as the courts have construed their respective constitutions. Especially in Mississippi Valley and western states, some courts and attorneys general during the middle part of this century took the position that efforts to authorize interim studies, or to create legislative research councils, or to compensate legislators for interim expenses were illegal attempts to extend the life of a legislature. The legislature, so the reasoning went, has legal existence only during regular and called special sessions. Kentucky, Arkansas, Missouri, Montana, Washington, and Utah were among the states affected by such decisions. As recently as June 1974, the Arkansas Supreme Court reversed a lower court ruling that had blocked payment to legislators for interim expenses on constitutional grounds.

In a similar vein, the "lame duck" interval between election and the traditional convening of the first regular session has been reduced. Alabama, California, Florida, Oklahoma, South Carolina, and a growing number of other states start legislative terms soon after election.

Florida organizes the new legislature in mid-November, so that pre-filed bills can be considered by standing committees before the regular session convenes.

Furthermore, the number of legislatures that can call themselves into special session has increased—from thirteen in 1965 to twenty-six today. Some voters, however, remain reluctant to permit more than fixed-period, biennial sessions. In recent elections, Kentucky, New Hampshire, and Texas rejected annual-session proposals, while in November 1974, Montana reverted from annual to biennial sessions.

Having adequate time to function on a flexible basis does not mean that a legislature must be in constant session—as Florida, among several states, has demonstrated. With responsible leadership, a sound management approach to use of time and scheduling of business, competent staff, and adequate facilities and services—all of which the Florida legislature had in its 1973-74 biennium—a legislature can cope fully and effectively with today's tasks and yet absorb less than half the time of most of its members each year.

## COMPOSITION AND STRUCTURE

The representative nature of all legislatures has been altered during the past decade to conform with the Supreme Court's "one man-one vote" decisions in *Baker v. Carr*. In some states like Alabama and Tennessee, these recent efforts to redistribute representation on the basis of population were the first meaningful ones since early in this century. Thus reapportionment, coupled with more widespread use of single-member districts, led to turnovers of unprecedented proportions in the legislatures of most states in mid-1960s elections.

Nationwide, the turnover rates of state legislatures have been somewhat lower since the elections that followed the mandated reapportionments, except in 1974; but they are several times higher than corresponding rates for the United States Congress. Persistently high turnover rates of 40 per cent or more in a few states like Alabama and North Carolina concern many students of legislatures, since they erode the continuity and experience that strengthen the legislative process.[5] Under the circumstances, pre-session orientation conferences for freshmen legislators are much needed. Now all but universal, such conferences were offered in only a few states as World War II ended, and there on only a very casual and elementary level.

With "one man-one vote" reapportionment, many predicted that other states soon would join Nebraska, which adopted the unicameral legislature concept in the mid-1930s. No state thus far has done so, and the numerous state constitutional conventions of the past decade have found positive ground to prefer bicameralism.

5. See Alan Rosenthal, "Legislative Turnover in the States," *State Government*, 47, no. 3 (Summer, 1947), 148 ff.

Most state legislatures have remained more nearly constant in size than had been widely predicted a decade ago when the impact of *Baker v. Carr* was first felt. Only the lower houses in five states—Arizona, Connecticut, Massachusetts, Ohio, and Vermont—have been reduced 25 per cent or more in size; and somewhat offsetting increases have occurred in the Maryland and New Mexico senates and in both houses in New Jersey.

In other respects, however, major structural changes have come about in recent years. One of the most important is the far-reaching modification and modernization of standing committee arrangements. Virtually all of the above-mentioned studies stressed the need for steps to render such committees more effective: reducing over-all numbers, limiting service by members to fewer committees, comparable committees in the two houses, providing professional staff to serve committees, authorizing committees to function during the interim. Most legislatures have responded. In 1948, nationwide, the average senate had over 33 committees, the lower house more than 41. By 1973, the senate average had dropped to about 14 and the lower house average to about 18. Median numbers in 1973 were even lower: 12 for senates, 15 for lower houses.

Arkansas uses a carefully worked-out approach that a number of states have adopted. In 1973, it reduced the number of committees in each house to ten, with identical jurisdiction in each house. These are divided into "A" and "B" committee categories, which meet during sessions on nonconflicting days. Each legislator serves on one committee in each category. During the interim, the corresponding House and Senate committees meet jointly, with professional staff, to study problems and develop recommendations.

The role of legislative leadership, both majority and minority, has grown, especially in southern states. The tradition of one-term service for leaders is declining, although it persists in a number of states; and the role of the chief executive in selecting legislative leaders has been curtailed in several states, among them Georgia and Tennessee. In these and other ways, such as their increased scrutiny of budgeting and spending practices, the legislatures have more jealously guarded their independence.

## PROCEDURAL CHANGES

The procedural arrangements by which a legislative body works, set forth in the rules, have pervasive importance and impact on the entire lawmaking process. Such rules have been revised extensively in virtually all states in recent years, with three major objectives: to expedite the flow of legislative business; to improve order and decorum, and thus the public's image of the legislature; and to assure greater openness in the process.

Pre-session bill-filing long has been urged as one way to facilitate legislative business. From only a handful in 1945, the number of legislatures that either permit (or, as

in Massachusetts, require) pre-session filing has risen to almost three-quarters of the total. Equally important in saving time are deadlines for introducing bills. By 1973, at least forty-one states imposed such deadlines.

New methods of managing legislative time efficiently are the "phased deadlines" or "deadlines in depth"—systems that establish deadlines for bill introduction, committee and floor action in the house of introduction and the second house, and the like. Largely pioneered by Oklahoma and Wisconsin, such scheduling arrangements are now used in some thirteen states. This approach enables the lawmakers to complete business in a briefer period with less wasted time and to reduce the end-of-session log-jam, confusion, and clock-stopping that characterized many legislatures a generation ago.

In recent years legislatures and their drafting staffs have been concerned with the growing number of bill introductions. Connecticut in 1973 inaugurated a new approach: legislators now introduce, by the early-in-the-session deadline, "proposals" in prose or narrative rather than bill form. These proposals then are considered by the appropriate standing committees, which may kill them, have them drafted for reintroduction and consideration as committee bills, or combine two or more for drafting and reintroduction. Procedures exist to assure that minority-party proposals can be drafted and given public hearing. Economies of time and effort have been sizable: in the 1971 session, about 6,700 bills were drafted, of which only 20 per cent became law; in 1973, about 2,100 bills were drafted, and 43 per cent were enacted.[6]

Many procedural steps have been taken since World War II to improve legislators' understanding of the intent and impact of bills on which they must vote. At the most basic level, required printing of bills, not that common in 1945, now has become almost universal. The key importance of legislation with impact on revenue and expenditure led, in the 1950s, to the development and refinement of "fiscal notes"; fiscal notes are summaries in narrative form of the short- and long-run effects of a proposed bill, and they are attached to the bill when it reaches the floor. Pioneered by Wisconsin and a few other states, this procedure had become widespread by 1970. More recently, several states—Louisiana, Texas, and Wisconsin among them—have required every bill that goes to the floor to carry a summary of its intent and effect. Hawaii requires that a committee report accompany each bill recommended for passage; the report includes a history of the legislation to which the bill relates.

Legislative concern with public awareness has led to major changes in other procedures and arrangements. Access to the House and Senate floors, virtually unrestricted a generation ago, has been curtailed rigorously in most states; other states, such as Georgia and Texas, may well follow suit in 1975. Also, legislative bodies have slapped curbs on traditional but time-consuming practices such as introduction of gallery guests. This concern with decorum is partly attributable to greatly increased television coverage of sessions.

Public awareness has also led more and more legislatures to open both their proceedings and their committee proceedings. Some thirty states now require open committee meetings; in most of the rest, the discretionary authority to close meetings is exercised more cautiously and less regularly. Legislatures have begun to establish special staffs to provide information about the legislature's work, its houses, and its caucuses. Examples are the New York and Texas senates, the West Virginia legislature, the Georgia House, and the California Assembly majority and minority caucuses.

## SERVICES FOR THE LEGISLATURE

Tremendous changes have occurred since World War II in the provision of staff and related services to assist lawmakers. So true is this that observers speak of the "legislative bureaucracy."[7] By the mid-1960s, over four-fifths of the states had established staffed, multi-purpose, joint research committees or councils and other staffed facilities for interim research and policy analysis and to provide members and committees with spot informational research, bill-drafting, and other help. Sixteen states then provided budget and fiscal analysis services for the money committees, and eighteen had institutionalized audits under legislative control. Also, efforts were being started to apply electronic data processing and other technology to legislative activities; to strengthen professional staffing of legislative committees; and to provide staff for leaders, party caucuses, and individual members.

In the past ten years provision of professional staff for standing committees has increased greatly, enabling the committees to become principal agencies for policy analysis and recommendation and to oversee and evaluate the administration of state laws and programs. To a large extent, this movement has represented a shift in the focus of policy research from a single, joint legislative research council to the respective substantive committees; and this shift has broadened the base of interim study to include most members of the legislature. By early 1975, forty-three legislatures had staffed their budget and fiscal review agencies, and forty-one had taken similar steps to strengthen their post-audit function.

Consolidation and rationalization of standing committee systems has facilitated their professional staffing. For example, states in the Southeast that now provide professional staff to some or all of their substantive committees include Maryland Virginia, West Virginia, South Carolina, Georgia, Florida, Kentucky, and Tennessee. In

6. David B. Ogle, "Joint Committee Operations and Bill Procedures in Connecticut," *State Government*, 47, no. 3 (Summer, 1974), 170 ff.

7. For example, Malcolm E. Jewell and Samuel C. Patterson, "The Legislative Bureaucracy," *The Legislative Process in the United States*, 2d ed. (New York: Random House, 1973), chap. 10.

most cases, such staff is recruited and assigned by a joint legislative council or equivalent agency; in some states, such as Florida and South Carolina, the houses and their leadership act separately.

In recent years legislatures have greatly increased their use of electronic data processing (EDP) for such matters as statutory retrieval, bill-status reporting, bill-typing or drafting, and photo-composition printing. Only about a dozen states used EDP in the 1960s; by late 1974, all but seven used it in one way or another, and South Carolina had plans to join that majority in its 1975 session.

As a result of the great growth of legislative staff and facilities and of legislative business generally, a new area of staff service has emerged beginning in the 1960s—legislative management, functioning jointly for both houses or separately for each.[8]

## SPACE AND COMPENSATION

Traditional capitoline architecture, which most states have, allows woefully little space for present-day legislative purposes. In the early post-World War II years, only a very few states could provide anything like adequate space for lawmakers; California, with its capital annex; Missouri, Oklahoma, and Texas, for their senators; and perhaps a few others. Especially since the early 1960s the problem of space has had much discussion and considerable action. North Carolina and Hawaii were among the first to act. Major new buildings with ample office space for both committees and staff have been provided more recently in Florida and New York, while Maryland is completing comparable facilities. New buildings in some states, such as Arizona and New Mexico, meet many of the needs. Some states—among them Illinois, Michigan, Minnesota, Mississippi, Oregon, Tennessee, Virginia, and Texas—have acquired space by remodeling existing capitols, relocating nonlegislative agencies, and using adjoining structures. Nevertheless, lack of space remains an acute problem for most legislatures.

Compensation for legislators has improved—especially where voter approval for any change has not been required. Figuring from the total paid during a biennium in salary, per diem, and allowances, the median estimated biennial compensation for American state legislators in 1962-63 was $3,950. By 1972-73 that median biennial figure had risen to $14,520. But the extremes were further apart than ever; in New Hampshire, the figure was $200 for the biennium: in California, it was $53,490. The amount of time legislators must devote to their duties has a bearing on this matter, and California probably comes closer than any other state to having a full-time legislature. Voters approved pay increases and other matters affecting compensation to a greater degree in the late 1960s and very early 1970s than they have since. Growing distrust of politicians in general, which spread in 1973-74, has led to rejection of most recent proposals of this kind.

An interesting development of the past decade has been the rise and spread of a new mechanism for establishing legislative compensation—legislative compensation commissions or equivalent agencies, such as those now in existence in Maryland, West Virginia, and ten or so other states.

## ETHICS

In recent days legislators and officials generally have become very much aware of the tremendous loss of public confidence in government, largely as a result of the Watergate revelations but also as a result of scandals within certain states. The spotlight has fallen on such matters as ethics, conflicts of interest, disclosure, lobby regulation, and campaign-financing. Legislatures, especially in 1973-74, have grappled with some or all of these issues, and most states have enacted a significant body of new law in this area. On the matter of campaign-financing alone, eleven states had enacted laws before 1973; thirty-seven more did so in 1973-74.

Pressures to provide ethics legislation in those states that have none are strong, and similar pressures exist in other states to fill gaps that have been left or to strengthen enforcement machinery that seems inadequate. Apparently this will be an issue for our lawmakers for years to come.

It is a sign of the times that the heads of the various state boards and commissions charged with administering financial-disclosure, ethics, conflict-of-interest, and campaign-finance programs have held their first exploratory, nationwide conference to review their common responsibilities and to share experiences. Paradoxically, this meeting in mid-December 1974 was held at the Watergate Hotel in Washington, D.C.

## CONCLUSION

An article like this cannot dwell long on the many other aspects of the legislative process that could be considered. But several conclusions seem justified:

(*continued on page 17*)

8. An instructive sign of the times was the overwhelmingly favorable response by key state legislators and legislative service agency heads around the country to a 1974 poll concerning greater attention by the field of public administration to legislatures and the legislative process. Respondents identified housekeeping, procedural, staffing, evaluation capacity, and several other areas for attention by schools of public administration and by the American Society for Public Administration. Schools of public administration, which have tended to ignore legislative processes, were polled at the same time and gave similarly high approval. "The Public Administration Field and Legislatures: Avenues Toward Alliance," *Comment* (published by the Comparative Development Studies Center, State University of New York at Albany), 1, no. 2 (November, 1974).

# THE LEGISLATURE AND THE LEGISLATOR IN NORTH CAROLINA

*Willis P. Whichard*

## THE LEGISLATIVE INSTITUTION

The modern North Carolina state legislator is the heir to a long and distinguished heritage that has evolved through several centuries in the life of our state. History records that the first legislative assembly in North Carolina met under a large oak on a wooded knoll in Pasquotank County in 1665. During its first hundred years the legislative branch had very little authority, its acts being subject to veto by both the crown and the Royal Governor. It then acquired extensive powers which it retained for approximately two-thirds of a century. During those years it elected all other state officials and rather fully controlled the government of the state. Thereafter the executive branch was strengthened, and the two branches have since observed a more or less balanced separation of powers.

Article II, section 1, of the current Constitution of North Carolina provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." The Constitution then specifies the number of senators (50) and representatives (120), the method of districting, the qualifications for and the terms of office, the officers and procedures of each house, and the powers of and limitations on the legislative branch. The members of the General Assembly are frequently reminded of the necessity of adhering to the fundamental law as set forth in the Constitution—if not in committee or floor debate, then subsequently by the judicial branch. For while legislative powers and prerogatives are extensive, their exercise must comport with the bounds of constitutional tolerance.

## THE BICAMERAL SYSTEM

The state Constitution establishes a bicameral legislative system: that is, the legislative power of the State is vested in two distinct bodies—a Senate and a House of Representatives—and enactment of legislation by one body is meaningless unless the other concurs.

This dichotomy has enormous implications. First, it presents an inexorable tendency toward "buck-passing." Not uncommonly one house will pass legislation with the expectation, and perhaps even the assurance, that the other house will either defeat it or substantially amend it. This buck-passing tendency is enhanced by the fact that North Carolina's Governor (alone among the fifty governors) is denied the veto power, and thus the only source available for by-passing responsibility in a given matter is the other house.

But despite the possibilities for buck-passing, bicameralism has much to commend it. No proposal becomes law in North Carolina without scrutiny by committees and floor debate in both houses. A House committee may detect constitutional or policy defects which a Senate committee failed to note. Senate floor debate may produce desirable amendments overlooked in the haste produced by a crowded House calendar. Members of one body may deliver the citizens of the state from irresponsible action by members of the other who consider their decisions restricted by campaign commitments which enhanced knowledge may make them regret.

The general thrust of the bicameral system is not so much to frustrate the will of the people (though it can be used for that purpose) as to promote a thoroughgoing conservatism, even meticulousness, as to fundamental policy changes. Yet on balance, few if any legislators, given the choice, would opt for a unicameral system.

## THE COMMITTEE SYSTEM

By far the greatest portion of the legislator's work is performed in committees. The respective houses are too large to permit truly deliberative lawmaking by the full membership. Size alone makes the committee system inevitable.

In the 1973-74 session of the General Assembly, the Speaker appointed 38 House committees and the Lieutenant Governor appointed 27 Senate committees. The presiding officers derive much of their power from this prerogative to appoint committees and assign proposed legislation to them. Their knowledge of the predispositions and commitments of the legislators who serve on the committee to which they assign a bill may be critical in determining whether the proposal succeeds or fails.

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Once a bill has been assigned to committee, it still falls within the scope of presider's prerogative. The committee chairmen, like the Speaker and the Lieutenant Governor, exercise considerable powers over the fate of legislation. A committee chairman may simply not calendar a bill for consideration; or he may calendar it so late in the session that it has little chance to pass both houses in the time remaining before adjournment *sine die*; or he may calendar a bill at a time when he knows many of its adherents or opponents cannot be present. The rules of both houses give the author of a bill, or his designee, the right to move upon three days' notice to recall a bill from committee if the committee has not acted on it within 10 legislative days. But that right is almost never invoked; and if a bill is controversial enough to make a committee chairman pocket it, securing a majority of the full membership to override the committee or its chairman is unlikely.

If the proposed legislation obtains active committee consideration, it is generally subjected to rigorous examination. Its merits and demerits are thoroughly explored. Seldom will major legislation emerge from committee scrutiny completely unscathed. The committee has several options. If it believes that only minor changes are needed, the committee will approve amendments to the bill. If major overhaul is in order, it will adopt a "committee substitute" or complete rewrite of the bill. Bills are reported from committee to the floor with (1) a favorable report; (2) a favorable report as amended; (3) an unfavorable report as to the bill but a favorable report as to the committee substitute; or (4) an unfavorable report. If a bill is reported unfavorably but at least one-fourth of the committee members sign a minority report, the full membership votes on adopting the minority report. If the full membership adopts that report, the bill is placed on the favorable calendar. If it rejects the minority report, the bill is placed on the unfavorable calendar. Once placed on the unfavorable calendar, a bill is dead unless infused with new life by a two-thirds vote of the membership—an event that occurs with the frequency of the appearance of Halley's Comet.

The committee system is thus the foundation of the legislative process. If the process is to function at all, albeit imperfectly, it is mandatory that committee members take their responsibilities seriously and perform their assigned tasks diligently, and that the full membership accord considerable weight to the committees' judgments. Otherwise, given the volume of bills introduced, the legislative process would be interminable.

## THE BUDGET PROCESS

The most difficult task of any General Assembly is allocating the state's limited financial resources among a variety of worthy and competing needs. Nearly all the monetary requests submitted to the legislature have some merit; if we could operate in an economic vacuum, virtually all would be granted. But ours is not such a world, and the paring knife is an essential tool in the budget process.

The budget process begins with the Advisory Budget Commission. This body—composed of four senators, four representatives, and four gubernatorial appointees—is responsible for recommending proposed biennial budgets to the General Assembly. In formulating its proposals, the Commission meets regularly, hears presentations by department and agency heads and other interested parties, and generally tours many of the state institutions.

The Advisory Budget Commission's recommendations constitute the point of departure for the General Assembly. The Appropriations committees of the House and Senate sit jointly while considering the budget. The joint committee hears requests for supplemental appropriations (those items requested but omitted from the Advisory Budget Commission's recommendations) from department and agency heads and then divides into subcommittees to consider these requests as well as designated subject areas of the budget in their entirety. The subcommittees report their recommendations to the full committee, and the chairmen then appoint a "super subcommittee" to put together the final budget package.

This package is usually adopted with only minor alterations by the joint committee and reported favorably to the full House and Senate, which then invoke an unwritten rule that prohibits "breaking the budget." The rule is based on the assumption that the budget, like Pandora's box, cannot be opened without releasing a variety of adverse consequences. The primary fear seems to be that tampering with the budget, if allowed at all, could continue for an indeterminate period, and adjournment *sine die* could thereby be postponed indefinitely. Consequently, the "rule" is taken quite seriously; legislators who try to violate it have sometimes been denied seats on the Appropriations Committee in subsequent sessions.

The complement to the Appropriations Committee is the Finance Committee, which is charged with raising revenue. While the Appropriations Committee is fully functional throughout the session, the Finance Committee frequently is relatively dormant until later in the session, when the course of appropriations has been largely determined. At that point it must insure that sufficient revenues will be available to sustain the approved appropriations. That pattern may be precluded in the future by the current impetus toward some kind of tax reform, but it remains accurate as a historical generalization.

As this is written, the possible merger of the separate Finance and Appropriations committees into a single Budget Committee is being discussed. At present, half

the membership in each house serves on Finance and the other half on Appropriations. The purpose of the proposed change is to unite the now-separate functions of approving spending programs on the one hand, and approving the means of raising revenue to support these programs on the other, thus giving the lawmakers who serve on the Committee a grasp of the entire monetary process. This proposal is now strictly in the nascent stages, however.

The essence of the budget process is the establishment of priorities. The budget is an outgrowth of the planning and programs of the state. It is the General Assembly's task to ascertain both the short-term and the long-term objectives of the state, and then to implement those objectives primarily through the medium of the budget.

## STAFF AND OTHER RESOURCES FOR "AMATEUR LEGISLATORS"

A few years ago a national survey ranked the North Carolina General Assembly forty-seventh among the fifty state legislatures in the United States in effectiveness. When my constituents ask me to comment on this, I have generally replied, facetiously, that the survey was conducted before I became a legislator and obviously my presence in the General Assembly should improve our standing considerably.

In a serious vein, though, I believe those who conducted the survey held a fundamentally different philosophy from the one adhered to in North Carolina. It is evident that they gave the highest rankings to "professional legislatures"—that is, those that meet virtually year-round, pay their members a living wage, and have substantial supportive personnel.

In North Carolina, by contrast, we have always had an "amateur legislature." Except for the 1973-74 experiment with annual sessions, we have met once every two years for roughly four to six months; our members have served at a genuine financial sacrifice; and our supportive personnel has been at a minimum. The prevailing philosophy has been that men and women who maintain regular jobs or professional practices and thus walk among the populace in ordinary capacities are closer to the people and their problems and thereby better equipped to represent them.

While I basically agree with that philosophy, I believe the ability of an amateur legislature to function adequately in the complex era in which we live depends upon the capacity of lawmakers to secure sufficient information and technical assistance; and, given the extensive demands on the individual legislator's time, that capacity is directly proportionate to the adequacy of staff resources. The one criticism of our system by the national survey which has substantial validity is that we do not have adequate supportive personnel. Until the 1973-74 session, in the House only the committee chairmen had full-time secretary-receptionists. While all legislators now have the assistance of a secretary-receptionist, the individual members have no other staff answerable primarily to them.

As a consequence, they have been overly dependent on the executive branch for research and technical assistance. The Office of State Budget and Management has historically been the primary source of information regarding budgetary matters. The various state departments and agencies have been looked to for information regarding their programs and policies (and too often their attitude has been that "the General Assembly does not run this agency"). The Legislative Drafting Division of the Attorney General's Office has rendered most of the bill-drafting services. The staff of the Institute of Government has occasionally provided bill-drafting services and has frequently served as counsel to committees.

Inadequate staffing may likewise render the lawmakers overly dependent and reliant upon information furnished by lobbyists. The good lobbyist never intentionally misleads a legislator; for if he does and his treachery is discovered, his influence is thereby greatly diminished. Yet, while the lobbyist can be and often is an extremely valuable source of information, he is nevertheless the paid representative of a particular point of view. And while outright mendacity on his part is generally considered unforgivable, he is not expected to present his case otherwise than in terms most favorable to his client.

While individual staffing remains inadequate, the resources available to the legislative leadership and to the lawmakers as a group have expanded considerably in recent history. Perhaps the foremost example of this expansion is the Fiscal Research Division of the Legislative Services Commission. This Division was established and funded by the 1971 General Assembly. It is solely a staff agency of the General Assembly, responsible only to the General Assembly through the Legislative Services Commission, and independent of all other offices, agencies, boards, commissions, divisions, and other instrumentalities of state government.

Its function is to make analyses of past receipts and expenditures and of current requests and recommendations for appropriations of state departments, agencies, and institutions; to review and evaluate compliance by state departments, agencies, and institutions with legislative directives contained in the budget; to examine the structure and organization of state departments, agencies, and institutions and recommend changes to increase efficiency; to make other studies as directed by the Legislative Services Commission, the Committee on Appropriations of either house, or by either house; and to make periodic reports of its activities. State departments, agencies, and institutions are compelled by statute to furnish the Division with any information it requests; and the statutes provide for staff members of the Division to attend meetings and hearings of the Advisory Budget Commission and to accompany the Commission to inspect the facilities of the state.

The Fiscal Research Division has given North Carolina legislators a way to secure information independent of and thus relatively unbiased by the departments, agencies, and institutions concerning which the information is sought. It has been and should continue to be a valuable analytical instrumentality in the General Assembly's endeavors to remain abreast of rapidly changing conditions in the programs of the various departments, agencies, and institutions which it funds.

Several other increases in staff resources are worthy of note. A former director of the Office of State Budget and Management is now employed by the General Assembly to assist in budget analysis. The Legislative Services Commission has recently employed full-time staff assistants for several key legislative committees. North Carolina now has its first full-time Lieutenant Governor, and the enlarged staff of that office renders assistance at many junctures in the legislative process. The Speaker of the House in the 1975 session has retained a five-term former House member who did not seek re-election to be his legislative assistant—a first in legislative annals in North Carolina. Finally, an expanded internship program provides qualified college and university students to assist the legislators with their allotted tasks.

Thus, while lack of adequate staff resources remains perhaps the greatest weakness of the General Assembly in North Carolina, a change of direction in this regard has clearly begun. This change of direction should proceed until the resources available to the legislative branch permit it to perform its constitutional duties as a truly co-equal branch of state government, independent of and not extensively reliant upon either the other branches or the lobbying profession.

## INTERIM STUDIES

The magnitude of the task of adopting major policy changes that involve extensive drafting of new legislation makes it virtually impossible to accomplish such changes during a regular legislative session alone. North Carolina's solution to this problem has been extensive use of interim legislative studies. Three major devices have been used for this purpose: 1) the independent study commission; 2) the Legislative Research Commission; and 3) the standing committee.

Extensive use of independent study commissions predates both the establishment of the Legislative Research Commission and the experiment with standing committees. While there is merit to the contention that these commissions have been used to avoid or delay difficult or controversial decisions, it is equally true that they have been used to accomplish major legislative change in North Carolina which probably could not have been achieved otherwise.

These commissions are usually populated by a mixture of legislators and nonlegislators, the latter frequently being in the majority. The power to appoint the commission members is generally shared by the Governor, the Lieutenant Governor, and the Speaker of the House. In some instances interest groups with special concern for the topic under consideration are granted representation on the commission.

Funding for study commissions may be provided by a special appropriations bill, but more often comes from the Contingency and Emergency Fund. Staff assistance may be supplied by the Legislative Services Commission, the Institute of Government, the Office of the Attorney General, or nongovernmental sources. The end product of the commission's efforts is a report to the General Assembly containing policy recommendations and frequently containing drafts of legislation to implement the suggested policy.

The Legislative Research Commission (LRC) was established by the 1965 General Assembly. Its membership consists of five senators appointed by the President pro tempore of the Senate and five representatives appointed by the Speaker of the House. The President pro tempore and the Speaker serve as co-chairmen of the Commission.

The LRC is empowered by statute to make studies of and investigations into governmental agencies and institutions and matters of public policy and to report the results of these studies to the General Assembly. It may make recommendations and suggest bills to effectuate the recommendations.

The LRC's working format has generally been the subcommittee system. Its members chair the subcommittees, and other members are drawn from the General Assembly as a whole. Members of the public with special expertise in the subject under consideration may also be appointed. Staff assistance and general information are provided by the Legislative Services Office, the Attorney General's Office, the Institute of Government, and various departments and agencies of state government.

When they complete their work, the subcommittees report to the full LRC, which must then adopt or reject their reports or adopt them with modifications. While ultimately the General Assembly itself must pass upon these recommendations, LRC commendation carries considerable weight; and proposals bearing LRC blessing generally fare better than the general course of legislation.

The interim standing committee is a by-product of recent experiments with special sessions and annual sessions. The first use of this device in modern history occurred in 1971, when the Senate and House Committees on Higher Education continued to meet between the regular and special sessions of that year to prepare legislation restructuring the system of higher education in North Carolina. More extensive use of standing committees took place in conjunction with the annual sessions of 1973-74. Since the 1974 session constituted a continuation of the 1973 session, the structure of the committee system and the membership of the committees remained intact. This unique continuity from one session to

another made it possible, and in some instances necessary, to carry on substantial legislative activity between sessions. Standing committees could continue to work on legislation pending from the session just concluded as well as undertaking longer, more intensive research projects not possible during a regular session. In some instances committees were combined for interim work; in others, individual committees functioned in their original form.

Among the subjects considered by the standing committees in 1973 were state government reorganization, coastal land management, state land-use planning, campaign reform, pre-trial criminal procedure, no-fault automobile insurance, medical care needs, and small water and sewer systems. In some instances the standing committees dealt with new subjects and produced entirely new proposals (e.g., the small water-sewer system study). But in most cases the committees only refined and revised previous bills on the basis of further hearings, studies, and drafting.

Like any experiment, the standing-committee experiment worked well in some instances and not so well or not at all in others. One clear conclusion emerges, however—the standing committee does provide an opportunity for more careful, thorough, long-term evaluation of a subject than is possible during a regular session. It also has an advantage over the study commission approach in that the standing committee is made up entirely of legislators, whereas the study commission frequently contains only one or two legislators from each house and is otherwise composed of private citizens. Having a committee composed entirely of legislators results in having an entire committee, rather than just one or two members, familiar with proposed legislation and prepared to help secure its enactment when the full assembly reconvenes.

The future of interim standing committees is probably inextricably interwoven with that of annual sessions. The standing-committee device peculiarly lends itself to use between the first and second sessions of a two-session biennium, because that is the only time that members are assured of returning and serving on the same committees. The problem of attrition in committee membership—either through defeat or failure to seek re-election, or through new leadership in the respective houses making new committee assignments—characterizes any other situation.

From the standpoint of the individual legislator, interim committee work presents a substantial problem in terms of time demands; for so long as legislative service remains a part-time occupation, interim work will be performed during seasons normally devoted to the legislator's other business or profession. But from the standpoint of the legislative institution, the experiments with standing committees in 1971 and 1973 met with enough success to warrant consideration of further use.

## CONCLUSION

Jonathan Swift wrote in *Gulliver's Travels* that "ignorance, idleness and vice may be sometimes the only ingredients for qualifying a legislator." Similarly depreciatory views of legislators have been expressed in recent times. When the General Assembly was considering appropriating funds for a state zoo, one wag suggested the same purpose could be served at less expense by fencing the Legislative Building and keeping the legislature in perpetual session. And when the question of whether to designate the squirrel as the state animal was at issue, a member of the House cautioned that if an animal that buried nuts was loose in the state, it constituted a clear and present danger to the members of the General Assembly.

Alexander Hamilton had a more glamorous view of the legislator's role. The story is told that one day Hamilton brought a foreign dignitary into the gallery of the United States House of Representatives. A hotly debated measure was then before that body, and virtual pandemonium prevailed on the floor. The dignitary turned to Hamilton and inquired: "What goes on there?" Hamilton replied: "There, sir, the people govern."

When the citizens of North Carolina enter the galleries of the legislative halls, they too witness the people governing. The men and women through whom the people govern are not ignorant, are seldom idle, and are neither the pawns nor the purveyors of vice. The citizens of North Carolina probably do not fully comprehend how well the legislative branch of their government has served them. It has for many years been virtually free of scandal. It has maintained fiscal responsibility. And it has managed to attain progress without sacrificing stability.

Governor Zebulon Vance once described North Carolinians as a people of sober second thought who move cautiously, but always forward. In every phase of their public service—in committee or on the floor of the House or Senate, in budget deliberations or participation in interim studies, in work with staff assistants or relations with constituents—the members of the North Carolina General Assembly reflect the tradition of moving cautiously, but always forward.

