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Subjective Standards and Objective Language: Can Taste Be Codified?

CHARLES B. NUTTING*

One of the most difficult challenges to a draftsman's skill is the articulation of standards to guide courts and administrative agencies in making the subjective determinations often required by statutes. Mr. Nutting discusses the need for these standards and suggests various approaches to problems involving physical, aesthetic, and moral "taste," with particular reference to food and drug, urban planning, and obscenity legislation.

THE HISTORIC flurry over delegation of legislative power caused by the *Schechter*[1] and *Panama Refining*[2] cases has long since subsided. The declarations in those cases, decided in one instance by a unanimous and in the other by a "unanimous but one" court, at least caused government counsel to realize that the problem of standards could not be swept under the rug completely. Lawyer-like drafting was needed to assure the attainment of legislative policies. In my view it was the recognition of this fact by legislative draftsmen, rather than the alleged fear of the court packing plan, which brought about the acceptance of much of the New Deal legislation when it was reoffered in neater packages.[3] This does not necessarily indicate disagreement with Professor Miller's suggestion that ". . . Congress has delegated power to the Executive Branch and to the so-called independent regulatory commissions . . . under the loosest of standards, with the net result that the present day viability of the *Schechter* and *Panama Oil* cases is extremely dubious."[4] But draftsmen have at least been advertent to the problem and, in general, have been as definite as possible in the prescription of standards depending upon the nature of the subject matter and the area of activity. The result, however, often has been a display of sound and fury signifying nothing.

I think no one today would deny the practical necessity of

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delegating wide powers of discretion to administrative officials. But on the assumption that careful drafting is necessary to soothe the courts as well as to preserve the appearance of the classical doctrine of the separation of powers, some discussion of the problem of standards, in what may seem to the worker in more conventional fields of legislation to be unusual settings, may be useful. Essentially these are areas in which subjective considerations are basically involved but where constitutional theory requires some statements implying the existence of objectivity. For the purposes of this discussion, the word "taste" has been chosen to indicate the problem area.

Physical Taste

Probably the Positive State has not yet reached the point of requiring all citizens to prefer lemon peel to olives in martinis. But the state, in the interest of consumers, does have an appropriate role to play in insuring that a purchaser who relies on a representation that a given product has a characteristic flavor will not be disappointed. This has been a concern of the Food and Drug Administration and its predecessors. In general the definitions and standards of identity for foods do not specifically refer to taste, but the result is probably accomplished by detailed descriptions of the ingredients and the methods of preparation. Thus, in the forty-seven pages of the Code of Federal Regulations dealing with cheese,[5] various types are described by their accepted names, but flavor or taste as such is not ordinarily mentioned.[6] However, one of the classic cases on the constitutional power of delegation does involve taste. This is the famous tea tasters case[7] which, because of its historic importance and because of its subject matter, deserves somewhat detailed consideration.

In 1897 the Congress enacted a law[8] which provided for a board to prepare and submit standard samples of tea. The Secretary of the Treasury, upon recommendation of the board, was required to establish uniform standards of purity, quality, and fitness for consumption of all kinds of tea. Tea which did not conform to the standards could not be imported. In the case just cited, standards were adopted by the Secretary upon recommendation of the board. Certain tea was rejected as being inferior in quality. Quality was interpreted by the Court as meaning "the cup quality

of the tea, that is to say, its taste and flavor."[9] The action of the Secretary and the validity of the delegation were upheld by the Supreme Court of the United States in an opinion which said in part: "Congress legislated on the subject as far as was reasonably practical, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."[10]

The original statutory provision has been carried over into the United States Code which provides that the Secretary of Health, Education and Welfare shall establish standards for tea and shall deposit duplicate samples of such standards in various places.[11] It should be noted at this point that the "standards" are not expressed in words but in physical samples which are used as a basis of comparison. The statute further provides that tea shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the tea in boiling water.[12] More specifically, it is provided:[13]

> Quality shall be ascertained by drawing, according to the custom of the tea trade, with the weight of a silver half dime to the cup. The quality must be equal to the standard, but the flavor may be that of a different district, as long as it is equally fit for consumption. As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow or Wenchow of sour character is not considered equal to the first two mentioned.

Are these constitutionally valid standards and regulations? The Supreme Court said so and probably rightly. To begin with, the problem involved was highly technical and limited in scope. The audience to which the regulations were directed was also a limited one. In such a case, the question is not whether the regulations were intelligible to the man on the street but rather whether they were meaningful to those subject to control. It has been said that the sex of a turtle is relevant only to another turtle. Similarly, it may be said that the definitions and standards of identity for tea are relevant only to persons in the tea trade and their governmental supervisors. Since the definitions and standards were recommended in the first instance by members of the industry it seems fairly clear that they were understandable by those subject to the regulations. The lessons for draftsmen are that when a technical matter is being dealt with, knowledge of its technical

aspects is essential, and that regulations should be drafted in close consultation with the technicians involved.[14]

Aesthetic Taste

However, quite a different problem is presented when the regulation applies not to a closely defined trade group but rather to the general public. This has become increasingly apparent in connection with the emergence of legislation attempting to control land use and, particularly, the construction of buildings. Early zoning ordinances were largely confined to controlling land use in terms of the conventional police power, that is, the power to legislate in order to preserve the public health, safety, and morals. When aesthetic considerations were involved, they were recognized only in these terms. Thus, anti-billboard legislation was justified in part at least because of the public interest in morals, since one never knew what might go on behind billboards.[15] Gradually, however, it was recognized that aesthetic values in themselves were worthy of consideration. Thus, in *Berman v. Parker* the Supreme Court of the United States said: "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[16]

But the problem cannot be disposed of with such a judicial wave of the hand. A government may decide that a city shall be beautiful; but who decides what is beautiful? And how can conceptions of beauty be expressed in meaningful language?

In some instances there may be a consensus. For example, an appropriate legislative body may decide that the buildings in a certain area have aesthetic, as well as historical, value and may decree that all future buildings within the area shall conform to the existing architectural style.[17] Here an administrative decision regarding a particular building is not difficult since the standard is clear and the judgment can be objective. However, a much different situation is presented when, as is now common, legislation creates an architectural review board which has power to approve or disapprove designs for new buildings.[18] In general, ordinances of this kind provide that approval shall be withheld if the proposed building is so different in design from others in the area that its construction may depreciate the value of existing

structures. This "standard," if it can be called one, calls for both aesthetic and economic judgments, each of which is essentially subjective in character. It has been suggested that in at least one case the rejection of a design was based on the ground, "We don't like the appearance of that house in the neighborhood." [19]

It would seem that in the case of aesthetic standards more than a semantic difficulty is involved. The real question is whether or not such standards exist. Certainly styles in architecture vary from generation to generation, if not from year to year. The gingerbread of the Victorian era was approved by Victorians who would have viewed the stark simplicity of modern architecture with alarm. Christopher Wren and Frank Lloyd Wright were both distinguished architects; but, apart from their undisputed eminence in their respective periods, they had virtually nothing in common. And even among contemporaries wide differences in values are apparent. Since this is true, it seems strange that the legislation creating architectural review boards has generally been upheld by the courts. Here there is no real consensus. There are no meaningful standards. And yet the owner may be severely restricted in using his property because of a virtually unreviewable determination of "experts" who are neither guided by definite language nor by the settled customs of a trade.

A much more satisfactory way of handling this problem is through the creation of property owners' committees within a given development.[20] These committees ordinarily have the power to approve or disapprove designs in order to maintain a reasonable degree of structural uniformity. This is, perhaps, government by contract; but, at least, one who buys property within such a development voluntarily assumes the restrictions and thus is not subject to governmental controls imposed against his will. Another effective device in urban renewal projects is the imposition of controls through contracts between the redevelopers and the governmental agency involved. Again, the restrictions are voluntarily assumed and legal problems of delegation are avoided, except in the sense that the enabling legislation vests authority in the agency to impose controls.

It might be noted parenthetically that the federal government through the Housing and Home Finance Agency is affirmatively interested in good design. As Dr. Robert Weaver, the

Administrator of the Agency, puts it: "[the matter of design] involves taste, and it is sure to inspire and occasion heated controversies. HHFA has devoted much effort to emphasizing the importance of aesthetics in the development of our cities during the past three years. . . . The Federal Government cannot, and should not, establish standards of taste, but it does have a responsibility to encourage local communities to be concerned with design. This we have attempted to do. As a consequence, increasingly, urban renewal projects involve architectural competitions."[21]

Moral Taste

This heading may be inapt since morals basically are concerned with principles rather than preferences. However, in the case of writings where obscenity is an issue, an element of taste clearly is involved. This is perhaps why courts and legislatures have floundered for years in attempting to define obscenity in an intelligible way. Over twenty-five years ago I explored this problem[22] and I revisited it some time later.[23] The courts and the Congress have been concerned with the matter for well over a century, although the basic federal legislation was adopted in 1873. This legislation attempted to define obscenity by exhausting the synonyms for the word. The many early cases dealing with the statute are not enlightening. But in a number of recent opinions the Supreme Court of the United States has dealt with the matter with particular reference to the application of the free speech clause of the first amendment. As a part of their consideration the question of definiteness and certainty has arisen. It has been decided that the term "obscene" has meaning when properly defined by a court in instructions to the jury. The currently accepted standard, although there are widely differing views as to its application, is "whether to the average person, applying contemporary community standards, the dominating theme of the material taken as a whole appeals to prurient interest."[24] This means that if the publication makes people itch sexually it may be banned, obviously a clear standard for juries to apply.

The most recent case on the matter is *Jacobellis v. Ohio*.[25] There the court adhered to the *Roth* standard but the case is noteworthy because of the completely frank admission by several of the Justices that a definition of obscenity is virtually impossible.

The clearest statement is by Mr. Justice Stewart, who said, "I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[26] Mr. Chief Justice Warren would interpret "community" to mean the local group and would allow state courts considerable latitude in dealing with the problem. The same point of view was expressed by Mr. Justice Harlan. Both of their opinions were dissents.

The opinion of the Chief Justice is of particular interest since it refers to situations, such as the determination of negligence, in which the common law has left to juries the application of virtually undefinable terms. It may well be that this is the most practical solution of the problem in spite of the fact that constitutional issues are involved. Mr. Justice Brennan's view that it is the duty of the Court to exercise independent judgment because of the constitutional aspects of the cases is not discussed here, but a review of the decisions cited by him scarcely supports his extreme position.

Conclusions

It would seem that there should be no quarrel with the view that physical taste can be defined since regulations can be, and are, understood by the particular and limited group to whom they are addressed. Perhaps this is a key to the whole problem of standards. But if it is, standards are woefully lacking in the area of aesthetic taste. As a matter of fact, it is remarkable that the cases contain so little in the way of discussion of standards. As has been mentioned, the opinions are largely concerned with legislative discretion under the police power, and it seems to be assumed that the content of the police power is well understood. This might be true under the original conception of that power, but aesthetic considerations have been smuggled in, and as to those it is difficult to believe that either judges or juries, let alone the

persons subject to control, have any definite understanding. The result has been the vesting of virtually unlimited discretion in the hands of "experts" who themselves are unlikely to agree on any applicable standard.

As to obscenity, it seems that the courts have recognized that a social problem exists which must be dealt with, and thus have been content to allow the standards to be applied, or perhaps found, by juries under appropriate instructions. If we are to deal with this matter at all, this is probably the best way. Further, the view of the Chief Justice as to what is a "community" is more appealing than the position of the majority that, in effect, requires a jury to define an abstraction.

Can improved drafting techniques help in these cases? Probably only to a limited extent. But the general rule that draftsmen should be as precise as possible under the circumstances will certainly produce more satisfactory solutions.

NOTES

1. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
2. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
3. Nutting, *Congressional Delegations Since the Schechter Case,* 14 Miss. L.J. 350, 367 (1942).
4. Miller, *The Changing Role of Congress,* 50 A.B.A.J. 687, 688 (1964).
5. See generally 21 C.F.R. (1964).
6. *Cf.* 21 C.F.R. 19.500(a) (1964). "Cheddar Cheese, cheese, is the food prepared from milk and other ingredients specified in this section, by the procedure set forth in paragraph (b) of this section . . . . It contains not more than 39 percent of moisture, and its solids contain not less than 50 percent of milk fat as determined by the methods prescribed in paragraph (c) of this section." Paragraphs (b) and (c) are detailed descriptions of the process.
7. Buttfield v. Stranahan, 192 U.S. 470 (1904).
8. 29 Stat. 604 (1897).
9. 192 U.S. at 474–75.
10. *Id.* at 496.
11. 21 U.S.C. § 43 (1958).
12. 21 C.F.R. 281.23(b) (1964).
13. 21 C.F.R. 281.24 (1964).
14. See Nutting, *Institutional Research and Legislative Drafting,* 37 A.B.A.J. 929 (1951).
15. See, *e.g.,* Cusack v. City of Chicago, 242 U.S. 526 (1917).
16. 348 U.S. 26, 33 (1954).
17. Mass. Acts & Resolves 1955, ch. 601, § 4.
18. For a discussion of these laws see Reid v. Architectural Review Board

of the City of Cleveland Heights, 192 N.E.2d 74 (Ct. App., Cuyahoga Cty., Ohio, 1963); City of West Palm Beach v. State *ex rel.* Duffy, 158 Fla. 863, 30 So. 2d 491 (1947).

19. Reid v. Architectural Review Board of the City of Cleveland Heights, *supra* note 18, at 79. I am indebted for this citation and those in notes 17 and 18 to S. David Levy, Esq., who prepared a paper on the subject of Aesthetic Controls as a research project in the Graduate School of Public Law, The George Washington University.

20. See Haar, *Cases on Land-Use Planning* 622 (1959).

21. See Weaver, *The Urban Complex* 123, 124 (1964).

22. Nutting, *Definitive Standards in Federal Obscenity Legislation,* 22 Iowa L. Rev. 24 (1937).

23. Nutting, *Control of Objectionable Publications—A Drafting Problem?* 44 A.B.A.J. 175 (1958). See this and the article cited note 22, *supra,* for detailed documentation of what follows.

24. Roth v. United States, 354 U.S. 476, 489 (1957).

25. 378 U.S. 184 (1964).

26. *Id.* at 197.

The Uniform Post-Conviction Procedure Act: One State's Experience

THOMAS B. FINAN*

The substantial disparity between the scope and availability of the federal habeas corpus remedy and its various and more restricted counterparts on the state level has caused a deluge of petitions to the federal courts seeking to raise federal claims which were not adequately raised or heard in prior state court proceedings. The problem was especially acute in the state of Maryland, which had enacted the Uniform Post-Conviction Procedure Act. Attorney General Finan discusses the inadequacies of the Uniform Act as it has been applied by the Maryland courts and concludes that, because limitations on the availability of post-conviction relief are compelled by the language of the Uniform Act, only substantial revision can accomplish the purpose of affording a remedy equivalent to that offered in the federal courts.

A REVISION of Maryland's Uniform Post-Conviction Procedure Act (Md. Ann. Code art. 27, §§ 645A to 645J (Supp. 1964) and Md. R. Pro., subtit. BK) is needed to make the scope of state court collateral review of criminal convictions correspond more perfectly with the scope of review by the federal courts of the same convictions upon a state prisoner's petition for a writ of habeas corpus.† The problem is a serious one, generated by the wide disparity between the Supreme Court's recent decisions in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), and the case law theretofore written by the Maryland courts applying the Uniform Act.

While there is nothing in *Noia* and *Sain* expressly making them in any particular directly applicable to the states, this office nonetheless is of the opinion that these two cases shall have—indeed,

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† The needed revision has been made. Shortly before press time we received word of the enactment of a number of amendments to Maryland's "Uniform Act." However, we have resisted the temptation to change verb tenses and are printing Mr. Finan's comments as they were written, since the immediacy of the problem on a national scale is only slightly alleviated by Maryland's action.—Ed.

already have had—profound practical effects upon the administration of criminal justice in the courts of our state. As we grimly pointed out in *Midgett v. Warden,* 329 F.2d 185, 186 (4th Cir. 1964), if the states do not adjust their post-conviction procedures to harmonize with the doctrines of *Noia* and *Sain,* their judicial tribunals will be reduced to nothing but way stations along the prisoner's path to the federal district court. See *Wampler v. Warden,* 224 F. Supp. 37 (D. Md. 1963). Thus, we wish to avoid (a) the potential diminution of the effectiveness of the Maryland courts in dealing with the constitutional objections of state prisoners, (b) the pointless and unjustifiable squandering of time in disposing of these objections upon their merits in an adequate proceeding, and (c) the needless increase in the work load of the federal courts.

Legislation, we are convinced, is the only effective remedy for this situation—which already is difficult and soon, we fear, shall become intolerable. It is true that the Court of Appeals of Maryland, in a number of recent decisions, has taken certain steps to alleviate the problem. However, the problem is too vast, too complex, and too firmly rooted in the Uniform Act itself for a satisfactory resolution upon an *ad hoc,* case-by-case basis. That this is so and that the problem is widespread might easily be verified by consulting the periodic reports of the Administrative Office of the Courts of the United States. Federal habeas litigation is growing at an amazing rate, perhaps nowhere more rapidly than in Maryland.

This problem can be broken down into five parts.

1. *Issues Cognizable under the UPCPA.* Maryland courts heretofore have held that many constitutional questions are cognizable only on direct appeal and not under the UPCPA. See Merrill, *Federal Habeas Corpus and Maryland Post-Conviction Remedies,* 24 Md. L. Rev. 46 (1964). Recent decisions have ameliorated this problem, at least in part; however, the scope of the Uniform Act still remains uncertain. See *Hunt v. Warden,* 335 F.2d 936 (4th Cir. 1964). Because the Court of Appeals has taken a narrow view—and properly so—of the cases that have come before it since *Noia* and *Sain,* the UPCPA is being broadened slowly and only on a piecemeal basis. This, of course, involves a great many remands ("yo-yo review") and, consequently, a waste of much

judicial time and effort in a system the dockets of which are already quite clogged. Any legislation should cure this.

2. *Waiver.* The most immediate and serious difficulty under the Uniform Act is that of waiver and is very closely related to the problem of cognizability. Heretofore, the Court of Appeals has held that many issues, such as the voluntariness of confessions, because they could have been but were not raised on direct appeal, had been waived and, therefore, could not be adjudicated under the UPCPA. *Cheeseboro v. Warden,* 224 Md. 660, 168 A.2d 181 (1961); *but see Ledbetter v. Warden,* 234 Md. 643, 200 A.2d 81 (1964). The extent to which the Court of Appeals still adheres to this rule of automatic waiver cannot be conclusively stated, for their recent opinions in some instances appear to be contradictory. Compare *Plitt v. Director,* 234 Md. 602, 197 A.2d 252 (1964); *Elliott v. Warden,* 233 Md. 649, 197 A.2d 237 (1964); and *Gans v. Warden,* 233 Md. 626, 196 A.2d 632 (1964). What can be conclusively stated is that automatic waiver is firmly embedded in the UPCPA itself. Section 645A of article 27 specifically states that all questions which reasonably could have been but were not raised in a first petition under the UPCPA are waived. The test as to whether or not a question reasonably could have been raised in a first petition invariably has been considered by the Court of Appeals to be a procedural one, rather than a factual test, such as is suggested by *Noia.* And the only possible exception is to be found in that line of cases involving the retrospectivity of *Mapp v. Ohio,* 367 U.S. 643 (1961). See *Nichols v. Warden,* 232 Md. 663, 194 A.2d 444 (1963).

3. *Final Litigation and State Habeas Corpus.* The UPCPA provides that no question may be raised under that Act which has been "previously and finally litigated." Thus, the problem often arises in *federal* habeas corpus, under 28 U.S.C. § 2254, of whether a question raised in *state* habeas proceedings in the *nisi prius* courts—from which no appeal lies, Md. Ann. Code art. 42, § 6 (Supp. 1964)—has been finally litigated for purposes of precluding UPCPA review. *Rudolph v. Warden,* 217 F. Supp. 579 (D. Md. 1963). The Maryland courts have indicated, without so holding, that the answer to this should be in the affirmative. However, the sounder view, enforceable through legislation, would be to the contrary. Without collateral UPCPA review of *nisi prius*

proceedings in habeas corpus cases, the Court of Appeals would be left without the means to control needless restrictions which might be engrafted upon this ancient, yet still potent, remedy.

4. *Hearings under the UPCPA.* The UPCPA contains no provisions regarding the circumstances under which a hearing upon a petition brought thereunder must be held. Nor does it specify the form of such a hearing. This allows endless debate in federal habeas corpus proceedings as to whether or not Maryland's UPCPA hearings satisfy the tests laid down in *Townsend v. Sain, supra.* Legislation could make this debate unnecessary and could lay down sensible standards.

5. *Transcript of a Prisoner's Original Trial.* The UPCPA contains no provision stating under what circumstances the UPCPA court and the petitioning prisoner should be provided with a transcript of the prisoner's original trial. As a consequence, transcripts of original trials are almost never made available in UPCPA proceedings, unless one happened to have been prepared for purposes of a direct appeal. Substituted for the transcript is the prisoner's often inaccurate and seldom believed recollection of the circumstances of his conviction. This is an inexcusable example of false thrift, for the transcript invariably must be ordered when the prisoner finally files his habeas corpus petition in the federal district court.

These are the most serious of the many difficulties surrounding the current application of the UPCPA and the most grievous sources of its cacophonous clash with *Fay v. Noia, supra,* and *Townsend v. Sain, supra.*

One of the legislative proposals made thus far in Maryland has been that of simply repealing the UPCPA without the enactment of any substitute. This, because of the even more restrictive doctrines in Maryland's post-conviction law prior to the UPCPA's passage, we consider a cure worse than the ill.

A Suggested Solution

The following proposal, prepared by the Harvard Student Legislative Research Bureau, is a revision of the Uniform Post-Conviction Procedure Act in substance and in form. Like the 1965 Maryland amendments, which were based on an earlier Bureau draft, it deals with the problems of waiver, finality, and cognizability of issues and requires that a post-conviction hearing be held whenever a petition alleges facts which could entitle the petitioner to relief. Unlike the Maryland solution, it revises the form and structure of the Uniform Act. Its distinguishing characteristics are shorter paragraphs and clearer organization, with the attendant benefit that the separate considerations involved in granting a hearing and in dispensing relief are more obviously reflected.

A POST-CONVICTION PROCEDURE ACT

PART I. PURPOSE AND AVAILABILITY

SECTION 101. *Post-conviction procedure established; purpose; other procedures superseded.*

This Act establishes a post-conviction procedure for providing relief from convictions obtained and sentences imposed without due process of law. The procedure hereby established supersedes all common law and statutory procedures for the same purpose that exist when this statute takes effect, including habeas corpus and coram nobis. However, nothing in this Act limits the availability of remedies in the trial court or on direct appeal.

SECTION 102. *Eligibility for relief.*

To be eligible for relief under this Act, a person must initiate a proceeding by filing a petition under section 201 and must prove the following:

(a) that he has been convicted of a crime;

(b) that he is either incarcerated under a sentence of death or imprisonment, or on parole or probation;

(c) that his conviction or sentence violates the Constitution or laws of the United States or the constitution or laws of this state; and

(d) that the error resulting in his conviction and sentence has not been finally litigated or waived.

[alternative paragraph (c)]

[(c) that his conviction or sentence resulted from

(1) the introduction of evidence obtained pursuant to an unlawful arrest;

(2) the introduction of evidence obtained by an unconstitutional search and seizure;

(3) the introduction of a coerced confession into evidence;

(4) the introduction into evidence of a statement obtained in the absence of counsel at a time when representation is constitutionally required;

(5) the infringement of his privilege against self-incrimination under either federal or state law;

(6) the denial of his constitutional right to representation by competent counsel;

(7) a plea of guilty unlawfully induced;

(8) the unconstitutional suppression of evidence by the state;

(9) the unconstitutional use by the state of perjured testimony;

(10) the obstruction by state officials of petitioner's right of appeal;

(11) his being twice placed in jeopardy;

(12) the abridgment in any other way of any right guaranteed by the constitution or laws of this state or the Constitution or laws of the United States, including a right that was not recognized as existing at the time of the trial if the Constitution requires retrospective application of that right; or

(13) the unavailability at the time of the trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced; and]

SECTION 103. *When an issue is finally litigated or waived.*

(a) For the purposes of this Act, an issue is finally litigated if

(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue, and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling; or

(2) a court of appeals has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals; or

(3) the [highest court] of the state has ruled on the merits of the issue.

(b) For the purposes of this Act, an issue is waived if

(1) the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually

conducted, or in a prior proceeding actually initiated under this Act; and

(2) the petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.

(c) There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

PART II. INITIATION OF PROCEEDINGS

SECTION 201. *Petition.*

Any person who desires to obtain relief under this Act may initiate a post-conviction proceeding by filing a petition with the clerk of the court in which he was convicted. He may file a petition at any time. A petition must be in the following form:

(a) The petition must state that it is a Post-Conviction Procedure Act petition and must include the name of the petitioner, his place of confinement, if any, an identification of the proceedings in which the petitioner was convicted and the place of conviction, the date of the entry of judgment, the sentence imposed, the alleged error on which the petition is based, the relief desired, and an identification of all previous proceedings that the petitioner has taken to secure relief from his conviction or sentence.

(b) The petition must either include affidavits, records, and other supporting evidence, or state why they are not included.

(c) The petition need not include argument or citations and discussion of authorities.

(d) All facts within the personal knowledge of the petitioner must be set forth separately from other allegations of fact.

SECTION 202. *Docketing.*

Upon receipt of a petition seeking relief under this Act, the clerk of the court in which the petition is filed shall immediately docket the petition and promptly notify the court and the [state's attorney].

SECTION 203. *Amendment and withdrawal of petition.*

The court may grant leave to amend or withdraw the petition at any time. Amendment shall be freely allowed in order to achieve substantial justice. No petition may be dismissed for want of specificity unless the petitioner is first given an opportunity to clarify his petition.

SECTION 204. *Answer.*

The [state's attorney] shall respond by answer or motion within fifteen (15) days from the day the petition is docketed, or within such

time as the court orders. If the petition does not include records of the proceedings attacked therein, the respondent shall file with his answer the records or parts of records that are material to the questions raised in the petition.

PART III. HEARINGS

SECTION 301. *When hearing granted.*

If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding.

SECTION 302. *Scope of hearing.*

The hearing may extend only to the issues raised in the petition or answer.

SECTION 303. *Full and fair hearing required.*

The petitioner shall have a full and fair hearing on his petition. The court shall receive all evidence that is relevant and necessary to support the claims in the petition, including affidavits, depositions, oral testimony, certificate of the trial judge, and relevant and necessary portions of the transcripts of prior proceedings.

SECTION 304. *Evidence recorded.*

Evidence at the hearing shall be recorded.

SECTION 305. *Right to personal appearance.*

The petitioner has the right to appear in person at the hearing.

SECTION 306. *Order of the court.*

If the court finds in favor of the petitioner, it shall order appropriate relief and issue any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that are necessary and proper.

SECTION 307. *Final disposition of the petition.*

The order finally disposing of the petition shall state the grounds on which the case was determined and whether a federal or a state right

was presented and decided. This order constitutes a final judgment for purposes of review.

SECTION 308. *To whom copy of order sent.*

A copy of the order shall be sent to the petitioner, the petitioner's counsel of record, and the [administrative office] of the courts.

PART IV. RIGHT OF APPEAL

SECTION 401. *Who may appeal.*

The party aggrieved by an order under section 306 or section 307 may, within thirty days from the day on which the order is issued, apply to the [Court of Appeals] for leave to appeal from the order.

SECTION 402. *Contents of application for leave to appeal.*

An application for leave to appeal must be accompanied by a record which contains the petition, the [state's attorney's] answer or motion, and the order and statement of the court. In addition the [Court of Appeals], in its discretion or on motion by either party, may order a transcript of the post-conviction hearing certified to it as part of the record.

PART V. INDIGENTS

SECTION 501. *Right to record.*

If the court finds that the petitioner is unable to pay for a copy of the record of any trial court proceeding or appellate court proceeding that he seeks to attack under this Act, the court shall furnish him a certified copy of the record without charge.

SECTION 502. *Right to transcript.*

If a hearing is granted under section 301 and the court finds that the petitioner is unable to pay for a copy of the transcript of a proceeding that he seeks to attack under this Act, the court shall furnish him, without charge, a copy of such portions of the transcript as the petitioner certifies and the court finds to be relevant and necessary to support any allegation in the petition.

SECTION 503. *Right to counsel; costs of proceeding.*

If a hearing is granted under section 301 and the court finds that the petitioner is unable to pay the costs of the proceeding or to employ counsel, the court shall appoint counsel for him and provide for payment of the costs of the proceeding [by the appropriate authorities].

SECTION 504. *Right to counsel on appeal; costs of appeal.*

If an appeal is sought by the petitioner under section 401, and the [Court of Appeals] finds that the appeal is not frivolous and that the petitioner is unable to pay the costs of the appeal or to employ counsel, the [Court of Appeals] shall order the respondent to furnish the documents required to accompany the application for leave to appeal, shall appoint counsel for the petitioner, and shall provide for payment of the costs of the appeal [by the appropriate authorities].

PART VI. MISCELLANEOUS

SECTION 601. *Title.*

This Act may be cited as the Uniform Post-Conviction Procedure Act.

COMMENT

Post-conviction procedure has been a long-standing source of friction between state and federal courts. The friction arises from the fact that too often a state criminal proceeding does not afford the defendant an adequate opportunity to raise federal constitutional rights, with the result that his conviction may subsequently be subject to collateral attack. Very few states have extensive statutory post-conviction remedies. Indeed a good many states afford simply a common law habeas corpus proceeding, judicially expanded only to cover situations where the trial court lacked jurisdiction over the person or subject matter, and cases where the sentence imposed was in excess of the statutory maximum. See Brennan, *Federal Habeas Corpus and State Prisoners; An Exercise in Federalism*, 7 Utah L. Rev. 423 (1961). The inevitable result of this deficiency on the state level has been a continual flow of petitions from state prisoners to the federal courts, where federal rights not raised or waived at the trial may be litigated. 28 U.S.C. § 2241 (1958). Moreover, United States Supreme Court decisions handed down during the last two years have so broadened the scope of habeas corpus review on the federal level that the state standards, already narrower than their federal counterparts, are now so disparate that a deluge of petitions is pouring into the district courts.

The first significant statutory attempt to insure adequate provi-

sion for the hearing of federal claims raised by a defendant following a criminal conviction was the Illinois post-conviction act, Ill. Rev. Stat. ch. 38, §§ 122–1 to –7 (1964), adopted in 1949. During the year following its adoption, the number of habeas corpus petitions to the Illinois federal courts dropped from 209 to 61. This statute provided an important basis for the Uniform Post-Conviction Procedure Act which was drafted in 1955 by the National Conference of Commissioners on Uniform Laws in response to demands (in 1953) by the Committee on Habeas Corpus of the Conference of Chief Justices. The committee appointed by the Conference of Chief Justices had found that state procedures were restrictive, multifarious, and at variance with one another. It found further that a large part of the petitions which reached the federal courts were frivolous but owing to the scanty and occasionally unfathomable reports of the state hearings, the frivolity was not always apparent. The result was a phenomenal waste of judicial time.

Accordingly the Uniform Commissioners set out to correct these evils by providing a uniform and simple statutory remedy which would guarantee an adequate hearing of federal claims at the state level. Uniform Post-Conviction Procedure Act, 9B Unif. Laws Ann. 352. (The act was adopted in Oregon in 1959, Ore. Rev. Stat. §§ 138.510–.680 (Supp. 1963); Maryland in 1957, Md. Ann. Code art. 27, §§ 645A to 645J (Supp. 1964); and Arkansas in 1957, repealed in 1959. North Carolina has a similar statute which it enacted in 1951, N.C. Gen. Stat. §§ 15–217 to –222 (Supp. 1963). The act has recently been submitted to a number of state legislatures.) The statute supersedes such common law remedies as habeas corpus and coram nobis, and attempts to simplify the fulfillment of the federal requirement that all state remedies be exhausted. *Darr v. Burford,* 339 U.S. 200 (1950).

While the Uniform Post-Conviction Procedure Act represents a long stride towards clearing away the inadequate, obsolete, and conflicting remedies which existed in the states prior to 1955, experience has shown that it has several serious defects. These defects have been compounded, moreover, by two 1963 Supreme Court decisions, *Townsend v. Sain,* 372 U.S. 293 (1963), and *Fay v. Noia,* 372 U.S. 391 (1963). The former broadened tremendously the requirements that a defendant receive a full and fair hearing

on any federal claim, while the latter extended the waiver standard so that a petitioner could obtain a hearing in the federal courts, unless during the state court proceeding he had made an "intelligent and understanding" waiver of the federal constitutional right which he sought to raise by habeas corpus.