# RECENT CHANGES IN THE APPROPRIATIONS PROCESS

*Stephen N. Dennis*

BUDGETING—the process of allocating the public's resources, chiefly monetary—is a principal function of any government. It is the means by which a government establishes priorities among the social and political objectives that it wishes to accomplish. It is therefore of the first importance who controls the critical phases of the budgetary process.

Budgeting has three critical phases: preparation of the budget, review and adoption of the proposed budget, and administration of the adopted budget. Over the last half-century, North Carolina has experienced an interesting series of shifts of budgetary power from the legislature to the executive branch and now back again toward the legislative branch. This article will examine some recent developments in the evolving legislative-executive relationships with respect to the state budget.

## THE GOVERNOR'S ROLE

Until the early twentieth century, the North Carolina state budget was prepared and adopted by the General Assembly, was administered by the agencies to which appropriations were made, and often ended the fiscal year in deficit. The legislature was unable to predict revenues accurately, to assess expenditure proposals comparatively and comprehensively, or to keep authorized expenditures within the bounds of actual revenues. After various efforts to give the legislature and its agencies adequate control over the budget had proved ineffectual, the state in 1925 adopted the Executive Budget Act, joining a national trend toward the adoption of similar acts. That statute made the Governor, as Director of the Budget, chief formulator of a comprehensive state budget and the chief administrator of that budget after it had been enacted by the General Assembly. This power was delegated to him in recognition that a part-time, unstaffed General Assembly that met biennially could not serve those functions.

Because the General Assembly, sitting only intermittently, could not give continuous direct oversight to the Governor's exercise of the fiscal powers conferred on him, it created the Advisory Board Commission at the same time that it passed the Executive Budget Act. Until 1973 the Advisory Budget Commission consisted of four leading legislators (the chairmen of the Appropriations and Finance committees of the two houses, ex officio) and two members appointed by the Governor, who were usually men with substantial legislative experience and orientation. Thus the Commission was intended to be and has functioned largely as the means through which the General Assembly has maintained continuous involvement in the budgetary processes.

The Executive Budget act declares, however, that in formulating the proposed budget (except for the sections dealing with the Treasurer and Auditor) and in most aspects of administering the budget, the role of the Advisory Budget Commission is, as the Commission's name implies, advisory. The Act provides, for example, that if the Commission disagrees with the Governor's budget recommendations, the Governor's judgment prevails and the Commission may file a dissenting recommendation with the General Assembly.[1]

In the legislative review and adoption of the recommended budget, the General Assembly retains full power to appropriate or not appropriate, in such amounts as it sees fit, and the Governor has no veto over its actions. Yet the Governor's role has been important, not only as the direct advocate of his recommended fiscal plan but also as the provider of the chief (and until recent years, the only) staff assistance available to the Appropriations committees.

Once the legislature completes work on the budget, it then becomes the Governor's duty to administer the budget, which includes making quarterly allotments against appropriations and approving budget transfers requested by the agencies.

Notwithstanding the "literary theory" of the Executive Budget Act and the absence of substantial change in the Executive Budget Act from 1929 until 1973, there has been a marked tendency in recent years for the Advisory Budget Commission to acquire, by custom and special legislative action, more initiative and independent authority than the Act contemplated. As a result, the popular perception—which reflects but probably exaggerates

1. "If the Director and Commission shall not agree in substantial particulars, the Director shall prepare the proposed budget based on his own conclusions and judgment and shall cause to be incorporated therein such statement of disagreement and the particulars thereof, as the Commission or any of its members shall deem proper to submit as representing their views." N.C. GEN. STAT. § 143-11

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the reality—has come to be that the Advisory Budget Commission prepares the state budget and the Governor only occasionally and selectively takes part in the budget-making process. So long as the Governor and all members of the Commission belonged to the same political party, the potential for conflict rarely materialized. The Governor generally could command the Commission's support on issues important to him, while the Commission exercised increasing influence over both budget formulation and administration in matters not vital to the Governor's interests.

Governor James E. Holshouser, Jr., has taken a much more consistently active role in budget preparation than his recent predecessors have. He has attended and presided over most of the meetings of the Advisory Budget Commission. (The Executive Budget Act makes no provision for a chairman of the Commission and it may have been intended that the Governor always be the presiding officer, but in recent years the Commission has chosen a chairman from its membership.) Because he appoints only a third of the Commission's members and does not share party allegiance with the rest, the Governor has found an active personal role to be necessary if he is to have the influence he wants on the Commission's deliberations.

DURING THE LAST DOZEN YEARS, the General Assembly has become increasingly aware of itself, the importance of its role in state government, and the limitations that its short, intermittent sessions and the part-time character of legislative service impose on its effectiveness. The legislature has responded to this awareness in several ways—by erecting the State Legislative Building, by acquiring a year-round and growing professional staff, through improved technical support processes and annual sessions (at least on an experimental basis), through increased legislative compensation, and others. Several responses have focused on the relative roles of the legislature and the Governor in budget preparation, review, and execution, and they have been intended generally to enhance the General Assembly's part in those processes. Some of the changes have come about by statute, some by legislative rule, and some by other kinds of legislative action. Concurrently, a constitutional change with a counterthrust may have strengthened the Governor's position. It is too early to do more than speculate about these changes. But the tide of change seems still to be running, and the 1975 session of the General Assembly may take further action in regard to this important facet of legislative-executive relations.

## CONSTITUTIONAL PROVISION

A little noticed but potentially very important recent change in the executive-legislative relationships in state finance is a provision of the Constitution of 1971 included in the enumeration of the Governor's powers. Until 1971, the Governor's budgetary powers were entirely statutory in their basis and therefore were subject to modification or repeal at the legislature's pleasure. As if to guard against such a contingency, the revised Constitution embodies in Article III, section 5(3), the following statement:

> *Budget.* The governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.[2]

Section 5(3) makes no mention of the Advisory Budget Commission. It vests power to prepare, to recommend, and (after legislative enactment) to administer the state budget entirely in the Governor. He may accept—or reject—the Commission's advice as he sees fit. The General Assembly is free to do as it wishes with his recommendations, and the Governor is obliged to administer the budget as enacted by the legislature, but the General Assembly's power to limit his budget formulation and administrative powers has been curtailed. The significance of this new constitutional element in executive-legislative relationships is yet to be developed.

## THE ADVISORY BUDGET COMMISSION

*Enlargement of the Commission.* The General Assembly of 1973 enlarged the Advisory Budget Commission by adding to its existing membership (the four chairmen of the "Money" committees and the Governor's two appointees) two other senators appointed by the President of the Senate, two other representatives appointed by the Speaker of the House of Representatives, and two more appointees of the Governor, for a total membership of twelve. The effect was to bring a larger numerical (though not proportional) legislative participation to the Commission's work.

*The Open Meetings Law.* North Carolina's Open Meetings Law, sometimes referred to as a "sunshine" law because it was intended to bring most governmental deliberations into the glare of public scrutiny, was passed in 1971.[3] G.S. 143-318.5 states that "[t]he provisions of this Article shall not apply to meetings of the Advisory Budget

2. The North Carolina State Constitution Study Commission noted in 1968 that Section 5(3) was the "only addition to the list" of the Governor's duties, and gave "constitutional status to the Governor's present statutory responsibility for preparing and recommending the state budget to the General Assembly and then for administering it after enactment. . . ." REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 77 (1968).

3. N.C. GEN. STAT. §§ 143-318.1 through -318.7.

Commission held for the purpose of actually preparing the budget required by the provisions of the Executive Budget Act . . . ." Thus the Open Meetings Law itself has had no effect upon the traditional secrecy in which the Governor and the Advisory Budget Commission prepare the proposed state budget. Nevertheless, G.S. 143-34.4 expressly permits staff members of the Fiscal Research Division to "attend all meetings of the Advisory Budget Commission and all hearings conducted by or for the Commission," which seems rational in view of the fact that the Commission is largely the creature of the General Assembly, and the Fiscal Research Division is the legislature's staff agency for making independent budget analyses.

## ANNUAL SESSIONS

On April 9, 1973, the General Assembly ratified Resolution 58 of the First Session of the 1973 General Assembly, stating its intention to "experiment" with annual sessions and annual budget appropriations. As reasons for the experiment, the resolution cited (1) "the increasing complexity and magnitude of State government," (2) "the constantly changing impact of uncertain and shifting federal funding on State and local governments," (3) "the constant output of new and varying judicial rulings on legal and constitutional questions," (4) "new scientific inventions and discoveries," and (5) "the generally accelerating tempo of modern life." The resolution cited almost every reason except the one that many observers have felt was the controlling reason: the presence of a Republican Governor in Raleigh for the first time in recent memory.

Resolution 58 directed the Appropriations Committee of each house to report a committee substitute for the Budget Appropriations Bill that would provide appropriations for the 1973-74 fiscal year only rather than for the 1973-75 biennium. The Appropriations committees were further directed to report out to the adjourned 1974 session a bill providing appropriations for the 1974-75 fiscal year only. Thus Resolution 58 contemplated that the General Assembly would meet in 1973, 1974, and 1975. No decision could be made in 1973 about whether the General Assembly would meet in a fourth annual session in 1976, the last year of Governor Holshouser's administration. An attempt (Senate Bill 45) was made to put before the voters a constitutional amendment authorizing annual sessions; it was not reported out of the Senate Rules Committee.[4]

Previously, on January 17, 1973, the Attorney General, in an opinion written to Clyde L. Ball, Legislative Services Officer, said that there were no existing constitutional impediments to the adoption of an annual rather than a biennial budget for state government. The opinion went on to say:

> As indicated in your inquiry, there are numerous statutory amendments to the Executive Budget Act which would need to be made in order for the Advisory Budget Commission to have the authority to prepare an annual budget and in order for the General Assembly to adopt an annual budget. In addition, we would recommend a catch-all change since there probably are numerous sessions laws, not codified in the Executive Budget Act, which refer to the biennial budget. [42 N.C. Att'y. Gen. Rep. 160, at 162].

Despite this suggestion that a number of statutory amendments would be needed if the Advisory Budget Commission were to recommend an annual budget and if an annual budget were to be adopted, the appropriations bill enacted (Ch. 533, Sess. Laws 1973) seems to have dealt with the subject only obliquely by the simple statement in Section 32 that "[a]ll laws and clauses of laws in conflict with this act are hereby repealed." Apparently the legislature considered this provision, read in conjunction with the statement in Section 2 of Chapter 533 that appropriations were being made "for the fiscal year ending June 30, 1974," to be an implicit amendment of whatever statutes the Attorney General had in mind in his opinion of January 17, 1973. Though this provision may have been sufficient to authorize the adoption of an annual budget by the General Assembly, it was probably insufficient to authorize future recommendations of annual budgets by the Advisory Budget Commission.

By the time this article appears, the 1975 General Assembly may have decided whether to have an annual session in 1976.

## ADOPTION OF A PROGRAM FORMAT

Senate Joint Resolution 654 of the 1973 session (which passed the Senate but was never reported out of the House Appropriations Committee) would have provided for the creation of a Joint Interim Standing Appropriations Committee to recommend to the Governor, through the Legislative Fiscal Research Division and in conjunction with the Advisory Budget Commission, changes in the state's budget format to overcome certain deficiencies noted in the state's line-item budget format. The 1973 Appropriations Subcommittee on Personnel and Long-Range Planning had noted "that the fragmentation of programs and activities among several agencies makes it difficult to determine the number of people being served, the objectives of the programs, the investment during prior years, the requested funding for the next year, the quality of service being provided, and duplication of ef-

4. At least one member of the House was sufficiently opposed to the concept of annual sessions to cause his remarks made shortly before Resolution 58 was ratified to be inserted into the House Journal:

> Our General Assembly must use its power with caution, since our Governor has no veto, and annual sessions may bring too much power forward. (Remarks of Representative Johnson of Wake, 1973 *House Journal* (1st sess.), p. 482, April 6, 1973.)

fort involved, and other information needed to evaluate the program . . . ." Further, the subcommittee objected to the "fragmentation" of the state's budget into four volumes (a volume for the "A" or continuation budget, a volume for the "B" or expansion budget, a volume for the "C" or capital improvements budget, and a final Summary volume), and noted that "the relationship in many instances between the organization of the budget and the actual organization of the agency makes it difficult to determine who is responsible for a given appropriation." Largely on the strength of this resolution, the Office of State Budget recommended to the Advisory Budget Commission a shift from a line-item format to a program format. Because the Advisory Budget Commission approved the recommended new programmatic format during the summer of 1973, in time for the 1974-75 Budget to be prepared in the new format, it was unnecessary for the General Assembly to take further action on Senate Joint Resolution 654 in 1974.

The 1974-75 proposed state budget was, according to the Office of State Budget, "the first budget to provide extensive narrative and fiscal material in a program format." Presented in a single volume that included all operating and capital appropriation recommendations, it abandoned the "multivolume style of presentation" used since 1959. Though the costs of continuing a program and the costs of adding new functions to a program or otherwise expanding a program are still separated, both costs appear now on the same page, so that all relevant information pertaining to one state agency or program is grouped together in one location in the budget format.

The Office of State Budget has systematically eliminated "object-of-expenditure information" in favor of "narrative information." Even though object-of-expenditure information no longer appears in the budget format, it is still available, as in the past, from the Office of State Budget. The House's Base Budget Committee continues, as the discussion will show, to rely on much line-item information.

## SUBCOMMITTEES

Until the 1969 session of the General Assembly, the Appropriations committees, each composed of half the membership of each house, met jointly into the early spring.[5] Only near the end of the committees' work was a joint Appropriations Subcommittee formed to put the final touches on the budget. This system was criticized on the grounds that it failed to involve most members of the Appropriations committees in the budget process in any meaningful way and permitted control of the budget by a small group of legislators—those few members selected to work on the joint subcommittee.

Beginning in 1969, the Joint Appropriations Committee was broken down into four subcommittees[6] structured along subject-matter lines, and what had formerly been denominated the Subcommittee became known as the "Supersubcommittee." In the 1974 session, these four standing subcommittees were (1) the Subcommittee on Health, Welfare, and Institutional Care, which examined the recommended budgets of the Governor and the Advisory Budget Commission for the Department of Human Resources and the Department of Social Rehabilitation and Control (now the Department of Correction); (2) the Sub-committee on Education, which examined the recommended budgets for public schools, community colleges, and higher education; (3) the Subcommittee on General Government and Transportation, which examined the recommended budget for the Departments of Transportation, State Auditor, Treasurer, Commerce, Insurance, Justice, Labor, Agriculture, and Military and Veterans Affairs; and (4) the Subcommittee on Salary Increases, which examined recommended salary increases for state officials, state employees, and public school personnel.[7]

Each of the subcommittee reports made recommendations ranked according to four priorities: Priority I—Compelling, Priority II—Highly Recommended, Priority III—Recommended, and Priority IV—Not Recommended. The four subcommittee reports were submitted to the Joint Appropriations Committee. Subcommittee 4 reported on February 26, 1974; Subcommittee 3 on March 19; Subcommittee 2 on March 20; and Subcommittee 1 on March 21. Only after all subcommittee reports had been received by the Joint Appropriations Committee could the "Supersubcommittee" begin its final work in shaping the budget. The appropriations bill was not passed until April 8, 1974.

## OPEN MEETINGS OF JOINT SUBCOMMITTEE ON APPROPRIATIONS ("SUPERSUBCOMMITTEE")

On April 30, 1973, the Attorney General wrote to Representative Carl J. Stewart, Jr., co-chairman of the Joint Subcommittee on Appropriations, stating his opinion, (which has not been published as an Opinion of the Attorney General) that the Joint Subcommittee is required by G.S. 143-14 to hold open meetings. That statute provides that subcommittees of the Joint Appropriations Committee must hold open meetings unless an express rule of either house of the General Assembly changes this requirement. Since there is no such rule, the Joint Subcommittee is required to hold open meetings.

5. The two Appropriations committees have met jointly by rule and by operation of G.S. 143-14, but legally they are several, not joint, and their final, definitive actions are taken separately.

6. The House had a fifth subcommittee, a Subcommittee on the Base Budget, for which there was no Senate equivalent.

7. Senate Joint Resolution 654, referred to above, would have recommended, in addition to a new budget format, a study of the alignment of Appropriations Committee subcommittees.

## HOUSE RETURNS TO LINE-ITEM CONSIDERATION

Traditionally, each house of the General Assembly has been divided into a Finance Committee and an Appropriations Committee, and the two Appropriations committees have met together for hearings and most of their deliberations, with final, formal committee action being taken in separate sessions. On January 22, 1975, House Speaker James C. Green indicated that the House will no longer follow this tradition. Instead he appointed an entirely new committee, a Base Budget Committee, to consider possible cuts in the "continuation" budget (formerly referred to as the "A" budget), and an Appropriations Committee, to consider both the "expansion" budget (formerly the "B" budget) and the capital improvement budget (formerly the "C" budget). Thus the former House Appropriations Committee has been split into two committees, while the Senate continues to have only a single Appropriations Committee. In effect, the House's Subcommittee on the Base Budget has been elevated to full committee status. Because of the significance of this change, a major part of the Speaker's charge to the newly created Base Budget Committee appears below:

> The Base Budget Committee shall be a full standing committee with full powers to look into every item of the base budget and the continuation budget with the following duties.
>
> 1. To study in detail and by line item each recommendation constituting a part of what is now called the continuation budget.
> 2. To determine whether or not each line item and program component of the continuation budget is necessary and needed or whether it can be deleted or reduced, and to delete or reduce each and every line item in the continuation budget recommended, which the committee in their wisdom feel should be eliminated or reduced.
> 3. In performing this service, the Base Budget Committee shall first require for each department its recommended continuation budget in line-item detail.
> 4. After considering and making their determination as to whether each line item is to remain in the continuation budget or be deleted, the Base Budget Appropriations Committee shall bring forth to the floor of the house for consideration by the entire house of representatives that portion of the appropriations bill that has to do with the continuation budget.
> 5. To review the format of the appropriations bill to continue current operations and, if the 1975 General Assembly deems it advisable, be in a position to rewrite such appropriations bill and make it possible for the 1975 General Assembly to pass and appropriate necessary monies in a line-item budget form.
> 6. The committee is authorized to work independently of any other committee, but at the same time the committee is directed to coordinate its efforts with the House Committee on Appropriations, which will be handling the expansion budget, and the committee shall, wherever feasible, coordinate its work with any Senate Committee on Appropriations.

This is a new approach to examining the budget. However, the time has come in our history when we cannot afford the luxury of obsolete programs and excessive spending and even though this committee may create work for state agencies and long hours of work for the members of the legislature, this is something that must be done to fulfill our responsibility to the citizens of North Carolina.

On February 5, the Speaker said that he is trying to shift policy decisions from the Appropriations Committee to other House committees. The split of the old Appropriations Committee into the new Base Budget Committee and a reduced Appropriations Committee would seem to be one part of such a strategy. Green believes that in the past the Appropriations Committee made policy as it decided on the contours of the state budget. This year other committees will be expected to establish policy, and the Appropriations and Base Budget committees will be expected to report to the full membership of the House a proposed state budget that will reflect the policy decisions made in other committees.

## THE FISCAL RESEARCH DIVISION

The Fiscal Research Division of the Legislative Services Commission, provided for in G.S. 120-36.1 through -36.5, was created in 1971. It came about as a result of the General Assembly's need for competent help, available and responsible solely to it in dealing with its responsibilities toward the state budget—in obtaining factual information, in doing comprehensive analyses, and in making recommendations based on exhaustive research.

As created, the Fiscal Research Division has fifteen staff members divided administratively into six groups. The staff members of each group are responsible for developing studies of the departments of state government, the individual agencies of state government, and the occasional functions of state government that have been assigned to a particular group. As of October 1974, the six groups were organized as follows:

1. *Human Resources*

   Human Resources
   Corrections
   Child-Caring Institutions
   Day-Care Licensing (Administration)
   North Carolina Cancer Institute
   Orthopedic Hospital

2. *Education*

Public Education (Public Instruction and Community Colleges)
University of North Carolina
North Carolina Memorial Hospital

3. *Transportation and Development*

Transportation and Highway Safety
Administration
Natural and Economic Resources
Highway Fund Debt Service

4. *Public Safety and Regulation*

Military and Veterans Affairs
Commerce
Insurance
Justice
Judicial Department
Courts Commission
Labor
Occupational and Professional Licensing Boards
Agriculture

5. *General Government*

General Assembly
Governor's Office
Lieutenant Governor's Office
Secretary of State
Auditor
Treasurer
Revenue
Pensions—Governor's Widows
Cultural Resources
Historical Educational Grants
Salaries and Benefits (General)

6. *Revenue/Taxation*

Revenue/Taxation Matters
General Revenue-Sharing
Local Government Finance
General Fund Availability

The Division's staff members have diverse backgrounds that strengthen its working effectiveness. Three staff members come from business and or accounting, and one is a certified public accountant. The others tend to be one of a kind—with backgrounds in, for example, public administration, political science, economics, and the sciences.

Because the Fiscal Research Division is relatively new, its function is still evolving. Some uncertainty remains in the General Assembly about precisely what the Division is supposed to do. Because different groups of legislators may have widely varying expectations of it, the Division cannot always satisfy all of its legislative clients simultaneously. Some sources suggest that it was created to function as a "watchdog staff" for the legislature, but such a view may not only expect more from the Division than it can deliver with the size of its present staff but also overlook the valuable role that the Division can play in conducting occasional in-depth analyses of various state agencies or departments of state government. As now organized, the Division is well prepared to conduct such analyses. But if, in establishing the Division, the legislature intended to create a staff agency that would look carefully into complex problems and report to the General Assembly with clear and brief analyses, it may find that certain problems do not, because of their great complexity, lend themselves to this treatment, however desirable it might be. Clearly, only after the Fiscal Research Division has functioned during several legislative sessions will both its staff members and the General Assembly reach a general agreement on what it can and should do. The fact that the first session of the General Assembly for which it worked had a continuation session may have prevented the Division from developing the proper between-session stride, and the uncertainty about the duration of the General Assembly's "experiment" with annual sessions will make it difficult for the Division to function optimally.

It appears likely that the recent creation of a Base Budget Committee in the House will put severe strains on the Division's ability to meet the demands likely to be put on it during the current session. The return to a line-item consideration of the budget may also require a sudden revamping of the materials that would have been presented to the traditional Appropriations Committee, a development that would strain the staffs of both the Fiscal Research Division and the Office of State Budget, which are now together preparing the materials to be considered by the Base Budget Committee. In the past, the Division has provided staff assistance to the Appropriations Committees. This year, it may need to provide staff assistance to a Senate Appropriations Committee, the House Appropriations Committee, and the House Base Budget Committee. Should any of these committees be subdivided into subcommittees, the Division's staff would be further fragmented. Because in some areas the Division has only one specialist, it may be hard pressed to serve all committees adequately unless the committees somehow manage to stagger their considerations of certain departments and activities.

The Division's initial funding for the 1971-75 biennium was $375,000 (N.C. Sess Laws 1971, Ch. 1048), but the Division, because not immediately staffed as fully as authorized, spent only $38,734 in 1971-72 and $180,531 in 1972-73. The Budget of 1973-75 recommended an appropriation of $226,765 to support the Fiscal Research Division in 1973-74; the General Assembly appropriated a slightly greater amount—$237,598. The Budget for 1973-75 recommended appropriation of $230,765 for the

Division's work in 1974-75, yet the Budget presented in the 1974 session recommended a significantly larger appropriation for that work in 1974-75—$271,686. The increased appropriation for the Division was intended to permit an expansion of the staff from 13 to 15. The General Assembly's generosity indicates its strong interest in the Fiscal Research Division's work and its willingness to appropriate whatever funds the Division may need to function at the level the legislature thinks suitable.

IMPLICIT IN THE FOREGOING DISCUSSION is the crucial importance of personalities in North Carolina's budgeting and appropriations processes. Disembodied theoretical possibilities do not mesh and interact with abstract legal constraints. A dominant committee chairman, a strong-willed Governor with a personal interest in the budget process, or an imaginative and forceful administrator may cause a temporary realignment of the political forces and tensions that are normal to the process. Only a naive observer would conclude that the powers and responsibilities of the Governor and the General Assembly in the budget area have been forever fixed in some immutable relationship.

Whatever the precise relationship at any given time, the process of preparing, adopting, and administering the budget of a state whose total governmental expenditures now exceed $3 billion annually cannot help but interest not only those actively involved in the budget process, but also the citizens who pay the bill and benefit from the governmental services provided.

## STATE LEGISLATIVE MODERNIZATION (*continued from page 5*)

Our present-day legislatures are more representative of people than at any other time in the twentieth century, and probably in all of American history.

Our state legislators are more receptive to change and innovation, "trial and error," than ever, as the record of procedural, staffing, and other alterations indicates.

Today's legislators seem willing and able to devote a higher percentage of their time than in the past to legislative duties, although there appears to be a marked preference among incumbents throughout the country for the "citizen legislator" approach over the full-time legislator approach.

Our legislatures have become highly responsive to demands of the public, as the widespread enactment of ethics, conflict-of-interest and election-reform law in recent sessions demonstrates.

The legislatures have indicated determination to be independent of executive control and to make a reality of their responsibility to hold administrative agencies accountable for carrying out programs in accordance with legislative intent.

The legislatures, as a matter of trend, seem to be gaining positions of strength in the key areas of problem identification, policy analysis, and solution-finding, which are essential ingredients of a legislative program; and thus they are coming closer to achieving co-equality with the chief executives, who also have constitutional and political responsibilities for delineating needs and recommending solutions.

If these characteristics are the ones the American people want in their lawmakers, our legislatures are on the way.

# LEGISLATIVE ETHICS: ENDS AND MEANS

*Clyde L. Ball*

TODAY WE OFTEN HEAR that "people have lost their faith in government." The use of the present perfect tense in that phrase suggests that this phenomenon, though completed, is a recent development. The suggestion is probably misleading. This writer has seen no proof that the American people ever had anything approaching a childlike faith in their government, or that the ethical standards of government are any lower today than they have been in the past.

One thing is clear, however: politicians seem to be more keenly aware of the citizens' distrust of government. Watergate was a scandal in one party in the executive branch of the national government. Yet elective officials from all parties—at local, state, and national levels, in legislatures as well as executive departments—feel themselves injured in some degree in their public images by that scandal.

Long before Watergate, however, the various state legislatures were giving serious attention to troublesome ethical questions arising out of the activities of the legislatures and their members. Legislators were concerned primarily with the actual ethical quality of the legislatures, but they also had to pay attention to their public image if they were to survive politically.

Legislators tend to rank near the bottom of the scale in the public estimate. News media from the present back through Will Rogers to Mr. Dooley and probably far beyond have frequently suggested that legislatures are peopled by knaves and clowns. Distrust of the legislatures is exemplified by the remarkable circumstance that self-appointed "consumer advocates" who have never faced the voters at the polls are considered to be the champions of the people as against those representatives of special interests—the legislators elected in the regular democratic process.

Faced with these and other evidences of public disenchantment with the legislatures and motivated, this writer believes, by an increasingly perceptive sense of ethics and propriety, legislators have been searching for solutions. The solutions quite naturally take the form of regulatory legislation.

Seven states have long-standing statutes or constitutional provisions dealing with legislative ethics. Some 35 other states have enacted some type of legislative-ethics statute, and about 30 of these statutes have been enacted since 1960. These figures do not include states that have statutes that do no more than prohibit bribery or forbid a legislator to contract with the state. Bribery statutes are well-nigh universal, and statutes prohibiting contractual dealings in clear conflict-of-interest situations are almost as common.

## TYPES OF LEGISLATIVE ETHICS STATUTES

A number of states have included legislators within a general ethics code governing public officers and employees; sometimes these general codes contain special provisions relating to legislators. More common is the ethics code that applies to legislators only.

The reasons for separate codes for legislators include: (1) Legislators are responsible directly to the electorate and hence are subject to no supervision by higher officials, while at the same time legislators are routinely subjected to considerable pressures from many sectors. (2) State legislators are usually part-time officials who receive a very limited salary; they are employed or retained by other private or public employers, or they have their own businesses. The fact that legislators must have sources of income other than that received for their legislative service creates a much greater incidence of conflict between private interests and public duty than exists for full-time officers and employees. (3) Most state legislators must conduct biennial campaigns in order to retain their seats, thus making it necessary to obtain campaign contributions on a frequently recurring basis.

A number of states have adopted comprehensive statutes that cover most of the situations in which ethical questions are most likely to arise. Other states have dealt only with limited types of situations. The more recent statutes tend to be the more comprehensive. For example, Connecticut, Indiana, Maine, Nebraska, and New Jersey have all adopted comprehensive statutes since 1970.

The most common types of provisions found in legislative-ethics statutes are those that:

1. Prohibit a legislator from accepting employment that he has reason to believe will impair his independence of judgment.

*The author was an Institute faculty member from 1956 to 1964 and now is the General Assembly's Legislative Services Officer.*

2. Prohibit a legislator from accepting a fee for prosecuting a claim against the state.

3. Prohibit a legislator from representing a client before a state regulatory board or agency.

4. Prohibit a legislator from contracting to sell goods or services to the state.

5. Prohibit a legislator from accepting a gift or other thing of value, including an "economic opportunity" that might reasonably tend to influence his legislative judgment.

6. Prohibit disclosure of confidential information gained as an incident to legislative service.

7. Prohibit a legislator from acting to obtain personal profit from confidential information gained as an incident to his legislative service.

8. Prohibit a legislator from voting on any matter in which he or a member of his family has a personal or private financial interest.

9. Require a legislator to disclose the personal financial interests of himself and members of his family.

## PROBLEMS ARISING UNDER VARIOUS TYPES OF STATUTES

If a legislator is prohibited from accepting employment that he has reason to believe will impair his independence of judgment, what employment is open to him? Almost every type of business and profession is subject to some degree of regulation by the state. Certainly all are subject to taxation or to exemption from taxation. May a legislator accept employment with a public utility? With a farm that produces tobacco, which is constantly involved in tax arguments? With an industry that manufactures machinery of a type used by the state? May he become a minister of a church whose property and income are exempted by statute from taxation? In short, what kind of employment does not carry the possibility that the legislator will find a conflict between his employer's private interest and the public interest? Furthermore, is the legislator's subjective judgment to control? If so, what is to be done when a particular individual is uncommonly insensitive to the potential for conflict of interest? If a legislator is prohibited from accepting a particular type of employment, would one who now holds that kind of job be prohibited from running for a legislative seat? If so, would such a prohibition be constitutional?

A similar list of questions could be posed with respect to most of the types of statutory provisions listed in the preceding section of this paper. A special group of questions is particularly applicable to the last type of provision listed—questions of a different nature from those posed in the preceding paragraph. Specifically, with respect to a statute requiring that a legislator disclose his personal economic interests, the following questions must be answered:

1. What kinds of economic interests must be disclosed? Some statutes require that disclosure be made of every office or directorship held by the legislator in any firm or enterprise established for the purpose of making a profit. Others require that the names of all persons, etc., from whom the legislator received more than a specified amount of money (e.g., $1,000) during the preceding year be listed. Still others require a listing of personal and real property, particularly real property that was acquired during the preceding year. A very common provision requires that the legislator disclose every interest he holds in an entity that is subject to state regulation. Also very common is the requirement that the legislator disclose any personal interest he has in particular legislative proposals before he votes on those proposals.

2. Whose interests must be disclosed? Shall the disclosure requirements apply only to the legislator himself, or shall they apply to others, such as his spouse, children, business partners, or others whose economic interests are closely bound up with his own?

3. How shall disclosure be made? In most states disclosure is made by filing a statement with the Secretary of State. In some states, the statement is filed with a board of ethics, in others with the appropriate house of the legislature. In any case, shall the reports be made public?

4. When shall disclosure be made? Commonly, reports filed with the Secretary of State are required annually. Some disclosures with respect to private interest in particular legislative proposals are filed with the clerk of the appropriate house of the legislature just before voting on those proposals. Some statutes require that amendments be filed to disclosure reports each time that substantial changes in the facts reflected in the latest report occur. A related question is, shall disclosure be required during the election campaign? If so, shall the disclosure report be filed with the same officer who receives post-election reports, or shall it be filed with election officials?

5. What shall be the effect of a disclosed interest? Shall it prohibit the interested legislator from participating in debate on bills related to the interest, or shall it merely prevent him from voting on these bills? Shall he be allowed to vote, once the interest is disclosed?

6. What shall be the effect of failure to disclose at the required time? Shall a candidate be disqualified? (Such a result may offend the North Carolina Constitution.) Shall the offending legislator be censured, suspended, expelled, or prosecuted through the criminal courts?