The impact of these decisions on the writ of habeas corpus has been equalled only by the pressure on the states to do something about the resulting disparity. In a flurry of law review articles, *e.g.*, Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461 (1961); Brennan, *supra;* Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. Rev. 78 (1964); and Bator, *Finality in the Criminal Law*, 76 Harv. L. Rev. 441 (1963); criticism has been directed at the narrowness and inadequacy of state post-conviction remedies in contrast to the ever-expanding federal standards. It has been urged that the states provide an adequate statutory means of assuring a full hearing on any federal claim raised in connection with a state criminal proceeding so as to relieve the federal courts of the great burdens which the Supreme Court in effect has placed upon them. Indeed, pleas have come from the Supreme Court itself as recently as January 18, 1965, in the case of *Henry v. Mississippi*, 379 U.S. 443 (1965):

> The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the states would look upon our decisions in *Fay v. Noia, supra,* and *Townsend v. Sain, supra,* as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims.

The Court emphasized the overcrowded federal dockets, burdened with relitigation of habeas corpus petitions which increased from 1,903 to 3,501 or 85% from the 1963 to the 1964 fiscal year.

The major criticisms of the 1955 Uniform Act have focused on six aspects of the trial and post-conviction proceedings which have presented obstacles to constitutional claims: 1) What constitutes a waiver? 2) When is an issue "finally litigated"; *i.e.*, at what point

during the trial and appellate procedures can the court be said to have provided a full and fair hearing and rendered an adequate and binding decision on the merits? 3) What is the scope of the post-conviction hearing and what must a petition contain? 4) What issues are cognizable at the hearing? 5) Must the court keep a detailed record or transcript of the post-conviction hearing? 6) What are the requirements for providing counsel to indigent petitioners? It is to these shortcomings of the 1955 act that the statute here proposed is addressed.

This statute represents a considerable revision and expansion of the 1955 act, with a view towards clarification and additional protection of constitutional rights. The objective is to spell out precisely what the courts and the parties must do so that constitutional claims can be properly raised on the state level and a hearing can be given commensurate in all respects with the federal standards. The desired result is to minimize the amount of relitigation in the federal courts.

In the proposed statute, therefore, the right to counsel is secured at both the post-conviction hearing and the appeal. A transcript must be kept and a record made available. A broad scope is explicitly prescribed for the hearing, and the contents of the petition are itemized and kept simple. This latter provision gains particular importance when it is realized that most post-conviction petitions are drafted either by the petitioners themselves or by jail-house lawyers whose ability to interpret a complicated or vague statute is drastically limited. The clumsy work product which is the frequent result wastes considerable court time. As a consequence, amendment of the petition is allowed so that the petitioner is given every opportunity to state his case clearly.

Perhaps the major stumbling blocks in a post-conviction proceeding are the waiver and finality standards. This statute adopts the requirement of a "knowing and understanding" waiver coupled with a presumption that any failure to raise a claim at a timely point in prior proceedings was "knowing and understanding." In cases where information concerning the denial of a federal claim does not become available until after the trial and after the appeal time has lapsed, there is generally no problem as to waiver. A defendant cannot be said to have waived a claim either that did not exist or that he could not have reasonably known to exist. The

penumbral area is the so-called "negligent waiver" in which the petitioner may have had cause to know of a claim that he has failed to raise. A large number of state courts summarily dismiss petitions under such circumstances, only to have the federal court later remand and require a hearing to determine whether in fact the petitioner was aware of his claim and knowingly failed to raise it on appeal.

In addition to clarifying the definitions of waiver, the statute also requires that, in order for post-conviction relief to be barred on the grounds that the petitioner's claim has already been finally litigated at the trial or on appeal, the petitioner must have had a hearing and ruling on the merits. This standard, and that of the provision for the scope of the post-conviction hearing itself, is guided by the Supreme Court's opinion in *Townsend v. Sain, supra.*

The question of what issues the court must take cognizance of may be broadly answered in terms of any denial of rights under the United States Constitution or laws or the state constitution or laws. This is provided in paragraph 102(c). However, a few jurisdictions, notably Maryland, which adopted a slightly modified form of the Uniform Post-Conviction Procedure Act in 1958, have experienced a restrictive judicial construction. Therefore if the courts are in doubt as to particular constitutional questions cognizable under the act, the alternative paragraph (c) incorporating an open-ended list of such issues may be enacted.

Perhaps the most common area of doubt as to the cognizability of issues is presented in the declaration by the Supreme Court of a constitutional right, as in *Gideon v. Wainwright,* 372 U.S. 335 (1963). Is it or is it not retroactively binding on the states? If the Supreme Court fails to state clearly whether it is or is not (and there is some difference of opinion as to *Gideon*), the state must hear a petitioner's claim. The legislature can require the state courts to grant a hearing, but they, of course, cannot in advance direct the court's decision. Thus paragraph 102(c) on cognizable issues is broadly open. Also the hearing is open to any claim that a petitioner's conviction is now constitutionally invalid, even though judicial interpretation of the Constitution did not so hold at the time of the trial.

The precise language and provisions used to obtain the desired

objective of bringing the scope and standards of state post-conviction procedure into harmony with those of the federal courts is discussed below in a section-by-section analysis of the statute.

PART I. PURPOSE AND AVAILABILITY

SECTION 101. *Post-conviction procedure established, etc.*

This section states in broad language the purpose and scope of the post-conviction remedy. Because the statute is designed to supersede any prior existing state post-conviction procedures, its enactment should be accompanied by the repeal of any such other remedy. It should be noted that considerable complications arise when a state elects to retain the existing writ of habeas corpus while enacting the Post-Conviction Procedure Act alongside, as was done in Maryland in 1958. This involves problems of appeal, for there is often no appeal from a habeas corpus proceeding whereas there is such right under this act. Needless to say, under such a dual-alternative system of law, a full hearing under one proceeding may, under the waiver provision of this part, bar relief under the alternative proceeding.

SECTION 102. *Eligibility for relief.*

This section sets forth the availability of the remedy and thereby further defines the scope. The coverage is similar to that of the federal statute, 28 U.S.C. § 2255. Any claim that a conviction or sentence was imposed in violation of the United States Constitution or laws or state constitution or laws may be raised under this statute. The substance is therefore not essentially different from section 1 of the 1955 act.

A new provision in paragraph (b) secures the availability of relief under this statute notwithstanding the fact that the petitioner is on parole or probation. There has been a division of authority on this issue among the states, with perhaps a prevalence against affording relief. See *In re Herrera,* 23 Cal. 2d 206, 143 P.2d 345 (1943). The federal standard is otherwise. *James v. Cunningham,* 371 U.S. 236 (1963). It makes little sense to deny relief to a paroled petitioner on the state level if it will be granted subsequently under the federal law.

Alternate paragraph 102(c) is a new provision which spells out

categories of constitutional claims which are cognizable under this act. It is an optional provision which is recommended only for states where judicial interpretation of the broad statement of cognizability which appears in the recommended 102(c) is persistently narrower than federal cognizability. The categories are phrased in broad constitutional terms, and the list is explicitly open-ended so as to permit a court to consider at a future date issues which do not today provide a basis for relief. Thus the state standards are susceptible to expansion or contraction in harmony with the pronouncements of the United States Supreme Court. Again, the list is indicative and not exhaustive. A commentary on each issue follows.

(1) *Evidence obtained through an unlawful arrest.* The federal rule, which is generally effective in the states as well, is that an unlawful arrest by itself is not a ground for post-conviction relief. It is only when the fruits of the arrest are used against the prisoner at his trial that the legality of the arrest becomes material. An arrest may be made only on "probable cause," and the sufficiency of the evidence to establish such probable cause determines the legality of an arrest. On this legality may well depend the lawfulness of a search and seizure or the admissibility at the trial of statements elicited incident to the arrest.

(2) *Search and seizure.* As a result of the Supreme Court decision in *Mapp. v. Ohio,* 367 U.S. 643 (1961), evidence seized during an unlawful search and seizure is inadmissible in state proceedings. This is a federal constitutional right which is available to state prisoners at their trials, and should, therefore, be cognizable at a post-conviction proceeding.

(3) *Coerced confessions.* The act provides as a ground upon which petitioners may demand a hearing the allegation that his conviction may have resulted from the introduction into evidence of a coerced confession. The Supreme Court has held that the voluntariness of a coerced confession is determined by whether or not the defendant's will was overborne at the time he confessed and not, as some states have held, on its probable truth or falsity. *Rogers v. Richmond,* 365 U.S. 534 (1961); *Lynumn v. Illinois,* 372 U.S. 528 (1963); *Townsend v. Sain,* 372 U.S. 293

(1963); *Haynes v. Washington,* 373 U.S. 503 (1963). These Supreme Court decisions are binding on the states through the fourteenth amendment, and should be recognized in the state proceedings in order to avoid later reversal in the federal courts.

(4) *Right to Counsel.* The decision in *Gideon v. Wainwright, supra,* and *Escobedo v. Illinois,* 378 U.S. 478 (1964), have greatly expanded the sixth amendment requirement of right to counsel as applied to the states through the fourteenth amendment. A large number of habeas corpus petitions are the result of a denial of right to counsel or a failure on the part of the court or magistrate to inform a defendant of his right to counsel. Here again, relitigation can be avoided only by making the state procedure coextensive with the federal rule.

(5) *Self-incrimination.* The Supreme Court has recently held that the fourteenth amendment extends to state proceedings a defendant's privilege against self-incrimination guaranteed on the federal level by the fifth amendment. *Molloy v. Hogan,* 378 U.S. 1 (1964).

(6) *Competent Counsel.* Some states have not only required representation by counsel, but they also have added that the counsel must be reasonably competent, a claim which has been vindicated in the federal courts. See, *e.g., Bowler v. Warden,* 236 F. Supp. 400 (D. Md. 1964). The best view on this is that a lawyer who is licensed to practice by the bar of any state is presumed competent unless such a presumption is overturned by a significant showing of evidence to the contrary. Needless to say a defendant assumes the risk of petty errors or wrong guesses on the part of his lawyer; the problem generally arises only when a court-appointed lawyer has had manifestly insufficient time to prepare his case, or where his interests are antagonistic to those of his client. The requirement of competence does not apply to such pretrial stages as arraignment or prearraignment questioning. At that stage, the requirement is merely that the accused shall have the right to call a lawyer—any lawyer he chooses.

(7) *Plea of guilty wrongfully induced.* Where a state official wrongfully induces a plea of guilty, the federal courts allow the conviction to be collaterally attacked.

(8) *Suppression by state of exculpatory evidence.* Collateral relief has also been afforded when the state has suppressed evidence tending to exculpate the defendant. Such evidence must be substantial, yet the suppression need not be intentional.

(9) *Use of perjured testimony by the state.* Where the state knowingly uses perjured testimony, or where the use is unknowing and the Constitution forbids it, a federal court may invalidate a conviction which the court finds to have been the product of such a use.

(10) *Interference with appeal by the state.* When a state official obstructs or interferes with the right of appeal of one convicted of a crime, collateral relief is available in the federal courts. This issue is related to the question of waiver, discussed below.

(11) *Double jeopardy.* While the constitutional provision against double jeopardy is not presently applicable to the states through the fourteenth amendment, *Palko v. Connecticut,* 302 U.S. 319 (1937), nearly every state has a constitutional or statutory requirement that a defendant shall not be twice placed in jeopardy for the same offence. A few states simply incorporate the common law prohibition. Some divergence does arise as to the extent of the double jeopardy ban. For example, there is a split of authority among the states as to whether an appeal by the state amounts to double jeopardy. The most frequently allowed appeal by the states is in connection with a post-conviction hearing. See discussion of section 401, *infra.* In any event the protection against double jeopardy is accepted as being of such a fundamental nature, *Palko* to the contrary, that a provision allowing its recognition under this act seems warranted in nearly all states.

(12) *Retrospectivity.* This provision secures to a petitioner the right to a hearing on a claim that his conviction, lawful at the time it was rendered, has become unlawful because of a later Supreme Court decision that at least arguably operates retrospectively. The act recognizes that such a decision may void a prior conviction, but only where two conditions are met: first, the newly recognized constitutional right must apply to the facts alleged in the petition; second, the court must decide that the Supreme

Court's decision does in fact operate retrospectively. If only a prospective application is found to be part of the decision, then a court in a post-conviction hearing need never reach the question as to whether the facts of the case support the claim for relief. If the facts do not support the claim, the court is not required to decide the issue of retrospectivity. However, if the court, in refusing to grant a hearing, decides that the constitutional decision upon which the petition is predicated does not provide for retrospective application, then this denial is subject to review under section 401 of this act.

(13) *Newly discovered evidence.* A large number of state courts have rejected a claim that newly discovered evidence is a ground for post-conviction relief. However the cognizability of an allegation of newly discovered evidence tending to acquit a federal prisoner is well established in the federal courts. *United States v. Rutkin,* 208 F.2d 647, 649 (3d Cir. 1953) (dictum). Consistent with the statute's purpose of equating state and federal scope of review, this issue is allowed to be raised.

Section 102(d) authorizes the raising of a claim that a conviction or sentence is invalid provided that the alleged error resulting in his conviction and sentence has not been "finally litigated." The purpose of this clause is that once a petitioner has already raised an issue and a court has rendered a judgment on the merits, there is no reason to provide him with a second day in court, aside from direct appeal. Indeed there are obvious policy reasons against allowing the post-conviction remedy to afford such relitigation in that it would amount to a duplication, or the substitution of a post-conviction remedy for appellate relief, without regard to the statute of limitations. The defendant could wait until after witnesses and evidence against him have disappeared and then reopen the trial. This would seriously undermine not only the finality of a conviction but the integrity of the criminal trial.

SECTION 103. *When an issue is finally litigated or waived.*

The 1955 act failed to incorporate a definition of what is "finally litigated," with the result that many state courts, seeking to minimize the number of new trials given to petitioners already convicted and sentenced, applied the requirement of final litiga-

tion as a forfeiture. They refused to grant relief where the issue had been raised and did not look further into the disposition or the nature of the hearing afforded. Paragraph 103(a) supplies a definition.

Under this act, an issue is considered finally litigated if either of three alternatives occur. The first alternative includes three elements, all of which are essential to achieve the final litigation of an issue: a) the court of original jurisdiction must have rendered a decision on the merits, b) the period of time for an appeal from that determination must have expired, and c) there must have been an effective waiver of the right to appeal that issue. To require an appellate court to decide the issue on the merits as a prerequisite to finality on an issue would place too great a burden on that court. Where petitioner has raised an issue and has received judgment on the merits and knowingly fails to appeal, this is final litigation. Secondly and thirdly, if a court of appeals or the highest state court has decided the issue on the merits, that decision is binding and constitutes final litigation if no further appeal is possible.

Post-conviction relief is not available where an issue has been "waived," as stated in section 102(d). A serious defect in the existing state practice is the ambiguity surrounding the concept of waiver. Paragraph 103(b) is a definition of "waiver." The 1955 act contains no definition. (The 1955 act in section 8 does include a provision for waiver of claims not raised in an initial petition under the Post-Conviction Act, but this contains no definition; nor does it deal with a claim which arguably could or should have been raised at the trial or on appeal. The substance of section 8 of the 1955 act is incorporated in this paragraph.) The states manage to find a waiver in a large number of cases where the broader federal standard is likely to vindicate a petitioner's contention that in fact there was no waiver. Here again, this statute seeks to remove the existing ambiguity and inconsistency with a definition based on the federal rule.

Waiver is defined in this act to accord with recent Supreme Court decisions, particularly *Fay v. Noia, supra.* Prior to these decisions, many state courts have held that if certain issues are not raised at the trial or on direct appeal, they are waived and cannot be raised in a post-conviction proceeding. However, in

Fay v. Noia, the Supreme Court held that to constitute a waiver, there must be an intentional relinquishment of a known right or privilege. The Supreme Court also required a deliberate by-passing of the state procedures to establish an effective waiver.

This statute applies the "intelligent and understanding" standard of waiver that has been used in recent federal habeas corpus cases. *Carnley v. Cochran*, 369 U.S. 506 (1962); *Moore v. Michigan*, 355 U.S. 155, 162 (1957); *Wright v. Dickson*, 336 F.2d 878, 883 (9th Cir. 1964). This definition of waiver is made applicable to the entire hierarchy of state criminal proceedings (proceedings before the trial, at the trial, on direct appeal, in a habeas corpus proceeding, in a post-conviction proceeding, etc.). Failure to seek a habeas corpus remedy does not constitute waiver of any issue. It is only when an issue is not raised during a habeas corpus proceeding actually held that the question of waiver arises.

This definition does leave open the possibility of excusing the waiver because of extraordinary circumstances. Such an exception was mentioned by the Supreme Court in *Fay v. Noia*. It would be to the prisoner's benefit to show such extraordinary circumstances, and he is the person most likely to have knowledge of them. Thus, the burden of proof as to the presence of extraordinary circumstances to excuse an otherwise valid waiver is placed on the petitioner.

The actual fact of an intelligent and understanding waiver will probably be difficult, if not impossible, to prove on the part of the state. For this reason, and to prevent the success of mere assertions of no waiver by petitioners, there is a presumption, which is rebuttable, that if an issue was not raised, it was intelligently and understandingly waived. Furthermore, this presumption eliminates possible confusion which might arise from a negligent waiver.

A final consideration has been the possibility of a statutory limitation on the period following petitioner's awareness of a claim which may be raised after the expiration of the time for appeal. The suggestion is that once a petitioner knows he has a claim, he should not be allowed to wait indefinitely, until a new trial is virtually impossible owing to the disappearance of evidence, before filing a petition. While this suggestion reflects a desirable policy, there are distinct problems of proving the time of knowledge of the claim, especially where a "knowing and

understanding" waiver is required. Even if the waiver is determined by such a standard as the time at which the claim became open to him, any statute of limitations at the state level, fixing the time within which a petition must be filed, will in all likelihood fail for the simple reason that there is no such limitation at the federal level. A petition barred by a state statute of limitations would simply go to the district court—precisely the result which this act seeks to avoid. Thus until a federal time limitation is enacted, a statute of limitations on a state proceeding is not likely to be helpful.

It should be noted that an allegation in the state's answer that an issue has been waived or finally litigated does not bar petitioner from a hearing. On the contrary, this is a question for the determination of the court. Unless waiver or final litigation appear conclusively from the petition or attached evidence, the court must grant a hearing to determine whether an issue has in fact been waived or finally litigated. A significant consequence of this feature is that, should petitioner subsequently file a habeas corpus petition with a federal court, the state court will have rendered a decision pursuant to a hearing on the issue of waiver or final litigation. The federal court will be spared the burden of affording a new hearing, since under this act the state standards are identical with the federal standards.

Part II. Initiation of Proceedings

Section 201. *Petition.*

This section describes in considerable detail the nature and content of the petition. As such it represents a major expansion and elaboration upon section 4 and part of section 3 of the 1955 act. An effort has been made to remove the considerable inherent ambiguity under the 1955 act and under nearly all existing state remedies. Because most petitions are the unskilled work of convicts or jail-house lawyers, there are strong policy arguments for telling these petitioners precisely what they should include, particularly in view of the fact that an unsuccessful petition may be dismissed with prejudice.

Although under paragraph (b) the petitioner may submit certified copies of the records of prior proceedings, the burden of in-

cluding these items when petitioner fails to do so is placed on the respondent under section 204. To require the petitioner to obtain copies of the records is impractical from his standpoint, since some state court clerks are reluctant to provide such records. The federal statute, 28 U.S.C. § 2249, which places this function on the respondent (generally the state's attorney), has apparently worked well and is therefore incorporated into this act.

The term "record" as used in this statute does not include a transcript. A petitioner may state that certain portions of the transcript are relevant evidence in support of his case and these may be submitted in evidence pursuant to section 303. See also section 502.

No statutory provision is included for the situations in which a record or transcript is not available, owing to loss, omission, or death of a stenographer. The law is not settled as to what circumstances warrant a new trial where no record is available. See *People v. Fearon,* 13 N.Y.2d 59, 242 N.Y.S.2d 33 (1963), and *People v. Adams,* 255 N.Y.S.2d 339 (App. Div. 1964). The statute leaves the question open to judicial consideration in light of the standards set out in section 102, *supra.*

SECTION 202. *Docketing.*

Prompt docketing and notice to the court and the state's attorney are required under this section.

SECTION 203. *Amendment and withdrawal of petition.*

The section sets forth the policy of free amendment of the petition. If a petitioner is justly entitled to relief, his claim should not be obscured or obliterated by his inability to articulate it or to give it proper form. More particularly it is proposed that no claim be dismissed for want of specificity until the petitioner is first given the chance to amend and thereby clarify his allegations. A by-product of this free amendment provision would be the encouragement of court-appointed counsel to amend the petition originally filed by the petitioner himself or a jail-house lawyer.

SECTION 204. *Answer.*

As stated above, the respondent must submit records of prior proceedings when the petitioner fails to submit them. The fifteen-

day period within which an answer must be filed may be altered at the discretion of the legislature.

PART III. HEARINGS

SECTION 301. *When hearing granted.*

The sections in part III represent a vast expansion of section 7 of the 1955 act, which lacks guidelines as to when a hearing should be granted and what its scope should be. The lack of such standards has long plagued post-conviction hearings.

Because a petition under this act may be dismissed with prejudice, or a subsequent petition may be barred by waiver, it is desirable that the petitioner be given every opportunity to present his case. Therefore he is denied a hearing only when his claim is frivolous and without evidentiary support, or when the allegations, even if proven, would not entitle him to relief. It is provided, however, that the court need not grant a hearing on an issue as to which a full and fair hearing has already been afforded at the trial. This avoids useless relitigation.

SECTION 302. *Scope of hearing.*

A very broad scope is allowed for the hearing, except that a petitioner is not allowed to raise issues not duly raised in his petition. Even this limitation is mitigated by the fact that the court may authorize amendment of the petition at any time.

SECTION 303. *Full and fair hearing required.*

In keeping with the broad scope of the hearing, the phrase "full and fair," reflecting intentionally the standard of *Townsend v. Sain, supra,* is incorporated. In addition to the more obvious items which may be introduced, it is provided that a certificate by the trial judge is admissible in evidence, as is currently provided under the federal habeas corpus rules. 28 U.S.C. § 2245 (1958).

SECTION 304. *Evidence recorded.*

Perhaps the most serious impediment to proper review of a hearing has been the absence of a complete record of the evidence considered. This section incorporates the requirement that the court make such a record.

SECTION 305. *Right to personal appearance.*

The petitioner is given the right to appear personally at his hearing. Under existing law this is usually discretionary with the court. This hearing is generally a petitioner's last chance. His petition may be dismissed with prejudice, possibly owing to an ambiguity in the petition which is apparent neither to the court nor to petitioner's counsel, who in many cases is appointed by the court. In such a case the unarticulated issue may be clear in petitioner's mind. Because the petition may be clarified by amendment, the petitioner has a vital interest in being present, and this interest should be protected.

A rare problem arises when the petitioner is a prisoner in one state and seeks to attack a conviction in another state where he will subsequently serve a sentence. Because the latter state has no jurisdiction over a prisoner in the former state, the petitioner may be denied the right to appear at his post-conviction hearing unless the state which holds him in custody consents to his release. The state enacting a post-conviction procedure act can provide that its own prisoners be released for hearings in another state, but it can obtain reciprocal treatment only if there is corresponding legislation in the other state, or if there is a mutual agreement between the states.

SECTION 306. *Order of the court.*

This section, like its predecessor in section 7 of the 1955 act, allows the court considerable latitude in its disposition of the case.

SECTION 307. *Final disposition of the petition.*

The reasons for the decision must be clearly stated. Likewise the court must state whether or not a federal right was presented and decided. These provisions are intended to facilitate subsequent review.

SECTION 308. *To whom copy of order sent.*

This section gives notice of the court's order to the parties involved.

PART IV. RIGHT OF APPEAL

SECTION 401. *Who may appeal.*

This section allows an appeal by either party to the post-convic-

tion hearing. The legislature should designate the court or courts to which the appeal should be taken. It may also wish to alter the relatively short thirty-day period of limitations within which leave to appeal must be sought.

SECTION 402. *Contents of application for leave to appeal.*

The content of the record for such an appeal is stated, and it is further provided that the appellate court may in its discretion or on motion by either party have the transcript of the post-conviction hearing included as part of the record on appeal. Without such a transcript, only the conclusions of law of the judge at the post-conviction hearing, and not the factual evidence, can be evaluated.

PART V. INDIGENTS

SECTION 501. *Right to record.*

An indigent petitioner may obtain a copy of the record of his trial without charge. It is expected that such expense will be defrayed by the political subdivision in which judgment was rendered. Of course the requirement of furnishing a copy of the record is satisfied for the purpose of this section if, when petitioner fails to obtain a copy and attach it to his petition, the copy is furnished by the respondent.

SECTION 502. *Right to transcript.*

It is provided in section 303 that portions of the transcript of petitioner's trial are admissible as evidence at the hearing. The cost of getting a transcript often runs to several hundred dollars. It is needlessly wasteful to allow the petitioner an entire transcript when perhaps only a few sentences are relevant. It would therefore seem appropriate to fix some sort of limitation on the length of the portions allowable; otherwise every petitioner would as a matter of course demand the entire transcript. The standard here adopted is "relevant and necessary to support any allegation." The portions of the transcript which the petitioner deems relevant and necessary could be pared down by the court to exclude those petitions which are clearly irrelevant and unnecessary to the proceedings. Generally any evidence tending to support petitioner's allegations is admissible.

The statute does not contain explicit standards for determining the content and extent of the transcript because the Supreme Court itself is not clear on this. It logically follows that the court could and should have some discretion in this area, which the proposed draft does allow. Further, a specific provision might conflict with a future decision of the Supreme Court. If the Supreme Court at any later date declares that there is a constitutional right to obtain a copy of the transcript in its entirety, as suggested in *Hardy v. United States,* 375 U.S. 277 (1964), the standard proposed in this statute would still be valid, since the Supreme Court would simply have declared in effect that in all cases the entire transcript is relevant and necessary.

SECTION 503. *Right to counsel; costs of proceeding.*

This provision secures to an indigent petitioner the right to counsel at the post-conviction hearing, as provided in section 5 of the 1955 act.

SECTION 504. *Right to counsel on appeal; costs of appeal.*

The right to counsel is here specifically extended to appellate proceedings. This section expresses the policy merely suggested in the 1955 act that counsel should be provided on appeal as well as at the hearing. The appellate review is a crucial time for a petitioner, and the lack of counsel, a severe handicap in any proceeding, would be quite detrimental where the issues on appeal are narrowly and technically drawn. The costs of the appeal itself, including the procurement of relevant documents, are to be borne by the appropriate state authorities.

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A State Statute to Create The Office of Ombudsman

This statute establishes the office of Ombudsman, or commissioner of investigation. The office, new to the United States, has been the object of increasing attention here because of its effective operation in Scandinavia and New Zealand. The Ombudsman, acting on citizens' complaints or on his own initiative, may examine the acts of the ever-growing administrative agencies, probing to find what injustices should be remedied and what procedures should be improved. As liaison between citizen, agency, and legislature, he may publicize his recommendations to help bring to state government long-sought standards of fairness and efficiency.

I. Introduction

With the vastly expanded need for government services, government agencies face a serious dilemma in trying to satisfy two conflicting obligations. In decision-making, there is an obligation to those immediately involved to consider carefully the facts and circumstances of each case. At the same time, there is an obligation to the public to handle each problem with a minimum of resources so that the agency can fulfill all its responsibilities—an obligation which can be met only by standardizing procedures and minimizing differences to allow speedy disposition of problems. Though more staff would often help, increases in size bring substantial organizational problems of their own, and agencies develop "blind spots" which make it difficult for them to evaluate critically and improve their rules and procedures.

The difficulties arising from this dilemma can be divided into three types: nonrecurring injury to an individual or group; recurring, systematic injury to a class of individuals; and injury to the general public. The first type of problem involves isolated instances of unfair treatment of an individual or group. It may be the result of willful injustice, legal or illegal. Usually it is the result of oversight, inadequate investigation of the facts, even simple clerical error. Such cases usually affect only a single individual. They have virtually no public significance since they are

not caused by inadequate substantive rules. Yet they should be rectified.

The second type of case involves recurring, systematic harm to a class of persons as a result of agency or statutory policy. Remedy in the courts may be too costly; or the rule, though unfair, may be within the statutory discretion of the agency. Those injured may be unaware that others in a similar situation are also being treated unfairly. And legislative action may be politically impossible. Such situations often arise where an overburdened agency, to save resources, adopts a general rule instead of examining each case on its merits.

The third problem is harm to the general public. This comes about when an agency, because of unsatisfactory procedures, is unable to handle all matters awaiting decision. This problem often arises from insufficient opportunity for the heads of an agency, or anyone else, to review present rules and methods in the light of new developments within and without the agency. The effect of these inadequacies often is to make an agency less capable of acting in the full area of its jurisdiction. Because of misallocation or under-utilization of resources, pressing problems are ignored.

II. Differing Conceptions of the Office

Differing views of the type of problem with which the Ombudsman should be primarily concerned lead to giving the office various powers. If nonrecurring injustice is the major concern, the Ombudsman's function becomes one of a "court of last resort," and he should be given power to force reconsideration of any decision he thinks erroneous and to demand action from reluctant officials. On the other hand, if the central concerns are seen as systematic injury to groups and harm to the general public, other powers are needed. The Ombudsman should be able to recommend administrative or statutory changes to eliminate fixed rules which unnecessarily ignore relevant distinctions or discriminate against disadvantaged groups. He should be a legal and administrative expert with access to all relevant information, one who can deal directly with the agencies on problems of organization and allocation of resources and responsibility. The choice between these alternatives will also affect the number and type of complaints presented to the Ombudsman.

This statute focuses on the second and third problem areas. The first area is less significant by its nature since no general improvement will result from rectification of the particular error. The present availability of administrative and judicial review protects against most of these injuries, and many statutes make it impossible for an agency to reopen its proceedings even if the Ombudsman does demonstrate that a nonrecurring type of error was committed. This statute does not confer powers to alter final administrative decisions.

The significant need of government today is for an office devoted to improving procedures, both to protect interests that are being intentionally or unintentionally ignored and to find more efficient ways of using government time and energy. To help meet this need the Ombudsman must have a few basic powers: ability to choose among complaints, investigating most intensively the most significant; capacity to act on his own initiative where appropriate; power to investigate thoroughly, so recommendations can be based on all relevant facts; and authority to recommend and publicize desirable changes.

Though the Ombudsman is most concerned with systematic injury and harm to the public, he will, in the course of investigating complaints, find and suggest remedies for many cases of nonrecurring injury. It is only through investigation of all reasonable complaints that the Ombudsman will find problems of more general concern. The great value of this office lies in its ability to serve these independent yet interrelated functions effectively.

III. The Work of the Ombudsman

The premise on which the office of Ombudsman is based is that an independent investigator with wide access to official information, acting on individual complaints, can improve the operations of government by bringing to official and public attention the errors and weaknesses of government agencies. The following analysis of how the Ombudsman would handle the problems which have been mentioned will give a clearer picture of the nature of the office.

Although he can act on his own initiative, the Ombudsman's role usually begins with his receipt of a complaint protesting the action of a particular agency or official. As a general rule he will

not investigate a complaint until all other legal remedies have been exhausted, though he may look into the matter earlier if circumstances warrant. Most complaints can be dealt with simply by reference to the appropriate person with a request for an explanation, and many more will be completely unfounded on either their facts or appropriate law. (From 1955 to 1959, the Danish Ombudsman received about 4,400 complaints, of which only 1,600 merited investigation. Only 10 to 15 percent of those investigated resulted in critical reports or recommendations. Hurwitz, *Denmark's Ombudsman,* 1961 Wis. L. Rev. 169, 179.) Of those complaints referred to agencies, a large percentage will appear unjustified once the agency presents its side of the story.

Of the surviving complaints, a substantial number will be problems of nonrecurring injustice, and merely calling the agency's attention to them might result in immediate remedial action if the agency is not foreclosed by law from acting. The following is a typical case:

> Case No. 169 (Customs Department)
> The complainant had applied for a no-remittance license for the importation of a business motorcar, but the license was refused. When I referred the matter to the Department it was found that the refusal had been due to a mistake within the Department, and the license was granted. (This case and others *infra* are taken from the Case Notes in the *Report of the Ombudsman for the Six Months Ended March 31, 1963* presented to the New Zealand House of Representatives May 1, 1963.)