If a board of ethics or similar type of body is created to deal with failures to disclose or other charges of breach of ethics, what shall its powers be? Shall it be advisory only, or shall it be empowered to investigate, determine an ethical issue on its merits, and impose sanctions? Shall the board be composed solely of legislators, or shall it include

# SELECTED PROVISIONS FROM LEGISLATIVE ETHICS LAWS OF OTHER STATES

*Ill Annot. Stat Ch. 127, § 604A-12*

(a) The following interests shall be listed by all persons required to file:

(1) The name, address and type of practice of any professional organization or individual professional practice in which the person making the statement was an officer, director, associate, partner or proprietor, or served in any advisory capacity, from which income in excess of $1,200 was derived during the preceding calendar year;

(2) The nature of professional services . . . and the nature of the entity to which they were rendered if fees exceeding $5,000 were received during the preceding calendar year from the entity for professional services rendered by the person making the statement.

(3) The identity (including the address or legal description of real estate) of any capital asset from which a capital gain of $5,000 or more was realized in the preceding calendar year.

(4) The name of any unit of government which has employed the person making the statement during the preceding calendar year . . . .

(5) The name of any entity from which a gift or gifts, or honorarium or honoraria, valued singly or in the aggregate in excess of $500, was received during the preceding calendar year.

(b) The following interests shall also be listed . . . :

(1) The name and instrument of ownership in any entity doing business in the State of Illinois, in which an ownership interest held by the person at the date of filing is in excess of $5,000 fair market value or from which dividends of in excess of $1,200 were derived during the preceding calendar year . . . . No time or demand deposit in a financial institution, nor any debt instrument need be listed;

(2) Except for professional service entities, the name of any entity and any position held therein from which income of in excess of $1,200 was derived during the preceding calendar year, if the entity does business in the State of Illinois. No time demand deposit in a financial institution, nor any debt instrument need be listed.

(3) The identity of any compensated lobbyist with whom the person making the statement maintains a close economic association, including the name of the lobbyist and specifying the legislative matter or matters which are the object of the lobbying activity, and describing the general type of economic activity of the client or principal on whose behalf that person is lobbying.

*Arizona Rev. Stat Ann § 38-542*

In addition to other statements and reports required by law, every public officer, as a matter of public record, shall file with the secretary of state on a form prescribed by the secretary of state a verified statement disclosing:

1. The name of the public officer and each member of his immediate family and all names under which they do business.

2. Identification of each employer and of each other source of compensation amounting to more than one thousand dollars annually received by the public officer and his immediate family in their own names, or by any other person for the use or benefit of the public officer or his immediate family and a brief description of the nature of the services for which the compensation was received, except that this paragraph shall not be construed to require the disclosure of information that may be privileged by law nor the disclosure of individual items of compensation that constitute a portion of the gross income of the business or profession from which the public officer or his immediate family derives compensation.

3. The name of every corporation, trust, business trust, partnership, or association in which the public officer and his immediate family, or any other person for the use or benefit of the public officer or his immediate family, have an investment or holdings of over one thousand dollars at fair market value as of the date of said statement, or in which the public officer or his immediate family holds any office or has a fiduciary relationship, together with description of the investment, officer or relationship, except that this paragraph does not require disclosure of the name of any bank or other financial institution with which the public officer or member of his immediate family has a deposit or withdrawal share account.

4. All Arizona real property interests including street address, specific location and approximate size or legal description to which either the public officer or his immediate family holds legal title, or a beneficial interest in, excluding his residence and property used primarily for personal recreation by the public officer or his immediate family.

5. The names of all persons to whom the public officer and his immediate family, in their own names or in the name of any other person, owe more than one thousand dollars, except that this paragraph shall not be construed to require the disclosure of debts owed by the public officer or his immediate family resulting from the ordinary conduct of a business or profession, nor debts on the residence of the public officer or his immediate family, nor debts arising out of secured transactions for the purchase of consumer goods, nor debts secured by cash values on life insurance, nor debts owed to relatives.

6. The identification of all accounts receivable exceeding one thousand dollars held by the public officer and his immediate family in their own names, or by any other person for the use or benefit of the public officer or his immediate family. This paragraph shall not be construed to require the disclosure of information that may be privileged by law, nor the disclosure of debts owed to the public officer or his immediate family resulting from the ordinary conduct of a business or profession.

7. The source of each gift of more than five hundred dollars received by the public officer and his immediate family in their own names during the preceding twelve months, or by any other person for the use or benefit of the public officer or his immediate family except gifts received by will or by virtue of intestate succession, or received by way of distribution from any inter vivos or testamentary trust established by a spouse or by an ancestor, or gifts received from relatives. Political campaign contributions shall not be construed as gifts.

8. A description of all professional, occupational and business licenses in which either a public officer or his immediate family has an interest, issued by any Arizona state department, agency, commission, institution, or instrumentality, including the name in which the license is issued, the type of business or profession, and its location.

*N J Stat Ann § 52 13D-18*

(a) No member of the Legislature shall participate by voting or any other action, on the floor of the General Assembly or the Senate, or in committee or elsewhere, in the enactment or defeat of legislation in which he has a personal interest until he files with the Clerk of the General Assembly or the Secretary of the Senate, as

the case may be, a statement (which shall be entered verbatim on the journal of the General Assembly or the Senate) stating in substance that he has a personal interest in the legislation and that notwithstanding such interest, he is able to cast a fair and objective vote and otherwise participate in connection with such legislation.

(b) A member of the Legislature shall be deemed to have a personal interest in any legislation within the meaning of this section if, by reason of his participation in the enactment or defeat of any legislation, he has reason to believe that he will derive a direct monetary gain or suffer a direct monetary loss. No member of the Legislature shall be deemed to have a personal interest in any legislation within the meaning of this section if, by reason of his participation in the enactment or defeat of any legislation, no benefit or detriment could reasonably be expected to accrue to him, as a member of a business, profession, occupation or group, to any greater extent than any such benefit or detriment could reasonably be expected to accrue to any other member of such business, profession, occupation or group.

*Washington Rev. Code Ann.* § *42-21.060*

Every public official . . . and every candidate shall . . . file with the secretary of state, a written statement of:

(1) The name of any corporation, firm or enterprise subject to the jurisdiction of a regulatory agency in which he has a direct financial interest of a value in excess of one thousand five hundred dollars: Provided, That policies of insurance issued to himself or his spouse, accounts in banks, savings and loan associations or credit unions are not to be considered financial interests; and

(2) Every office or directorship held by him or his spouse in any corporation, firm or enterprise which is subject to the jurisdiction of a regulatory agency; and

(3) The name of any person, corporation, firm, partnership, or other business association from which he receives compensation in excess of one thousand five hundred dollars during the preceding twelve month period by virtue of his being an officer, director, employee, partner or member of any such person, corporation, firm, partnership or other business association; and

(4) As to attorneys or others practicing before regulatory agencies during the preceding twelve month period, the name of the agency or agencies and the name of the firm, partnership or association of which he is a member, partner, or employee and the gross compensation received by the attorney and the firm, partnership or association respectively for such practice before such regulatory agencies; and

(5) A list of legal description of all real property in the state of Washington, in which any interest whatsoever, including options to buy, was acquired during the preceding calendar year where the property is valued in excess of fifteen hundred dollars: Provided, That legislators shall also comply with such rules or joint rules as they now exist or may hereafter be amended or adopted.

*Ind. Ann. Stat.* § *2-2. 1-3-10*

No member of the general assembly shall receive compensation for the sale or lease of any property or service which substantially exceeds that which the member of the general assembly would charge in the ordinary course of business from any person or entity whom he knows or, in the exercise of reasonable care and diligence should know, has an economic interest in a legislative matter.

laymen or some officials from the executive or judicial branches of government? How shall its members be selected? Shall the board be nonpartisan or bipartisan? If bipartisan, shall the two major parties be equally represented, or shall there be proportional representation?

This list of questions is not exhaustive, but it serves to emphasize that many important and difficult policy questions must be answered before the draftsman can begin to put together a legislative-ethics bill. And when all the questions have been answered, the draftsman is faced with an extraordinarily difficult task in arriving at language that will effectuate the policies agreed upon.

## THE PROS AND CONS OF LEGISLATIVE ETHICS STATUTES

"Ethics" is an attractive word. It suggests a sense of high moral character, of rightness, of freedom from base or ignoble motive or action. As applied to a legislator, it suggests particularly commitment to the public good as distinguished from personal advantage.

Because "ethics" has attractive connotations, the word appeals to legislators who must face the electorate frequently. The candidate who supports ethics legislation is on the side of the angels. If he is a veteran legislator, he has seen the evil and promises to fight to eradicate it. If he is a newcomer, he promises to bring his untarnished strength to the battle for good.

Both of these positions are praiseworthy. But the task of developing a truly meaningful ethics statute—one that will produce a higher level of ethical behavior among legislators without producing undesirable consequences that may outweigh the benefits—requires more than a sincere and worthy motive. It requires a long, hard look at every proposed clause. *Esse quam videri* demands that North Carolinians get results, not illusions.

What are the chief undesirable results that may flow from one or more of the types of ethics statutes? First, if the statute is effective—that is, if it eliminates situations in which a legislator may have a conflict between his private interest and the public interest—it may make it impossible for most persons who are in their most productive years to serve in the legislature. A person cannot support himself or others on the usual state legislator's salary. In North Carolina the legislative salary is $4,800 per year. This figure, which represents a 100 per cent increase over the pre-1975 salary, is hardly enough to provide minimal support for one individual, not to mention his family. A very strict interpretation and application of conflict-of-interest provisions could eliminate from the legislature all but the independently wealthy, the retired, and the otherwise unemployed.

Second, if the statute requires detailed disclosure of a legislator's private economic affairs, a natural reluctance to have one's personal finances paraded in public will cause many valuable persons to decline to run for a legislative seat. One may be embarrassed to disclose that he has little or no economic resources; another may not like the public to know how wealthy he really is.

Furthermore, if a statute requires the legislator or candidate for a legislative seat to disclose the personal economic affairs of members of his family, it may require him to do what he has no power to do. Suppose a man is a candidate, and the ethics statute requires that he disclose his wife's economic interests. The wife has her individual resources and keeps her own records. She declines to disclose the information required by the statute. A law that requires one spouse to sacrifice his or her privacy in order to allow the other spouse to run for a legislative office is surely not calculated to promote domestic tranquility, will probably eliminate a number of potential legislators, and is possibly unconstitutional.

Third, enforcement of ethics statutes is especially difficult. It is often difficult to obtain a conviction for violating an ordinary criminal statute. Yet, compared with questions of conflict of interest and improper influence of a legislator's judgment, ordinary criminal issues are simple indeed. Ethics statutes may be phrased in high-minded generalities forbidding conflicts of interest or acceptance of improper gifts, but enforcement issues may turn upon such questions as "Is it unethical for a legislator to vote on an education appropriation when his daughter is a public school teacher?" or "Is it a breach of ethics for a legislator to attend a dinner given by an industry regulated by state statute?"

## WHAT IS A "GOOD" LEGISLATIVE ETHICS STATUTE?

Unfortunately, we have no way to measure objectively or even subjectively the effects of legislative-ethics statutes in other states. One may perhaps point to the high incidence of scandal in one state and to the relative freedom from scandal in another. However, even if the second state has an ethics statute and the first does not, there is no way to establish with certainty that a cause-and-effect relationship exists between statute and incidence of scandal. The high rate of scandal may be due to a vigorous law enforcement agency, or a highly partisan situation that leads to extreme vigilance in reviewing official actions, or a greater sensitivity of the public and public officials to dishonesty or impropriety in office. Conversely, the low rate of scandal may simply reflect a general permissiveness at all levels of society and government in a state.

It seems, then, that a good legislative-ethics statute is one that is drawn in strict accord with the classic formula for regulatory legislation: Define the evil to be remedied; determine the various means of accomplishing a remedy: and select from those means whichever one or ones, in view of the customs and history of North Carolina, are most likely to produce the desired result with a minimum of undesirable consequences.

What is the evil to be remedied? Not bribery or fraudulent use of the legislative office; existing criminal statutes are probably adequate to deal with this type of conduct. What the ethics statutes should be aimed at is the less-than-criminal but nevertheless improper influence that special interests or the legislator's own private interest may exert upon his decisions as a legislator.

Despite our experience with prohibition and similar laws, we Americans still retain the notion that laws may not only deter crime but also make people good. I suggest that if a dishonest man is elected to legislative office, no amount of law will force him to be honest. Instead of seeking that kind of law, we should concentrate on an effort to avoid the election of persons who are dishonest or who obviously can be expected to favor special interests over the public good.

The problems of financing election campaigns lie at the root of much special-interest influence and power. If a candidate must have the support of certain financial interests in order to wage an effective campaign, one need not be a cynic to suspect that that support carries with it some demands. The friendly use of power may be the coin with which the debt is paid. A necessary first step in ethics legislation is a campaign-finance law that is simple enough to be enforceable, realistic enough to be practicable, and strong enough to be effective. This type of law is needed for all elective officers and has no special application to legislators.

Next, what is needed is a statute that makes certain that the voters in a legislative district are informed before the election as to the special interests that may affect a candidate if he is elected. If a school teacher is concerned about the regulation and support of public education by the state, he may run for a seat in the General Assembly in order to do something about his concern. If the people of his district are fully informed as to the teacher's connection with the school structure, if they know what he is, and then elect him to the office, he should be allowed to come to Raleigh and work toward the very end that caused him to seek the seat. It makes no sense to tell him that he has a conflict of interest and therefore may not sit on the Education Committee and may not vote on the education appropriation. If a medical doctor feels that various programs for free medical care for the indigent are iniquitous and un-American, he may seek a legislative seat to work against those programs. If the people of his district know that he is a doctor who owns a private clinic that caters only to the wealthy but nevertheless elect him to the office, should he be denied the right to attempt to do the very thing for which he was elected? If the owner of a strip of coastal land who wishes to drain it and build a local Coney Island makes that fact known and runs for a legislative seat on a platform of opposition to all land-use regulation, must he, if he is elected, limit his legislative activity to a field like mental health?

The courts have traditionally sought to have individual cases decided by jurors who have no knowledge of the case, except what comes to them through the judicial process. However valuable such ignorance is in the judi-

*(continued on page 26)*

# DOES NORTH CAROLINA NEED ANNUAL SESSIONS?

*Although the North Carolina Constitution provides for biennial sessions of the General Assembly, it also allows the legislature, once in session, to adjourn for any length of time and then reconvene. The 1973 Assembly took advantage of that provision to adjourn in May and reconvene in January of 1974 for three more months as an experiment in annual sessions. The constitutionally mandated biennial session in 1975 will mean that the General Assembly will have been in session in each of three consecutive years. As this is written, no decision has been made whether to continue the annual-session experiment into 1976. Anticipating the need to make that decision,* Popular Government *asked several members of the 1973-74 General Assembly to respond to a series of questions concerning annual sessions. Those questions and the responses are reproduced below.*

*Those who replied to the questions are Senator Harry Bagnal (Forsyth), Representative Laurence Cobb (Mecklenburg), Senator Philip Godwin (Gates), Senator Harold Hardison (Lenoir), and Representative John Stevens (Buncombe).*

**1. Would the kinds of people who become legislators change if North Carolina adopted annual sessions?**

*Bagnal:* Yes. There would be more retired and wealthy persons and fewer businessmen and lawyers. There would also be a trend toward more professional legislators.

*Cobb:* Yes. Few employees of companies and self-employed individuals could afford to miss so much time from work. Therefore, the tendency would be for more retired people, women, and independently wealthy persons to offer for office.

*Godwin:* Yes. This reply is based on the trend already established by those members who did not seek re-election in 1975. One who is in business for himself and has no partners to carry on his business while he is in the General Assembly cannot afford to neglect his business affairs on an annual basis. We have always had a cross-section of citizenry in our General Assembly; however, annual sessions will promote professional legislators. The danger in this is that the so-called professional legislator cannot rely on his legislative salary for a livelihood; therefore, he must turn to other sources—whether they be special interests, retirement, or other income—in order to stay in Raleigh on an annual basis. I also feel that annual sessions will tend to decrease the interest that professional people will have in seeking a seat in the legislature.

*Hardison:* Yes.

*Stevens:* I believe that the kinds of people who become legislators in North Carolina would necessarily change if annual sessions were adopted. Annual sessions are going to mean more and more time spent in the legislative process. This fact will increasingly require that members of the legislature spend more of their time on legislative business and less on their personal and business affairs. With annual sessions, members of the General Assembly will gradually but increasingly become people whose primary interest and livelihood will be as members of the General Assembly.

**2. What effect would annual sessions have on the cost of the General Assembly and the cost of state government generally?**

*Bagnal:* The cost of operating the General Assembly would be negligible, but there would be more pressure for services that would increase the cost of state government in general.

*Cobb:* Obviously, annual sessions would increase the cost of operating the General Assembly substantially. Similarly, annual sessions probably would result in the passage of more programs that would increase the costs of state government generally.

*Godwin:* Our experiment with the 1974 session is best evidence that annual sessions will increase the cost of the General Assembly and state government. The cost of operating the General Assembly has increased over the past years drastically, and meeting each year would further increase it.

*Hardison:* It would increase tremendously.

*Stevens:* Certainly annual sessions will cost somewhat more in direct cost simply because of the requirement to "tool up" twice as frequently, although this might be offset somewhat by shorter sessions. On the other hand, it is

speculative whether annual sessions will achieve over-all savings in state government as a result of having a legislature that is more acutely sensitive to the day-to-day costs of state government. Annual budgeting may achieve some savings. Then again, simply being in session may give the General Assembly an increased opportunity to consider and experiment with new and different programs that may involve some additional expense.

**3. In most states annual legislative sessions also mean annual budgeting. Do you think annual budgeting would or would not be preferable for North Carolina?**

*Bagnal:* After working with both on annual and biennial budget, I believe my preference would be for biennial budgets with some adjustments being made in programs the second year by salaries and long-term programs being kept strictly on the two-year plan. The preparation of the budget is an exhaustive process, and it is foolish (also politically unwise) to go into great detail every year.

*Cobb:* Preparing a full budget on an annual basis would involve substantially increased work on the part of the Budget Department and the various departments of government, which would either be in the process of preparing budget requests or appearing before the General Assembly to request appropriations for such requests almost constantly. If annual sessions are instituted, I feel that it would be preferable to prepare a biennial budget, including reversions from the first year in the appropriations for the second year, with the second year budget simply being reviewed rather than being prepared from the beginning.

*Godwin:* The reason that I originally supported annual sessions was that I honestly believed that annual budgeting would save the taxpayers money; however, the 1974 session proved that I was wrong. Unless our budgetary system is changed, annual budgeting only affords those who seek more money from the General Assembly an opportunity to request these increases each year. I had hoped that annual budgeting would take some of the guesswork out of the budget in regard to the second year of a biennial budget. This did not prove to be so in that the A, or base, budget remained the same while the additions and supplemental budgets in the 1974 session increased almost to what they have been on a biennial basis. Therefore, I wonder if the taxpayers can afford annual budgeting. I believe that our budgetary system can be improved upon and needs serious examination.

*Hardison:* I think it would be advantageous.

*Stevens:* If we have annual legislative sessions in North Carolina, then in my judgment we ought to have annual budgeting. If a good case can be made for annual sessions, it is the advantages of annual budgeting.

**4. If North Carolina does have annual sessions, should the second (even-numbered) year's session be open to all business or should it be limited in some way?**

*Bagnal:* The legislature should consider only minor budget matters in the second year.

*Cobb:* If we were to have annual sessions, it would be preferable to limit the second year's session to budget matters only, but I question whether this could successfully be done without a constitutional amendment. There always would be pressures during the second session to consider legislation which its proponents would insist was of an emergency nature.

*Godwin:* History has proved that it is difficult to limit a session to a particular type of business. If this is tried, some emergency always comes up for which the rules are suspended, and then other legislation is taken up. Once emergency legislation is taken up, it opens the opportunity for other matters. If we were to have annual sessions, I think the best approach would be to limit the number of days that the General Assembly may be in session.

*Hardison:* I think it should be limited to budgeting and emergencies.

*Stevens:* If North Carolina does have annual sessions, the second session should be restricted to budgeting on an annual basis.

**5. In what way would annual sessions affect the kind and amount of legislative work done by legislators between sessions?**

*Bagnal:* The workload on legislators is considerably increased with annual sessions—both during and between sessions. I believe legislation in the second year is affected more acutely by political considerations.

*Cobb:* If annual sessions were held without any limitation as to the type of business to be considered, legislators obviously would have to do additional work between the sessions in the various committee meetings. This increased work could be eliminated if bills introduced during the first year's session were not carried over to the second year, as was done in 1973-74.

*Godwin:* Annual sessions should reduce the amount of legislative work done by legislators between sessions; however, between 1973 and 1974 this did not occur. Too many study commissions were at work, and there was seldom a day in the Legislative Building that legislators were not there meeting on some committee. I am of the opinion that too many studies have been made for the effect that the studies have had. Appointing a study commission is a method that the General Assembly has used to pacify a member who had an idea but the General Assembly did not want to face it at the time. It was always easy to convert the idea into a study commission, again to the taxpayers' detriment.

*Hardison:* In my opinion there would be less work done on major legislation and more time spend on insignificant matters.

*Stevens:* Annual sessions would mean that more business would be done between sessions, although the emphasis here would rest, I should think, on the interim between the odd- and even-year sessions rather than the other way around. Before the experiment on annual sessions, legislative study commissions did a great deal of work between sessions. I would expect this practice to diminish somewhat, with more work done by certain standing committees, if annual sessions were adopted. This could very well mean that more legislators would be brought into the between-session work than was heretofore done.

**6. What lesson came from the experiment with annual sessions in 1973 and 1974?**

*Bagnal:* Obviously the annual sessions of 1973-1974 did not improve the quality of legislation. Too much legislation was introduced, and there was a definite tendency to put off action on bills that should be dealt with.

*Cobb:* The annual sessions in 1973 and 1974 showed us that such sessions will not be successful without better planning about how the General Assembly will work between sessions. The interim committees accomplished little between the 1973 and 1974 sessions.

*Godwin:* My answers to earlier questions have expressed some of my views about what has been learned. With annual sessions, the cost of the General Assembly and state government will rise, and many members of the General Assembly will not be able to seek re-election because of time and finance factors. I do not believe that the annual-session experiment cut down the work that was required in the 1974 session. It did not help us in regard to the budget, and it afforded an opportunity to postpone controversial legislation until the next year.

*Hardison:* There was a tendency to put off action on major legislation, and the double sessions also cost more.

*Stevens:* The experiment with annual sessions in 1973 and 1974 was not an exceptionally good one and probably should not serve as a guide to what North Carolina might expect with annual sessions that are properly structured. The decision to have annual sessions was made without much preparation, and a good many problems were associated with it. To me, the major problem was that simply because there was a session to come back to, many really tough issues that should have been met and decided in 1973 were held over to 1974. Then in 1974, with primary elections coming up, the members found that there really was not enough time to deal adequately with those tough problems. These problems included death penalty legislation, conservancy bills, land-use and management legislation, and medical education, to cite just a few.

**7. What effect, if any, did the fact that 1974 was an election year have on the operation of the General Assembly in that year?**

*Bagnal:* The fact that 1974 was an election year did have an effect on the General Assembly. Several important pieces of legislation such as tax reform, land-use planning, highway safety, etc., were not dealt with as they should have been.

*Cobb:* The fact that 1974 was an election year probably helped to bring the 1974 session to an earlier conclusion. However, there was not a great deal of political posturing, probably because the Governorship and Lieutenant Governorship and Council of State positions (other than Attorney General) were not involved in the election. If an annual session were to be held in 1976, we probably would see considerable political maneuvering as the various candidates for office tried to use the General Assembly for political exposure.

*Godwin:* All legislators are politicians, and they consider their votes more carefully during an election year than they would in an off year. Also, the pressure that is applied from outside on the individual legislator is greater during an election year. The individual legislator becomes more aware of politics during an election year and pays less attention to his conscience. The upcoming elections do tend to shorten the session because the members want to get out as early as possible to campaign in the primaries.

*Hardison:* There seemed to be a tendency to put off work, knowing that we would be back in January.

*Stevens:* The fact that 1974 was an election year did affect the operation of the General Assembly. First, there was a natural effort to adjourn quickly in order to get home and campaign. Second, there was more than the usual concern expressed by many of the members over how the voters back home would view their decisions and actions.

**8. What do you think is the strongest argument in favor of annual sessions?**

*Bagnal:* Rapidly changing economic conditions and the increasing influence of federal programs on legislation provide the strongest incentive for annual sessions.

*Cobb:* The strongest argument in favor of annual sessions is that they would allow us to appropriate funds with a greater degree of certainty and would give us the opportunity to consider legislation that might be needed without substantial delay. Of course, a special session could always be called to meet any emergency legislative needs.

*Godwin:* I would hope that the primary argument for annual sessions would be based on budget matters, and annual sessions for budgeting purposes could work if we had continuing committees to study the budget and if an atmosphere of restraint were maintained, so that the vari-

ous agencies and groups would not be allowed increases annually without excellent justification. Another argument is that annual sessions could bring government to a current basis, and many legislative acts are needed annually. This need is not so great as it used to be, in that the General Assembly has given local governments more home rule.

*Hardison:* I don't think it has a strong argument, except perhaps budgeting.

*Stevens:* The strongest arguments in favor of annual sessions are that the state's business ought to be attended to more frequently than every other year and that sound business management requires annual budgeting.

**9. What do you think is the strongest argument against annual sessions?**

*Bagnal:* The need for "full-time legislators," the increased pressure for spending, the inevitable rising cost of state government and subsequent growth of bureaucracy, the mountains of unnecessary and ill-advised legislation that annual sessions would bring are all good reasons to return to biennial sessions. I also believe that annual sessions would make the executive branch less effective and efficient. State employees would rely more and more on the legislature for direction and for airing grievances. Without the veto, the Governor of North Carolina is already handicapped, and annual sessions would further dilute his power and influence.

*Cobb:* The strongest arguments against annual sessions are that they are much more expensive, that they tend to reduce the efficiency of the General Assembly, and that the increased time required to serve would reduce the number of people who would be in a position to run for office.

*Godwin:* I believe that annual sessions will produce professional legislators in the State of North Carolina instead of the citizen-legislators that we have had in the past. I also believe that the cost of government will continue to rise with annual sessions. The best argument against annual sessions is the old saying that the least government is the best government, if the philosophy behind the saying is truly carried out.

*Hardison:* Legislators would be professional politicians. Fewer people would be involved, and the costs of operating the General Assembly would go up.

*Stevens:* The strongest argument against annual sessions is that it will represent an inevitable step toward a professional legislature, since members will need to devote essentially their full time to legislative business. We will lose some of the element of lay people who have historically come in and been a part of the legislative process for a couple of sessions and then retired from it. Further, I feel that the entire governmental process ought to be throttled back just a bit if at all possible in our present-day society. Finally, I see annual sessions as a fundamental change in our basic structure of government in North Carolina. To me, the reasons for making such a change in basic government must be overwhelming, and I simply do not see those overwhelming advantages in annual sessions.

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## LEGISLATIVE ETHICS (*continued from page 22*)

cial process, it is not conducive to good legislative results. If a district knows the financial and professional connections of a citizen and elects him to a seat in the General Assembly, he should be allowed to participate in the full range of legislative activity.

The answer is a suitable disclosure law. A suitable disclosure law is one requiring that a candidate for the legislature identify the types of his personal and immediate family economic interests. It should not require the disclosure of individual customers or clients or the amounts that they pay for his goods or services—we are not disclosing campaign contributions. If a candidate is employed by another person, the nature of the employer's business and the nature of the employee's position should be disclosed. Ownership of both real and personal property should be disclosed by type and range of value, not by individual identification and appraisal. If the candidate will continue to draw a salary from his employer or receive a portion of his law firm's income, or if all or part of his food, lodging, or travel expenses are to be paid by someone else, these facts should be disclosed, both to the voters and to the members of the legislative house for which the candidate is running. If a legislator gets meals, housing, or other goods or services at a special rate, these facts should be disclosed to the appropriate legislative house.

In summary, a campaign financing law should make certain that a legislator does not become unduly beholden to any one person or group in the process of getting elected. Then, a disclosure law should make certain that the people of his district have an opportunity to learn, before the election, what kinds of private economic interests the candidate has. Finally, his colleagues in the General Assembly should know of those special circumstances that may reasonably be expected to affect his freedom of judgment on issues before the legislature.

Given these things, we must suppose that the people will make wise choices, and that the legislature will reflect this wisdom. If we cannot depend upon the judgments of an informed electorate, then democratic government is indeed in peril. Unrealistic ethics laws cannot free the citizen from his responsibility for the quality of those whom he chooses to represent him.

# STAFF SERVICES TO THE NORTH CAROLINA GENERAL ASSEMBLY

*William H. Potter, Jr.*

UNDER THE CONSTITUTION of North Carolina, the General Assembly performs the legislative duties of state government and is a one-third co-equal partner, sharing the powers and responsibilities of government with the judicial and executive branches. Before the 1969 session of the General Assembly, the entire legislative branch of North Carolina state government had no professional staff, and it had no full-time employees of any kind. The legislature's payroll consisted of a few clerical workers and the three elected staff officers of each house, who all worked only for the duration of the legislative session. Nevertheless the General Assembly carried out the constitutional duties of the legislative branch, and the members were able to respond to the needs of their constituents.

The General Assembly was able to get along without a larger staff of its own because it relied on the executive branch for many of the supporting services necessary for adequate functioning of the legislative institution. The executive branch provided staff work for research and information in many areas, including education, health, and crime control, and especially it provided staff to support the legislature's examination and approval of the state budget. The Attorney General was responsible for providing drafting services to the General Assembly; the State Disbursing Officer prepared the General Assembly's budget and kept its accounts; the General Services Division of the Department of Administration looked out for the State Legislative Building; and the Department of Administration paid the expenses of legislators for the little interim activity that existed. A different type of staff support to the legislature came from the executive branch through the University of North Carolina's Institute of Government—different because the Institute is an academic rather than a purely governmental institution. By long tradition, the Institute has prepared its daily digest of legislation (*Daily Bulletin*) and provided professional staff assistance to legislators and legislative committees. All of these sources of executive support continue to be available to some extent today, but earlier they were about the only sources of research and information available. In many instances during earlier years, executive branch support was the sole supplement to the skills and knowledge of the General Assembly members when the legislature made changes or additions to the statutory laws, reviewed executive programs, financed government operations, and authorized expenditure of state funds.

A need more basic to legislative functioning than research and information staff services is record-keeping and clerical support services. The events of the legislative day must be recorded and published in the Journals, and legislation that results from the recorded deliberation must be typed, printed, amended, revised, engrossed, enrolled, certified, filed, published in the Session Laws, and disseminated throughout the state to the people who will be governed by the new laws. The record-keeping and related duties begin with and are the major responsibilities of the Principal Clerks . For many years the Principal Clerks have been aided by the Secretary of State in their filing, publishing, and disseminating duties. Before 1969 this executive participation was necessary because the legislature's own small staff was available only for the period of the legislative session—some four months of every two years—and the state and its citizens need access to recent legislation and related records on a year-round basis. In sessions before 1969, the Principal Clerks and their assistants typed and prepared the records and bills from the session, and the Secretary of State enrolled and filed the ratified bills and published and disseminated the Journals and Session Laws months after the legislature had adjourned the session and released its staff.

THE GENERAL ASSEMBLY before 1969 informally placed most of the responsibility for pre-session gearing-up arrangements with the persons who expected to be elected to the office of Principal Clerk in each house, usually the clerks from the previous session. Orders for supplies and other arrangements had to be started before the session convened and the officers were elected, and the preliminary decisions by the clerks were of necessity ratified by the legislative leadership after the session began. The Legislative Research Commission, which originated in 1963 as an interim research body, had begun to handle some of the pre-session arrangements by 1967, but neither the clerks' operations nor the Research Commission could fully respond to the needs of the Gen-

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eral Assembly. The difficulties in this area of staff support were important in prompting some major changes in the structure of General Assembly staff services after 1969, though many other factors were also involved in these changes.