The Ombudsman has no power to alter any administrative or executive decision himself, but his prestige and power of publicity will assure him a sympathetic hearing by agency officials. Furthermore, there will be a willingness to act on his suggestion which might not be accorded to members of the public. Such nonrecurring problems are of little public interest and would involve no general publicity, unless the injustice were intentional. In that case the Ombudsman would report the matter to the appropriate authorities, if any, for disciplinary action. He has no power to punish or to order punishment on his own authority.

Occasionally a series of complaints about the same practice or a single complaint claiming continuing discrimination will bring the Ombudsman's attention to a situation of recurring, systematic

injury. In such situations the Ombudsman would take the matter to the agency, pointing out that the agency rule harms some group, and suggesting a way to better accommodate or protect the interests of all parties. By tactful use of his skill and authority, the Ombudsman can develop a good working relationship with agency officials, helping them provide more equitable treatment to various individuals and groups. If the agency is reluctant to make improvements, the Ombudsman may go to the press or suggest remedial action to the Governor and the legislature.

Sometimes on complaint or on his own initiative the Ombudsman will find a situation involving potential harm to the general public due to inefficiency or inadequate provision for a potential problem:

> Case No. 19 (Department of Internal Affairs)
>
> The complainants had requested the Minister to take certain action regarding representation on a local authority. The Minister was advised by the Department that the local authority had acted in accordance with specified provisions of the statute concerned. It was alleged by the complainants that the local authority had not acted in accordance with these provisions.
>
> My investigation revealed that the Department's advice to the Minister had been based on sources other than the local authority's minutes, and that in fact the specified provision had not been complied with. However, the mistaken advice had not been a material factor in the Minister's decision.
>
> I recommended to the Department that where proceedings of local bodies are in question, and the possibility of Government action thereon is being considered, it is desirable to have reference to the primary record in the shape of certified copies of the minutes of the local authority, and not to rely upon correspondence and newspaper references which are submitted by persons who may be parties to a dispute.

Upon bringing such matter to the attention of the agency involved, the Ombudsman will work with that agency to improve procedures, enabling the agency to fulfill its functions. An administrative expert with a fresh approach and time for some serious reflection often can come up with ideas benefitting all concerned.

Whatever action the Ombudsman takes on a complaint, the complainant will be informed of that action and the reasons for it. This procedure will give the unhappy citizen a better idea of why he was treated in a manner he considered unjust. Communication

between government and the public through the Ombudsman will help improve public understanding and the popular image of government.

The Ombudsman is also required to consult with agency officials both before and after any investigation, and must give them an opportunity to comment on and implement any of his suggestions. Only after the Ombudsman has consulted with the agency can he recommend any change to the Governor or legislature.

IV. The Ombudsman in Other Countries

The office of Ombudsman already exists in several other countries, and it is worthwhile to survey their statutes briefly. The first Ombudsman was created in 1809 as an arm of the Swedish parliament. The original purpose of the office was to protect individuals against unjust assertions of power by the king's judges and administrative appointees. The Swedish Ombudsman, usually an outstanding judge, is elected by parliament for a four-year term. He has been given broad powers. His jurisdiction includes both the executive offices and the courts, and local, as well as national, officials. He can prosecute derelict officials, publicize undesirable behavior, make recommendations to parliament, give his opinion on past court decisions, render advisory opinions on present laws, and criticize past or proposed executive action. With the growth of administrative agencies in recent years he has turned his energies and resources toward them. Bexelius, *The Swedish Institution of the Justitieombudsman,* 27 Int'l. Rev. Admin. Sciences 243 (1961).

For over a century, the Swedish Ombudsman was unique. But with the growth of government powers the need for such an institution led other nations to consider adopting the office. In 1919 the Finnish government created an Ombudsman similar to Sweden's. In 1955 Denmark established the office of Ombudsman with a similar statutory structure. However, the jurisdiction and powers of the Danish Ombudsman indicate a different conception of the office. He has no jurisdiction over the court system, and thus concentrates his efforts on the executive and administrative sectors. He has jurisdiction over local government as well as the power to order, but not initiate, prosecution of erring officials, and abundant power to investigate. The first Ombudsman appointed was Stephan Hurwitz, a doctor of laws and a professor

at the University of Copenhagen. He conceives of his office as a positive force for improving government operations. He feels that its success is greatly dependent on its prestige and the impartiality with which he conducts the office. Hurwitz, *The Ombudsman: Denmark's Parliamentary Commissioner for Civil and Military Administration* (1962). In its first few years of operation, the Danish Ombudsman seems to have won wide public acceptance, largely because of the great ability of the man chosen to fill the office.

Since 1962 Norway and New Zealand have enacted Ombudsman legislation. Both offices are patterned after the Danish model, with some variations. After much parliamentary discussion the Norwegian Ombudsman was given jurisdiction over municipalities only when investigation of some other matter calls for it, or when deprivation of liberty is at stake. It was understood that this limitation would be removed when the office demonstrated its capacity to handle these problems. Os, *The Ombudsman in Norway,* Royal Norwegian Ministry of Justice, Release No. 71 (1963). The New Zealand Ombudsman has no authority over local government. Parliamentary Commissioner (Ombudsman) Act, Act No. 10 of 1962 (New Zealand). An innovation in both statutes was a provision giving the parliament power to order the Ombudsman to investigate a particular matter and report his findings to it specially. A Norwegian commentator has noted that this section could seriously interfere with the Ombudsman's independence if the power were abused. Os, *op. cit. supra.*

V. Applicability to the American States

Piecemeal efforts have been made at state and national levels to establish officials with some of the powers and duties of an Ombudsman. Perhaps the best examples are at the national level—the military Inspector General and the Hoover Commissions. Davis, *Ombudsmen in America: Officers to Criticise Administrative Action,* 109 U. Pa. L. Rev. 1057 (1960). Many municipalities have "complaint departments" of some kind. For example, New York has a "complaint wagon," and a phone number to call about Housing Code violations. Connecticut and California are presently considering the adoption of an Ombudsman, but the institution is still new to America.

The Ombudsman is generally identified with nations that have

parliamentary systems of government. Some question may therefore arise about the applicability of such an institution to the "presidential" systems of government found in the United States. But the office fits as well with the separation of powers theory of American state governments as with the combined powers found in parliamentary governments. The Ombudsman was originally created in Sweden as a means of strengthening the parliament against the royally controlled judiciary. Its purpose was to protect the parliament and citizenry against executive power. Furthermore, the Ombudsman has operated effectively for almost half a century in Finland, which has a mixed presidential and parliamentary system of government. See Anderson, *Connecticut Ombudsman?*, 70 Case & Com., March–April, 1965, p. 4.

Today the problems in both the American states and the parliamentary democracies relate to the control and supervision of the great mass of discretionary powers in the hands of relatively independent administrative officials, and the institution has evolved to fulfill this purpose. Regardless of the degree of independence of the executive branch of the government, the Ombudsman can serve effectively to protect the rights of individuals and groups from administrative mistreatment and assist the legislature in improving administrative procedures.

It might be argued that the direct election of the chief executive and other top personnel of the state assures responsive action by the executive branch which is not found in parliamentary systems. But while direct election alleviates some of the problems which the Ombudsman is intended to handle, it aggravates others. Gross mismanagement, if discovered, can be more easily punished by the voters. But the less dramatic individual injustice, recurrent injury, and general inefficiency are more easily perpetuated, often by inattention, when the highest officials come and go every few years. The result is sometimes virtually leaderless government in the administrative realm. Even if our "presidential" system of government at the state level may be more protective of individual rights and more efficient in prosecuting the public interest than is parliamentary government, the value of an institution specially designed to improve governmental structure and protect citizens' rights cannot be ignored. The general success of the Ombudsman is illustrated by this statement of the Danish Ombudsman:

> Summing up after six years work, it may be said that the office of the Parliamentary Commissoner in Denmark has proved to be an institution acknowledged as a natural and beneficial unit in our democratic form of government, by all sections of the Danish community. Since the institution came into force in April, 1955, and until now, there has been no serious public criticism and the viewpoints concerning the value of the institution which have been expressed in the Press or in public meetings show a desire for amplification rather than restriction of the powers of the Parliamentary Commissioner. Hurwitz, *The Ombudsman: Denmark's Parliamentary Commissioner for Civil and Military Administration* (1962) p. 46.

The success of the Ombudsman in other lands gives every reason to believe that it would be equally successful in the American states.

THE STATUTE

Part I. Short Title and Definitions

Section 101. *Short title.*

This Act may be called "The Ombudsman Act of 1965."

Section 102. *Definitions.*

(a) "Agency" includes any permanent governmental entity, department, organization, or institution, and any officer, employee, or member thereof acting or purporting to act in the exercise of his official duties, except

(1) a court;
(2) the Legislature, its committees, and its staff;
(3) a political subdivision of the state or an entity thereof;
(4) an entity of the federal government;
(5) a multistate governmental entity; and
(6) the Governor and his personal staff.

(b) "Administrative act" includes any action, omission, decision, recommendation, practice, or procedure, but does not include the preparation or presentation of legislation.

Part II. Organization of the Office

Section 201. *Establishment.*

The office of Ombudsman is hereby established.

SECTION 202. *Appointment of the Ombudsman.*

The Governor, with the advice and consent of the Senate, shall appoint the Ombudsman.

SECTION 203. *Qualifications.*

No person may serve as Ombudsman

(a) within two years of the last day on which he served as a member of the Legislature,

(b) while he is a candidate for or holds any other state office, or

(c) while he is engaged in any other occupation for reward or profit.

SECTION 204. *Term of Office.*

The term of office of an Ombudsman is six years. An Ombudsman may be reappointed but may not serve more than three terms.

SECTION 205. *Removal.*

The Legislature, by a two-thirds vote in each house, may remove or suspend the Ombudsman from office, but only for neglect of duty, misconduct, or disability.

SECTION 206. *Vacancy.*

If the Ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the First Assistant to the Ombudsman becomes the Acting Ombudsman until a new Ombudsman is appointed for a full term.

SECTION 207. *Compensation.*

The Ombudsman is entitled to compensation equal to that of the chief judge of the highest court of the state.

SECTION 208. *Staff and delegation.*

(a) The Ombudsman shall appoint a First Assistant and such other officers and employees as may be necessary to carry out the provisions of this Act.

(b) The Ombudsman may delegate to his appointees any of his duties except those specified in sections 502 and 503.

SECTION 209. *Procedure.*

The Ombudsman may establish procedures for receiving and process-

ing complaints, conducting investigations, and reporting his findings. However, he may not levy fees for the submission or investigation of complaints.

PART III. JURISDICTION AND INITIATION OF INVESTIGATIONS

SECTION 301. *Jurisdiction.*

(a) The Ombudsman has jurisdiction to investigate the administrative acts of agencies.

(b) The Ombudsman may exercise his powers without regard to the finality of any administrative act.

SECTION 302. *Investigation of complaints.*

The Ombudsman shall investigate any complaint indicating an appropriate subject for investigation under section 401, unless he believes that

(a) there is presently available an adequate remedy for the grievance stated in the complaint;

(b) the complaint relates to a matter that is outside the jurisdiction of the Ombudsman;

(c) the complaint relates to an administrative act of which the complainant has had knowledge for too long a time before the complaint was submitted;

(d) the complainant does not have a sufficient personal interest in the subject matter of the complaint;

(e) the complaint is trivial or made in bad faith;

(f) the facilities of the Ombudsman's office are insufficient for adequate investigation; or

(g) there are other complaints more worthy of the Ombudsman's attention.

SECTION 303. *Investigation on the Ombudsman's motion.*

The Ombudsman may investigate on his own motion if he reasonably believes that an appropriate subject for investigation under section 401 exists.

SECTION 304. *Notice to complainant.*

(a) If the Ombudsman decides not to investigate, he shall inform the complainant of that decision and shall state his reasons unless he reasonably believes it is inappropriate to do so.

(b) If the Ombudsman decides to investigate, he shall notify the complainant of his decision.

SECTION 305. *Notice to the agency.*

If the Ombudsman decides to investigate, he shall notify the agency of his intention to investigate.

PART IV. INVESTIGATIONS

SECTION 401. *Appropriate subjects for investigation.*

(a) An appropriate subject for investigation is an administrative act of an agency which might be

(1) contrary to law;

(2) unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law;

(3) based on a mistake of fact;

(4) based on improper or irrelevant grounds;

(5) unaccompanied by an adequate statement of reasons;

(6) performed in an inefficient manner; or

(7) otherwise erroneous.

(b) The Ombudsman may investigate to find an appropriate remedy.

SECTION 402. *Investigation procedures.*

In an investigation, the Ombudsman may

(a) make inquiries and obtain information as he thinks fit;

(b) enter without notice to inspect the premises of an agency; and

(c) hold private hearings.

SECTION 403. *Powers.*

(a) Subject to the privileges which witnesses have in the courts of this state, the Ombudsman may

(1) compel at a specified time and place, by a subpoena, the appearance and sworn testimony of any person who the Ombudsman reasonably believes may be able to give information relating to a matter under investigation; and

(2) compel any person to produce documents, papers, or objects which the Ombudsman reasonably believes may relate to a matter under investigation.

(b) The Ombudsman may bring suit in an appropriate state court to enforce these powers.

PART V. PROCEDURE AND REPORTS AFTER INVESTIGATION

SECTION 501. *Consultation with agency.*

Before giving any opinion or recommendation that is critical of an agency or person, the Ombudsman shall consult with that agency or person.

SECTION 502. *Procedure after investigation.*

If, after investigation, the Ombudsman finds that

(a) a matter should be further considered by the agency;

(b) an administrative act should be modified or cancelled;

(c) a statute or regulation on which an administrative act is based should be altered;

(d) reasons should be given for an administrative act; or

(e) any other action should be taken by the agency;

he shall report his opinion and recommendations to the agency. He may request the agency to notify him, within a specified time, of any action taken on his recommendations.

SECTION 503. *Publication of recommendations.*

After a reasonable time has elapsed, the Ombudsman may present his opinion and recommendations to the Governor, the Legislature, the public, or any of these. The Ombudsman shall include with this opinion any reply made by the agency.

SECTION 504. *Notice to the complainant.*

After a reasonable time has elapsed, the Ombudsman shall notify the complainant of the actions taken by him and by the agency.

PART VI. MISCELLANEOUS

SECTION 601. *Misconduct by agency personnel.*

If the Ombudsman thinks there is a breach of duty or misconduct by any officer or employee of an agency, he shall refer the matter to the appropriate authorities.

SECTION 602. *Annual report.*

The Ombudsman shall submit to the Legislature and the public an annual report discussing his activities under this Act.

SECTION 603. *Judicial review.*

No proceeding or decision of the Ombudsman may be reviewed in any court, unless it contravenes the provisions of this Act.

SECTION 604. *Immunity of the Ombudsman.*

The Ombudsman has the same immunities from civil and criminal liability as a judge of this state.

SECTION 605. *Ombudsman's privilege not to testify.*

The Ombudsman and his staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this Act.

SECTION 606. *Agencies may not open letters to Ombudsman.*

A letter to the Ombudsman from a person held in custody by an agency shall be forwarded immediately, unopened, to the Ombudsman.

SECTION 607. *Penalty for obstruction.*

A person who willfully hinders the lawful actions of the Ombudsman or his staff, or willfully refuses to comply with their lawful demands, shall be fined not more than one thousand dollars.

COMMENT

PART I. SHORT TITLE AND DEFINITIONS

SECTION 102. *Definitions.*

The Ombudsman's jurisdiction, under section 301(a), extends to the investigation of the administrative acts of any agency. Since "administrative act" and "agency" are often referred to in the statute, they are defined in this section for convenience. There are several ways to define the included agencies. One could name in the act those agencies which the draftsmen desire to include. However, unless amended, the list would become obsolete when old agencies were altered and new ones created; and it is an imposition upon a busy state legislature to require it to update the list whenever an agency is changed or created. In addition, it would be relatively easy for an agency, through either inadvert-

ence or political influence, to be excluded from the Ombudsman's jurisdiction by having its name omitted from the list.

A second course would be to include those agencies that perform any one of various functions such as issuing licenses, regulating economic activity, or dispersing public funds. However, since the intent is to include all state agencies, listing criteria is a circuitous route to that objective. Inadvertent omission of agencies and frequent litigation over jurisdiction would be the likely result. Thus, the alternative chosen was to define "agency" in a general fashion and to specify the exclusions.