By 1969, sessions of the General Assembly were getting longer and more bills than ever before were being considered. There were more bills because there were more important issues for the legislators to deal with—issues concerned with more automobiles, more schools, more hospitals, more people involved in civil and criminal matters, more services expected from government by the citizens, and a larger than ever state budget for the legislature to examine. This increased volume and complexity meant that the legislature needed more research and information services. The press and the public had begun to demand more access to the legislature so that interested citizens could express themselves in regard to legislation under consideration and be able to react to new and changed laws. This demand for access brought the need for better records, more indexes, quicker publication, and other recording and reporting services. At this time, only the legislative leadership and the chairmen of significant committees had individual secretarial assistance. The other members, with their broader responsibilities, came to be dissatisfied with the services of only a secretarial pool. Legislators also had begun to consider the potential bias of information on proposed legislation that was supplied by executive branch employees who would be affected by the legislation; the conflict of interest inherent in using executive staffing was being criticized by forces pressing for legislative modernization.

Whatever the combination of factors that led to independent legislative staffing, it began in 1969. The General Assembly had already moved from its quarters in the old capitol building in 1963. The new legislative building had room enough not only for individual offices for legislators but also for staff offices, a legislative library, and other production facilities. For the 1969 session the General Assembly employed, through the Legislative Research Commission, an administrative officer as its first full-time employee. During the 1969 session the duties of this employee were replaced and additional staff arrangements were begun by the statutory creation of the Legislative Services Commission.

AT THE BEGINNING of the 1975 session, it is easy to see the changes in available staff services that have been made since 1969. Most of them have come from the directions of the Legislative Services Commission in response to the expressed concerns of the General Assembly membership. The Services Commission now consists of the President Pro Tempore of the Senate and the Speaker of the House as ex officio chairmen and six members of each house appointed by the respective chairmen. The Commission's duties are set out in G.S. 120-32:

§ 120-32. Commission duties.—The Legislative Services Commission is hereby authorized to:

(1) Determine the number, titles, classification, functions, compensation, and other conditions of employment of the joint legislative service employees of the General Assembly, including but not limited to the following departments:
   a. Legislative Services Officer and personnel,
   b. Electronic document writing system,
   c. Proofreaders,
   d. Legislative printing,
   e. Enrolling clerk and personnel,
   f. Library,
   g. Research and bill drafting,
   h. Printed bills,
   i. Disbursing and supply;

(2) Determine the classification and compensation of employees of the respective houses other than staff elected officers; however, the hiring of employees of each house and their duties shall be prescribed by the rules and administrative regulations of the respective house;

(3) Acquire and dispose of furnishings, furniture, equipment, and supplies required by the General Assembly, its agencies and commissions and maintain custody of same between sessions. It shall be a misdemeanor for any person(s) to remove any state-owned furniture, fixtures, or equipment from the State Legislative Building for any purpose whatsoever, except as approved by the Legislative Services Commission;

(4) Contract for services required for the operation of the General Assembly, its agencies, and commissions; however, any departure from established operating procedures, requiring a substantial expenditure of funds, shall be approved by appropriate resolution of the General Assembly.

(5) a. Provide for engrossing and enrolling of bills,
   b. Appoint an enrolling clerk to act under its supervision in the enrollment and ratification of acts;

(6) a. Provide for the duplication and limited distribution of copies of ratified laws and joint resolutions of the General Assembly and forward such copies to the persons authorized to receive same.
   b. Maintain such records of legislative activities and publish such documents as it may deem appropriate for the operation of the General Assembly.

(7) a. Provide for the indexing and printing of the session laws of each regular, extra or special session of the General Assembly and provide for the printing of the journal of each house of the General Assembly.
   b. Provide and supply to the Secretary of State such bound volumes of the journals and ses-

sion laws as may be required by him to be distributed under the provisions of G.S. 147-45, G.S. 147-46.1 and G.S.147-48.

(8) Approve or disapprove the authorization for travel for all members of the General Assembly, when traveling as representatives of the General Assembly or of its committees or commissions, when the expenses of such travel are to be paid from funds appropriated to the General Assembly. (1969, c. 1184, s. 2; 1971, c. 685, s. 2; c. 1200, s. 8.)

In addition, by authority of G.S. 120-32.1, the Services Commission now has control over the use and maintenance of the legislative building, and by authority of G.S. 143-8 and G.S. 120-35, the chairmen of the Commission have the power to make up the legislature's budget and make payments from budgeted funds. But as the Commission leadership indicated recently, the Legislative Services Commission is not a "super legislature." The Commission does not deal with substantive issues before the General Assembly, and it does not screen legislative proposals. Rather, the Services Commission provides a vehicle through which the legislative branch of government minds its own affairs instead of having to look to the executive branch to perform its management and service functions. The Services Commission sets the policy for these services, and the policy is carried out by the Legislative Services Officer and other Commission employees.

This year every member of the General Assembly has his own clerk, who will serve as his secretary and will handle the clerical duties relating to the member's committee if he is a committee chairman. The Services Commission determines the classification and compensation of these and other General Assembly employees. All of the supplies and equipment necessary to support the members were secured before the session convened by the Legislative Services Commission through the Legislative Services Officer and his staff. These supplies and equipment include telephone, dictating machine, typewriter, stationery, books, and papers in the members' individual offices. Other materials will be drawn from the Services Commission's Disbursing Office, which will also issue the members' salary and expense checks and pay the General Assembly's bills.

Services Office personnel will perform the bill-typing, printing, engrossing, and enrolling functions for both houses, and they will have the use of the state's computer system, operated by the Office of Management Systems in the Department of Administration, to produce the material faster, more accurately, and in greater volume than ever before. The text of bills is fed in by Services Office operators, proofread, and stored in computer memory; it is automatically typed out on command by a high-speed printer at 600 lines per minute. From the computer printout the Services Office printing operation, sometimes working with the state's prison enterprises, makes individual copies of all introduced bills available to each legislator. Every time the text is amended or otherwise changed, only the changes need be introduced into the computer, and revised engrossed copies are almost immediately available on the high-speed printer. Through the printing operation, individual copies of these revised later editions are distributed to each legislator to replace his copy of the earlier text. When successful legislation is finally ratified, the latest text is already stored in the computer memory; without any rekeying, this stored text is transferred to magnetic tape and sent to a photocomposition company, where it is electronically set into page negatives for production of the Session Law books.

In a separate Legislative Services Office operation, members of the General Assembly and the public have access to the legislature's computerized bill-status system. This system is financed and managed by the Services Office, updated by the Institute of Government and bill-status system terminal operators, and supported by Office of Management Systems programmers and engineers. (Toll-free telephone access to the status of all current legislation before the General Assembly is available to the state's citizens from any location in North Carolina through the Services Office's Bill Status Desk, reached at 1-800-662-7910 or 829-7779 from the Raleigh area.) The legislature in its internal use and citizens in their individual capacities will have access to copies of pending or recently enacted legislation from the Services Office operation for distribution of printed bills. (Citizens may get a free single copy of any current legislation by calling for it in person or by sending a stamped, self-addressed envelope to Printed Bills, State Legislative Building, Raleigh, North Carolina 27611. Requests for printed bills should identify legislation by bill number and title; help in identifying the legislation is available through the Legislative Library or the Bill Status Desk.)

The Legislative Services Commission has installed electronic voting equipment in the Senate Chamber. The equipment is operative for the first time this session, and recorded votes are available for inspection in the Legislative Library. G.S. 120-11.2, enacted in 1973, authorizes installation of equipment in both houses, and equipment similar to that in the Senate will be installed in the House Chamber if the necessary funds are appropriated.

Through the Legislative Building Superintendent, the Services Commission provides for building security personnel, guides for the thousands of visitors to the legislature, operation of the legislative restaurant, legislator and staff parking, and other things necessary to operate and maintain the building.

An expanded Legislative Services Office will make professional staff services available to the members of the 1975 General Assembly. The Services Commission plans to continue the long-standing contractual type of arrangements with the Institute of Government. These arrangements will make research and information services regularly available to the Local Government committees of both houses, and also spot research services to other legislative committees as they consider major issues in the

environmental, highway safety, health, and other areas. The *Daily Bulletin* will be continued, supported by a direct appropriation to the Institute. The general research and information arm of the Legislative Services Office, under the Director of Research, will have five attorneys and up to five subject-matter specialists in such areas as state government, health, and education available to individual legislators and to committees. The Services Office also anticipates arranging for some special consulting help for committees from other universities or the private sector in such technical areas as reorganization of state government.

Money matters during the 1975 session will be the concern of the Legislative Services Commission's Fiscal Research Division under the Director of Fiscal Research. The Fiscal Research Division's thirteen professional fiscal staff people will concentrate mostly on the appropriations process, but they will also be concerned with the Finance committees and related economic matters. The Services Commission also employs, in addition to the Fiscal Research Division, a special adviser to the Appropriations Committee chairmen. Both the general research operation and the Fiscal Research Division staff members are employed year-round, and they have been working during the last interim period on major issues that face the 1975 session. By statute the Attorney General still has the official drafting responsibility for the General Assembly, but in 1975 some drafting will be done by Legislative Services personnel and the other staff persons who work with the members of the General Assembly.

The Principal Clerks, Sergeants-at-Arms, and Reading Clerks will continue in 1975 as the elected staff officers for the General Assembly. The Sergeants-at-Arms are responsible for security of the legislative chambers and committee rooms and some miscellaneous individual needs of the legislators; the Reading Clerks are responsible for communicating the matters before the respective bodies; and the Principal Clerks are responsible for record-keeping, as already discussed. In 1975 the clerks will be able to concentrate on production of the Journals and the administrative needs of the daily sessions, since the bill-typing and engrossing functions have over the past several sessions been shifted away from their area of responsibility. In 1975, for the first time, the text of both Journals will be fed into the Legislative Services bill-typing computer system by the clerks' assistants. The Journals may be produced by means of the same type of photocomposition operation used for the Session Laws. The Session Laws will be indexed by an employee of the Services Office, and the Journals will be indexed by the Principal Clerks. Original filing of ratified bills and the Journal records will be continued by the Secretary of State, who will disseminate the Session Laws and Journal books published by the Legislative Services Office.

In 1975 the Speaker of the House will have access to staff support from the House Principal Clerk and other officers, from the Legislative Services Office, and from his own clerical staff. Also in 1975, for the first time, the Speaker will have his own legislative counsel, a professional staff person who will work exclusively for the Speaker and help him in his duties as presiding officer of the House. As chairman of the Services Commission in even-numbered years (in odd-numbered years the President Pro Tempore of the Senate is chairman), the Speaker will have significant control over the staff services available to the General Assembly. The Lieutenant Governor, who serves as President of the Senate ex officio, has access to most of the same services as the Speaker, except that he has two staff professionals who work directly for him—an administrative assistant and a legislative counsel; these staff assistants were first available in 1973. The office of Lieutenant Governor was only part time until after the 1971 General Assembly; before the beginning of the 1973 session the duties of the office were mostly legislative and were performed during the short legislative session. The present Constitution of North Carolina provides that in addition to presiding over the Senate and succeeding to the higher office on the death of the Governor, the Lieutenant Governor "shall perform such additional duties as the General Assembly or the Governor may assign to him." After the office of Lieutenant Governor was made full time, its separate budget appropriation was changed to reflect anticipated increases in staff to support the Lieutenant Governor's legislative and executive duties. As presiding officers, the Speaker and the President of the Senate share many powers, such as appointment of legislative committees, but they have a different relationship to legislative staff (1) because of the Senate President's shared legislative leadership role with the President Pro Tempore, and (2) because of the separation-of-powers limitations on the Lieutenant Governor's legislative control. One fairly unusual instance of parallel participation by the Speaker and President of the Senate in legislative staff matters is their membership in the Legislative Intern Program Council, which was created in 1969. Along with the chairman of the Department of Politics at North Carolina State University, they control the intern program, which in 1975 will have a director and thirteen interns available for staff services to the General Assembly.

THIS ARTICLE has touched briefly on the changes and recent developments in North Carolina legislative staff services, concentrating on the modifications that have taken place since the beginning of the 1969 legislative session. Hopefully, it will serve as a useful outline of the General Assembly's present staffing plans to those interested in North Carolina's legislative branch of government. As to the future, it appears that more additions will be made to the legislative staff, but it also appears that the time of significant growth has passed. There will probably be more refining of present resources than outright expansion. In any event, the part-time participation in government by the legislative branch is over, and there is no indication that legislative activity or staff services will be reduced.

# LOCAL LEGISLATION IN THE NORTH CAROLINA GENERAL ASSEMBLY: AN EVALUATION

*Joseph S. Ferrell*

*Mr. Ferrell, an Assistant Director of the Institute of Government, for the last ten years has worked in the area of local government. He served as consultant to the Local Government Study Commission from 1967 to 1973, during which time the Commission sponsored legislation granting increased home-rule powers to local government and revising much of the law regulating local governmental affairs. He has served as counsel to the House and Senate local government committees each session since 1969, and he has written extensively on the process of local legislation in the General Assembly.* Popular Government *asked Mr. Ferrell to explain how the local bill system operates and to consider how it might be improved.*

FROM THE STANDPOINT of legislative procedure, bills passing through the North Carolina General Assembly fall into two broad categories: public and local. A local bill applies only to those counties, cities, or other units of local government specifically named in the bill. A public bill applies throughout the state. On the floor of each chamber, each public bill is explained by its chief sponsor, by the chairman of the committee that handled it, or by some other member designated for this purpose, and it may be debated, sometimes at length. Before it reaches the floor, each public bill has been explained in detail to the committee to which it was assigned, public hearings may have been held on it, the committee members have considered it on its merits, and the vote to give it a favorable report indicates that a majority of the committee favor its passage. On the other hand, local bills typically are given only minimal explanation, if any, on the floor, are not debated, and are enacted by unanimous vote. Each local bill is referred to committee, but typically the committee's deliberations are confined to ascertaining whether the bill is controversial from a statewide viewpoint and whether it has partisan political implications. Legislative custom decrees that any local bill that has the support of the legislative delegation representing the local governments affected by it, and does not raise controversial statewide issues, will be enacted by both houses unless its sponsors are members of the minority party and the bill is opposed by the party with majority control of the General Assembly.

North Carolina is one of a very few states whose constitutions do not effectively prohibit the legislature from enacting local bills that minutely regulate the affairs of the local governments to which they are directed. From 1901 through 1965, local bills accounted for 60 per cent or more of all enactments in a typical legislative session — a pattern that has prevailed since the colonial period.[1] The effect of the volume of local legislation on the legislative process has been a matter of concern at least since the early 1900s, when Secretary of State J. Bryan Grimes began to complain that the quantity of local bills made his job as enrolling clerk nearly impossible to perform. At the same time the Raleigh *News and Observer* began what came to be a biennial editorial campaign condemning the local bill system as wasteful of legislators' time and attention. This concern led Governor W. W. Kitchen to urge the 1911 General Assembly to propose a constitutional amendment prohibiting local legislation on a wide variety of subjects, an action finally accomplished at the general election of 1916, when the people approved a watered-down version of Governor Kitchen's original proposal.[2]

This amendment had little real support in the General Assembly. As originally introduced, the proposal would have prohibited local legislation on such subjects as incorporating new cities and towns, local courts, local salaries, creating local offices or prescribing the powers or duties of local officials, and regulating the public schools, as well as some dozen other minor matters. Had the amendment been ratified by the people in this form, it would have virtually put a stop to local legislation. However, by the time it passed through both houses, it had been shorn of all the subjects just mentioned except the one relating to incorporating new cities and towns — and that prohibition was interpreted into oblivion by the State Supreme Court. What remained was a list of topics that no legislator cared about strongly enough to fight

1. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. Rev. 340 (1966).

2. N.C. Const. art II, §24. The current version incorporates a few post-1916 amendments to the original section and the 1835 amendments concerning private legislation on divorce and alimony, name changes, legitimations, will and deed validations, and restoration of felons to citizenship.

over: matters such as ferries and bridges, cemeteries, tax refunds, changing the name of local governments, and the like. Two items on the list that seemed innocuous in 1916 later came to be of some importance: legislation relating to health, sanitation, and the abatement of nuisances; and bills regulating labor, trade, mining, and manufacturing. However, these two topics have never generated large numbers of local bills. It should come as no surprise, then, that the amendment has never had a discernible effect on the volume of local legislation. Yet those intimately familiar with the legislative process never lost their concern over the effect of the local bill system on legislative efficiency. A study commission was appointed to study the subject in 1947, but its recommendations for improvement were ignored.[3] In the 1950s, Henry W. Lewis and J. A. McMahon of the Institute of Government pointed out the need for more careful scrutiny of local bills,[4] but their ideas lay dormant until 1967.

In 1967, the General Assembly created the Local Government Study Commission and charged it with the duty to make recommendations for improving North Carolina's local governments and for reducing the volume of local legislation in the General Assembly.[5] The Commission concluded that the most effective way to accomplish the latter objective was to reduce the need for local bills by enacting general laws that confer broad discretionary powers on local governments and through a screening process in the legislature intended to weed out unnecessary and unconstitutional local bills.[6] Both of these basic ideas were accepted by the legislative leadership in 1969, and the Commission embarked on a long-range program of implementing them.

In the 1969 session, the Commission sponsored a package of "home rule" legislation intended simultaneously to strengthen local government and to improve the legislative process by eliminating much of the need for enactment of local bills in the General Assembly. Two of these "home rule" measures delegated to counties and cities the power to modify their form of government in such ways as altering the number, term of office, and method of electing governing board members. Another bill delegated to county commissioners and city councils the authority to set their own salaries, and to county commissioners the authority to set the salaries of all county officials and employees, including officers elected by the people. Another delegated to counties essentially the same ordinance-making authority possessed by cities. The Commission also sponsored jointly with the state's registers of deeds a uniform fee schedule for recordation of instruments in the register's office. Finally, it asked that the General Assembly remove most of the exemptions of specific counties and cities from general statewide enabling legislation. The General Assembly enacted all of the Commission's legislative package without substantial amendment. Each of the acts just mentioned dealt with matters that had been the subject of extensive local legislation.

In the 1971 and 1973 sessions, the Commission continued its legislative program by sponsoring complete revisions of those portions of the General Statutes that set out the basic machinery governing city government, county government, local finance, and municipal elections. These revisions further eliminated the need for local legislation by modernizing the general law and, in the case of the municipal elections law, providing a general statute where no adequate one had existed before.

These general laws have undoubtedly contributed substantially toward a decline in the over-all number of local bills. Before 1969, local salary and fee bills were among the most common types of local legislation; they have almost disappeared. Bills regulating municipal elections have also declined to the vanishing point, as have bills enacting local ordinances for counties. The statute authorizing counties to modify their forms of government has not eliminated so large a number of bills, since the law's machinery is cumbersome and it requires a vote of the people for each change. However, the companion statute for cities has been widely used.

The effect of the Commission-sponsored "home rule" legislation and comprehensive revisions of existing general laws has been most apparent to local governments, which now find that they need not request as much local legislation as formerly. From the perspective of the General Assembly, however, the most visible effect of the Commission's work is the revision of the committee structure for handling those local bills that are introduced and the provision of professional assistance to the committees that handle local legislation.

## HOW LOCAL BILLS HAVE BEEN HANDLED

*Before 1969.* The Local Government Study Commission found that as of 1967 each house had four committees whose workload primarily consisted of local bills: Counties, Cities and Towns; Local Government; Salaries and Fees; and Propositions and Grievances.[7] In addition, the House had a Committee on Justices of the Peace.[8]

3. Coates, *The Problem of Private, Local and Special Legislation and City and County Home Rule in North Carolina*, 15 POPULAR GOVERNMENT 6 (Feb.-Mar. 1949).

4. LEWIS, LEGISLATIVE COMMITTEES IN NORTH CAROLINA 46-47 (1952); McMahon, *County Home Rule and Local Legislation*, POPULAR GOVERNMENT (March 1957).

5. N.C. Sess. Laws 1967, Res. 76. The members of the Commission were Representatives Samuel H. Johnson, Julian F. Fenner, Robert J. Falls, Roberts H. Jernigan, Herchsel H. Harkins, and James R. Sugg; Senators Jack H. White, LeRoy G. Simmons, J. J. Harrington, and Thomas R. Bryan; and Messrs. Weldon Weir, Forest Lockey, Frank Holding, Robert S. Rankin, and M. C. Benton, Jr.

6. NORTH CAROLINA LOCAL GOVERNMENT STUDY COMMISSION REPORT, 58-68 (1969).

7. This committee handled all liquor legislation.

8. The committee prepared one bill each session appointing justices of the peace in each county. It passed out of existence when magistrates replaced the justices under the court reform legislation.

Bills flowed through these committees in assembly-line fashion. Frequently, one of the four chairmen would announce during a session of the House or Senate that a meeting of his committee would be held at his desk immediately after adjournment for the purpose of passing out local bills. Most local bills were not even printed and were never read by any member other than the introducer. Instead, legislators and local officials alike relied solely on the Institute of Government's *Daily Bulletin* and its weekly *Digest of Local Bills* for information on the substance of two-thirds of the legislative product.

The Commission found this system lacking in many respects, but primarily in that it undermined a basic assumption fundamental to the entire legislative process: that each bill enacted by the General Assembly has been carefully screened by a committee. This assumption is essential because no single legislator can become familiar with each of the more than 2,000 bills introduced in a typical session.

The Commission realized that it was unrealistic to expect legislators to give local bills the same close scrutiny that public bills receive. Indeed, if this were done, the resulting drain on legislators' time would seriously impair the ability of the General Assembly to deal with more important matters. The Commission's solution was to centralize the handling of local bills in one committee in each house, with a consultant assigned to that committee for the purpose of helping it weed out unnecessary and unconstitutional local bills and assuring that each bill was so drafted as to accomplish its intended effect. The Commission's proposals gained the support of Speaker Earl Vaughn and Lieutenant Governor Pat Taylor and were implemented in the 1969 session.

*Since 1969.* Under the leadership of the presiding officers, each house amended its rules in 1969 to abolish the old local bill committees and to establish a single Local Government Committee. The Commission had recommended that these committees be divided into two subcommittees, one to handle local bills and one to handle public bills relating to local governmental affairs. The subcommittee plan was implemented in the House, but not in the Senate. In both 1969 and 1971, the two subcommittees of the House committee each held a weekly meeting, and the full committee held a weekly meeting to pass on the recommendations of its subcommittees. The Senate committee at first held two meetings each week, but soon found it hard to muster a quorum twice a week and reverted to a single weekly meeting.

The House subcommittee system did not work effectively for several reasons: (1) the chairman of the full committee had little to do, since the full committee almost always accepted its subcommittee's recommendations without question; (2) some members of the local bill subcommittee felt that the work they were doing was of little importance; (3) meetings of the full committee took valuable time and space for sessions that were mostly formality; (4) simultaneous meeting times for the two subcommittees made it difficult for the staff to serve both of them; and (5) the relationship between the subcommittee chairmen and the chairman of the full committee was ill defined and tended to foster friction. These problems led the House in 1973 to create two Local Government committees, each to handle a combination of local and public bills. This arrangement was continued without change in 1974.

Beginning in 1969, the local bill committees in each house have been served by consultants supplied by the Institute of Government.

## EVALUATION

Six years and four sessions after the reforms of 1969, my evaluation of the local bill system reforms is mixed. Certainly, the over-all volume of local legislation has declined sharply, in both absolute and relative terms. By this measure alone, the 1969 reforms have been remarkably successful. Before 1969, local bills accounted for more than half the total number of bills introduced in a typical session. In 1969 there were 895 local bills introduced out of a total of 2,347, or about 39 per cent of the total. The number and percentage declined in 1971 to 588 local bills out of 2,589—22 per cent of the total. The 1973 and 1974 sessions saw still further declines: 416 local bills out of 2,317 in 1973, and 252 local bills out of 1,384 in 1974—18 per cent for each annual session considered separately.

The greater part of this decline can be traced directly to the 1969 "home rule" legislation, the court reform movement, and the 1971 constitutional amendment concerning local finance. Of the 478 local acts in 1967 affecting counties, 68 dealt with salaries and fees, 28 with local courts, and 49 with fiscal matters—a total of 135, or nearly 30 per cent of the total. By contrast, there were no more than three local bills on these subjects in 1974.

Another factor contributing to the decline may be that legislators know that local bills now receive at least some scrutiny in the legislative process. It is impossible to produce solid evidence of this, since legislators leave no evidentiary trail leading to reasons why requests for introduction of local bills are denied. Yet it is now common knowledge that the consultants to the Local Government committees call to the chairmen's attention highly unusual local bills that seem to call for explanation by the introducer. Also, the North Carolina Association of County Commissioners once actively opposed a local bill removing a local official from office and replacing him with a legislative appointee on grounds that it subverted the home-rule policy begun in 1969. Finally, the committee consultants have on rare occasions advised against the introduction of local bills on grounds that they were unnecessary or unconstitutional.

The handling of local bills in committee has improved substantially as a direct result of the 1969 reforms. The Local Government committees in each house meet at reg-

ular times and places. The old practice of ad hoc meetings around the chairman's desk has passed. On the whole, committee chairmen have extensively used the assistance available to them from their consultants in attempting to see that bills that pass through the committee are properly drafted and in good form before they are reported out. Yet there remains substantial room for improvement in committee practice. The most formidable obstacle to further improvement, and the root of the remaining problems in the local bill process, is the fact that legislators simply do not take local bills seriously. In 1973, the Senate Committee on Local Government frequently could not muster a quorum of its members and just as frequently could not muster enough of its majority-party members to maintain majority-party control of committee votes. On such occasions, the committee could not take up public bills or local bills about which there was partisan dispute. The House committees had members who had never attended a meeting and several members who rarely attended.

Even now, not all local bills are routed through the Local Government committees or a committee appropriate to the subject matter of the bill. This situation was particularly pronounced in 1974. In an effort to bring the session to an early conclusion, the Speaker and the Lieutenant Governor began to refer many bills to the Calendar committees in late February, six weeks before the session finally ended. As a result, 40 per cent of all committee referrals of local bills in 1974 were to the House or Senate Calendar committees. The Local Government committees received 48 per cent of local bill referrals, and other committees received the remaining 12 per cent. Neither Calendar Committee sought the professional assistance of the consultants to the Local Government committees in reviewing local bills. Since nearly all bills, both public and local, were being handled by the Calendar committees during the last month of the session, it is reasonable to assume that the members of these committees had no time to devote to local bills and that local bills were in fact passed out of the Calendar Committee with no scrutiny whatever.

Finally, the Local Government Study Commission foresaw, as one result of centralizing consideration of local bills in a single committee in each house, the identification of topics on which new general laws or amendments to existing general laws were desirable. This would come about almost as a matter of course as several local bills all dealing with the same subject matter were received in the same or succeeding sessions of the General Assembly. The Commission's hopes in this regard have been largely disappointed. Almost the only example is the 1974 general satellite-annexation statute that was enacted after several local bills, all derived from the Raleigh local act passed in 1967, had been introduced. Other subjects that obviously need general legislation have not been touched. For example, the general law provides that local boards of education receive $5 per day for attending board meetings and attending to official business and are allowed only 7 cents per mile for travel. Nearly every board of education has secured local legislation increasing these allowances, which means that more local bills will be needed as the present figure becomes inadequate.

## PROPOSALS FOR FURTHER REFORM

While the General Assembly has made much progress in reducing the volume of local legislation, around 500 local bills are still introduced each session. Given the governmental structure and traditions of North Carolina, local legislation cannot be ended altogether without giving up the flexibility the system provides. In states that have prohibited all local legislation, it becomes necessary to legislate for local government only through general laws. This means that any proposal to confer new powers on local government, or provide new machinery for carrying out existing powers, must be acceptable to a majority of each house of the legislature in a bill that applies either to all local governments of like kind or to all within a class defined by population or other criteria. Class legislation is extremely difficult to draft if the object is to include those units of local government who want the benefit of the legislation and exclude those who do not; frequently the desired objective cannot be achieved without either excluding a unit that wants the bill or including one that does not. A classic example of the usefulness of local legislation is North Carolina's municipal annexation laws, which are recognized as among the most progressive and enlightened in the nation. These laws were enacted in 1959 only after twelve counties and the cities therein were exempted from their operation. Had the General Assembly faced the choice of making the laws apply to all or none, it might well have chosen none. Since there was no constitutional or procedural restraint on providing the legislation for those units requesting or willing to accept it, opposition was handled by permitting legislators to exempt the cities they represented. As the legislation proved workable and beneficial to city government, units that were originally exempted were gradually added to the general legislation by local act until today the legislation applies to all but one of the state's major cities.

Assuming that the General Assembly will continue to enact local bills, though fewer, some fairly simple changes in the way local bills are introduced and voted upon could further streamline the process and reduce the demands this type of legislation makes on time that becomes more and more precious as the length and complexity of legislative sessions increase.

Before the 1973 session, the Constitution was thought by many to require each house to hold a formal session on Saturday if the members were to receive their per diem pay for an entire week.[9] Although the practice had large-

9. Ferrell, Report to the Legislative Research Commission on Legislative Session Days in the General Assembly of North Carolina, (1966).

ly died out by the mid-1960s, for many years the Saturday session was a convenient time to dispose of the local bill calendar, thus clearing the agenda for the following week. I do not propose that the Saturday sessions be revived, but the legislative leadership might well consider a new twist on this old idea. Each house now convenes in the early afternoon; the morning is filled with committee meetings. It would be possible to hold two sessions each day—the regular afternoon session, which would be devoted to considering public bills; and one earlier in the day, perhaps at 9:00 a.m., to transact routine business like the introduction of local bills, receipt of committee reports, receipt of messages from the other house, and the second- and third-reading voice-vote local calendar. The local second- and third-reading roll-call calendar would remain with the afternoon session.

Only two or three members need be on the floor on either house while routine business is carried on.[10] A member who wishes to introduce a local bill on a particular day might make a brief appearance in the chamber during the 9:00 session, or he might give his bill to a member assigned to attend on that day and ask that it be introduced for him. Should this prove unworkable, there appears to be no reason why bill introductions must take place by the introducer's asking for recognition from the presiding officer during a formal session. In many legislative bodies bills are introduced simply by filing them with the principal clerk, who then reports the introduction at the next formal session.[11] Similarly, the full membership now plays no role whatever in the process by which bills reported by committee are placed on the calendar, except to sit idly and listen while the reading clerk races through the committee report. Messages received from the other house are now read at length, while the presiding officer refers the bill to committee—again, a process in which the full membership plays no role except occasionally to request that a bill be referred to a particular committee.

The only functions now served by having the full membership present while local bills are introduced and enacted and committee reports and messages from the other house are received are to inform the membership of new developments in the legislative process—and to preserve the formality of recording their unanimous vote on local bills. The informative function could be performed by a printed report of actions taken at an earlier daily session, and the voting function can be handled as it was in the days of the Saturday session—by unanimous consent to a convenient fiction. Now that the General Assembly has the benefit of a computer-based information-retrieval system, calendar actions taken at 9:00 a.m. could be printed and placed in each member's desk in time for the afternoon session or delivered to his office somewhat earlier. To guard against abuse of the system, the rules of each house could be modified to provide that any vote taken on a local bill at the 9:00 a.m. session be set aside on motion of the floor leader of either party, in which event the bill would be placed on the calendar for the afternoon session.

A second improvement would be for the General Assembly to take the local bill deadline seriously. Beginning in 1965, each house has adopted a rule providing that local bills may not be introduced after a certain date without the approval of the Rules Committee. The deadline has prompted a flood of local bills in the week or ten days just before it expires, but it has not stopped introductions after that time. The Rules Committee has full authority to withhold its consent to the introduction of a local bill after the deadline, but to my knowledge it has never exercised that authority. The most serious problem caused by failure to observe the deadline is the referral of local bills to the Calendar Committee. These committees are not equipped, and do not have the time, to give local bills the attention they need. As a result, the Calendar Committee is forced either to kill local bills indiscriminately or to pass them out with equal indiscrimination. It has always chosen the latter alternative. Enforcement of the local bill deadline is a simple matter of getting the word out to boards of county commissioners, city councils, and other sources of requests for local legislation that they must make their requests early in the legislative process. It is a rare local bill that meets a true emergency situation in the first place, and almost never is there a valid excuse for a local governing board to lodge its first request for local legislation in May or June, long after the deadline has passed.

Finally, I would like, but frankly do not expect, to see the General Assembly give each local bill the same consideration on its merits that would be given to a public bill to the same effect. Nearly everyone involved in the legislative process—the members themselves, the press, the clerical staff, and my colleagues at the Institute of Government—find it difficult to take local bills seriously. Fortunately, the Attorney General's staff, who draft most of them, do not share that attitude. A bill that would not receive ten votes in the House or five in the Senate if it were public will often be enacted unanimously by both chambers because it does not affect anybody's constituents other than the introducer's—and the members are willing to let him take full responsibility for it. Yet such a bill affecting Mecklenburg County affects nearly 400,000

(*continued on page 44*)

10. A quorum is not essential for transacting routine business. Unless the Journals affirmatively show to the contrary, the courts will presume the presence of a quorum. See generally, Ferrell, *The Courts and Legislative Procedure*, 40 POPULAR GOVERNMENT 66 (Winter 1975); State *ex rel.* Dyer v. City of Leakesville, 175 N.C. 41 (1969).