Six governmental entities have been omitted from the Ombudsman's jurisdiction so that it will encompass only state administrative agencies. Giving the Ombudsman jurisdiction over courts serves no useful purpose and might interfere with the functioning of the legal system. The Governor and the legislature are excluded to avoid the intrusion of the Ombudsman into the political process. Also, since he will need the cooperation of both to perform his duties, investigating them might prejudice his working relationship with them. Federal and multistate entities have been excluded since the interests of other sovereign governments are involved. Allowing a state official to investigate such bodies might create constitutional and practical difficulties, particularly in light of the novelty of the Ombudsman in an American environment. Thus, all federal agencies are excluded, even those with many local offices, such as Social Security, Selective Service, and Internal Revenue Service. However, the fact that federal funds may partially or entirely support a state activity, such as highways, welfare, or unemployment compensation, does not mean that such an agency is excluded from the Ombudsman's jurisdiction. "Multistate governmental agencies" includes, for example, transportation authorities created by more than one state. The considerations that apply to excluding federal governmental agencies are also applicable here, though to a lesser extent.

The sixth exclusion, political subdivisions of the state or entities thereof, is the most significant and controversial. The basic reasons for exclusion are political and cautionary. Including municipalities would bring forth far too many complaints for the Ombudsman to investigate. It would also severely hamper the bill's chance of passage: Its fate would become intertwined with such present

political controversies as police civilian review boards and remedies for housing code violations, both vital concerns if the Ombudsman were to operate on the local level. By narrowing the area of the Ombudsman's jurisdiction, it is easier to evaluate the institution in an American environment and to observe what modifications may be required. However, since supervision is needed at least as much on the local as the state level, the successful functioning of the Ombudsman institution might lead to the inclusion of municipalities within its jurisdiction. For example, when the Danish Ombudsman was elected in 1955, his jurisdiction did not include localities. However, in 1961, the governing statute was amended to give him power to investigate localities on his own initiative if the matter involved a violation of material legal interests.

Finally, the definition of agency includes personnel of those agencies acting or purporting to act in the exercise of their official duties. The purpose is to ensure that the Ombudsman does not investigate such personnel, even in cases of grave misconduct, unless official duties are involved.

The definition of "administrative act" covers the entire spectrum of agency activity. It includes not only agency action or omission, but also agency processes—the manner in which an agency performs its functions and arrives at decisions. Since the purpose of the Ombudsman is to investigate the implementation of policy through the administrative process, and not the wisdom of the basic policies themselves, the preparation and presentation of legislation have been excluded from the definition of "administrative act." Thus, whether the agency prepares legislation on its own initiative or at the request of the Governor or the legislature, this activity is outside the Ombudsman's jurisdiction. Though he cannot investigate the process of formulating legislation, after an investigation he can, under sections 502 and 503, recommend that a statute on which an administrative act is based be altered.

Part II. Organization of the Office

Section 202. *Appointment of the Ombudsman.*

This section provides for the appointment of the Ombudsman by the Governor. This is the generally accepted American pro-

cedure for the appointment of administrative officers. There is some argument for appointment by the legislature since the Ombudsman will be investigating executive agencies. However, the check of Senate confirmation should provide sufficient safeguards. The draft can be altered if legislative appointment is preferred.

SECTION 203. *Qualifications.*

Subsection (a) provides that no person may serve as Ombudsman if he has been a member of the legislature at any time during the two preceding years. The provision covers present members of the legislature as well as those recently retired or defeated. This deters the Governor and the legislature from using the office as a payment for past political favors and detaches the office from politics to that extent.

Subsection (b) makes the Ombudsman ineligible to serve while he is a candidate for or holds any other state office. Thus, if the Ombudsman ever becomes a candidate, he must leave office at that time, and cannot await the outcome of the election. Subsection (c) does not prohibit the Ombudsman from engaging in sporadic activities such as writing articles and giving lectures, as long as they do not conflict with the duties of his office. Since he cannot function effectively unless people know of his existence, such activities can be viewed as pertaining to his office.

SECTION 204. *Term of office.*

A six-year term gives sufficient time for the Ombudsman to become acquainted with the office, provides a measure of independence from politics, and is long enough to interest qualified persons in the position. The three-term limitation prevents an individual from becoming so identified with the office that it will not be able to function effectively after his departure. In view of its experimental nature, the limitation will also give people with new ideas and new conceptions of the office a chance to become the Ombudsman.

SECTION 205. *Removal.*

The legislature may wish to reserve the right to remove or suspend the Ombudsman for neglect of duty, misconduct, or dis-

ability. However, further grounds such as "other sufficient cause" should not be included, since they present too great a threat to the desired independence of the Ombudsman from political control. The legislature should have the sole removal power in spite of the gubernatorial method of appointment, since the Ombudsman, in the exercise of his investigatory powers, may at times act counter to the interests of the Governor.

SECTION 206. *Vacancy.*

If the Ombudsman leaves office or becomes ineligible to serve, the First Assistant becomes Acting Ombudsman until a new Ombudsman is appointed for a full six-year term. The same reasons that support a long term for the Ombudsman are applicable here. The added problem of finding a qualified individual to take the office for only the unexpired term of the old Ombudsman is alleviated by this section.

SECTION 207. *Compensation.*

Setting the Ombudsman's compensation equal to that of the chief judge of the highest court of the state increases the prestige of the office and provides sufficient remuneration to attract qualified persons.

SECTION 208. *Staff and Delegation.*

Within the limits of available appropriations, the Ombudsman shall appoint a First Assistant and other necessary employees. No provision regarding civil service requirements is included in the statute, since state provisions vary. In any case, because of the flexible and experimental nature of the office and the close relationship inherent in a small staff, the Ombudsman should be able to appoint his First Assistant and others with important duties without regard to civil service.

Paragraph (b) allows the Ombudsman to delegate any of his duties except his duty to make recommendations to the agency, the Governor, the legislature, or the public. These are the Ombudsman's only means for securing changes in administrative acts, and this section assures that such reports will be his responsibility. Within this limitation, flexibility requires that the Ombudsman be given wide freedom to delegate as he sees fit.

SECTION 209. *Procedure.*

This section gives the Ombudsman broad discretion in regulating his office and complaint procedures, although he may not charge a complaint fee. One of the purposes of the Ombudsman is to aid people who through ignorance or limited finances cannot seek their own redress through the agency. This objective would be defeated by permitting fees, since even a nominal amount discourages some people from filing bona fide complaints.

PART III. JURISDICTION AND INITIATION OF INVESTIGATIONS

SECTION 301. *Jurisdiction.*

Subsection (a) specifies that the jurisdiction of the Ombudsman extends to the investigation of all administrative acts of agencies. Section 102 should be consulted for definitions of those terms. Subsection (b) allows the Ombudsman to investigate even though the agency action is deemed final by statute or case law. However, as will be seen in the discussion of section 502, the Ombudsman has no power to revise any agency action or impose any sanction on an agency that disagrees with his recommendations. He can only send his opinion, along with the agency's reply, to the Governor or the legislature, and make it public.

SECTION 302. *Investigation of complaints.*

In general, the Ombudsman has the duty to investigate any complaint which discloses the existence of an appropriate subject for investigation under section 401. He may decline to investigate only for certain reasons, stipulated in section 302. However, these reasons are broadly stated and leave much to the Ombudsman's discretion. He may consider the degree of the complainant's interest in the problem disclosed, the seriousness of the grievance, whether the resources of his office permit an adequate investigation, and whether there are other complaints more worthy of his attention. He may also decline to investigate if another remedy is available to the complainant. Since the number of complaints an Ombudsman in an American state would receive is an unknown quantity, such provisions are necessary to enable him to make the most effective use of his powers. They in no way preclude

the Ombudsman from investigating any agency under his jurisdiction. Often the Ombudsman will prefer to investigate in a case where the statute permits him to refuse. For instance, if he believes that recourse to a legal remedy would be futile or overly burdensome to his client, he might wish to render assistance. He might also want to proceed on a complaint from a public-spirited citizen who discloses administrative inefficiency even though the complainant is not personally injured. These examples are not exhaustive. However, in the vast majority of cases, the Ombudsman can be expected to rely on the standards implicit in section 302.

SECTION 303. *Investigation on the Ombudsman's motion.*

The Ombudsman has power to investigate on his own motion. However, since he must have reason to believe an agency action comes within section 401, he does not have power to conduct a "fishing expedition" through agency files. An implied corollary of this power is the right of the Ombudsman to continue on his own motion if he discovers another agency action not mentioned in the complaint which he believes justifies investigation.

SECTION 304. *Notice to complainant.*

This section requires the Ombudsman to inform the complainant when he decides whether or not to investigate. With one limited exception, paragraph (a) requires that notification of a decision not to investigate be accompanied by a statement of the reasons for the Ombudsman's decision. In cases where the Ombudsman declines to investigate because the complaint shows on its face that the agency's action was proper, this explanation could lead to better relations between the agency and the complainant in any future dealings between them. However, there may be cases when an explanation will serve no useful purpose or might even cause harm. In such cases, the Ombudsman is authorized to omit the reasons for his decision. However, the language of the statute is designed to inform the Ombudsman that his duty to give reasons extends to all but the extraordinary case. Paragraph (b) applies to notification that an investigation will be conducted. This is included primarily to insure that members of the public will be aware of the work the Ombudsman is doing on their

behalf. Section 504, discussed below, provides for notifying a complainant of the outcome of an investigation.

SECTION 305. *Notice to the agency.*

Whenever the Ombudsman decides to investigate, he shall so inform the agency. This gives the agency an opportunity to supply the Ombudsman on its own initiative with information it considers relevant to the case. It also avoids the problem of agency personnel feeling that the Ombudsman is investigating behind their backs.

PART IV. INVESTIGATIONS

SECTION 401. *Appropriate subjects for investigation.*

Paragraph (a) states what administrative acts are appropriate subjects for investigation by the Ombudsman, whether he proceeds on his own motion or by complaint. Item (1) permits the Ombudsman to investigate if a complaint discloses that administrative acts of an agency might be contrary to law. However, he has no power to revise any decision. Where a minor matter is involved and an agency has clearly acted without legal authority, the Ombudsman may be very effective in persuading the agency to remedy the wrong, thus saving the complainant the delay and inconvenience of going to court.

The remaining provisions of paragraph (a) cover every type of maladministration. Item (2) authorizes the Ombudsman to investigate agency actions performed according to statute. Item (3) is self-explanatory. Item (4) permits the Ombudsman to investigate when he suspects that an otherwise unimpeachable agency action was taken for improper reasons.

In some cases, the Ombudsman may believe that an agency's only mistake is failure to explain its action. Item (5) permits him to investigate in such a case. This provision applies to administrative acts involving adjudication and promulgation of regulations, but its most frequent use will probably involve less important administrative matters, such as those where an individual is refused information or assistance without being told the reasons.

Item (6), dealing with administrative inefficiency, relates to every aspect of an agency's practices or procedures. This provision

permits the Ombudsman to be of service to many agencies. In his work, he will have an opportunity to observe many agencies in action. The knowledge he obtains about the operation of the successful agencies should be shared with others that need improvement. Item (7) permits the Ombudsman to investigate when he suspects that an agency has made a mistake, even though the agency action is not so invidious as to come within item (2).

Paragraph (b) makes it explicit that the Ombudsman's power to investigate does not come to an end at the moment he satisfies himself that an agency has been remiss. He can continue to investigate in order to determine what remedial action would be most appropriate.

SECTION 402. *Investigation procedures.*

Paragraph (a) gives the Ombudsman broad authority to make inquiries and to obtain relevant information. Paragraph (b) gives him authority to enter and inspect the premises of an agency without notice, since in some situations advanced notice might thwart an investigation. This is most likely to be true of agencies holding persons in custody. However, since the goodwill and cooperation of agencies are necessary to the Ombudsman's effectiveness, as a practical matter he is unlikely to use this power except in extraordinary circumstances. Paragraph (c) permits the Ombudsman to hold private hearings. He is given no power to hold public hearings because publicity is reserved as the Ombudsman's ultimate sanction to be used only after investigation has established the existence of a wrong and after all other attempts at obtaining agency cooperation have failed.

SECTION 403. *Powers.*

Since one of the basic functions of the Ombudsman is investigation, he must be able to compel information and testimony. Under subparagraphs (a)(1) and (2) the Ombudsman may subpoena and obtain sworn testimony, documents, papers, and objects from any person if the Ombudsman believes they relate to a matter under investigation. This section applies whether or not the witness is affiliated with an agency over which the Ombudsman has jurisdiction. Since an investigation often will involve persons other than the complainant and agency personnel, limiting

the Ombudsman's powers to obtain information to those persons would severely hamper his effectiveness. However, paragraph (a) does preserve the same evidentiary privileges in proceedings before the Ombudsman that witnesses have in the state courts.

Paragraph (b) gives the Ombudsman authority to sue in state courts to enforce his powers under paragraph (a). While this procedure might cause some delay, there are state constitutional problems in allowing the Ombudsman to punish for contempt if his subpoena were ignored or a person refused to answer questions. Since state courts usually give preference to cases involving such matters, delay should not prove serious.

Part V. Procedure and Reports after Investigation

Section 501. *Consultation with agency.*

This section assures that the Ombudsman will have the views of an investigated agency before he issues any adverse report.

Section 502. *Procedure after investigation.*

The Ombudsman is not required to notify an agency of his findings unless he has a recommendation to make. However, he may not take any coercive action, such as appealing to the public, unless the agency is first notified and thus given a chance to respond. In some cases he will recommend a modification of an agency action or procedure even though no act of the agency is clearly erroneous or otherwise defective under the standards of section 401. Even if an agency act is not erroneous, for example, he may still recommend, under paragraph (a), that the agency further consider the matter or, under paragraph (e), that other action be taken.

However in the vast majority of cases, the Ombudsman would recommend further action only if in his opinion the administrative act is subject to criticism under the standards of section 401. However, this provision does not change the doctrine of finality as applied to administrative agencies. What action is available to the agency when the Ombudsman recommends a change of decision will depend on its procedures as to when a decision can be reopened. Where the agency is free to reconsider the matter, or where no one would be adversely affected if it did so, the views of

the Ombudsman may often be of direct help to the complainant. However, even in the case where the agency cannot or will not reopen the question, it will frequently consider the Ombudsman's comments on the matter when future cases arise.

Paragraph (c) requires the Ombudsman to report to the agency if he believes a statute or regulation on which an administrative act is based should be altered. He is not a law revision commission, however; he can make recommendations relating only to a case he has investigated. This advisory function of the Ombudsman may often work to the advantage of an agency. For example, if an agency needs support for a proposed change in its governing statute, the Ombudsman's opinion will be persuasive evidence from an impartial source that such a modification is desirable. This section further provides that the Ombudsman may request the agency to notify him of any action it will take pursuant to his recommendations. This gives him an opportunity to take into consideration the agency's action if he proceeds under section 503 and enables him to inform the complainant of the results of his investigation.

SECTION 503. *Publication of recommendations.*

A reasonable time after his report to the agency, the Ombudsman may present his opinion and recommendation, with comments, to the Governor, the legislature, or the public—any or all of them. This section applies even if the agency complies with the Ombudsman's recommendations. In many cases, the Ombudsman may desire to publish a favorable report, if the agency has shown itself willing to acknowledge mistakes or reconsider past practices. Conversely, even though the agency has followed the particular recommendation, the Ombudsman's investigation may have revealed matters which should be made known. Furthermore, it is important to the Ombudsman to be able to demonstrate his success, to justify his office to the legislature, and to convince the public that it is worthwhile to file complaints with him.

The Ombudsman must allow a reasonable time to elapse before proceeding under this section. This allows the agency to consider the matter and take remedial action if it desires. As a protection for the agency, the Ombudsman must attach any reply it makes, when submitting any report under this section. This guarantees

that whoever reads the Ombudsman's opinion and recommendations will have the agency's response as well.

After the Ombudsman has made use of section 503, his ability to influence the administrative act of an agency is at an end. His success in accomplishing his goals will depend not upon naked power but on his ability to convince the Governor, the legislature, or the public, that a change is required.

SECTION 504. *Notice to the complainant.*

Within an appropriate time, the Ombudsman shall notify the complainant of the actions taken by him and by the agency. This does not preclude the Ombudsman from keeping a complainant informed during a long investigation, or from answering requests from individuals about the status of their complaints. The section states only the minimum required of the Ombudsman.