11. After this article was written, the House has begun to require members to get all bills that they wish to introduce to the clerk by 4:30 p.m. on the day before introduction. This procedure should help speed up the process of introducing bills and referring them to committees.

# INTERIM LEGISLATIVE STUDIES

*Milton S. Heath, Jr.*

INTERIM LEGISLATIVE STUDIES by "study commissions" and other study groups are a familiar feature of the North Carolina political landscape. In the past two decades, during every interim between legislative sessions except one, the General Assembly has assigned fifteen or more interim studies to study groups. (See Chart 1 and Table 1.) The past twenty years show a trend of increasing absolute numbers of studies, combined with increasing reliance on legislative (rather than executive) initiation of studies and legislative leadership in study commissions.

The legislature in session is a forum suited to promotion and evaluation of matured legislative proposals. The demands and pressures of the legislative session, however, are ill adapted to leisurely in-depth studies of complex problems. To this need for thoughtful and often prolonged analysis, the interim study group is far better adapted than the standing committee functioning during the session. Study commissions also sometimes usefully respond to problems of lesser scope that are identified too late for handling during the session.

It is often bandied about that sending a bill or a proposal to a study committee amounts to committing it to the deep freeze. The modern record of interim legislative studies in North Carolina indicates that, although this may sometimes occur, it is not a common practice. (See Chart 2.) Most interim studies during the past two decades have generated significant legislation, including a number of major new policy directives.

This article will briefly explore and analyze some of the highlights of the past twenty years' experience with interim legislative studies in North Carolina.

## THE CHARACTERISTICS OF INTERIM STUDIES

The main features of interim study activity in North Carolina can be summarized in terms of subject matter, study vehicles, selection of study groups, volume, and results.

*Subject Matter.* A broad spectrum of subject matter has been covered by the interim studies of the past twenty years, ranging from subjects of very limited scope with short time requirements to major public issues.

The General Assembly has turned to major interim studies, for example, to resolve crisis issues (e.g., the Pearsall Plan[1]); to recodify entire chapters of the General Statutes; to investigate broad subjects over a period of several years (e.g., the Local Government Study Commission and the Courts Commission); and to develop certain issues via umbrella study groups (e.g., the improvement of legislative services through the work of the Legislative Research Commission, and the studies of state departments by the Reorganization Commission). It has rarely relied on study commissions to generate major tax reform or major new spending programs.

Among the milestones of the interim study process during the past twenty years have been:

—Significant contributions to resolving the critical issues involved in the Pearsall Plan (1956), the Speaker Ban Law (1965), and the creation of the UNC Governing Board (1971).

—Development of the major state government reorganizations of the 1950s and implementation of the constitutionally mandated reorganization of the 1970s.

—General revision of the State Constitution, plus several major constitutional amendments (such as the rewrite of the public finance provisions).

—The entire court reform legislation of the 1960s and 1970s.

—Substantially all of the major local government reform legislation of the past two decades.

—Much of North Carolina's public health legislation of the era.

—Substantially all of the state's environmental legislation.

—A number of general statutory recodifications[2] of the past two decades—including laws relating to property tax, elections, state land management, welfare, alcohol-

1. The Pearsall Plan, named after the chairman of the study commission that originated it, was North Carolina's initial legislative response to the 1954 desegregation decision.

2. Temporary study commissions have shared the field of recodification with the General Statutes Commission, a permanent statutory revision agency staffed by the Attorney General's Office. The General Statutes Commission concentrates on fields that are of special concern to practicing lawyers. It has drafted, and successfully piloted through the General Assembly, recodifications of such subjects as corporation law, wills and estates, divorces and alimony, etc.

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ic beverages, civil procedure, criminal procedure, and the commercial code.
- Revision of the commercial fisheries laws.
- The Coastal Area Management law of 1974.
- The creation of the State Zoological Garden.
- Legislative service improvements.

Matters of more modest scope are assigned to study groups for a variety of reasons. Here are a few examples of such chores, identified by their short titles and accompanied by some hunches about their origins:
- "Tobacco Advisory Board Study" (HR 1524, 1971 session). The Legislative Research Commission was directed to study the need for a Tobacco Advisory Board to advise tobacco farmers and warehousemen about their marketing problems. After a series of hearings in the various marketing areas, the LRC committee assigned to this study recommended that no advisory board be created because a single state board could not solve the problems of a multi-state marketing region and because it found little support in its hearings for the proposal. The LRC committee had served the useful purpose of ventilating a proposal that, on closer scrutiny, proved not to withstand analysis.
- "Aviation Study Commission" (HR 1146, 1965 session). An ad hoc study commission was promoted by the Governor's office and the Department of Conservation and Development as a vehicle for a proposal to encourage aviation development with state funds. After a brief study and perfunctory report, the study commission recommended a program of state aid to small airports, which was funded by the 1967 legislature.
- "Quail Sale" (HR 1431, 1969 session). This study of the feasibility of propagating and marketing quail was committed to the Legislative Research Commission because the General Assembly had wearied of several years of unproductive and agonizing debate on a divisive issue among sportsmen. The Legislative Reseach Commission "lost" this study while awaiting the results of a Wildlife Resources Commission inquiry that never materialized.
- "Unborn Class"—a study of a bill to permit paying the proceeds of a sale of the living members of a class of heirs, conditioned upon posting of a bond for the benefit of potential unborn heirs (HR 1423, 1969 session). The bill was assigned for study to the Legislative Research Commission, probably because most of the legislature had not the foggiest notion of what it was about. The Research Commission promptly discharged its responsibility by re-referring it to the General Statutes Commission.

*Vehicles for Legislative Studies.* Several vehicles have been employed for legislative studies during the past two decades.

Throughout this period, ad hoc study commissions have been used to examine specific assigned topics. So common has been this approach, indeed, that many legislators speak of all interim studies as "study commissions." Usually, ad hoc study commissions conduct their investigations, report to the General Assembly, and conclude their business all within one interim between legislative sessions. Occasionally, as with the Local Government Study Commission of 1967 to 1973, the assigned task is too large to complete in this time frame, and the life of the study commission is extended from session to session until the job is finished. Once in a great while, such a study commission eventually achieves permanent status, as with the Courts Commission and the Cancer Study Commission. (At that point these commissions joined the illustrious company of the long-time permanent study groups, such as the General Statutes Commission and the Judicial Council.)

Another major study vehicle active during most of this period has been the umbrella commission, broadly mandated to investigate a variety of subjects. From 1953 until 1963 the Commission on Reorganization of State Government functioned under this kind of authority; it originated an impressive array of major legislation, often with the support or initiative of the Governor. The Reorganization Commission recommended its own successor in this mold, the Legislative Council, which in 1965 evolved into the Legislative Research Commission (hereafter referred to as the LRC). The LRC has continued and expanded the tradition of the umbrella study commission until the present day. In its heyday (circa 1967-73), the LRC rivaled the Reorganization Commission as a generator of major legislation, though without the close affiliation with Administration bills that typified the Reorganization Commission.

During the 1973-74 interim, extensive reliance was placed on standing legislative committees whose existence was extended into the interim for in-depth study of certain issues and bills still pending when the 1973 Assembly recessed. This reliance upon extended standing committees was associated with the experimental annual sessions of 1973 and 1974. Although this approach has occasionally been used before and after the 1973-74 interim, its future role is likely to be linked closely with the fate of annual sessions.

From time to time, the General Assembly has assigned a specific topic to a state agency for a study and report. The legislature has not relied heavily on this method of interim study, although occasionally it is a source of major new policy directions (e.g., the 1967 water-use legislation that was developed by the Department of Water Resources pursuant to a 1965 study resolution).

Occasionally a nonstandard study group, acting much in the fashion of the typical ad hoc interim study commis-

Chart 1

**Ad hoc Interim Legislative Studies**
**1955–1975**

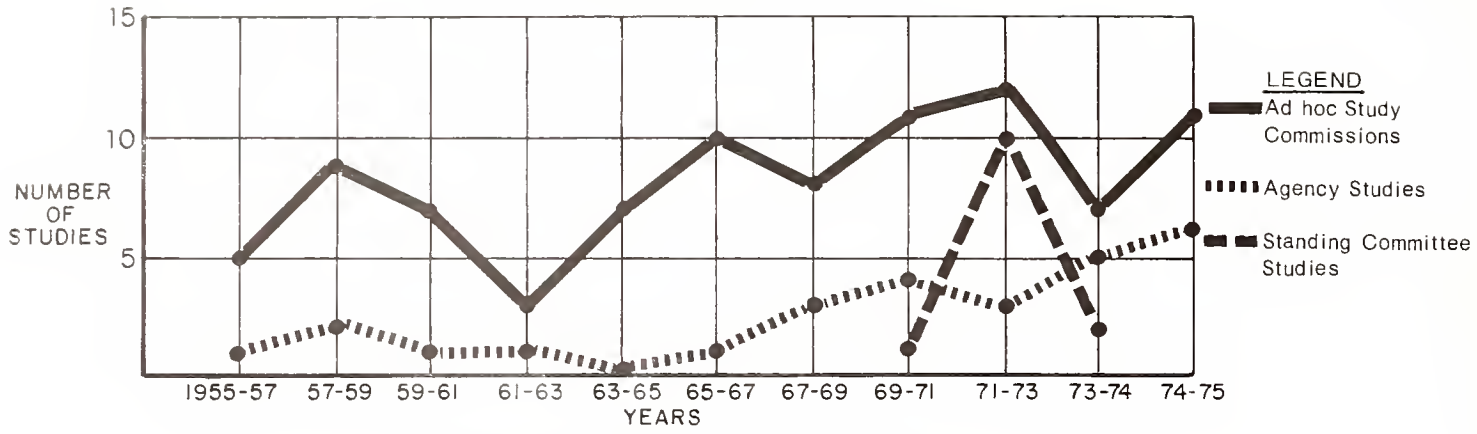


Chart 2

**Continuing Interim Legislative Studies**
**1955–1975**

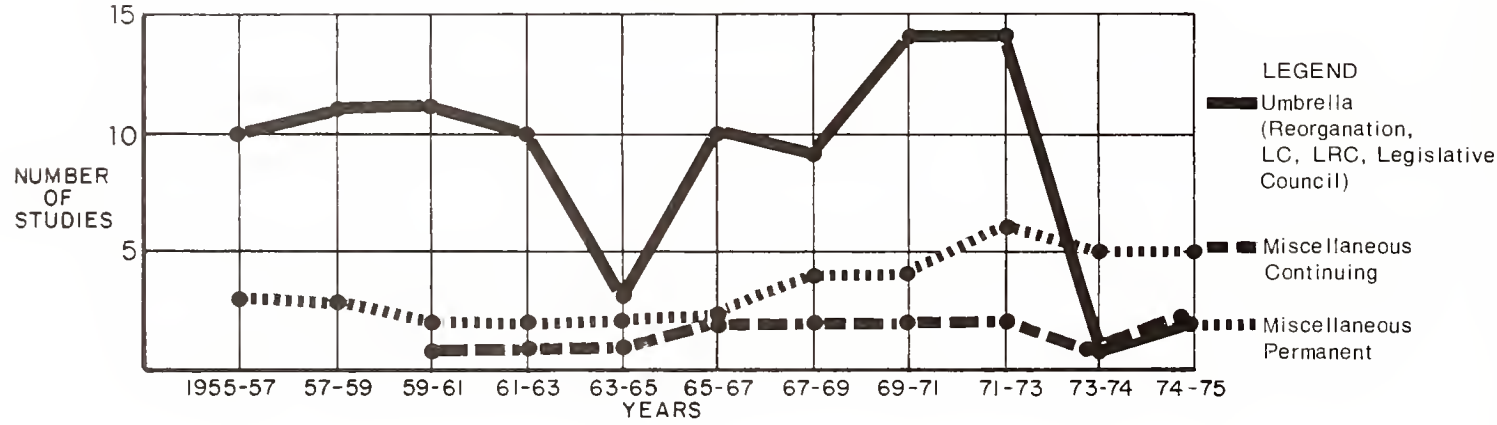


Chart 3

**Total Interim Legislative Studies**
**1955–1975**

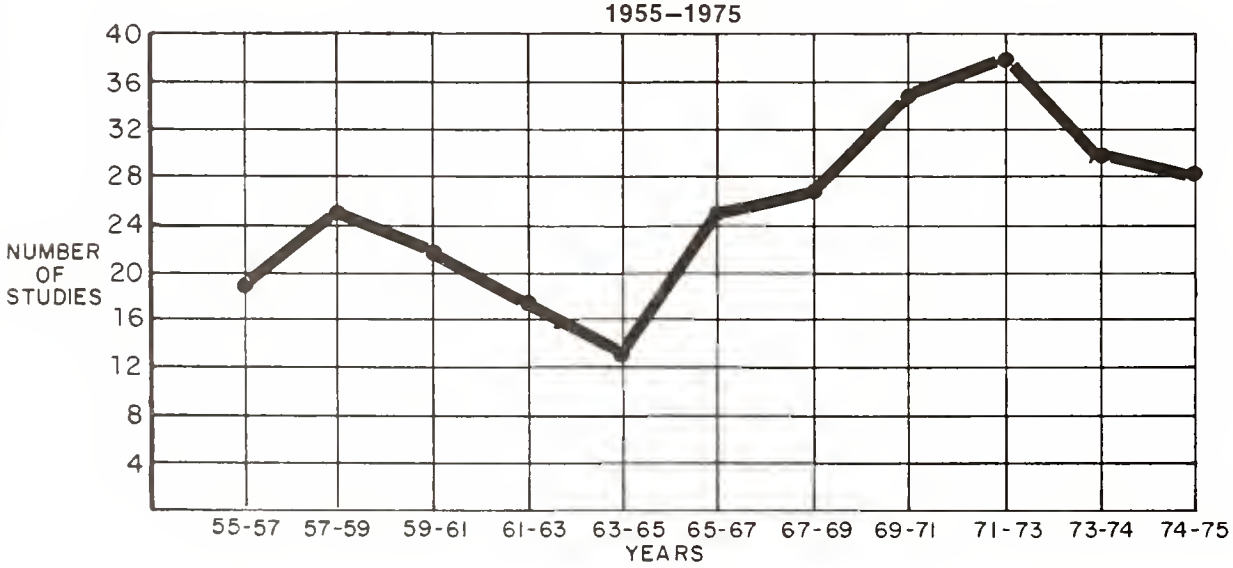

Table 1
Interim Legislative Studies, 1955-1975

| Study Unit | Number of Studies | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 55-57 | 57-59 | 59-61 | 61-63 | 63-65 | 65-67 | 67-69 | 69-71 | 71-73 | 73-74 | 74-75 |
| Reorganization Comm'n | 10 | 11 | 11 | 10 | — | — | — | — | — | — | — |
| Legislative Council | — | — | — | — | 3 | — | — | — | — | — | — |
| Legislative Research Comm'n | — | — | — | — | — | 10 | 9 | 14 | 14 | 1 | 2 |
| Misc. continuing comm'ns | — | — | — | — | — | 2 | 2 | 2 | 2 | 1 | 2 |
| Misc. permanent comm'ns | 3 | 3 | 2 | 2 | 2 | 2 | 4 | 4 | 6 | 5 | 5 |
| Ad hoc study comm'ns | 5 | 9 | 7 | 3 | 7 | 10 | 8 | 11 | 12 | 8 | 11 |
| Agency studies | 1 | 2 | 1 | 1 | — | 1 | 3 | 4 | 3 | 5 | 6 |
| Extended standing committees | — | — | — | — | — | — | — | — | 1 | 10 | 2 |
| TOTALS | 19 | 25 | 22 | 17 | 13 | 25 | 26 | 35 | 38 | 30 | 28 |

Note: This table shows the number of studies assigned by each General Assembly to various study groups during the past two decades. In the case of the Reorganization Commission, the specific study subjects were selected by the Commission rather than by the General Assembly. This is true also of a minor proportion of the studies undertaken by the Legislative Research Commission, by the Legislative Council, and by standing committees in 1973-74.

sion, conducts a substantial inquiry that results in legislative recommendations. Two such groups were sponsored by the North Carolina Bar Association—the Bell Committee, which conducted the studies that ultimately resulted in the court reform program of the 1960s; and the State Constitution Study Commission, which generated the comprehensive 1970 revision of the State Constitution.

*Selection of Study Groups.* The pattern of selection of study commissions has changed markedly during the past two decades. Writing in the 1967 legislative issue of *Popular Government*, John Sanders noted this change:

Before 1965, nearly all legislative enactments for temporary commissions authorized the Governor to appoint all commission members. Among the eleven commissions established in the 1967 session, however, the Governor is authorized to name all members in only two instances. Legislative leaders will share in the appointment process for eight of the group and will appoint the entire membership in a ninth case.

The new style of selection has persisted to the present day and, if anything, intensified. Sanders' observations about ad hoc study commissions are equally applicable to long-term groups, including those of the umbrella variety. For example, where the Governor appointed the entire membership of the Reorganization Commission, the Speaker and the President Pro Tem have appointed the entire membership to the LRC.

Associated with this development has been a trend toward legislative leadership in study commissions on a broad front. If study commissions during the late 1950s were typically a means for the Governor to exercise initiative and leadership, the study commission of the late 1960s and the early 1970s has more often been an avenue for legislative initiative and leadership in the lawmaking process.

*Volume.* The volume of interim studies during the past two decades is summarized in Charts 1, 2, and 3 and in Table 1. These data show that volume has risen from a median of eighteen per interim during the first decade to a median of twenty-nine per interim during the second decade. No effort has been made to weigh the individual studies composing these totals systematically, but the author regards them as reasonably comparable in scope, length, and significance.

Along with this increase in interim study activity, staff resources and legislator membership on study groups have expanded. During the 1955-57 interim, only twenty-six members of the General Assembly were named to study groups, and only one of these twenty-six was named to more than one study group. By the 1974-75 interim, the number of members named had increased to 112, and many of these members served on two or more study groups. Also, the number of nonlegislator members of study groups increased from 19 in 1955-57 to 58 in 1974-75. (The magnitude of the increase in legislator involvement probably should be discounted somewhat. For example, 38 of the 112 legislators serving on the study

groups in 1974 sat on one study commission—the Finance Subcommittee on Privilege License Tax, Liquor Tax, and Property-Hauling Vehicles Tax. It is not known how actively they participated.)

During the 1955-57 biennium the Institute of Government and several permanent state agencies were the only staff resources available to study commissions, other than occasional participation from university faculty members. By 1974 these limited staff resources had been substantially augmented by the Legislative Services Office and its Fiscal Research Division, as well as by broadened state agency participation. Indeed, the Services Office and the Fiscal Research Division supplied the General Assembly with an in-house staff resource that met most of the interim research demands of the Assembly this year. Clearly, the extent of interim legislative research in North Carolina has increased very substantially during the past two decades, and by and large, staff resources and legislator involvement have kept pace with this expansion.

*Results.* Measuring aggregate results of interim legislative studies with any precision is difficult, and a precise measurement of results is beyond the scope of this article. The problem is illustrated by the Conservation and Development Study Commission, authorized in 1967. The principal responsibility of this commission was to study possible reorganization of state conservation and development agencies, and specifically to investigate whether North Carolina's traditional omnibus Department of Conservation and Development (hereafter "C and D") should be split into separate departments, one concerned with commerce and industrial development and the other concerned with natural resources management and environmental protection. The originators of the study, Lieutenant Governor Robert Scott and C and D Board Chairman Willie York, were believed to favor a split for different reasons—York, in order to free the state's development programs from their association with conservation agencies; and Scott, in order to free conservation programs from the dominance of a program that stressed development over conservation. The study commission was chaired by a leader in Scott's gubernatorial campaign, Charles Hayworth.

Against this background, so highly favorable to a split of C and D, the commission began its proceedings. In an exhaustive series of hearings, the commission heard more than fifty witnesses from all walks of public life. As the hearings progressed, to the surprise of many, the evidence mounted in favor of retaining the conglomerate Department of C and D. In the end, not a single member of the commission voted in favor of splitting C and D, and the commission made no major legislative recommendations.

The dilemma for aggregate evaluation of study commission results is obvious. If one appraises study commission results in terms of legislative products, the C and D study commission would probably fall in the minus column. But if this commission is rated by the thoroughness and integrity of its work and by its ultimate impact on state policy, it was a resounding success.

In full awareness of the pitfalls of aggregate measurement, a rough evaluation has been attempted here based upon a single criterion—the amount of legislation resulting from study commission activity. Table 2 reflects this effort. In deference to the C and D study commission experience and others of its genre, only those study groups that profess to have made potential legislative recommendations are evaluated by these statistics. Table 2 shows the author's best estimate of the percentage of studies that have resulted in the enactment of substantial legislation. These estimates necessarily are somewhat subjective, and they are by no means comprehensive. (The gaps in the chart reflect the author's inability to determine or decide in some instances whether a significant legislative product was intended or achieved, or even whether a particular study commission recommended any legislation.)

No average percentage of legislative success has been derived from these data, because they are too fragmentary to justify such a figure. But an inspection of the chart will show that the legislative success ratio of interim studies has usually been 50 per cent or higher. For most legislative years, John Sanders' observations about the success of the Reorganization Commission proposal in the 1967 legislative issue of *Popular Government* could have been equally applied to most or all study commissions:

> The increasing reliance on advance spadework by study commissions was evident in the high degree of acceptance which met the proposals of such quotes in the reorganization field. Virtually all of the important bills in the state government area were the product of study commissions, and almost none of the major recommendations of such agencies concerning state government reorganization matters were rejected by the legislature.

The record of study commission results has not been without its ups and downs. One marked decline in study commission volume and significance occurred in the early 1960s. This probably reflected both Governor Sanford's preference for other policy vehicles and a legislative weariness of Governor Hodges' strong reliance on study commissions as an avenue for policy formulation. Since about 1965, however, the trend of study commission activity has been generally upward.

Of course there are variations in the quality of study commission work, arising from the strength or weakness of the commission's leadership, the extent of the commission members' involvement, and the quality of its staff work. Fortunately, many North Carolina study commissions have had the benefit of strong leadership, high involvement, and good staff work.

It is fitting to conclude this section with the observation of House Speaker David Britt at the Legislative Orientation Conference of 1968:

Table 2
Legislative Results of Interim Legislative Studies, 1955-1975

| Study Unit | Percentage of Studies Resulting in Substantial Legislation | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 55-57 | 57-59 | 59-61 | 61-63 | 63-65 | 65-67 | 67-69 | 69-71 | 71-73 | 73-74 |
| Reorganization Comm'n | 80 | 90 | 100 | 71 | — | — | — | — | — | — |
| Legislative Research Comm'n | — | — | — | — | — | 60 | 100 | 90 | 91 | 100 |
| Misc. continuing comm'ns | — | — | — | — | — | 100 | 50 | 100 | 100 | 100 |
| Ad hoc study comm'ns | 80 | 63 | 43 | 67 | 80 | 57 | 83 | 66 | 66 | 66 |
| Agency studies | 100 | 50 | 100 | — | — | 100 | — | 100 | 50 | — |
| Extended standing committees | — | — | — | — | — | — | — | — | 100 | — |

Note: This table represents the author's working estimate of the proportion of legislative studies that resulted in the enactment of substantial legislation. (The test of "substantiality" is obviously somewhat subjective. In applying this test the author, for example, concluded that a study commission whose only legislative product was a resolution extending its study for another biennium did not generate any "substantial" legislation.) A recommendation that was not enacted in the next succeeding legislature but was enacted by a subsequent legislature was counted as resulting in legislation.

One group that was included in Table 1 had to be omitted from this table because of inadequate information on legislative follow-up—The Legislative Council and "Miscellaneous permanent commissions."

Usually it is fairly easy to spot substantive legislative results of study commission activity, but where the only results are appropriations, the task is much more difficult. Because of this difficulty, the author may have improperly characterized some study commission products as not having produced legislative results.

Finally, it should be cautioned that failure to generate legislation is not necessarily a true test of a study commission's success. Some of the most thorough and useful interim legislative studies have concluded that no legislation was needed, or that only administrative changes were desirable. For this reason, the percentages shown in this table measure only the results of studies that recommended some identifiable legislative action.

I'll admit that in days gone by to propose a study commission was another way of killing a bill. Several years ago a man who served in the legislature back in the '40s for four or five terms and had been very influential stayed out for five or six terms and then back in the early '60s. Reports of study commissions began coming in and the legislature began acting upon them. This fellow saw me out in the hall one day and said: "Britt, I want you to tell me what's going on around here. When I served up here before, back in the '40s—why, any time we sent anything to a study commission, that was just another way of getting rid of it. But now, people bring this stuff up here and expect us to pass it."

I am glad to see the change of attitude on this matter. This is not to say that every recommendation of a study commission is worthy of enactment; that certainly is not true. But a study commission report provides us with basic information for consideration in trying to find the right answers. I think that if the books are reviewed and records are studied for the past several sessions, you will find that some of the finest legislation that has been enacted has resulted from study commission work. One of the arguments against annual sessions of the General Assembly is that yearly meetings would not allow study commissions to work as effectively as they have during recent years.

## UMBRELLA STUDY GROUPS

The remainder of this article will examine in greater detail some of the more successful interim study vehicles of the past two decades, beginning with two principal "umbrella study groups"—the Reorganization Commission and the Legislative Research Commission.

*The Commission on Reorganization of State Government.* A popular theme of study commission activity at both state and federal levels during the late 1940s and the 1950s was reorganization studies. The Hoover Commission's work on the national level was paralleled by similar investigation in many states. North Carolina shared in this trend through a series of commissions on reorganization of state government. The first reorganization commission was created by the 1953 General Assembly, and a series of successor commissions were renewed each biennium through 1961-63. Each commission consisted of nine members appointed by the Governor, of whom a majority were legislators.

The reorganization commissions successfully developed a great deal of the major program legislation of the Hodges Administration that affected state government. Among their principal products were the creation of the departments of Administration, Water Resources, and Mental Health; over-all revision of the law relating to management of state-owned lands, succession in office, occupational licensing, and building regulation; the establishment of the Legislative Council and the State Legislative Building Commission; the organization of the State Capitol Planning Commission; and the Heritage Square concept.

The various reorganization commissions left a shelf of thorough and well-reasoned reports, together with an impressive record of legislative success. More than 80 per cent of their major legislative recommendations were enacted during the decade of reorganization studies. A continuing factor in this success record was the active involvement of a number of distinguished legislative leaders in the work of these commissions. Governor Hodges' support of many Reorganization Commission proposals as Administration measures also weighed heavily; indeed, the reorganization commissions served as an important channel of policy formulation throughout the Hodges Administration.

*The Legislative Research Commission.* The Legislative Research Commission can trace its origins to the last Reorganization Commission, which recommended the creation of a Legislative Council "to make . . . studies into governmental agencies and institutions and matters of public policy" and report its recommendations to the General Assembly. When the Legislative Council concluded a rather rocky first biennium, the General Assembly trimmed its wings slightly and gave it a new name—"the Legislative Research Commission."

The LRC shares two traits with the Reorganization Commission—a broad range of study responsibilities and continuity for a number of legislative sessions. There the resemblance stops. The LRC is a purely legislative vehicle; its ten members are appointed entirely by the Speaker and the President Pro Tem, who alternately serve as its chairman, and its studies originate solely by legislative direction. Occasionally LRC bills have enjoyed Administration support, but the LRC has never been closely allied with an incumbent Administration.

Some hopes were held out that the LRC would assume all interim legislative research responsibilities and eliminate the need for further ad hoc study commissions. While this prospect never materialized, the LRC has compiled a record of legislative accomplishments comparable with that of the reorganization commissions. From its studies and recommendations have come:

- Significant progress in public health and mental health programs, including new laws on emergency medical services, and broader use of physician's assistants and nurses;
- Day-care licensing legislation;
- Most of the environmental legislation of this period, including pesticide control, oil-spill control, sedimentation control, regional water and sewer laws, small watershed law revision, and stored-water use legislation;
- Comprehensive recodifications of alcoholic beverage, motor vehicles, and public welfare laws;
- Coastal insurance legislation;
- Important reforms in legislative services, including establishment of the Legislative Services Office and improvements in legislators' salaries and benefits.

Several other aspects of the LRC experience are worthy of note. One is its partly realized goal of coordination and supervision of legislative studies. Even though the LRC has never become the single, all-purpose interim study commission that was once envisioned, it has been a useful tool for a modest development of supervisory and coordinative values. Through the LRC, the legislative leadership has been able to oversee continuity in some lines of legislative development, to discourage some unwarranted proposals, and to ensure substantial support for studied measures.

Also notable is the simple mechanism for launching studies set forth in the LRC Act. Under this act, a resolution of a single house suffices to initiate an LRC study.

Finally, the LRC developed in its environmental studies a flexible method of organizing its studies by appointing to its subcommittees LRC members, as well as some legislators who are not LRC members and some citizen nonlegislator experts. The result has been a blend of legislative leadership and lay expertise that has realized some of the values of each and generated mutual respect among legislators and citizens.

## CONTINUING STUDY COMMISSION

From time to time an ad hoc study commission takes stock of its responsibilities and concludes that more than one legislative interim will be required to discharge these responsibilities completely. Or the General Assembly itself may reach a similar conclusion in establishing a study commission. The Local Government Study Commission is an example of the former; the Courts Commission, of the latter. Both commissions exemplify the value of allowing sufficient time for a major study to be completed.

*Local Government Study Commission.* In 1967 the General Assembly established the Local Government Study Commission with an authorization broad enough to encompass the study of the entire range of local government structure, powers, finance, and relationships with the state. Early in its work the Commission recognized that it could not complete its full assignment during one biennium, and it proceeded on the assumption that a successor commission would carry on its work for at least two more years. This assumption proved valid, and the Commission was able to secure two extensions that allowed for the orderly completion of its work.

Before the Commission hung up its laurels in 1973, it had recommended and the General Assembly had enacted an extensive revision of state constitutional provisions with respect to local government finance, together with implementing legislation; home-rule powers for all cities and counties; revision and recodification of the city and county chapters of the General Statutes; a complete revision of municipal election laws; an overhaul of local bill procedures and local government committee structure in the General Assembly; and revision of the local finance and fiscal control laws. This was the second time in fifteen years that the General Assembly had employed a

study commission to trigger major reform in local government law (the first being the Municipal Government Study Commission of 1957-59).

*The North Carolina Courts Commission.* In 1962 North Carolina adopted a constitutional mandate to reorganize the state's lower court system. The 1963 General Assembly recognized that it could not possibly develop the necessary implementing legislation itself and assigned the task to a long-term study commission, the North Carolina Courts Commission. As specified by the constitutional amendment, the resolution creating the Commission allowed seven years for this task to be completed.

In that seven-year period the Courts Commission met as often as weekly during several stretches of time and developed the necessary implementing measures. Altogether, the bills recommended by the Commission and enacted by the General Assembly included the Judicial Department Act of 1965, the Courts of Appeals Act of 1969, revision of jury-selection laws and juvenile laws, the Judicial Standards Commission Act, judicial retirement laws, and scores of technical bills. The Assembly was pleased enough with the result to give the Commission permanent status in 1969, and the Commission continues to generate significant recommendations, including the pending judicial-selection bill (the "Missouri Plan"). The substantial long-term success of this Commission is a tribute to the personal leadership of two outstanding chairmen (former Senators Lindsay Warren, Jr., and Ruffin Bailey); the continuity of membership that has characterized the Commission; the strong contingent of legislators in its membership; and the General Assembly's wisdom in allotting time enough to do the job.

## EXTENDED STANDING COMMITTEES

In recent years the General Assembly has seen fit more than once to extend the lives of certain standing committees beyond the end of a legislative session and give them leave to pursue interim legislative studies after the manner of a study commission.

The first such occasion came when the 1971 General Assembly recessed until a date certain to allow time for development of a consensus proposal concerning reorganization of institutions of higher learning. The task of developing a proposal was assigned to the Committees on Higher Education. The success of this complex and highly controversial venture illustrates the utility of this approach to interim studies.

The second occasion involved a much more ambitious extension of committees following the 1973 legislative sessions. Faced with an experimental "annual session" to come in 1974, together with a large complement of important bills to be carried over from 1973 to 1974, the legislative leadership decided to empower a number of standing committees to extend their operations into the interim in order to facilitate preparation for the 1974 session.

Among the subjects considered by the extended standing committees in 1973 were state government reorganization, coastal land management, state land-use planning, campaign reform, pre-trial criminal code, no-fault auto insurance, medical care needs, and small water and sewer systems.

Most of these studies bore fruit in legislation enacted in 1974. In several instances it seems clear that complex and highly controversial legislation received the kind of in-depth review during the interim that was essential to its enactment in 1974 (e.g., the coastal area management and state government reorganization laws).

The experience of 1973-74 points up the advantages of extended standing committees in the case of an annual legislature that has a substantial carry-over of pending bills from the previous year's session. In this case, the same committees that are to consider the bills during the following year conduct the interim studies. Where a new legislature with new committees is involved, the advantages of extended standing committees are not self-evident and have not been proved through actual experience. In 1974 the Senate and House each extended one subcommittee for study purposes, but no useful conclusions can be drawn from this fragmentary experience.[3]

Will extended standing committees continue to be used for interim studies in North Carolina? This question is probably tied closely to the issue of annual vs. biennial sessions.

The 1973-74 experience indicates that extended standing committees can productively study bills that are carried over from one general session to another. (*Quaere,* if this would hold for a general session followed by a limited session, such as a "budget session.")

Whether an extended standing committee can effectively study new and complex subjects during the interval between two annual sessions is another matter. With full-time well-paid legislators supported by ample staff resources, this ought to be possible, but these conditions do not now prevail in North Carolina. Under existing conditions in North Carolina, it is anybody's guess whether standing committees will be used again on such a scale as they were in 1973-74. If they are, it seems likely that their scope will be limited for the most part to studying bills that are carried over from one year to another.

The 1973-75 experiment with annual sessions seems to lend some substance to Speaker Britt's concern that yearly meetings would not allow study commissions to work as effectively as biennial sessions (page 41 above). The number of substantial studies of new and complete subjects has noticeably declined since 1973. Also sharply on the decline has been the work of the umbrella type of study group, which has been responsible for many of the best interim study reports.

3. Senate Resolution 1087 provided for a subcommittee of the Rules Committee to study electronic voting, a subject previously studied by the I.R.C. House Resolution 2072 provided for a House Finance Subcommittee to study privileges license taxes, liquor taxes, and taxes on property-hauling vehicles.

In short, annual sessions may risk a significant impairment of the interim study process. If the General Assembly wants to have annual sessions and at the same time to preserve the values and strengths of study commissions, some thought should be given to avenues for accommodating the two desires.

## CONCLUSION

Several conclusions emerge from this review of the interim legislative studies of the past score of years.

*One.* The North Carolina General Assembly has used interim studies extensively, at least since 1955, to screen and develop legislation on subjects that require depth of analysis and evaluation. Study commissions have often proved to be useful devices for grappling with problems that are too complex and controversial, or are identified too late to be resolved in a single session.

*Two.* More legislators are becoming involved in study commission activity, and legislative leadership and initiative in studies are on the increase.

*Three.* Study commissions, by and large, have been quite successful in seeing their proposals enacted. Legislators with extensive study commission experience often give major credit to study commissions for making possible the enactment of important complex legislation.

*Four.* North Carolina has experimented with a number of study vehicles, including ad hoc single-purpose study commissions, continuing commissions spanning several legislatures, umbrella general-purpose commissions, state agency and private (e.g., bar association) studies, and extended standing committees. No single approach has emerged as dominant.

*Five.* Each principal form of study commission has been shown to have certain advantages. The umbrella study commission (such as the LRC) has benefited from continuity, breadth, close contact with the legislative leadership, and flexibility of organization. The independent study commission, at its most effective, has been able to do justice to a particular subject better than any other form. The standing committee that is extended from the first year of a session to the second year obviously is in the best position to carry forward its own recommendations during the session.

*Six.* The 1973-74 experiment with annual legislative sessions and the possibility of permanent annual sessions have brought interim legislative studies in North Carolina to a crossroads. Unless some thought is given to accommodating study commissions to annual sessions, the interim study process may be seriously impaired, at least temporarily.

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## LOCAL LEGISLATION (*continued from page 35*)

of the state's citizens. Even if it affects only the 500 or so residents of one small town, it is no less important to them than if it were public and affected all the state's municipal residents.

I do not suggest that local bills should be given the same full explanation and debate on the floor as public bills. Such a practice would be extremely wasteful of time, and a strong local bill committee system would make it unnecessary. The key to responsible legislating has always been the committee system, and local legislation is no exception. I would suggest that the chairmen and members of the Local Government committees fully weigh each local bill referred to them, asking always whether this bill embodies sound public policy. The number of local bills that will require this kind of scrutiny will always be small, but the committee's actions with respect to the few local bills that raise basic policy issues would set the tone for the whole local bill process. A bill that increases the size of a board of county commissioners from three to five members need take very little of the committee's time. The only policy question it raises is that such decisions should have substantial local support.

Other measures raise very different issues. Some local bills directly affect the rights or tax liabilities of individuals. For example, a bill incorporating a new town creates a new unit of local government with the power to levy taxes on its citizens, to regulate land use and private conduct, and to engage in a wide range of functions and programs. A new town also has revenue implications for the state. It may qualify for gasoline tax allocations and will probably receive beer and wine, franchise, and intangibles tax allocations. A bill annexing territory to an existing city subjects the residents of the area to municipal taxes and regulatory powers. Usually, the interests of citizens directly affected by a local bill are adequately represented by the legislative delegation introducing it. However, full protection of these interests seems to demand that an individual legislator's judgment at least be reviewed by his colleagues to protect against hasty or arbitrary action.

# THE 1974 GENERAL ELECTION: Statistics on Political Party Strength, Voter Registration, and Voter Turnout

*H. Rutherford Turnbull, III, and James C. Drennan*

TWO ARTICLES published in *Popular Government* after the 1972 general election (Vol. 39, December 1972, and Suppl., Vol. 39) reported on the geographic distribution of political party strength in North Carolina, state and county-wide voter registration (by party affiliation and other characteristics), and statewide and county-wide turnout for various party candidates. This article has a similar purpose.

## PARTY ALLEGIANCE AND AFFILIATION

As the accompanying maps and following data show, North Carolina voters moved strongly away from their 1972 bi-partisan preferences and lodged their preferences solidly with the Democratic candidates in the 1974 general election. The reasons are easy to find. The Watergate scandal, combined with certain campaign tactics of a state Republican administration (in the tax matter of the Democratic candidate for Attorney General), tainted the G.O.P. In addition, the usual mid-term shift away from the White House party to the opposition, exacerbated by an economic dilemma of the first magnitude (joint recession and inflation), made a swing toward the Democrats highly predictable. The state Republican Party itself suffered internal differences as the "moderate" Governor Holshouser put forward his hand-picked candidates for U.S. Senate and State Attorney General with only nominal (and sometimes less) support of the "conservative" wing of his party.

The impact of the Democratic sweep can be measured by the Republicans' loss of two congressional seats, the loss of the statewide U.S. Senate and State Attorney General races, the decline from nine members to one in the State Senate, the drop from thirty-five to nine members in the State House of Representatives, and the fact that no Democratic incumbent seeking re-election was defeated. The percentage of registered voters affiliated with both parties changed by less than 1 per cent, a fact that also underscores the impact of the Democratic victory.

The Republican candidate for United States senator, William E. Stephens, carried only seven counties with 377,618 votes (37% of the total votes cast); the Labor Party candidate, Rudolph Nesmith, carried none with 8,974 votes (.08%); and the Democratic candidate, Robert Morgan, carried 93 counties with 633,775 votes (62.11%). By contrast, in the 1972 general election, the Republican candidate, Jesse Helms, carried 67 counties (and the Republican candidate for President carried all but two counties). Also, in the only other major statewide race, the Republican candidate for Attorney General, James Carson, carried only eight counties (390,626 or 38.22% of the votes) against his Democratic opponent, Rufus Edmisten (618,046 or 60.47% of the votes); the Labor candidate, Marion Porter, carried no counties (13,318 votes or 1.3%).

In the race for seats in the United States House of Representatives, the Republican Party fielded candidates in eight of the eleven contests (no candidates in the Second, Third, or Seventh districts), and recaptured only two of the four seats it had held as Wilmer Mizell lost to Stephen L. Neal in the Fifth District and Earl B. Ruth lost to W. G. Hefner in the Eighth. The returns: *1st District:* (D.) Walter B. Jones, 55,323 (77%); (R.) Harry McMullan, 16,097; *2nd District:* (D.) L. H. Fountain, 52,786, unopposed; *3rd District:* (D.) David N. Henderson, 50,931, unopposed; *4th District:* (D.) Ike Andrews, 62,660 (65%); (R.) Ward Purrington, 33,521; (L.) Michael Smedberg, 670; *5th District:* (D.) Stephen L. Neal, 64,634 (52%); (R.) Wilmer Mizell, 59,182; (L.) Lauren E. Brubaker, 425; *6th District:* (D.) Richardson Preyer, 56,507 (64%); (R.) R. S. Ritchie, 31,906; (L.) Harry Allen Fripp, 351; *7th District:* (D.) Charles Rose, 49,780, unopposed; *8th District:* (D.) W. G. Hefner, 61,591 (57%); (R.) Earl B. Ruth, 46,500; *9th District:* (R.) James G. Martin, 51,032 (54%); (D.) Milton Short, 41,387; (L.) Geoffrey Hooks, 1,458; *10th District:* (R.) James T. Broyhill, 63,382 (54%); (D.) Jack L. Rhyne, 53,131; *11th District*: (D.) Roy A. Taylor, 89,163 (66%); (R.) Albert F. Gilman, 45,983.

Finally, the G.O.P. lost eight of its nine state senators (although it fielded 33 candidates, compared with 25 in 1972) and 26 of its 35 state representatives (although it ran 87 candidates, compared with 84 in 1972).

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## THE MAPS—SOME BACKGROUND INFORMATION

The six maps illustrate the geographic strength of the two major parties. Two maps chart the congressional elections, one indicating the areas represented by the two major parties and the other showing how each county voted by party. The other maps are identical in form to the ones used in the supplement to Volume 39 of *Popular Government,* and the caveats that appeared there about the use of political maps are relevant here.

The maps illustrate that Republican voting power in 1974 was strongest in the mountainous and western part of the state, with some strength in the urban centers of the Piedmont. The only exception to this general pattern was the election of a Republican delegate to the State House of Representatives from coastal New Hanover County, which is urban. Republican strength was substantially less in 1972—the extent of the Democratic victory is apparent by a look at any of the maps.

Finally, a comparison of the maps presented in the supplement to Volume 39 of *Popular Government* and the current maps should show where the Republican Party lost ground in 1974.

## REGISTERED VOTERS AND ELECTED REPRESENTATIVES BY RACE

Statistics compiled annually since 1970 by each county board of elections and distributed by the State Board of Elections give the number of registered voters by race (white, Negro, and Indian or other nonwhite). For the period beginning October 1972 and ending October 1974, the number of white registrants declined from 1,970,026 to 1,911,448 (a decrease of .09%). The number of Negro registrants declined from 373,285 to 350,560 (a decrease of .09%). But the number of Indian and other nonwhite registrants increased from 14,334 to 17,638 (12% increase). In 1972, Negro registrants represented 15.83 per cent of the total registered voters, and Indian and other nonwhite voters represented .60 per cent of the total. In 1974, Negro registrants constituted 15.37 per cent of the total, and Indian and nonwhite registrants accounted for .77 per cent of the total.

The Negro and nonwhite representation in the General Assembly is greater in the 1975 session than in the 1973 session. In 1973, there were only three blacks in the House, all Democrats—Reps. Henry E. Frye (Guilford), Joy J. Johnson (Robeson), and H. M. Michaux, Jr. (Durham)—but in 1975, they are joined by Rep. Richard C. Erwin (D., Forsyth) for a total of four. The State Senate had no blacks in 1973, but in 1975, there will be Sens. John W. Winters (D., Wake) and Fred D. Alexander (D., Mecklenburg). Rep. Henry W. Oxendine (D., Robeson), an Indian, served by appointment to fill a vacancy in the second (1974) session of the 1973 General Assembly and was elected to serve in 1975. No Negro, Indian, or other nonwhite candidates stood for election in any races for U.S. senator or representative; all candidates for the office of Attorney General were white.

## MORE WOMEN ELECTED

The number of women serving in the General Assembly increased from seven representatives in 1973 to 13 in 1975 and from one senator in 1973 to two in 1975. Of the 13

(*continued on page 65*)

I. Total Statewide Registration

| | | |
|---|---|---|
| October 1972 - October 1974 | | |
| from | 2,357,645 | |
| to | 2,279,646 | |
| Total decrease | 77,999 | -0.96% decrease |

II. Statewide Democratic Party Registration

| | | |
|---|---|---|
| October 1972 - October 1974 | | |
| from | 1,729,436 | |
| to | 1,654,304 | |
| Total decrease | 75,132 | -0.45% decrease |

III. Statewide Republican Party Registration

| | | |
|---|---|---|
| October 1972 - October 1974 | | |
| from | 541,916 | |
| to | 537,568 | |
| Total decrease | 4,348 | -0.08% decrease |

IV. Statewide Labor Party Registration

None in 1972. In 1974, 30 persons (Burke, 1; Caswell, 2; Durham, 1; Guilford, 6; Mecklenburg, 18; Mitchell, 1; Pitt, 1).

V. Statewide Independent and No-Party Registration

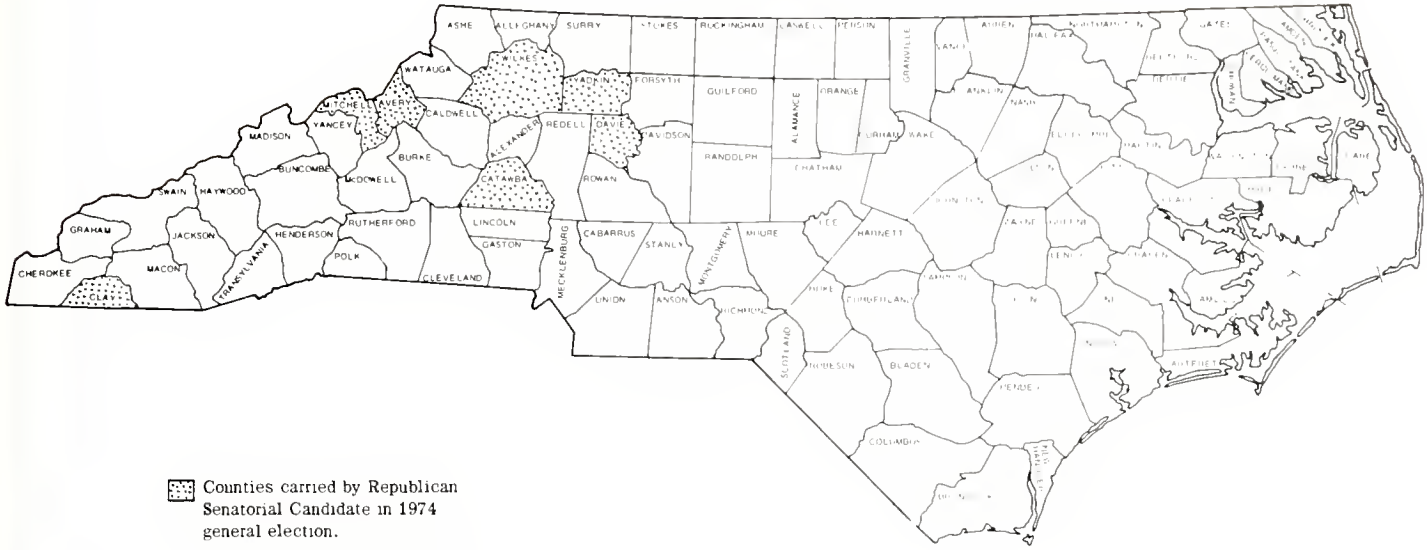
| | | |
|---|---|---|
| October 1972 - October 1974 | | |
| from | 79,129 | |
| to | 87,744 | |
| Total increase | 8,615 | +11.08% increase |

VI. Percentages of Party (other than Labor, with 30 registrants) and Other Statewide Registration

| | Democrat | Republican | Independent or No-Party |
|---|---|---|---|
| Dec. 1970 | 75.26 | 21.90 | 2.49 |
| Dec. 1970 | 74.84 | 22.03 | 2.78 |
| Oct. 1972 | 73.35 | 22.98 | 3.35 |
| Oct. 1974 | 72.56 | 23.58 | 3.84 |

Map 1

**GEOGRAPHIC DISTRIBUTION OF POLITICAL PARTY STRENGTH AS REFLECTED IN THE 1974 UNITED STATES SENATORIAL ELECTION**

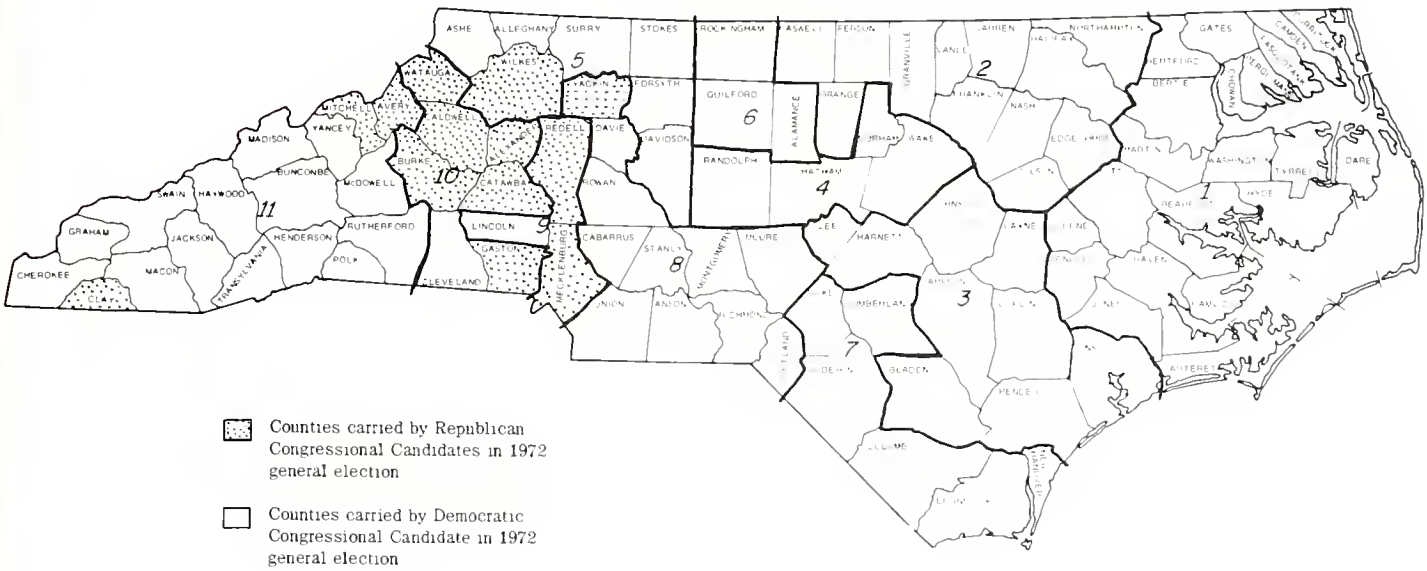



Counties carried by Republican Senatorial Candidate in 1974 general election.

Counties carried by Democratic Senatorial Candidate in 1974 general election.

Map 2

**GEOGRAPHIC DISTRIBUTION BY COUNTY OF POLITICAL PARTY STRENGTH AS REFLECTED IN CONGRESSIONAL ELECTIONS OF 1974**

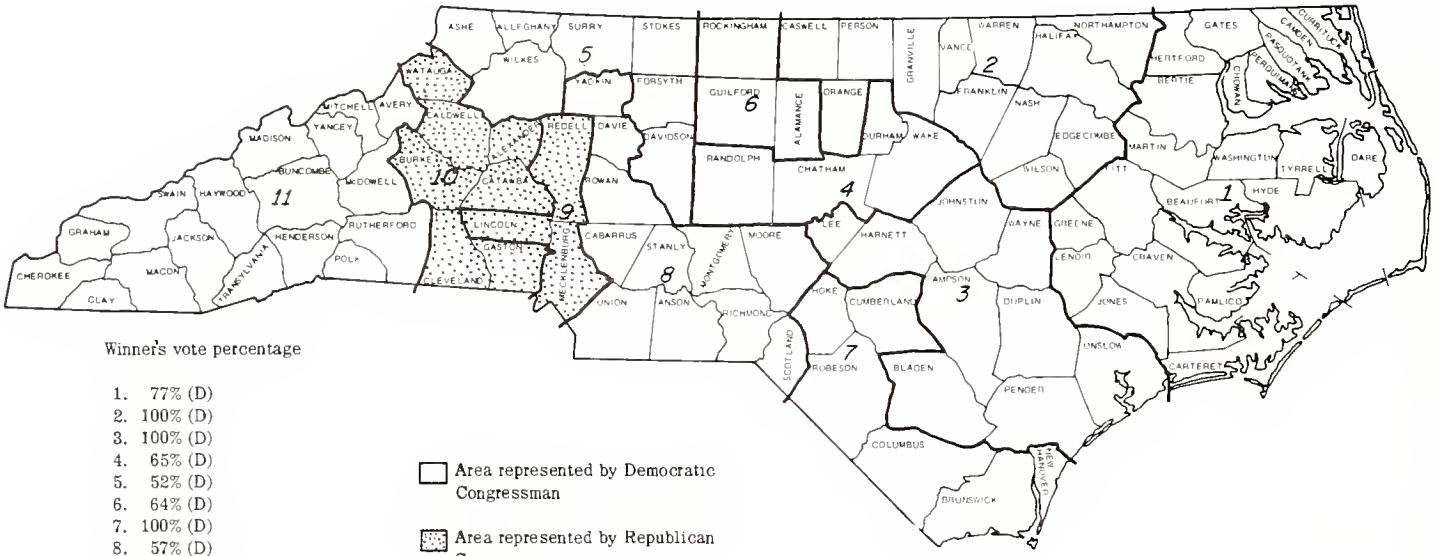



Counties carried by Republican Congressional Candidates in 1972 general election

Counties carried by Democratic Congressional Candidate in 1972 general election

Map 3

**GEOGRAPHIC DISTRIBUTION OF POLITICAL PARTY STRENGTH BY CONGRESSIONAL DISTRICT AS REFLECTED IN CONGRESSIONAL ELECTIONS IN 1974**




Winner's vote percentage

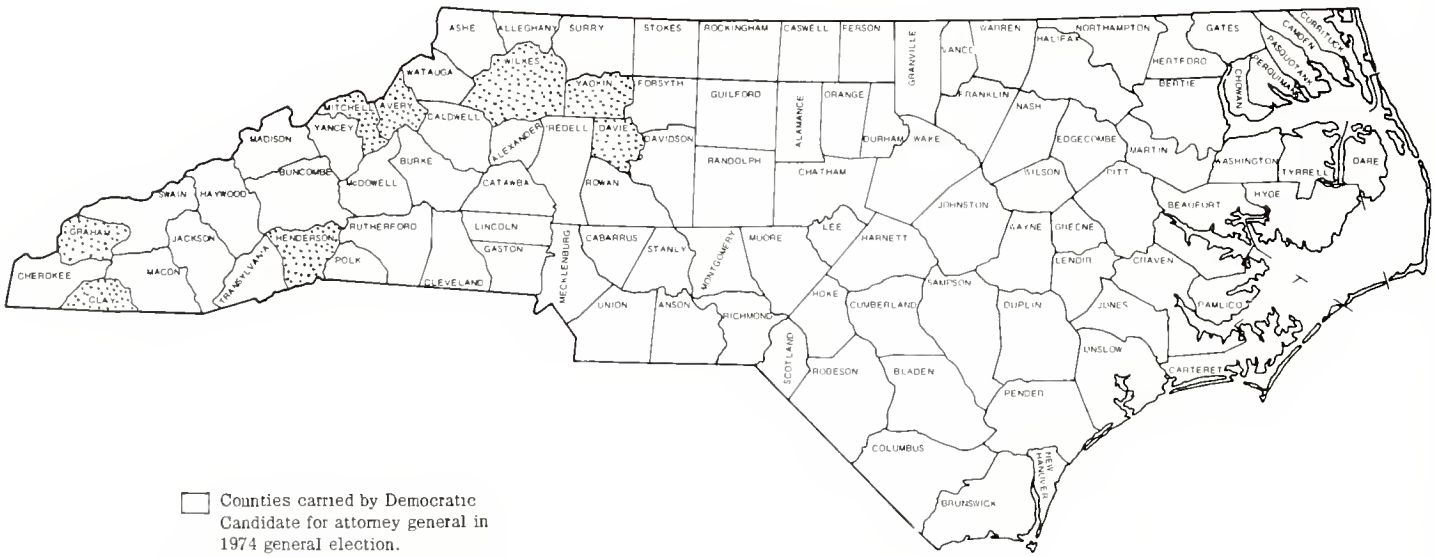
1. 77% (D)
2. 100% (D)
3. 100% (D)
4. 65% (D)
5. 52% (D)
6. 64% (D)
7. 100% (D)
8. 57% (D)
9. 54% (R)
10. 54% (R)
11. 66% (D)

Area represented by Democratic Congressman

Area represented by Republican Congressman

Map 4

**GEOGRAPHIC DISTRIBUTION OF POLITICAL PARTY STRENGTH AS REFLECTED IN 1974 NORTH CAROLINA ATTORNEY GENERAL'S ELECTION**

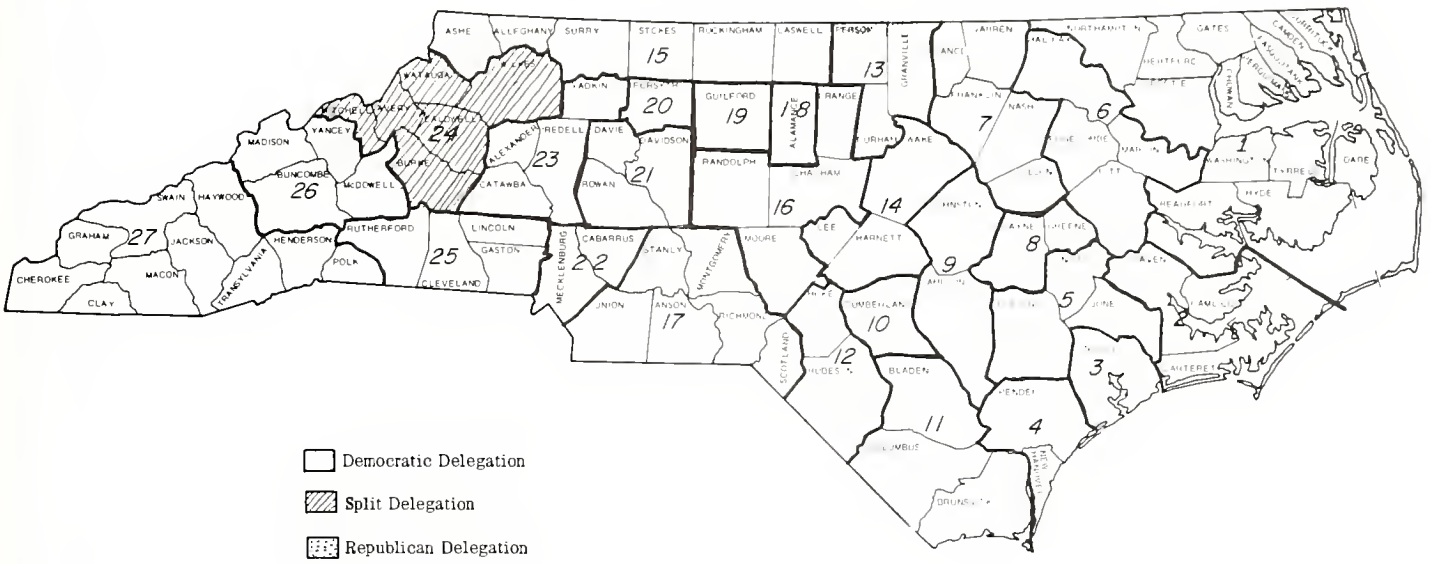



Counties carried by Democratic Candidate for attorney general in 1974 general election.

Counties carried by Republican Candidate for attorney general in 1974 general election.