PART VI. MISCELLANEOUS

SECTION 601. *Misconduct by agency personnel.*

This section has much less force than the provisions found in the Scandinavian acts. In Sweden, the Ombudsman himself can prosecute misconduct, while the Danish Ombudsman has power to order prosecution. Under this statute, the Ombudsman can only refer the matter to the appropriate authority, usually the agency itself, the civil service commission, or the attorney general. Giving the Ombudsman greater power has political disadvantages and interferes with the discretion traditionally lodged in prosecuting officials.

SECTION 602. *Annual report.*

The annual report keeps the legislature and the public informed about the Ombudsman's activities. It also gives the Ombudsman an opportunity to call problems to their attention, and to suggest that the legislature broaden or reduce his powers if experience proves that such a change is needed.

SECTION 603. *Judicial Review.*

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombuds-

man has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new in this country, one cannot be certain how the law will develop. This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

SECTION 604. *Immunity of the Ombudsman.*

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a state judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

SECTION 605. *Ombudsman's privilege not to testify.*

The purpose of this section is to encourage people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act, this privilege is not withheld from him. Its most likely use is to enforce his subpoena power under section 403. He may also testify in regard to the penalty for obstruction under section 607.

SECTION 606. *Agencies may not open letters to Ombudsman.*

The Danish and New Zealand acts have provisions similar to this section. The purpose is to prevent prisons and other agencies that hold people in custody from opening or delaying complaints to the Ombudsman. Those in custody must be able to speak without fear of reprisal.

SECTION 607. *Penalty for obstruction.*

This section penalizes only willful obstruction of the Ombudsman.

An Act to Establish Standards and Procedures for Municipal Boundary Adjustment

Municipal boundary adjustment legislation has not kept up with the problems of urban America. This proposed statute establishes a Board to administer and supervise municipal annexation, detachment, incorporation, and consolidation. Standards and criteria are provided to promote logical, reasonable, and consistent solutions. The primary focus is on state and community problems rather than local, parochial considerations. However, necessary insights into the local situation are provided by local representation in all boundary adjustment deliberations.

THE POPULATION of the United States is now more than 70 percent urban, yet most municipal boundary adjustment legislation is unsuited for providing the most effective and efficient form of urban government.

"The law has not kept up with municipal problems, many of the statutes being designed to protect selfish interests instead of the public interests. Some of the statutes were adequate for the America of the past, but not for the America of the present with its trend toward urban living, but these statutes, for the most part, remain unchanged." Note, *Annexation and the Law in South Carolina,* 13 S.C.L.Q. 258 (1961).

Originally all municipal boundary adjustment was controlled by the state. Charters were granted by the legislature, which also approved annexation. Comment, *Changes in Wisconsin Annexation Proceedings and Remedies,* 1961 Wis. L. Rev. 123, 125. This procedure is still followed in parts of New England. Mass. Ann. Laws ch. 3, § 5 (1961); Maine constitution, art. IV, pt. 3, § 14. However, subsequent rapid urban growth and the clamor for more local control of government gradually led to delegation of this legislative authority. The problems had become too unwieldy for the legislature to handle.

Three basic procedures developed. The most typical boundary adjustment procedure is like that for annexation in Ohio. Ohio Rev. Code Ann. §§ 709.02–.04 (Page 1953). There the county commissioners receive petitions and hold hearings to determine whether an annexation is "right." A similar procedure using a

county annexation court exists in Virginia. See Va. Stat. Ann. §§ 15.1–1035 to –1067 (1964).

This system has two inherent defects. First, the commissioners are called upon to determine whether an annexation which will diminish their effective powers should be permitted. The likelihood of bias against annexation in such a situation is very great. This is the reverse of the presumption which should exist in present-day annexation legislation.

The second defect of such a procedure is that consideration of petitions is treated as no more than a part-time job. Thus, any chance to formulate standards or to reduce the arbitrariness of the proceedings is highly restricted. Mandelker, *Municipal Incorporation on Urban Fringe: Procedures for Determination and Review,* 18 La. L. Rev. 628 (1958).

Another procedure for boundary adjustment is to allow the city to determine where and whether it will annex. For example, see N.C. Gen. Stat. §§ 160–445, –452 (1964). The unnatural result of such a procedure is the city of Nederland, Texas (population 12,032) which in 1960 annexed an area almost twice as large as New York City—an area which was virtually undeveloped. The Texas law was subsequently amended. See Tex. Rev. Civ. Stat. art. 970A (1963). Cities in states under such a procedure feel compelled to annex wide territory since other cities might get there first and the rule is first to petition, first to annex. See, *e.g.*, Cal. Gov't Code § 35115. In addition, several states allow small groups to incorporate under equally permissive standards. Thus, so-called "defensive incorporation" to avoid municipal annexation can thwart annexation and cause urban areas to become fragmented into a multitude of unnecessary governments. Note, *Annexation by Municipality of Adjacent Area in Missouri: Judicial Attitude Toward the Sawyer Act,* 1961 Wash. U.L.Q. 159.

A third common procedure which is the opposite of the permissive system just outlined also tends to frustrate any rational boundary adjustment. This procedure allows residents of unincorporated territory to vote against annexation and also to incorporate at will. Thus, short run concerns control completely. Wash. Rev. Stat. § 35.02.080 (1964); Cal. Gov't Code § 35122 (Supp. 1964); Minn. Stat. Ann. § 414.03 (subd. 5) (annexation) (Supp. 1964).

The degree of inadequacy in these systems is obvious in light of the great number of states which have recently amended their boundary adjustment procedures. For example, see Minn. Stat. Ann. ch. 414 (Supp. 1964); Cal. Gov't Code §§ 54750–71, 54775–91 (Supp. 1964); Wash. Stat. Ann. ch. 35.13 (1964); Ind. Ann. Stat. § 48–701 (1963); Mo. Rev. Stat. § 71.015 (Supp. 1964). Unfortunately all of these reforms have been only half-way measures which are still tied in part to the considerations of a rural, wide-open-spaces society.

California and Washington have set up standards to be used for the consideration of boundary adjustment by a local commission. (Most members in California and all in Washington have another primary duty, such as county commissioner, and the Washington commission is *ad hoc.*) Cal. Gov't Code §§ 54765, 54786 (Supp. 1964); Wash. Rev. Stat. § 35.13.173 (1964). But this step toward rational boundary adjustment is nullified to a great extent by allowing elections and city legislative body decisions to reverse the commission's findings. Thus, the procedure provides only negative control. No boundary adjustment can be made without commission approval; but any adjustment approved can be overruled.

Similarly, Indiana, New York, and Missouri have given power to courts to evaluate boundary adjustments after the fact in light of legislative standards. Ind. Ann. Stat. § 48–702 (1963); N.Y. Munic. Law § 712 (1965); and Mo. Rev. Stat. § 71.015 (Supp. 1964). Thus improper adjustments are blocked. These measures, however, only further tend to exaggerate the problem since no positive program is possible and there is no assurance that any boundary adjustment will, in fact, take place. Further, all forms of boundary adjustments are not handled by one group, so little coordination is possible.

The Minnesota statutory solution has gone farthest in the right direction by providing a state commission to oversee all boundary adjustments, but even there elections by residents of the territory are required in some proceedings. See Minn. Stat. Ann. ch. 414 (Supp. 1964).

The basic deficiencies in present day legislation are five in number. First, rational standards are rarely involved or provided so boundary adjustment cannot possibly be carried out for the

good of the entire community. Second, urban government is allowed to extend at times over vast rural areas and at other times is barred from clearly urban places. No consideration of the basic logic of municipal government that urban places need urban government and rural places need rural government is involved. Third, urban areas develop a proliferation of governments which leads to the fragmentation of the area and makes coordinated economic development impossible. See Mandelker, *Municipal Incorporation and Annexation: Recent Legislative Trends,* 21 Ohio St. L.J. 285 (1960), who considers this problem ripe for immediate legislative action. Fourth, natural and logical geographic and economic communities are divided into several government entities, though their problems are interconnected and the areas are interdependent. For example, residential communities which depend on center cities for employment and cultural activities are separate from those center cities which equally depend on the suburbs for revenues and leaders to solve urban problems of slums, crime, and opportunities for racial minorities. These are common problems of the community and are caused as much by the suburban residents as by those of the center city. Comment, *An Analysis of the Annexation Power of Texas Home Rule Cities,* 39 Texas L. Rev. 485 (1961). Finally, through elections local prejudices and jealousies become the primary controls over whether urban government will be extended. These shortsighted considerations are inherent even in the recently amended state procedures.

The proper solution to this problem is suggested in several articles. See, *e.g.,* Mandelker, *Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review,* 18 La. L. Rev. 628 (1958); O'Quinn, *Annexing New Territory,* 39 Texas L. Rev. 172 (1960). The solution is to put boundary adjustment back into the hands of the state which can adjust local problems impartially. At the same time, rational standards should be provided by the legislature, and an administrative body with sufficient expertise should be established to handle these difficult problems. Further, all boundary adjustment forms, since they are interconnected, should be considered by one body. Finally, the procedure should allow boundary adjustment to be made as urban areas expand and should not be so cumbersome or restrictive as to make boundary adjustment lag far behind population expansion. These criteria are the essence of the proposal that follows.

Before turning to the draft, it should be noted that no provision has been made for elections to approve or disapprove the boundary adjustments. The basic philosophy and goals of the draft are embodied in that omission.

The principal argument for retaining elections is grounded in some sense of "the consent of the governed"—that an individual should have the right to decide whether he wants to be the resident of a big city, a suburb, or a rural community. He has, so the argument goes, by moving to an area, located with an expectation that government and taxes will remain substantially static. This argument is logically unsound in light of present day urban society for at least four basic reasons:

1) The individual is not given a vote on zoning ordinances—which limit the size of his house, the size of his yard, and the use of his land—because it is a tenet of urban society that overall community needs require the sacrifice of some private goals in order to achieve the greatest social utility in the area. Comment, *An Analysis of the Annexation Power of Texas Home Rule Cities,* 39 Texas L. Rev. 458, 461 (1961).

2) The individual has in fact already made the choice to live in an urban community and to obtain his economic and social livelihood from that community. It is untenable "that dwellers within the 'fringe areas'—*whose location is meaningful only in relation to the central city*—should be given a veto power over the geographic, economic, and governmental destiny of [an] area . . . whose proximity largely gives affected properties whatever tangible desirability they have." *Id.* at 461 (emphasis added).

3) Municipal government is state government. Once all municipalities were located and expanded by acts of the state legislature. Some still are. Mass. Ann. Laws ch. 3, § 5 (1961). The states established municipal government in order to handle efficiently the problems of local urban administration. Thus as the creature of the state, the municipality should be regulated—at least to the extent of the limits of its jurisdiction—by the state. A lack of democracy is not the question here if the state legislature's creature, a board, administers the program.

4) Elections are not the only way for adequate expression of the popular will. Hearings in which all interested parties can be heard serve as well to express the degree of opposition and assure that all rational arguments are considered.

Given these theoretical justifications, it is well to examine the political feasibility of not holding boundary adjustment elections. Here is the real fallacy in the argument of most critics of municipal boundary adjustment. Often, elections are not required for incorporation. Mandelker, *supra* at 630–31. Annexation is permitted without elections by Ariz. Rev. Stat. Ann. §§ 9–471 to –479 (1956); Ind. Ann. Stat. § 48–701 (1963); Mass. Ann. Laws ch. 3, § 5 (1961); Miss. Code Ann. §§ 3374.10–.20 (1942); Mo. Rev. Stat. § 71.015 (Supp. 1964); and Va. Code Ann. §§ 15.1–1033 to –1042 (1964), to name only a few. It is simply not un-American to make boundary adjustments without popular consent. It is done in vast parts of the United States.

AN ACT

To create a State Boundary Adjustment Board and to prescribe its powers and duties; to provide for the annexation of a territory to a municipality, the detachment of a territory from a municipality, the incorporation of a territory, and the consolidation of two or more municipalities.

PART I. DEFINITIONS

SECTION 101. *Annexation.*

"Annexation" is the alteration of the boundaries and jurisdiction of a municipality to add a territory to the municipality.

SECTION 102. *Board.*

"Board" is the State Boundary Adjustment Board.

SECTION 103. *Boundary adjustment.*

"Boundary adjustment" is any annexation, detachment, incorporation, or consolidation.

SECTION 104. *Committee.*

"Committee" is the Board and local representatives acting as a unit.

SECTION 105. *Consolidation.*

"Consolidation" is the merging of two or more municipalities.

SECTION 106. *Detachment.*

"Detachment" is the alteration of the boundaries and jurisdiction of a municipality to exclude a territory from the municipality.

SECTION 107. *Incorporation.*

"Incorporation" is the establishment of an incorporated city or village of any class.

SECTION 108. *Municipality.*

"Municipality" is an incorporated city or village of any class which annexes, detaches, or is consolidated.

SECTION 109. *Territory.*

"Territory" is the area proposed to be annexed, detached, or incorporated.

PART II. STATE BOUNDARY ADJUSTMENT BOARD

SECTION 201. *Creation.*

There is hereby created a State Boundary Adjustment Board to supervise boundary adjustments and to execute the provisions of this Act.

SECTION 202. *Appointment and term.*

The Governor, with the advice and consent of the Senate, shall appoint to the Board three members, at least one of whom is learned in the law. The Governor shall designate one member as chairman. The first three appointments made under this Act shall be for terms of two, four, and six years, respectively. Each subsequent appointment shall be for a term of six years. If for any reason a vacancy occurs, the Governor, with the advice and consent of the Senate, shall appoint a new member to fill the unexpired term. Members are eligible for reappointment.

SECTION 203. *Duties.*

The Board shall perform the following duties:

(a) promulgate such rules and procedures as are necessary to carry out the provisions of this Act;

(b) initiate proceedings for boundary adjustments under part III;

(c) make preliminary rulings on petitions under section 304;

(d) meet with the local representatives in accordance with part IV;

(e) submit each fiscal year a written report to the legislature and the Governor stating the number of proceedings initiated, the outcome of those proceedings, the expenses incurred, and any other pertinent matters;

(f) subpoena witnesses and documents or other materials under section 504(b); and

(g) employ a secretary and other personnel necessary to carry out the provisions of this Act.

SECTION 204. *Vote.*

An affirmative vote by a majority of the Board is required to take action.

SECTION 205. *Compensation.*

Each member of the Board is entitled to compensation of $50 per diem plus travel and other reasonable expenses for meetings, hearings, and other official business.

PART III. INITIATION OF PROCEEDINGS

SECTION 301. *Board proposals.*

The Board may initiate proceedings for any boundary adjustment it considers to be in the public interest by making a proposal for the boundary adjustment. Once made, such a Board proposal has the same effect as a petition and shall be treated in every way as though it were a petition, except that a preliminary ruling under section 304 is not required.

SECTION 302. *Petitions.*

The Board shall initiate proceedings for boundary adjustments upon receipt by its secretary of a petition. The following may submit petitions:

(a) the legislative body of the municipality;

(b) the township board in the township where the territory, or part of it, is located;

(c) the [Board of Supervisors] in the county where the territory, or part of it, is located;

(d) the metropolitan or area planning authority in the metropolitan area where the municipality or territory is located;

(e) ten percent of the registered voters in the municipality;

(f) ten percent of the registered voters in the territory; or

(g) the owners of 25 percent of the assessed value of the real property in the territory.

SECTION 303. *Contents of petitions.*

A petition must contain the following:

(a) a statement of the boundary adjustment proposed;

(b) a statement of the reasons favoring the proposed boundary adjustment;

(c) an accurate map of every municipality and territory involved; and

(d) a description of the character, land-use, and facilities of either the territory or, in the case of consolidation, the municipalities involved.

SECTION 304. *Preliminary rulings.*

Within a reasonable time after it receives a petition, the Board shall meet and shall make a preliminary ruling on whether to dismiss the petition. The Board may rule to dismiss the petition only if it finds the following:

(a) the petition does not comply with the provisions of section 303 or the rules or procedures of the Board;

(b) the request for boundary adjustment is frivolous; or

(c) substantially the same boundary adjustment has been disapproved by a committee within two years of the petition.

SECTION 305. *Notification.*

If the petition is not dismissed, the Board shall notify those legislative bodies required to appoint local representatives under section 401.

SECTION 306. *Combination of petitions.*

The Board may combine for consideration petitions which concern the same territory, or parts of it, or the same municipalities, if such a combination will not cause an unreasonable delay in the processing of the petitions.