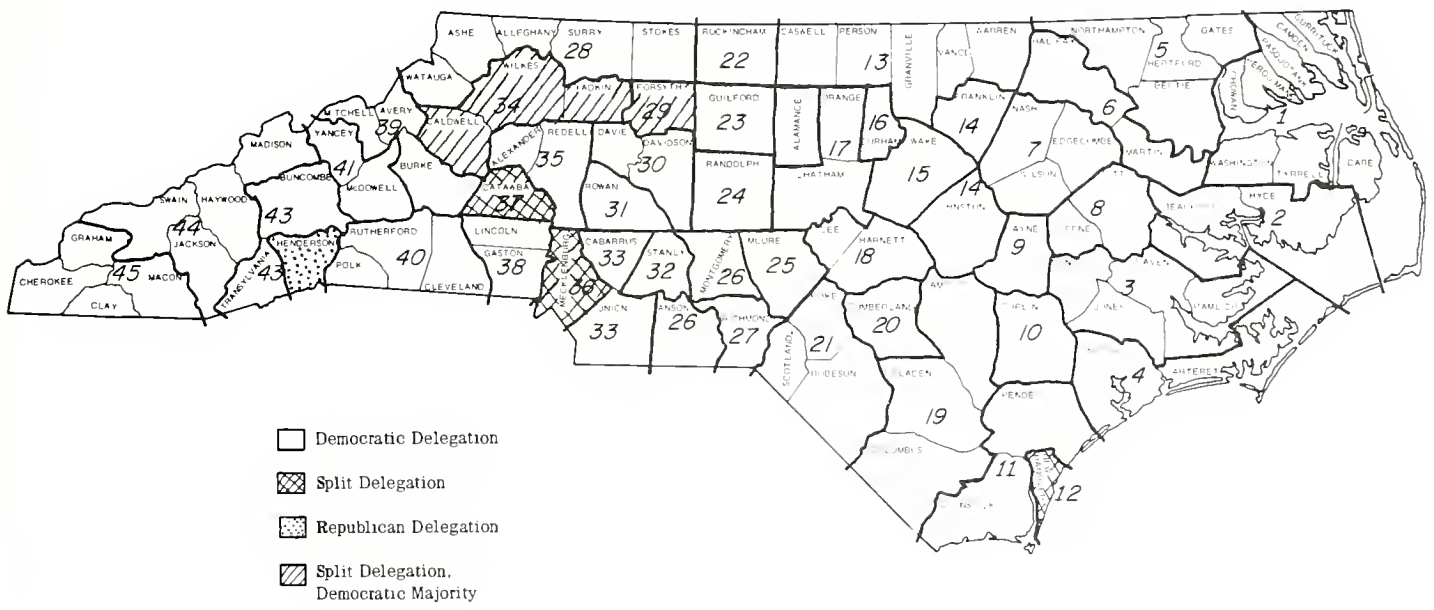
Map 5

**GEOGRAPHIC DISTRIBUTION OF POLITICAL PARTY REPRESENTATION IN NORTH CAROLINA SENATE**




Map 6

**GEOGRAPHIC DISTRIBUTION OF POLITICAL PARTY REPRESENTATION IN NORTH CAROLINA HOUSE OF REPRESENTATIVES**



# HOW COUNTIES VOTED IN 1974 BY PARTY

| County | % Registered | | | U.S. Senate | | U.S. House of Rep. | | Atty. Gen. | | N.C. Senate | | N.C. House of Rep. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | D | R | L | D | R | D | R | D | R | D | R | D | R |
| Alamance | 73.71 | 19.81 | 6.46 | X | | X | | X | | X | | X | |
| Alexander | 50.60 | 41.39 | 7.99 | X | | | X | X | | X | | X | |
| Alleghany | 71.00 | 26.90 | 2.69 | X | | X | | X | | X | | X | |
| Anson | 92.40 | 6.35 | 1.23 | X | | X | | X | | X | | X | |
| Ashe | 52.76 | 44.29 | 2.94 | X | | X | | X | | X | | X | |
| Avery | 22.88 | 75.76 | 1.34 | | X | | X | | X | X | X | X | |
| Beaufort | 86.15 | 11.64 | 2.19 | X | | X | | X | | X | | X | |
| Bertie | 95.77 | 3.36 | .85 | X | | X | | X | | X | | X | |
| Bladen | 92.52 | 6.60 | .86 | X | | X | | X | | X | | X | |
| Brunswick | 74.63 | 23.43 | 1.93 | X | | X | | X | | X | | X | |
| Buncombe | 70.22 | 26.08 | 3.68 | X | | X | | X | | X | | X | |
| Burke | 60.63 | 34.37 | 4.98 | X | | | X | X | | X | X | X | |
| Cabarrus | 68.49 | 28.53 | 2.97 | X | | X | | X | | X | | X | |
| Caldwell | 54.65 | 38.73 | 6.60 | X | | | X | X | | X | X | X | |
| Camden | 95.23 | 3.86 | .89 | X | | X | | X | | X | | X | |
| Carteret | 66.48 | 28.42 | 5.09 | X | | X | | X | | X | | X | |
| Caswell | 92.49 | 6.08 | 1.39 | X | | X | | X | | X | | X | |
| Catawba | 57.71 | 34.81 | 7.47 | | X | | X | X | | X | | X | X |
| Chatham | 74.14 | 21.96 | 3.89 | X | | X | | X | | X | | X | |
| Cherokee | 52.36 | 41.94 | 5.69 | X | | X | | X | | X | | X | |
| Chowan | 91.86 | 7.09 | 1.03 | X | | X | | X | | X | | X | |
| Clay | 48.44 | 44.14 | 7.40 | | X | | X | | X | X | | X | |
| Cleveland | 82.49 | 14.31 | 3.19 | X | | X | | X | | X | | X | |
| Columbus | 90.60 | 8.29 | 1.10 | X | | X | | X | | X | | X | |
| Craven | 84.39 | 12.98 | 2.61 | X | | X | | X | | X | | X | |
| Cumberland | 79.23 | 14.34 | 6.42 | X | | X | | X | | X | | X | |
| Currituck | 93.58 | 3.15 | 3.25 | X | | X | | X | | X | | X | |
| Dare | 82.73 | 14.08 | 3.18 | X | | X | | X | | X | | X | |
| Davidson | 60.02 | 35.01 | 4.96 | X | | X | | X | | X | | X | |
| Davie | 43.07 | 53.33 | 3.58 | | X | X | | | X | X | | X | |
| Duplin | 87.79 | 10.64 | 1.56 | X | | X | | X | | X | | X | |
| Durham | 80.91 | 14.82 | 4.25 | X | | X | | X | | X | | X | |
| Edgecombe | 88.40 | 9.81 | 1.78 | X | | X | | X | | X | | X | |
| Forsyth | 69.77 | 26.25 | 3.97 | X | | X | | X | | X | | X | |
| Franklin | 92.15 | 7.18 | .65 | X | | X | | X | | X | | X | |
| Gaston | 70.58 | 24.49 | 4.91 | X | | | X | X | | X | | X | |
| Gates | 97.62 | 1.53 | .84 | X | | X | | X | | X | | X | |
| Graham | 53.12 | 42.40 | 4.46 | X | | X | | | X | X | | X | |
| Granville | 94.14 | 4.77 | 1.07 | X | | X | | X | | X | | X | |
| Greene | 89.82 | 9.25 | .91 | X | | X | | X | | X | | X | |
| Guilford | 69.22 | 25.27 | 5.49 | X | | X | | X | | X | | X | |
| Halifax | 93.76 | 4.37 | 1.86 | X | | X | | X | | X | | X | |
| Harnett | 79.94 | 17.74 | 2.30 | X | | X | | X | | X | | X | |
| Haywood | 75.82 | 22.40 | 1.76 | X | | X | | X | | X | | X | |
| Henderson | 49.31 | 46.70 | 3.97 | X | | X | | | X | X | | | X |
| Hertford | 94.21 | 4.86 | .92 | X | | X | | X | | X | | X | |
| Hoke | 92.38 | 5.93 | 1.68 | X | | X | | X | | X | | X | |
| Hyde | 90.69 | 8.48 | .81 | X | | X | | X | | X | | X | |
| Iredell | 71.07 | 24.70 | 4.21 | X | | | X | X | | X | | X | |
| Jackson | 64.80 | 30.87 | 4.32 | X | | X | | X | | X | | X | |

| County | % Registered | | | U.S. Senate | | U.S. House of Rep. | | Atty. Gen. | | N.C. Senate | | N.C. House of Rep. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | D | R | L | D | R | D | R | D | R | D | R | D | R |
| Johnston | 79.41 | 18.23 | 2.35 | X | | X | | X | | X | | X | |
| Jones | 92.29 | 6.31 | 1.39 | X | | X | | X | | X | | X | |
| Lee | 84.34 | 13.40 | 2.24 | X | | X | | X | | X | | X | |
| Lenoir | 84.99 | 12.98 | 2.01 | X | | X | | X | | X | | X | |
| Lincoln | 66.99 | 29.05 | 3.95 | X | | X | | X | | X | | X | |
| Macon | 61.71 | 35.22 | 3.05 | X | | X | | X | | X | | X | |
| Madison | 61.66 | 35.28 | 2.11 | X | | X | | X | | X | | X | |
| Martin | 94.90 | 4.48 | .60 | X | | X | | X | | X | | X | |
| McDowell | 70.90 | 25.28 | 3.81 | X | | X | | X | | X | | X | |
| Mecklenburg | 67.48 | 27.50 | 5.00 | X | | | X | X | | X | | X | X |
| Mitchell | 27.35 | 71.63 | .99 | | X | | X | | X | X | X | X | |
| Montgomery | 68.77 | 27.99 | 3.23 | X | | X | | X | | X | | X | |
| Moore | 63.05 | 32.75 | 4.19 | X | | X | | X | | X | | X | |
| Nash | 83.01 | 15.02 | 1.95 | X | | X | | X | | X | | X | |
| New Hanover | 71.02 | 25.30 | 3.66 | X | | X | | X | | X | | X | X |
| Northampton | 98.45 | 1.51 | .25 | X | | X | | X | | X | | X | |
| Onslow | 81.62 | 14.08 | 4.28 | X | | X | | X | | X | | X | |
| Orange | 78.94 | 14.91 | 6.13 | X | | X | | X | | X | | X | |
| Pamlico | 87.78 | 10.83 | 1.38 | X | | X | | X | | X | | X | |
| Pasquotank | 89.47 | 7.90 | 2.62 | X | | X | | X | | X | | X | |
| Pender | 87.56 | 10.21 | 2.22 | X | | X | | X | | X | | X | |
| Perquimans | 93.92 | 5.21 | .85 | X | | X | | X | | X | | X | |
| Person | 90.99 | 8.00 | 1.00 | X | | X | | X | | X | | X | |
| Pitt | 83.67 | 13.67 | 2.84 | X | | X | | X | | X | | X | |
| Polk | 59.00 | 35.05 | 5.94 | X | | X | | X | | X | | X | |
| Randolph | 48.72 | 46.07 | 5.19 | X | | X | | X | | X | | X | |
| Richmond | 93.53 | 5.12 | 1.34 | X | | X | | X | | X | | X | |
| Robeson | 93.65 | 4.80 | 1.53 | X | | X | | X | | X | | X | |
| Rockingham | 79.30 | 16.76 | 3.93 | X | | X | | X | | X | | X | |
| Rowan | 61.85 | 34.24 | 3.89 | X | | X | | X | | X | | X | |
| Rutherford | 74.74 | 23.56 | 1.68 | X | | X | | X | | X | | X | |
| Sampson | 60.39 | 37.55 | 2.05 | X | | X | | X | | X | | X | |
| Scotland | 90.45 | 6.33 | 3.20 | X | | X | | X | | X | | X | |
| Stanly | 57.93 | 35.80 | 6.21 | X | | X | | X | | X | | X | |
| Stokes | 56.83 | 40.81 | 2.34 | X | | X | | X | | X | | X | |
| Surry | 63.96 | 32.96 | 3.06 | X | | X | | X | | X | | X | |
| Swain | 67.20 | 28.60 | 4.18 | X | | X | | X | | X | | X | |
| Transylvania | 59.29 | 32.78 | 7.91 | X | | X | | X | | X | | X | |
| Tyrrell | 95.13 | 4.43 | .43 | X | | X | | X | | X | | X | |
| Union | 81.07 | 15.99 | 2.93 | X | | X | | X | | X | | X | |
| Vance | 91.38 | 6.97 | 1.64 | X | | X | | X | | X | | X | |
| Wake | 74.64 | 19.99 | 5.35 | X | | X | | X | | X | | X | |
| Warren | 91.10 | 8.19 | .69 | X | | X | | X | | X | | X | |
| Washington | 92.72 | 6.31 | .95 | X | | X | | X | | X | | X | |
| Watauga | 51.89 | 42.03 | 6.06 | X | | | X | X | | X | X | X | |
| Wayne | 82.10 | 15.52 | 2.36 | X | | X | | X | | X | | X | |
| Wilkes | 40.11 | 56.51 | 3.37 | | X | | X | | X | X | X | X | |
| Wilson | 85.74 | 13.05 | 1.19 | X | | X | | X | | X | | X | |
| Yadkin | 37.94 | 57.37 | 4.67 | | X | | X | | X | X | | X | |
| Yancey | 58.12 | 38.20 | 3.66 | X | | X | | X | | X | | X | |
| TOTALS | 1,654,304 | 535,568 | | 93 | 7 | 87 | 13 | 92 | 8 | 93 | 7 | 96 | 4 |
| | 72.56% | 23.58% | | | | | | | | | | | |

The North Carolina General Assembly (Senate and House of Representatives) is largely composed of multi-member districts. As a result, it is difficult to graph the vote by party and county. Thus, with respect to the N.C. Senate and House, the chart represents the party of the representative(s) from the district of which the county may be only a part. Where the delegation is split, but one party has a majority, only the majority party is checked. Where the split is even, both parties are checked.

# STUDENT DISTRIBUTION OF NONSCHOOL-SPONSORED LITERATURE

*Robert E. Phay and George T. Rogister*

THE PROHIBITION of distribution of underground newspapers and other printed material on school grounds by students has raised a very difficult legal issue in the area of regulation of student conduct by schools. When school officials have prohibited the distribution of literature or have disciplined students for distributing literature, students have often brought suit seeking to have the school action overturned. The resulting judicial decisions have begun to define the rights of students to distribute literature on school grounds and the rights of the schools to prohibit such distribution. This article will review these issues and attempt to define what is permissible and impermissible regulation of student conduct in this area. The first part of the article reviews the grounds upon which school officials may limit the distribution of student literature and the limits on such power. The second part examines the legal issues involved when schools require that written materials be reviewed by school officials before they may be distributed.

## PERMISSIBLE RESTRICTIONS ON DISTRIBUTING LITERATURE

The First and Fourteenth Amendments to the United States Constitution (and similar provisions in state constitutions) guarantee a right of free speech and expression that extends to students in school. This right is not absolute but limited. The difficulty is in establishing precisely what is protected speech and beyond school control. The courts have decided enough cases within the last five years to permit defining with some clarity those instances when school limitations on the distribution of literature are constitutionally permissible and when they are not. The permissible limitations can be divided into four broad categories: (1) The school can limit the distribution of literature if the distribution will result in or can reasonably be forecast to result in "material and substantial disruption of school activities." (2) The school can set limitations on the time, place, and manner of the distribution. (3) The school can prohibit the distribution of materials that are obscene, libelous, or inflammatory. (4) The school can prohibit distribution when the distribution involves the violation of school rules, although the literature itself may be protected from school rules prohibiting distribution. The following sections of this article survey the case law in each of these broad categories of permissible restraints and point out the lines that have been drawn between protected and unprotected distribution of literature and the standards that must be met by rules governing that distribution.

### LIMITATIONS BASED ON DISRUPTION OF SCHOOL

The basic decision that sets the standard for judging whether free speech, including distribution of literature, can be prohibited because it is alleged to be disruptive is *Tinker v. Des Moines Independent Community School District*.[1] This case involved several students who had been suspended from school for violating a recently adopted school board rule forbidding the wearing of black armbands. The students had worn the armbands to protest the Vietnam War, knowing that doing so would violate the regulations, and were suspended from school until they returned without the armbands. The district court upheld the suspension on the ground that the school action was a reasonable attempt to prevent disturbance and maintain school discipline. An equally divided court of appeals affirmed, but the United States Supreme Court reversed on the basis that the wearing of armbands was symbolic speech, closely akin to "pure speech." The Supreme Court stated:

> First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.
>
> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[2]

1. 393 U.S. 503 (1969).
2. *Id.* at 506 and 511.

*Robert Phay is an Institute faculty member who specializes in school law. George Rogister, a third-year law student at the University of North Carolina at Chapel Hill, will join the Institute faculty in July.*

The Supreme Court recognized the state's important interest in protecting the orderly education of its children and affirmed the need for "comprehensive authority of the states and of school officials, consistent with fundamental safeguards, to prescribe and control conduct in school." But when the First Amendment rights of students and the rules of school officials collide, the Court said, these two interests must be balanced to determine on the facts whether abridgment of student speech is justified. The Court stated, "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."

In defining the burden of justification that the school officials must meet, the Court emphasized that ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." There must be facts that ". . . might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," or substantial disruption must have actually occurred.

The Court also stressed that a student's freedom of expression in the school setting is a right not to be construed narrowly: "School officials do not possess absolute authority over their students . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." The student's freedom of expression is protected not only in the classroom but also while he is on campus during school hours, in the cafeteria, on the playing field, or in the school building.

Even as the Court firmly established a broad student right of free expression in the school environment, it carefully pointed out that the First Amendment does not provide absolute protection for student expression.

> But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[3]

The Court characterized the wearing of armbands in *Tinker,* however, as "a silent, passive expression of opinion unaccompanied by any disorder or disturbance." Thus, there was no evidence that would justify the school's act in prohibiting the wearing of black armbands or in punishing the students for violating this prohibition.

Although *Tinker* did not deal with the right of students to publish and distribute materials in the schools, the courts that have dealt directly with these issues since *Tinker* have applied the *Tinker* "material and substantial disruption" standard. In nearly all the cases involving distribution, courts have ruled that the distribution was protected and have overturned school prohibitions. The courts have also generally held rules regulating distribution to be defective on their face partly because they did not conform with *Tinker's* disruption standard.

## An Application of the Tinker Standard

The *Tinker* standard is not easy to apply; the Supreme Court made little attempt to clarify, define, or narrow the meaning of "material and substantial disruption." To help understand what the Court considered to be "material and substantial disruption," it is useful to examine two 1966 Fifth Circuit decisions from which the standard was drawn. In *Burnside v. Byars,*[4] a group of high school students were suspended for wearing buttons to school that bore the legends "One Man One Vote" and "SNCC" after being warned by the principal that school regulations forbade such action. The evidence indicated only "mild curiosity" among the other school children, which the court said was not basis for finding "material and substantial interference with the requirements of appropriate discipline in the operation of the school," a standard the court required to justify abridgment of free speech. The court therefore found the wearing of "freedom buttons" to be protected "symbolic speech" and ordered the students reinstated.

In the second case, *Blackwell v. Issaquena County Board of Education,*[5] the court found a similar regulation prohibiting the wearing of buttons and the suspensions under the regulation to be permissible. The evidence in the case showed that students had pinned buttons on other students who did not want them, interrupted classes to distribute them, kept the halls in a state of confusion and disruption, and thrown buttons into rooms while classes were being held. The Court found that "more than a mild curiosity" had resulted from the students' conduct: "There was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority and a lack of order, discipline and decorum." It also found that "the conduct was reprehensible and so inexorably tied to the wearing of the buttons that the two are not separable." On this finding, the court held that the school regulation and the suspensions were justified.

These two Fifth Circuit decisions have been used by

3. *Id.* at 513.

4. 363 F.2d 744 (5th Cir. 1966).
5. 363 F.2d 749 (5th Cir. 1966).

later courts in applying the *Tinker* standard of "substantial and material disruption." In 1973 the Ninth Circuit Court of Appeals, in *Karp v. Becken,*[6] looked to *Burnside* and *Blackwell* in attempting to define "substantial disruption" in a case that involved the curtailment of students' distribution on campus of signs protesting the nonrenewal of a teacher's contract. The court concluded that in applying the "disruption" standard, courts must seek the line between the nondisruptive "mild curiosity" in *Burnside* and the disruptive "commotion" in *Blackwell.*

Court decisions applying the disruption standard to the distribution of literature have explicitly stated that the burden of justifying a prohibition is on the school. The nature of the "specific showing" required by *Tinker* to justify limitation of free speech is best illustrated by several examples of these decisions.

In *Sullivan v. Houston Independent School District,*[7] students were suspended because they had distributed off campus an underground newspaper critical of the high school administration that was later brought on campus by other students. The school argued that the paper had caused substantial disruption of school order, but the federal district court found that the paper had no such effect. It noted that "[t]he interruption of class periods caused by the newspaper were minor and few in number," and that there had been only one disciplinary infraction related to the distribution between the time the papers were distributed and the time the suspensions were imposed. The evidence that several teachers had found it necessary to confiscate copies before or during class, that students had asked to discuss the paper in class, and that copies had been stuffed in typewriters and paper towel dispensers did not support the contention by school officials that the distribution had "created a state of turmoil." The evidence was insufficient to justify curtailment of the distribution.

The Seventh Circuit Court of Appeals in *Scoville v. Board of Education,*[8] reversed the suspension of students who wrote and distributed on campus a nonschool-sponsored publication that was critical of the school administrators. The paper referred to a statement by the senior dean as "the product of a sick mind" and urged students to refuse to accept or destroy upon receipt all "propaganda" from the administration. The court found no evidence that disruption had resulted from the distribution and held that in the absence of actual disruption, the fact "that students may have intended their criticism to substantially disrupt . . . school policies is of no significance *per se* under Tinker." Although criticism of the dean may have been "tasteless and disrespectful . . . mere expressions of feelings with which school officials do not wish to contend" do not amount to the "showing required by the *Tinker* test to justify expulsion."

6. 477 F.2d 171 (9th Cir. 1973).
7. 307 F. Supp. 1328 (S.D. Tex. 1969).
8. 425 F.2d 10 (7th Cir. 1970).

## Limitations Based on a Forecast of Disruption

School officials often base prohibition of student distribution on a claim that disruption can be reasonably forecast if the distribution is permitted. The courts in these cases have looked to *Tinker's* warning that "undifferentiated fear" is not enough to justify abridgment of the right to speech and expression. These courts have attempted to define that type of evidentiary showing that is necessary for a "reasonable forecast of disruption." "Bare allegations" by school officials are not enough, the Second Circuit Court of Appeals said.[9] The Fourth Circuit observed that there must be "substantial evidence which reasonably supports a forecast of likely disruption"[10]—or, as the Fifth Circuit noted, "demonstrable factors" and "objective evidence to support a 'forecast' of disruption."[11]

In a case before the Fifth Circuit Court of Appeals, *Shanley v. Northeast Independent School District,*[12] school officials contended that a reasonable forecast of disruption was supported by the controversial nature of the literature that the students had distributed. The court found that "controversy is . . . never sufficient in and of itself to stifle the view of any citizen . . . ." It further stated that "such paramount freedom as speech and expression cannot be stifled on the sole ground of intuition." This rejection of unsubstantiated speculation as to what "might" happen or what "could result" as sufficient to support a "reasonable forecast of disruption" has been echoed in the decisions of other courts.[13]

To justify a prohibition of literature distribution on the reasonable-forecast basis, the school has the burden of proof, and it is not an easy one to meet—as several court decisions demonstrate. For example, in *Shanley*, the Fifth Circuit rejected a contention that student reaction justified the prohibition:

> We are simply taking note here of the fact that disturbances themselves can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance.[14]

The Ninth Circuit Court of Appeals, in considering a similar argument by school officials, indicated that officials must take steps to protect the reasonable exercise of the freedom of expression from the violent reactions of

9. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971).
10. Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1971).
11. Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 974 (5th Cir. 1972).
12. *Id.*
13. *See, e.g.,* Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973).
14. 462 F.2d at 974.

others. In that case, *Jones v. Board of Regents,*[15] a nonstudent wearing sandwich boards that contained antiwar messages was distributing antiwar leaflets in violation of a university regulation against distributing handbills on campus. The campus police reported that two members of the crowd that gathered around the nonstudent demonstrator "were moved to tear the sandwich boards from Jones' body." The police also reported that after they were unsuccessful in keeping Jones off campus the first day, they received anonymous telephone threats that Jones would be removed from campus if the police did not remove him. The next day the campus police again removed Jones from campus for violating the school regulation. The court found that Jones's activities were protected free speech and the policemen had misdirected their efforts to maintain order. "It is clear that the police had the obligation of affording [Jones] the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street."

When reasonable efforts fail to protect an individual from the reaction of others, even though that person is exercising what would otherwise be considered his First Amendment rights, it may be necessary to curtail his right to distribute written materials. However, the reactions of others do not necessarily justify punishing the person.[16] In two cases in which courts have upheld the curtailment of a student's free speech, the threatened reactions of others were a part of the evidence offered by school authorities to support their forecast of disruption and justify their actions.[17]

Although the courts have required that school authorities who attempt to regulate the distribution of student publications justify that action, they have indicated that it is possible to show a "reasonable forecast of disruption" that would justify a prohibition of distributing literature. As one court noted, "[i]f a reasonable basis for such a forecast exists, it is not necessary that the school stay its hand in exercising a power of prior restraint 'until the disruption actually occurs.' "[18] But in only three cases decided since *Tinker* have courts, in applying the *Tinker* standard, held that school officials have presented sufficient evidence to forecast substantial disruption and thereby justify their prohibition on distribution of literature.

In a case before the Sixth Circuit Court of Appeals, *Norton v. Discipline Committee,*[19] a group of college students were suspended for distributing on the campus "material of a false, seditious, and inflammatory nature." The literature, which was distributed in the spring of 1968, shortly after the student takeover at Columbia University, was critical of both the school administration and student apathy on campus. In affirming the district court's decision sustaining the suspensions, the court of appeals stated: "The students were urged to 'stand up and fight' and to 'assault the bastions of administrative tyranny.' This was an open exhortation to the students to engage in disorderly and destructive activities."[20] The inflammatory nature of the material, the testimony of school officials that they "feared" the material "could conceivably" cause an eruption on campus, and testimony that twenty-five students went to the school officials and wanted "to get rid of this group of agitators" persuaded the court that there was a reasonable basis for the school officials to forecast substantial disruption and therefore their actions were justified.

In *Baker v. Downey City Board of Education,*[21] a California federal district court found that the distribution of an underground newspaper containing "profanity and vulgarity" resulted in disruption that justified suspending distribution of the paper. The court based its decision on the testimony of school officials that the paper:

> . . . threatened the educational program of the school and would diminish control and discipline . . . . A few teachers testified that there were disruptions in their classes and some testified to the contrary. On cross-examination, . . . [the principal] stated that some 25 to 30 teachers had told him of their classes being interrupted and of failure in attention on the part of students due to their reading of and talking about [the newspaper] during class.[22]

The third case, *Karp v. Becken,*[23] came before the Ninth Circuit Court of Appeals. School officials had canceled a scheduled athletic awards ceremony because they feared violent confrontation between students who had announced to the media that they planned to protest the school's nonrenewal of a teacher's contract and members of the school's athletic club who had threatened to prevent the protest walkout. Despite the cancellation of the ceremony, some protesting students staged a walkout from classes. During the lunch hour, students and newsmen gathered in the multi-purpose room, where the plaintiff distributed signs supporting the teacher. The vice-principal asked the students to surrender their signs to him. All did so except Karp, who asserted that his right to possess and distribute the signs was protected by the First Amendment. After a second request by the vice-principal, Karp surrendered the signs and was taken to the principal's office. While he was there, chanting, pushing, and shoving developed between the protestors and some members of the athletic club. School officials intervened and the demonstration ended.

Karp was suspended for five days for bringing the signs

15. 436 F.2d 618 (9th Cir. 1970).

16. *See* text to which note 25 *infra* is attached.

17. Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973); Norton v. Discipline Comm., 419 F.2d 195, 199 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970).

18. Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971).

19. 419 F.2d 195 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970).

20. *Id.* at 198.

21. 307 F. Supp. 517 (C.D. Cal. 1969).

22. *Id.* at 522.

23. 477 F.2d 171 (9th Cir. 1973).

onto campus and distributing them to other students. He brought action in federal district court seeking to enjoin permanently the enforcement of this suspension. In determining whether the evidence supported "a reasonable forecast of substantial disruption," the court outlined three guiding principles. First, it stated that the ". . . First Amendment does not require school officials to wait until disruption actually occurs before they act." Second, it concluded that "*Tinker* does not demand a certainty that disruption will occur . . . ." And third, it found that ". . . the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." The court said that it was resisting the temptation to be a "Monday morning quarterback" and found that the circumstances at the time of the officials' actions indicated that their forecast of an incident resulting in possible violence was not unreasonable.[24] Therefore, the school authorities were justified in taking the plaintiff's signs in order to prevent such an incident.

In *Karp* the court pointed out, however, that even when the circumstances are such that school officials can reasonably forecast substantial disruption justifying curtailment of otherwise protected expressive conduct, this fact alone does not necessarily justify punishing students for exercising their First Amendment liberties. The court required separate justification in such instances, such as violation of a statute or a school regulation, for punishing student conduct that constituted "pure speech."[25]

The soundness of the judicial determinations that the facts in *Norton* and *Baker* were sufficient to support "a reasonable forecast of substantial disruption" is questionable when the decisions are compared with other recent decisions. In *Norton* the testimony of the school officials was that they "feared" that the students' distribution of leaflets "could conceivably cause an eruption." Other courts have held that language like "might" or "could conceivably" does not rise above the "undifferentiated fear" that the Supreme Court in *Tinker* said was insufficient to justify curtailing speech and distribution of literature.[26] In *Baker* the "profanity and vulgarity" complained of was essentially the same as that which other courts have held did not justify a reasonable forecast of substantial disruption.[27]

Recognizing that the *Tinker* disruption standard is difficult to apply, the court in *Karp* admonished the federal courts to ". . . treat the *Tinker* rule as a flexible one dependent upon the totality of relevant facts in each case," and not to make it into ". . . a rigid rule to be applied without regard to the circumstances of each case." "Disruptions" and "interference" are highly subjective terms, and attempts to quantify the degree of disturbance that will justify limitation on student expression are fruitless. Total incapacitation of the school program is not required—substantial interference with one lesson would probably justify an infringement. Flexibility, however, does not relieve school authorities from having to show specifically that substantial or material disruption resulted or was reasonably likely to result from students' exercise of their First Amendment freedoms in a particular situation.

## LIMITATIONS BASED ON TIME, PLACE, AND MANNER OF DISTRIBUTION

Court decisions have recognized that a school may regulate the distribution of literature with respect to time, place, and manner.[28] To be lawful, however, the regulations must be "consistent with the basic premise that the only purpose of any restrictions on the distribution of literature is to promote orderly administration of school activities by preventing disruption and not to stifle free-

24. *Id.* at 175-76. The *Karp* court found that the record showed the following facts justifying a reasonable forecast of substantial disruption:

(1) On the morning involved, a newspaper article appeared about the planned walkout indicating that Karp was the reporter's source of information.

(2) School officials testified that school athletes had threatened to stop the walkout.

(3) The assembly program was canceled because of feared violent confrontation.

(4) Newsmen appeared on campus and set up their equipment, and Karp and other students were talking with them during a free period.

(5) The vice-principal testified that there was an intense feeling that "something was about to happen."

(6) There was a walkout despite cancellation of the awards ceremony.

(7) The school fire alarm was pulled at the time the assembly had been scheduled. It would have emptied every classroom had it not been previously disconnected by the vice-principal.

(8) Approximately 50 students congregated in the area of the school's multi-purpose room and talked among themselves and with the news media.

(9) Excited by the general atmosphere, 20 to 30 junior high school students eating in the high school cafeteria interrupted their lunch period and ran into the multi-purpose room to see what was happening.

(10) Karp left the school grounds to get the signs from his car and brought them onto campus and distributed them to students in the multi-purpose room.

25. *Id.* at 176.

26. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973). *See also* Norton v. Discipline Comm., 399 U.S. 906 (1970) (Marshall J., dissenting), in which Mr. Justice Marshall argued that the Supreme Court should have granted certiorari in the *Norton* case because East Tennessee State University's justifications for stopping distribution of anti-administration leaflets on campus amounted to no more than "undifferentiated fears," insufficient reasons under *Tinker* to curtail the First Amendment rights of students.

27. *See, e.g.*, Jacobs v. Board of Sch. Comm'rs, 490 F.2d 601, 610 (7th Cir. 1973), *vacated as moot*, 43 U.S.L.W. 4238 (U.S. Feb. 18, 1975). *See also* Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960 (5th Cir. 1972), in which the court described "failures of attention" similar to those complained of in *Baker* as "minor" and insufficient to justify curtailment of protected free speech.

28. *See, e.g.*, Papish v. Board of Curators, 410 U.S. 667, 670 (1973); Jacobs v. Board of Sch. Comm'rs, 490 F.2d 601, 609 (7th Cir. 1973), *cert. granted*, 94 S.Ct. 2638 (1974); Riseman v. School Comm., 439 F.2d 148, 149 (1st Cir. 1971).

dom of expression."[29] Rules of time, place, and manner are not reasonable if their primary purpose and effect are to eliminate free expression. *Tinker* makes it clear that freedom of expression may not be "so circumscribed that it exists only in principle." It is not to be confined "to a telephone booth," the Court said.

The leading case on the validity of rules of time, place, and manner is *Jacobs v. Board of School Commissioners,*[30] in which the court quoted a 1972 United States Supreme Court decision:

> In determining whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, . . . we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest."[31]

The *Jacobs* court found little evidence presented by the school board to justify the school's prohibition of all distribution when classes were being conducted. The court found that there were periods when many students were on campus but were not involved in classroom activity. The regulation prevented these students from distributing or receiving student newspapers at these times. Thus the school had not demonstrated that the regulation was "narrowly drawn to further the state's legitimate interest in preventing material disruptions of classwork."

In *Shanley v. Northeastern Independent School District,*[32] the court held that the school's regulation was unconstitutionally overbroad because it established a prior restraint on distribution by high school students "at any time and in any place and for any reason." Thus the *Jacobs* and *Shanley* cases indicate that broad regulations of the time, place, and manner of distribution that are not narrowly tailored to serve the proper purpose of preventing disruption of school operations will not withstand challenges to their constitutionality.

Several other courts have indicated in dicta the types of rules that might be justified in limiting the time and place of distribution. The Seventh Circuit indicated that a rule prohibiting distribution during a fire drill might be reasonable, but in this case the school had impermissibly applied the rule *ex post facto.*[33]

In 1973, the federal district court in New Hampshire indicated that regulations aimed at avoiding disruption might reasonably require distribution to take place outside the school building or in the student lounge;[34] and a Texas district court stated that in regulating time, place, and manner of distribution school officials may prohibit reading newspapers in class, loud discussion in halls, or talking in the library.[35]

Although no cases have dealt with the issue of coerciveness in distribution, *Tinker,* drawing on the Fifth Circuit's decision in *Blackwell,* indicated that the manner of distribution may not be coercive.[36] Thus, school regulations may prohibit distribution when it is coercive.

Three other questions closely related to time, place, and manner of distribution have been litigated and undoubtedly will be raised again. One involves the authority of schools to regulate student conduct off campus and outside school hours. The second concerns the issue of school prohibition on the sale by students of nonschool-sponsored publications. The third deals with school prohibition of the distribution of anonymous student materials. Each of these issues is summarized below.

## Out-of-School Distribution

School regulations that govern student conduct off campus and outside school hours have been challenged in at least two cases. In one, *Baker v. Downey Board of Education,*[37] the suspended students had distributed an unofficial publication just outside the main gate to the school campus before school hours. The court found that the school authorities acted within the authority granted them by state law in suspending the students for conduct that occurred off campus and before school hours. But, a federal district court in Texas was less willing to impute power to the school authorities to control student conduct off campus and outside school hours. In *Sullivan v. Houston Independent School District,*[38] the court stated:

> Arguably, misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day. Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power questionable.
>
> However, under any circumstances, the school certainly may not exercise more control over off-campus behavior than over on-campus conduct.[39]

## Sale of Nonschool-sponsored Literature

The school board regulation that was being contested in *Jacobs* prohibited sale and solicitations for "any cause or commercial activity within any school or on its campus."

29. Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).
30. 490 F.2d 601 (7th Cir. 1973), *cert. granted,* 94 S.St. 2638 (1974).
31. *Id.* at 609, *quoting,* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).
32. 462 F.2d 960 (5th Cir. 1972). See text to which note 12 *supra* is attached.
33. Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972).
34. Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).
35. Sullivan v. Houston Ind. Sch. Dist., 307 F. Supp. 1328 (S.D. Tex. 1969).
36. 393 U.S. at 513.
37. 307 F. Supp. 517 (C.D. Cal. 1969).
38. 307 F. Supp. 1328 (S.D. Tex. 1969).
39. *Id.* at 1341.

The school board contended that this rule had the proper purpose of preventing the school premises from being used for "non-school purposes—particularly commercial activities." The court recognized that a school had a proper interest in prohibiting or at least limiting commercial activity on school premises. They found, however, that sale of a newspaper within a school is conduct that combines both speech and nonspeech elements. This fact requires a balancing of the state's legitimate interest with the students' fundamental First Amendment freedoms. The court concluded:

> It has not been established, in our opinion, that regulations of the place, time and manner of distribution can not adequately serve the interests of maintaining good order in an educational atmosphere without forbidding sale and to that extent restricting the first amendment rights of plaintiffs.[40]

A 1971 federal district court case,[41] however, upheld a school regulation prohibiting student sale of newspapers on campus. In that case the school had not attempted to interfere with the student's right to distribute newspapers on campus; only when the student began to sell the newspapers did school authorities intervene. The court found no First Amendment issue, since the school sought only to regulate the commercial sale of merchandise at the school, a permissible regulation of school activities that does not involve constitutionally protected free speech. On appeal, the Fourth Circuit Court of Appeals refused to review the constitutionality of the school regulation and the school's action taken pursuant to it because the plaintiff had left the state and no monetary damages had been shown.[42] Under these circumstances, the court considered any decision simply advisory. Accordingly, it vacated the judgment of the district court and dismissed the action as moot.

### Anonymous Articles

The *Jacobs* case also involved a challenge to the constitutionality of a school rule prohibiting distribution of any literature on campus "unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself."[43] In deciding *Jacobs*, the court of appeals relied on *Talley v. California*.[44] In *Talley* the United States Supreme Court had ruled that a city ordinance prohibiting distribution of anonymous handbills was unconstitutional, noting the historical importance of anonymous handbills as a vehicle for criticizing oppressive laws and practices. The *Jacobs* court found that anonymous student publications serve these same important purposes within the school community. Without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. The school board argued that the regulation was necessary in order to hold persons responsible for the publication of libel or obscenity, but the court rejected this argument because the regulation as drawn would prohibit protected anonymous expression as well as the unprotected speech it was intended to limit.

It is clear from these cases that rules of time, place, and manner cannot be used as justification for a vastly broader and more severe limitation on expression than those allowed under the *Tinker* disruption standard. The tests employed by the Seventh Circuit in *Jacobs* illustrate the overlapping nature of the standards governing restraint of disruption resulting from distribution and those governing regulation of time, place, and manner of distribution. If the rules are "reasonable" under these tests and if school authorities have given students notice of the rules as to time, place, and manner of distribution, then students may be required to comply with them even though the materials distributed come within the protection of the First and Fourteenth Amendments.

## LIMITATIONS BASED ON CONTENT OF MATERIALS

The First Amendment guarantees to students the right to distribute literature that is unpopular and offensive to some or even most people, but the right is not absolute. Distribution may be limited by school officials because of the content of the materials to be distributed. The types of written statements that the school can prohibit are those that are obscene or libelous or contain "fighting words," or are "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." This section will discuss each of these exceptions to protected First Amendment speech and how each has been applied by the courts in cases in which schools have sought to justify limitations on distribution of written materials on the basis of these exceptions.

### Obscenity

It is clear that obscene material is not protected by the First Amendment and its distribution can therefore be prohibited.[45] The problem is to define what is obscene and what modifications, if any, should be made to the general legal definition of obscenity when it is applied to literature distributed on school grounds. The difficulty of making this definition has left the courts and school officials faced with what Justice Harlan called "the intractable obscenity problem."[46]

40. Jacobs v. Board of Comm'rs, 490 F.2d 601, 608-9 (7th Cir. 1973), *vacated as moot*, 43 U.S.L.W. 4238 (U.S. Feb. 18, 1975). *See also* Peterson v. Board of Educ., 370 F. Supp. 1208 (D. Neb. 1973).

41. Cloak v. Cody, 326 F. Supp. 391 (M.D.N.C. 1971).

42. Cloak v. Cody, 449 F.2d 781 (4th Cir. 1971).

43. 490 F.2d at 607.

44. 362 U.S. 60 (1960).

45. Miller v. California, 413 U.S. 15, 23 (1973).

46. Interstate Circuit Inc. v. Dallas, 390 U.S. 676, 704 (1968) (concurring and dissenting opinion).

The Supreme Court's most recent attempt to define obscenity was in the 1973 decision of *Miller v. California*.[47] It said the basic guidelines for determining whether literature is obscene are:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . .
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[48]

In 1974 the Court refined the *Miller* definition in *Jenkins v. Georgia*[49] by clarifying the reach of the "contemporary community standards" language. Emphasizing that under *Miller* the First Amendment does not require juries to apply hypothetical national or even statewide community standards, the Court said that *Miller* permitted "juries to rely on the understanding of the community from which they came as to contemporary standards . . . ." Thus states have considerable latitude in framing statutes and regulations under the *Miller* decision, and the obscenity standard may vary from jurisdiction to jurisdiction. However, the Court made it clear that the *Miller* definition requires as a minimum that the materials complained of "depict or describe patently offensive 'hard core' sexual conduct . . . ." Juries do not have "unbridled discretion in determining what is 'patently offensive,' " and their decisions are subject to independent review by appellate courts to ensure that First Amendment rights have been protected.

The question that has confronted courts when they have had to judge school limitations on student distribution because the material to be distributed was allegedly obscene has been whether the special educational environment justifies a less stringent standard for testing obscenity on the school campus. In trying to resolve this issue, the courts have distinguished between college students, most of whom are legally adults, and high school students, most of whom are minors.

## College Students

*Papish v. The Board of Curators of the University of Missouri*[50] concerned the constitutionality of the university's expulsion of a student because she had distributed on campus a newspaper containing a cartoon captioned "With Liberty and Justice For All" showing a policeman raping the Statue of Liberty and the Goddess of Justice and an article entitled "Motherfucker Acquitted." After exhausting administrative procedures, the student appealed to the federal courts. The district court ruled that the publication was obscene and therefore the university had not invaded protected First Amendment freedoms in stopping distribution and expelling the student. The court of appeals affirmed on different grounds. It recognized that the publication was not obscene and could have been distributed in the community at large, but it found that on campus the freedom of expression could properly be subordinated to other interests such as "conventions of decency in the use and display of language and pictures" and concluded that the Constitution does not compel the university to allow such publications to be publicly sold or distributed on the campus.

The Supreme Court reversed, relying on *Healy v. James*,[51] in which the Court held that its precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." In *Papish* the Court concluded:

> We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.[52]

The *Papish* decision applies the legal definition of obscenity in judging censorship by college administrators of allegedly obscene materials and concludes that ". . . the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . ."

The Fourth Circuit, in a recent case from East Carolina University, expressly followed the Supreme Court's decisions in *Papish* and *Healy*.[53] In that case two students were expelled after the campus newspaper published a letter that criticized the university's dormitory policy and ended with a "four letter" vulgarity referring to Chancellor Leo Jenkins. The court found that the students had been expelled merely because the vulgar reference to the chancellor was "offensive to good taste." The university was ordered to expunge the disciplinary action from the students' records and allow them to continue their education if they were academically eligible. The court pointed out that college students enjoy First Amendment rights coextensive with those of other adults in the community. The vulgar reference was not legally obscene, and the fact that it was "offensive to good taste" did not justify the university's abridgment of the students' free speech.

It is clear from these cases that on the college campus state laws and school regulations dealing with the distribution of obscene literature must be measured by the constitutional standards set out in *Miller*.

47. 413 U.S. 15 (1973).
48. *Id.* at 24.
49. 94 S.Ct. 2750 (1974).
50. 410 U.S. 667 (1973).
51. 408 U.S. 169 (1972).
52. 410 U.S. at 670.
53. Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973).

The *Papish* decision, however, did not settle the question of whether the *Miller* standard for testing obscenity applies with full force on the high school campus. In a 1968 case, *Ginsberg v. New York,*[54] the Supreme Court said that it had long recognized that ". . . even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .' " In that case the Court upheld the constitutionality of a New York statute that provided a different standard for testing the obscene nature of materials distributed to minors. A variable standard for obscenity that takes into consideration the age and maturity of the children to whom the materials were directed was not found to violate the First Amendment. Relying on the *Ginsberg* decision, the lower courts have generally recognized that "[i]n the secondary school setting first amendment rights are not coextensive with those of adults" and "may be modified or curtailed by school regulations 'reasonably designed to adjust these rights to the needs of the school environment.' "[55]

Even with the acceptance of more limited First Amendment rights for high school students, allowing a different standard for obscenity based on age and maturity, the cases dealing with distribution of allegedly obscene materials on high school campuses have applied tests that are very close to the Supreme Court standards. In the most recent of these cases, *Jacobs,* the publications involved contained what the court described as "[a] few earthy words relating to bodily functions and sexual intercourse . . . ." In that case the court of appeals applied the test for obscenity set out in *Miller* and concluded that even when "[m]aking the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the material . . . could not be said to fulfill the *Miller* definition of obscenity." The *Jacobs* court also observed that the challenged school regulation prohibiting distribution on campus of literature "obscene as to minors" lacked specific definitions of the sexual conduct that the regulation forbade to be described or depicted and that such regulations would be valid under *Miller*[56] only if they were specific.

The application of a variable obscenity standard was examined in the 1972 decision of *Koppell v. Levine.*[57] In that case, high school students challenged a principal's impoundment of the school literary magazine because he found it obscene. The court reviewed the allegedly obscene materials under the same New York "variable obscenity" statute that had been approved by the Supreme Court in *Ginsberg.* The court found nothing in the student publication that was "obscene as to minors." In explaining the application of the concept of variable obscenity, it said:

> The definition of obscenity . . . may vary according to the group to whom material is directed or from whom it is withheld. Even regarding minors, however, constitutionally permissible censorship must be premised on a rational finding of harmfulness to the group in question.[58]

The Supreme Court's recent decisions on obscenity seem to reaffirm the Court's acceptance of the concept of variable obscenity, but variable obscenity is not a license to the states to abridge the First Amendment rights of high school students because the mode or content of their expression violated the "conventions of decency." The New York statute approved in *Ginsberg* mirrored to a great extent the then extant legal definition of obscenity for adults.[59] The Seventh Circuit in *Jacobs* implies that even with a differential standard of obscenity based on age and maturity, the basic tests of the *Miller* definition must be met.[60] In *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne,*[61] a case dealing with the concept of variable obscenity in the context of a city's ordinance power, the Seventh Circuit stated:

> . . . [A] city may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity in regulating the dissemination to juveniles of "objectionable" materials . . . . Although society is free to express its special concern for its children in a variety of regulatory schemes, it may not excise a child's constitutional prerogatives under the guise of protecting his interests.[62]

## Inconsistency Doctrine

Measuring allegedly obscene material against a legal definition of obscenity has not been the courts' only

54. 390 U.S. 629 (1968).

55. Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).

56. Other cases have also applied the prevailing legal definition of obscenity in ruling that student publications were not obscene. *See, e.g.,* Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973). The one exception to this general statement is *Baker v. Downey City Bd. of Educ.* In that case, the federal district court stated, "Neither 'pornography' or 'obscenity' as defined by law need be established to constitute a violation of . . . rules against profanity or vulgarity. . . . Plaintiff's First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas. . . ." 307 F. Supp. at 526-27. In light of the Supreme Court's decision in *Papish* it is unlikely that the "decency" standard used in *Baker* would receive support today in the federal courts.

57. 347 F. Supp. 456 (E.D.N.Y. 1972).

58. *Id.* at 458-59.

59. Ginsberg v. New York, 390 U.S. 629, 635 (1968). For a typical state statute, see N.C. GEN. STAT. § 14-190.10 (1974). This statute makes it a misdemeanor to disseminate "sexually oriented" materials to minors. The variable standard for testing obscenity in this statute closely parallels the *Miller* definition of obscenity.

60. The courts have not been faced with the question of whether there would be a difference in the standards for testing obscenity for students below the high school age. The Seventh Circuit in *Jacobs,* however, noted that its decision did not answer that question and that the decision did not foreclose consideration of this question on the merits. 490 F.2d at 610.

61. 493 F.2d 1297 (7th Cir. 1973).

62. *Id.* at 1302.

method of scrutinizing the attempts by school officials to restrain distribution of nonschool materials because of its content. The "inconsistency doctrine" is also important in cases involving both college and high school students. Several cases have held that the materials to which school officials objected could not be forbidden because the same objectionable language also was found in materials in the school's library, in readings assigned by teachers for classwork, or in publications available to students on campus through student stores or newsstands.

In *Vought v. Van Buren Public Schools,*[63] the expulsion of a student was based on his possession of a "24 page tabloid-type" publication that contained the word "fuck." The officials said that he had violated a school regulation prohibiting the possession of obscene literature. The evidence in the case showed that the same word was contained in J. D. Salinger's *The Catcher in the Rye* and in an article in *Harper's Magazine,* both of which had been assigned in the school as classwork. The court found the inconsistency to be "so inherently unfair as to be arbitrary and unreasonable," constituting a denial of due process, and thereupon ordered that the expelled student be reinstated to school. The "inconsistency doctrine" thus represents a major obstacle for school officials who attempt to limit the use of "profane and vulgar" language because of the large number of books, magazines, and pamphlets containing such language that are found in college and high school libraries and bookstores.[64]

## Libel

Libel, which is written or printed defamation, is unprotected by the First Amendment.[65] No court decision was found in which a school attempted to justify a prohibition on distributing literature because the literature contained libel. Only in the dicta of lower courts has this traditional exception to the First Amendment with respect to student publications been recognized as a basis for limiting student distributions.[66] It also should be noted that the general standard for libel is modified in the school context. The tort of libel is usually found when a false statement concerning another has been published that brings hatred, disgrace, ridicule, or contempt on that person and results in damage. The standard for judging alleged libel of school officials, however, is higher. The Supreme Court in *New York Times v. Sullivan*[67] held that the Constitution requires a public official to show that the statement was made with "actual malice" before recovery is available for a "defamatory falsehood relating to his official conduct." The Fourth Circuit Court of Appeals[68] recently indicated that this standard was applicable for libel of a school official.

One possible way to deal with student distribution of allegedly libelous materials is for schools to prohibit what they consider to be libel only when there is a possibility that the school itself will be liable under state libel laws. In situations in which libel would injure individual school officials or other citizens, the libeled person could rely on the civil remedy and sue the student responsible.[69]

## Criticism of School Officials/Advocacy of Violating School Rules

The test to determine whether a student publication that criticizes school officials or advocates violation of school rules can be prohibited is the *Tinker* test of whether the publication is likely substantially and materially to disrupt school operations. The critical question is when does a publication that is critical of school officials or advocates violations of school rules lose its protection because it is likely to create a substantial disruption. The Supreme Court decision in *Healy v. James,*[70] which involved the refusal by a college to recognize a student organization, helps answer that question:

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) . . . .
>
> In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school."[71]

It is significant that in *Healy* the Court linked the "reasonable forecast" language of *Tinker* to the test set out in *Brandenburg*[72] that "advocacy 'directed to inciting imminently lawless action and . . . likely to incite or produce such actions' " can be prohibited. This fact gives added weight to those lower court decisions that have ruled that mere criticism of school officials or advocacy of disruption is insufficient to support a reasonable forecast of dis-

63. 306 F. Supp. 1388 (E.D. Mich. 1969).

64. For other cases applying the "inconsistency doctrine," *see* Scovill v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970); Sullivan v. Houston Ind. Sch. Dist., 333 F. Supp. 1149, 1165-1167 (S.D. Tex. 1971) [supplementary injunctions vacated on other grounds, 475 F.2d 1071 (5th Cir. 1973)]; and Channing Club v. Board of Regents, 317 F. Supp. 689 (N.D. Tex. 1970).

65. *See* New York Times v. Sullivan, 376 U.S. 254, 268 (1964).

66. *See* Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 971 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972).

67. 376 U.S. 254 (1964).

68. Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973). *See also,* Trujillo v. Love, 322 F. Supp. 1266, 1271 (D. Colo. 1971).

69. *See* S. Nahmod, *Beyond Tinker: The High School as an Educational Public Forum,* 5 HARV. CIV. RIGHTS CIV. LIB. L. REV. 278, 290-91 (1970).

70. 408 U.S. 169 (1972).

71. *Id.* at 188-89.

72. 395 U.S. 444, 447 (1969).

ruption. In *Scoville*,[73] which was summarized earlier, the student publication criticized the school policies and administrators severely and advocated that students either refuse to accept or destroy written materials distributed by the school. In that case, the district court found no evidence of actual disruption and concluded that the criticism and advocacy were insufficient to support a forecast of substantial disruption. In a New York case decided by the State Commissioner of Education, students had been suspended for distributing an article advising incoming students to learn to steal passes, to forge teachers' signatures, to lie, and to sign their absence excuse cards, in order to "make your stay more pleasurable and to drive the administration crazy."[74] The Commissioner found that the article was satire, protected by the First Amendment. There was no evidence presented that the article had influenced any students to do or to attempt the acts suggested.[75]

### "Fighting" Words

It has long been recognized that insulting or "fighting" words, "the very utterance of which inflict injury or tend to incite an immediate breach of the peace," are not protected by the First Amendment guarantee of free speech.[76] Although no case was found that dealt directly with student distribution of materials alleged to come within the fighting-words exception, it seems certain that such an exception does apply in the school context and is closely related to the *Tinker* disruption standard.

In a New Jersey case, the Commissioner of Education found a school regulation totally prohibiting any student distribution on campus to be overbroad and, therefore, unconstitutional:

> It is beyond argument, however, that so called "hate literature" which scurrilously attacks ethnic, religious and racial groups, other irresponsible publication aimed at creating hostility and violence, . . . and similar materials are not suitable for distribution in schools. Such materials can be banned without restricting other kinds of leaflets by the application of carefully designed criteria for making such judgments.[77]

The fighting-words exception has not been expressly applied in school distribution cases, but it has been accepted in a recent case involving student symbolic speech. In a Florida desegregation case,[78] the federal district court found that white students in a predominantly white high school wore replicas of the Confederate battle flag for the purpose of offending, irritating, and provoking black students. The court concluded that where the use of a symbol had resulted in "violence and disruption at school, and the tensions surrounding the symbols had not subsided," the wearing and displaying of the flag should be prohibited. Although relying on the evidence of disruption to justify its order that the school and its students discontinue using the Confederate battle flag as a school symbol, the court pointed out that in a situation like this, in which the actual purpose of using the symbol was to provoke and anger black students, the symbol was analogous to unprotected "fighting" words and could be prohibited.[79]

## DISTRIBUTION CASES INVOLVING A VIOLATION OF SCHOOL RULES

In several cases dealing with distribution of nonschool-sponsored publications, the courts have focused on the students' violation of school rules, rather than on the constitutional question of free speech, in upholding disciplinary action taken against the students. In *Sullivan v. Houston Independent School District,*[80] the Fifth Circuit found that school authorities were not "powerless to discipline [the student] simply because his actions did not materially and substantially disrupt school activities." The high school student involved was suspended for distributing an "underground" newspaper in violation of a school regulation requiring prior approval of materials before distribution. After his suspension, the student returned to campus, refused to honor the principal's request to stop the distribution and leave campus, and twice shouted a profanity at the principal. The Fifth Circuit ruled that the prior-review regulation was reasonable and upheld the suspension on the basis of the student's "flagrant disregard of established school regulations . . . ." In support of its opinion, the Fifth Circuit cited *Healy v. James,*[81] noting that the Supreme Court in that case had stated that an announced refusal to comply with reasonable campus regulations would be a proper reason not to grant university recognition to a student organization.

In *Karp v. Becken,* the Ninth Circuit ruled that the school was justified in prohibiting distribution of signs on campus, but the school had not shown sufficient justifi-

73. 425 F.2d 10 (7th Cir. 1970); see text to which note 8 *supra* is attached.

74. Matter of Brocinio, 11 N.Y. Ed. Rpt. 204 (1972).

75. In light of *Healy*, the Sixth Circuit's decision in the *Norton* case that was discussed earlier is questionable. It is doubtful whether the testimony of school officials in *Norton* that they "*feared*" that the student publication advocating student disruption of school activities "could conceivably" cause campus disorder was enough to support a conclusion that distribution of the literature was "likely to incite or produce such action."

76. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

77. Goodman v. South Orange-Maplewood Bd. of Ed., N.J. Comm'r of Ed. (June 18, 1969).

78. Augustus v. School Bd. of Escambia County, 361 F. Supp. 383 (N.D. Fla. 1973).

79. *See also,* Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174 (E.D. La. 1970), *aff'd* 448 F.2d 414 (5th Cir. 1971), in which the court-ordered desegregation plan prohibited a school from displaying a Confederate flag. The court held that the school had no constitutional right to display this or other such symbols when the symbols are an affront to others.

80. 475 F.2d 1071 (5th Cir. 1973).

81. 408 U.S. 169 (1972).

cation for disciplining the student for the distribution.[82] However, the court stated:

> What we have said does not mean that the school could not have suspended appellant for violating an existing reasonable rule. In fact, in securing the signs, he broke a regulation by going to the parking lot during school hours.[83]

The court pointed out that the disciplinary action had been based on conduct that amounted to protected "pure speech" and not on the rule violations. Therefore, it could not be upheld.

*Schwartz v. Shunker*[84] also focused on violation of school rules. In this case the school principal ruled that an underground newspaper could not be distributed on campus again because it contained "four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda." The student who was distributing the paper was warned not to bring it on campus, but he did so and refused to surrender the material to the principal when requested to do so. For this conduct, he was suspended from school. Despite the suspension, the student returned to class in admitted defiance of the school officials' orders. The federal district court upheld the suspension, which was based on "flagrant and defiant disobedience of school authorities" rather than "protected activity under the First Amendment . . . ."

In a similar case,[85] the school announced that distribution of unauthorized materials on campus would result in disciplinary action. Several students distributed an underground newspaper in violation of that regulation and were suspended until they stopped the distribution. They challenged the constitutionality of the suspension, but the federal district court ruled that even though there was no evidence of a "substantial and material" disruption, the school could suspend the students for their "gross disobedience" of school regulations. The evidence before the court showed that "a major purpose" of the students' acts had been to "flaunt" (sic) the rule.

*Schwartz* and *Graham* leave two important questions unresolved.[86] First, should a suspension based partly on unprotected behavior (violation of school rules) and partly on protected free speech be permitted? Second, should a school be permitted to justify punishing a student for violating a rule that is unconstitutional? Notwithstanding the thrust of the *Graham* and *Schwartz* decisions, school officials should not consider it safe to discipline students for violating a rule that is invalid.[87]

## PRIOR REVIEW OF STUDENT LITERATURE

The limitations on the distribution of literature just reviewed are at times applied by the school before the literature is distributed. A requirement that the content of publications or the time, place, and manner of distribution undergo prior review before students are permitted to disseminate written materials raises a separate set of constitutional considerations that need special examination.

The court decisions that have ruled on prior review are divided. Most have said that a prior-review requirement can be imposed if adequate procedural safeguards are provided, while at least one circuit court, the Seventh, has said that prior-review requirements are per se unconstitutional. The Fourth Circuit in *Quarterman v. Byrd*[88] and *Baughman v. Freienmuth*,[89] the Second Circuit in *Eisner v. Stamford Board of Education*,[90] and the Fifth Circuit in *Shanley v. Northeast Independent School District*[91] have all said that prior review can be exercised if done properly. But these courts have relied on different theories to justify their conclusion. The Second and Fourth Circuit courts have said that the "reasonable forecast" language of *Tinker* supports prior review of student expression, while the Fifth Circuit (in *Shanley*) justifies prior review on "[T]he necessity for discipline and orderly processes in the high school . . . ." Although these courts recognized that some type of prior review could be imposed, the prior-review schemes considered in the cases just cited were found to be unconstitutional when the strict procedural standards of the Supreme Court, as set out in *Freedman v. Maryland*,[92] were applied. The courts of appeals found the school rules impermissible because they lacked adequate procedural safeguards. In addition, although the Court of Appeals for the First Circuit, in *Riseman v. School Commission of Quincey*,[93] implied that a properly drawn prior-review regulation would pass constitutional muster, the court issued an order suspending a school regulation prohibiting distribution and stated that ". . . no advance approval shall be required of the content of any such paper." The prohibi-

82. Karp v. Becken, 479 F.2d 171 (9th Cir. 1973); see text to which note 23 *supra* is attached.

83. *Id.* at 177.

84. 298 F. Supp. 238 (E.D.N.Y. 1969).

85. Graham v. Houston Independent School District, 335 F. Supp. 1164 (S.D. Tex. 1970).

86. *See* Pressman, *Students' Right to Write and Distribute*, 15 INEQUALITY IN EDUCATION 63, 68 (1973). It should be noted that the *Sullivan* case did not raise these questions because the court found that the prior-review rule was constitutional and therefore violation of the rule did not involve protected student activities.

87. *See* Karp v. Becken, 479 F.2d 171 (9th Cir. 1973); and text to which note 82, *supra*, is attached.

88. 453 F.2d 54, 57-59 (4th Cir. 1971).

89. 478 F.2d 1345, 1348 (4th Cir. 1973).

90. 440 F.2d 803, 805-8 (2d Cir. 1971).

91. 462 F.2d 960, 969 (5th Cir. 1972).

92. 380 U.S. 51 (1965) (setting out procedural safeguards for a system of state censorship of movies).

93. 439 F.2d 148, 149 (1st Cir. 1971). In Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973), the district court approved in principle prior review by school officials. The *Vail* case is now on appeal to the First Circuit and the decision in that case should clarify the rule in *Riseman*.

tion of prior review was, however, based on the vagueness of the existing prior-review regulations and its failure to provide necessary procedural safeguards, not on a theory that every system of prior review is unconstitutional.

The Seventh Circuit in *Fujishima v. Board of Education*[94] has ruled that a regulation requiring prior approval of publications was per se unconstitutional because it was "prior restraint in violation of the First Amendment." The court expressly disagreed with the Second Circuit Court's approval of prior review in *Eisner,* arguing that the *Eisner* court had misinterpreted *Tinker:*

> The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of their First-Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First-Amendment rights.[95]

The *Fujishima* court argues that "in proper context" the "reasonable forecast" language of *Tinker* is not an approval of prior review of student expression.

The conflict between the courts of appeal on prior review in the school setting has not been resolved by the Supreme Court. However, the Supreme Court's decisions on prior restraint of First Amendment rights in other contexts serve as guidelines in analyzing the disagreement between the courts of appeal. The Supreme Court has stated that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity."[96] The state "thus bears a heavy burden of showing justification for the imposition of such a restraint."[97] In *Healy v. James* the Court said that the college's interest in "preventing disruption" might justify prior restraint, but the same "heavy burden" of justification applies to prior restraint on the college campus.[98] Thus even though the Supreme Court greatly disfavors prior restraints on the exercise of First Amendment rights, it has not ruled that all such restraints are per se unconstitutional. There might be, as the Second Circuit noted in quoting the Supreme Court in *Near v. Minnesota,* "exceptional cases" that would justify a "previous restraint."[99]

The courts of appeal that have approved the principle of prior review have recognized the heavy presumption against its constitutionality.[100] It is clear from the Fourth Circuit's decision in *Quarterman* that the special circumstance under which school authorities can justify prior restraint occurs when the school can "reasonably forecast substantial disruption of or material interference with school activities on account of distribution of . . . printed materials."[101] To establish a "reasonable forecast," the school must show "substantial facts which reasonably support a forecast of likely disruption";[102] thus a prior restraint based on a general fear of disruption cannot stand. It seems that the state's recognized interest in maintaining order and discipline in the schools, when combined with a "reasonable forecast" of substantial and material disruption, would support in principle a regulation that requires prior review of student publications. The *Fujishima* conclusion that *Tinker,* when combined with *Near,* compels a rule against the constitutionality of regulations requiring prior review and approval of student publications is not compelling.[103]

If a prior-review requirement may be imposed, it is important to look at the procedural protections the courts require to make the requirement valid. First, it is clear that before prior review can be justified in the school situation there must be "a reasonable forecast" of substantial disruption of or material interference with school activities, or the specific intent to prevent only the distribution of unprotected content. A regulation allowing prior review of such unprotected materials must ". . . contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write."[104] Terms of art such as "libelous" and "obscene," if used in a regulation, are not "sufficiently precise and understandable by high school students and administrators . . . to be acceptable criteria."[105]

Even if the prior-restraint scheme precisely defines what may not be published or distributed, it is nevertheless invalid unless it meets the strict procedural safeguards required by the Supreme Court in *Freidman v. Maryland.*[106] These requirements have been translated for use in the school environment by the Fourth Circuit in *Baughman* as follows:

(1) A definition of "Distribution" and its application to different kinds of material;
(2) Prompt approval or disapproval of what is submitted;
(3) Specification of the effect of failure to act promptly; and
(4) An adequate and prompt appeals procedure.[107]

It may be that even with the perfect prior-review rule, the Supreme Court would decide that the school system had not sufficiently justified a prior restraint of students' exercise of their First Amendment rights. In a continuing

94. 460 F.2d 1355, 1357 (7th Cir. 1972).
95. *Id.* at 1358.
96. Banton Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1973); *see,* Near v. Minnesota, 283 U.S. 697 (1931).
97. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
98. 408 U.S. 169, 184 (1972).
99. Eisner v. Stamford Board of Educ., 440 F.2d 803, 806 (2d Cir. 1971).
100. *See, e.g.,* Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).
101. 453 F.2d 54, 58 (4th Cir. 1971).
102. *Id.* at 59.
103. 460 F.2d 1355, 1357 (7th Cir. 1972).
104. Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973).
105. *Id.* at 1350.
106. 380 U.S. 51 (1965).
107. 478 F.2d 1345, 1351 (4th Cir. 1973).

system of prior review of the content of student publications or the time, place, and manner of its distribution, it may be very difficult to prove that there constantly exists "a reasonable forecast" of disruption as opposed to a general "undifferentiated fear" of disruption. More important, the possibility that even the best rule of prior review will discourage the exercise of protected First Amendment freedoms by many students unwilling to risk submitting materials or challenge an adverse decision, may outweigh the interests of the schools in constant prevention of likely disruption when they can effectively control disruptive conduct by punishing violations of reasonable school regulations as they occur.

## CONCLUSION

The court decisions just reviewed clearly show that the authority once held by school authorities over student distribution of nonschool literature has been greatly reduced. It is important to recognize, however, that school authorities have not been hamstrung by these decisions. The cases clearly recognize the power of school officials to deal with substantially disruptive conduct even when it is expressive conduct that is otherwise protected by the First Amendment. Nor are schools required to stay their hands until disorder actually erupts: if there is a reasonable forecast of substantial disruption, curtailment of First Amendment liberties is justified in order to prevent such disruption. School officials need only be aware that the power to preserve order in the educational process must be exercised within constitutional limits. The fundamental freedoms that *Tinker* declared students carry with them into the schools must be protected by school officials and not extinguished unless the officials can show circumstances that leave them no other practical alternative.[108] As the Supreme Court stated in 1967:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . . The classroom is peculiarly "the market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues [rather] than through any kind of authoritative selection."[109]

108. *See* Butts v. Dallas Ind. Sch. Dist., 436 F.2d 728, 732 (5th Cir. 1971).

109. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

## GENERAL ELECTION (*continued from page 46*)

women in the House, two are Republicans (compared with three in 1973), and of the two in the Senate, both are Democrats (compared with one in 1973).

### THE FACTOR OF INCUMBENCY

An analysis of election results reveals that despite the election of new members, the membership of the General Assembly is not dominated by new faces. In the 1975 Senate, 26 persons (out of 50 total) served in the 1973 Senate; of the 24 persons newly elected in 1975, seven had served in either the Senate or the House in 1971 or 1973 and thus can hardly be called neophytes. In the 1975 House, 71 persons (out of 120 total) served in the 1973 House; but of the 49 persons newly elected in 1975, only five had served in either chamber in 1971, so that the 1975 House has a far greater percentage of newcomers than the Senate.

### REGISTRATION STATISTICS

Total registration declined in most categories from the period beginning October 1972 and ending October 1974. The mandatory purge of registration records after the 1972 presidential election and improved purging procedures appear to account for the slight decrease.

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