PART IV. COMMITTEE

SECTION 401. *Members; Appointment of local representatives.*

If a petition is not dismissed by the Board under section 304, a committee shall be established to rule on the boundary adjustment proposed in the petition. The committee shall consist of the members of the Board and two or more local representatives appointed as follows:

(a) If the petition concerns a territory located solely within one county, that county's [Board of Supervisors] shall appoint two residents of the county.

(b) If the petition concerns a territory located in two or more

counties, the [Board of Supervisors] of each county concerned shall appoint one resident of the county.

(c) If the petition is for the consolidation of two or more municipalities, the legislative body of each municipality concerned shall appoint one resident of the municipality.

(d) If two or more petitions, none of which is for consolidation, are combined under section 306, appointment shall be in accordance with (a) or (b) as if there were but one petition.

(e) If two or more petitions, all of which are for consolidation, are combined under section 306, the legislative body of each municipality proposed for consolidation shall appoint one resident of the municipality.

(f) If a petition for consolidation is combined under section 306 with one or more other petitions, at least one of which is for a boundary adjustment other than consolidation, the legislative body of each municipality proposed for consolidation shall appoint one resident of the municipality and the [Board of Supervisors] of every county concerned shall also appoint local representatives as in (d).

SECTION 402. *Eligibility.*

To be eligible to serve as a local representative, a person must be a resident of the county or municipality from which he is appointed and be a registered voter eligible to vote in local elections.

SECTION 403. *Compensation.*

Each local representative is entitled to compensation of $50 per diem plus travel and other reasonable expenses for meetings, hearings, and other official business.

SECTION 404. *Duties.*

The committee shall perform the following duties:

(a) approve or disapprove petitions for boundary adjustment;

(b) make financial allocations under part X; and

(c) hold hearings as required in part V.

SECTION 405. *Amendments.*

The committee may amend any petition, at any time before the day of voting under section 1101(a), by making alterations in the shape and size of the territory.

SECTION 406. *Quorum.*

A quorum of two board members and one local representative is required for the committee to act.

SECTION 407. *Voting.*

When the committee votes, each Board member and each local representative has one vote, except that if there are more than two local representatives, then each local representative has an equal fraction of a total of two votes.

PART V. HEARINGS

SECTION 501. *When hearings conducted.*

The committee shall conduct a hearing within 90 days from the date on which a petition is received by the Board, but if two or more petitions are combined under section 306, the 90-day period begins on the day of the receipt of the last of the petitions which are combined.

SECTION 502. *Questions before the hearing.*

The committee shall conduct the hearing on the following questions:

(a) whether a boundary adjustment should be approved; and

(b) what, if any, financial allocations should be made if a boundary adjustment is approved.

SECTION 503. *Notice of hearing.*

The Board shall give notice of the time and place of the hearing at least 30 days before the commencement of the hearing to the following:

(a) each governmental entity involved;

(b) each planning body that has jurisdiction in a governmental entity involved; and

(c) the public.

SECTION 504. *Information received at a hearing.*

At the hearing the committee shall do the following:

(a) receive all information, written or oral, that any person wishes to present and that is relevant to the resolution of the questions before the committee;

(b) seek all information, written or oral, that the committee believes will be useful to the resolution of the questions before the com-

mittee. If the committee so requests, the Board may subpoena witnesses and documents relevant to these questions.

SECTION 505. *Notice of amendment.*

If the committee amends a petition under section 405, the Board shall give notice of the amendment to the following:

(a) each governmental entity involved;

(b) each planning body that has jurisdiction in a governmental entity involved; and

(c) the public.

SECTION 506. *Continuation or reopening of hearing.*

If the Board gives notice of the amendment less than seven days before the commencement of the hearing, or during the hearing, or after the termination of the hearing, then if any person informs the Board, within seven days from the date notice is given, of his desire to present information relevant to the amendment, the committee shall continue the hearing for a reasonable time or reopen it within a reasonable time to receive that information.

PART VI. ANNEXATION

SECTION 601. *Standards.*

The committee shall approve a proposed annexation if, and may approve it only if, it meets all of the following standards:

(a) The present or probable future character of the territory must be urban or suburban.

(b) The municipality must be able and willing to provide necessary municipal services to the annexed territory within a reasonable time after the annexation.

(c) The interests of the state and community must be served by the annexation.

(d) Fair and equitable treatment must result.

(e) Annexation must be the type of boundary adjustment that is most beneficial to the community as a whole.

(f) The territory must be contiguous to the municipality. Contiguity is not affected by lakes, rivers, highways, and similar natural or man-made barriers.

SECTION 602. *Criteria.*

In determining whether the standards for annexation have been met,

the committee shall consider, but is not limited to the consideration of, the following criteria:

(a) the effect of the proposed annexation on the population growth of and assessed valuation of the real property in the territory and the municipality;

(b) the area and topography of the territory and the municipality;

(c) the extent to which the territory and the municipality are interdependent and are part of one community;

(d) the developmental scheme of pre-existing land-use plans that pertain to the community;

(e) the extent to which the functioning of the municipality will be improved;

(f) the need for municipal services in the territory;

(g) the extent to which the municipal services to be provided to the residents of the annexed territory will be commensurate with the taxes and other charges imposed on the residents;

(h) the ability of the counties and townships receiving revenue from the territory to finance their governmental operations without the revenues that will be lost if the territory is annexed; and

(i) the ability of the municipality to assume a share of the existing indebtedness of and to purchase property from counties and townships under section 1001.

SECTION 603. *Boundaries not a bar.*

County boundaries are not a bar to annexation.

PART VII. DETACHMENT

SECTION 701. *Standards.*

The committee shall approve a proposed detachment if, and may approve it only if, it meets all of the following standards:

(a) The interest of the municipality in regulating the development of the community must not be unduly contravened.

(b) The benefits of municipal government to the residents of the territory must be disproportionately low relative to the burdens imposed on the residents.

(c) The interests of the state and community must be served by the detachment.

(d) Fair and equitable treatment must result.

(e) The territory, after detachment, must not be surrounded by the municipality.

SECTION 702. *Criteria.*

In determining whether the standards for detachment have been met the committee shall consider, but is not limited to the consideration of, the following criteria:

(a) the effect of the proposed detachment on the population growth of and assessed valuation of the real property in the municipality and territory;

(b) the area and topography of the municipality, territory, and political subdivisions of which the detached territory will become a part;

(c) whether the present and probable future character of the territory is urban, suburban, or rural;

(d) the developmental schemes of pre-existing land-use plans that pertain to the community;

(e) whether the functioning of the municipality will be disrupted;

(f) the likelihood that the residents of the territory, upon detachment and in the foreseeable future, will receive proper sanitation, safety, school, and other necessary services;

(g) the extent to which the municipal services provided to the residents of the territory are incommensurate with the taxes and other charges imposed on the residents;

(h) the ability of the municipality to finance its governmental operations without the revenues which will be lost when the territory is detached; and

(i) the ability of the receiving township and county to assume shares of the existing indebtedness and to purchase property of the municipality under section 1002.

PART VIII. INCORPORATION

SECTION 801. *Standards.*

The committee shall approve a proposed incorporation if, and may approve it only if, it meets all of the following standards:

(a) The territory must be amenable to separate municipal government.

(b) The territory must be able to provide necessary municipal services to its residents within a reasonable period after its incorporation.

(c) The interests of the state and community must be served by the incorporation.

(d) Fair and equitable treatment must result.

(e) Incorporation must be the type of boundary adjustment that is most beneficial to the community as a whole.

SECTION 802. *Criteria.*

In determining whether the standards for incorporation have been met the committee shall consider, but is not limited to the consideration of, the following criteria:

(a) the effect of the proposed incorporation on the population growth of and assessed valuation of the real property in the territory;

(b) the area and topography of the territory;

(c) whether the character of the territory is urban or rural;

(d) whether the territory and any incorporated city or town of any class are interdependent and are part of one community;

(e) the developmental scheme of pre-existing land-use plans that pertain to the community;

(f) the need for municipal services in the territory;

(g) the extent to which the municipal services to be provided to the residents of the incorporated territory will be commensurate with the taxes and other charges to be imposed on the residents;

(h) the ability of the part of a township or county that survives an incorporation to finance its governmental operation without the revenues which will be lost if the territory is incorporated;

(i) the inadequacy of the township or county form of government to cope with the problems of the territory; and

(j) the ability of the incorporated territory under section 1001 to assume a share of the existing indebtedness of and to purchase property from the township and county which survive the incorporation.

SECTION 803. *Board must consider annexation.*

If a petition proposes incorporation of a territory any part of which is closer than four miles to an incorporated city or town of any class, the Board shall consider, before ruling on the petition under section 304, whether it should initiate proceedings for the annexation of the territory to that city or town.

SECTION 804. *Boundaries not a bar.*

County boundaries are not a bar to incorporation.

PART IX. CONSOLIDATION

SECTION 901. *Standards.*

The committee shall approve a proposed consolidation if, and may approve it only if, it meets the following standards:

(a) The municipalities must together form one community.

(b) The interests of the state and community must be served by consolidation.

(c) Fair and equitable treatment must result.

(d) Consolidation must be the type of boundary adjustment that is most beneficial to the community as a whole.

(e) The municipalities to be consolidated must be contiguous to each other. Contiguity is not affected by lakes, rivers, highways, and similar natural or man-made barriers.

SECTION 902. *Criteria.*

In determining whether the standards for consolidation have been met the committee shall consider, but is not limited to the consideration of, the following criteria:

(a) the effect of the proposed consolidation on the population growth of and assessed valuation of the real property in each municipality;

(b) the area and topography of the municipalities;

(c) the extent to which the municipalities are interdependent and are part of one community;

(d) the developmental scheme of pre-existing land-use plans that pertain to the community;

(e) the extent to which the functioning of each municipality will be improved; and

(f) the extent to which the municipal services to be received by the residents of each municipality will be commensurate with the taxes and other charges to be imposed on the residents.

SECTION 903. *Boundaries not a bar.*

County boundaries are not a bar to consolidation.

PART X. FINANCIAL ALLOCATIONS

SECTION 1001. *Upon annexation or incorporation.*

(a) If an annexation or incorporation is approved, the committee shall make financial allocations as follows:

(1) It shall determine what portion, if any, of the existing indebtedness of the townships and counties receiving revenue from the territory shall be assumed by the municipality or incorporated territory.

(2) If the township or county owns property located or used in the territory and so requests, the committee shall determine whether or not the municipality or the incorporated territory must purchase that property. The committee shall also determine a fair price for the property.

(b) The committee shall make these determinations in light of all the benefits and burdens that it believes will result from the boundary adjustment and in such a way as to effect the highest degree of fairness and equity to:

(1) the residents of the municipality in the case of annexation;

(2) the residents of the territory;

(3) the residents of the townships and counties receiving revenue from the territory; and

(4) the bondholders and creditors of every governmental entity involved.

(c) No municipality may be required to assume indebtedness of a county if that county collects revenues at the same rate throughout the county regardless of municipal boundaries.

SECTION 1002. *Upon detachment.*

(a) If a detachment is approved, the committee shall make financial allocations as follows:

(1) The committee shall determine what portion, if any, of the existing indebtedness of the municipality shall be assumed by each township and county of which the detached territory will become a part.

(2) If the municipality owns property located or used in the territory and so requests, the committee shall determine whether that property must be purchased by any township or county of which the detached territory will become a part. The committee shall also determine a fair price for the property.

(b) The committee shall make the determination in light of all the benefits and burdens that it believes will result from detachment and in such a way as to effect the highest degree of fairness and equity to:

(1) the residents of the municipality;

(2) the residents of the territory;

(3) the residents of the townships and counties of which the detached territory will become a part; and

(4) the bondholders and creditors of every governmental entity involved.

SECTION 1003. *Upon consolidation.*

If a consolidation is approved, the municipality formed by the consolidation shall assume all indebtedness of and receive title to all property owned by the pre-existing municipalities.

PART XI. VOTING; EFFECTIVE DATE; OPINIONS; NOTIFICATION

SECTION 1101. *Vote by the committee.*

After the hearing is completed and after due deliberation, the committee shall vote on the following questions:

(a) whether to approve the proposed boundary adjustment; and

(b) if the boundary adjustment is approved, what, if any, financial allocations should be made.

SECTION 1102. *Determination of effective date.*

If a boundary adjustment is approved by a vote of the committee, the committee shall determine the date on which the boundary adjustment and financial allocations take effect. That date must be not less than 90 days nor more than one year from the date on which the committee approved the boundary adjustment.

SECTION 1103. *Opinions.*

The committee shall issue an opinion that contains the following:

(a) a report of the votes of each member of the committee under section 1101;

(b) an explanation of the decision on the boundary adjustment;

(c) an accurate map of every municipality and territory involved; and

(d) the effective date of the boundary adjustment as determined under section 1102.

SECTION 1104. *Notification of officials.*

The Board shall transmit the opinion of the committee to the following:

(a) the Secretary of State; and

(b) the clerks of the townships, counties, and municipalities affected.

PART XII. CHARTER COMMISSION ELECTIONS

SECTION 1201. *Incorporation.*

(a) If an incorporation is approved by the committee, the voters of the territory shall elect members of a charter commission.

(b) The election of members of the charter commission shall be held on a date determined by the Board. Whenever a general or special election is to be held in the territory, the charter commission election shall be held with the general or special election if undue delay will not thereby result.

SECTION 1202. *Consolidation.*

(a) If a consolidation is approved by the committee, the voters of each municipality shall elect a charter commission. The election of members of the charter commission shall be held on a date determined by the Board. Whenever a general or special election is to be held in a municipality, the charter commission election in that municipality shall be held with the general or special election if undue delay will not thereby result.

(b) The commissioners chosen by each municipality shall together form the charter commission of the consolidated municipality.

SECTION 1203. *Results published.*

The Board shall announce and publish the results of an election not more than 10 days after the election.

PART XIII. APPEAL

SECTION 1301. *Appeal from decision by committee.*

(a) Any person aggrieved by a decision of the committee may appeal to the [Court of Appeals] on the grounds that the committee has acted arbitrarily or contrary to law in reaching its decision.

(b) On appeal the person aggrieved may seek an injunction to prevent a boundary adjustment from taking effect until the committee makes a decision according to law.

SECTION 1302. *Appeal from preliminary ruling.*

A person aggrieved by an improper dismissal of his petition by the Board under section 304 may seek an order from the [Court of Appeals] to require the Board to proceed with the application.

SECTION 1303. *Time limit for appeal.*

No appeal may be brought after the effective date of the boundary adjustment.

COMMENT

A State Boundary Adjustment Board is created to supervise all annexations, detachments, incorporations, and consolidations with-

in the state. Proposals for these boundary adjustments may originate with the Board, under section 301. Under part III, interested public entities and individuals may commence proceedings for boundary adjustments by petitioning the Board. Before a boundary adjustment takes effect, it is subjected to a thorough scrutiny. After receiving preliminary approval of the Board under section 304, it is submitted to a committee consisting of the members of the Board and local representatives chosen as specified in part IV. The committee must conduct a hearing on the proposal under part V, before it approves or disapproves. The Board or the committee may modify a proposal at any time before it is finally approved, so long as an opportunity for hearing on the modification is provided. After hearings have terminated, the committee must make a decision to approve or disapprove the proposal and must publish a written opinion explaining its action.

Throughout their deliberations the Board and the committee are guided by the legislatively declared principles, or standards, articulated in part VI through part IX. The statute also provides criteria, or suggested considerations, for determining whether the standards, which are mandatory, are satisfied. The committee is also charged with the responsibility of making indebtedness and property allocations according to a general standard of fairness, part X. An appeal is provided in part XIII.

A more detailed discussion of the act follows.

Part II. State Boundary Adjustment Board

This part describes the composition and duties of the Board. Section 202 provides for three Board members to be appointed by the Governor with the advice and consent of the Senate. This is a usual procedure for the appointment of similar officers.

The complex legal problems that will arise in many phases of the Board's work make it necessary that one of the appointees be learned in the law. The initial appointments of Board members will be made so as to stagger their terms in order to modulate great swings of attitude resulting from political changes in the state. The six-year term allows sufficient time for benefit to be derived from the expertise the Board members will develop during their first years in office. Reappointment is allowed for the same reason.

Section 203 specifies the Board's duties. Paragraph (b) which requires the Board to initiate boundary adjustment proceedings in accordance with part III is discussed below under that part, as is paragraph (c) on preliminary rulings.

Annual reports to the Governor and the legislature are required by paragraph (e) in order to (1) inform the legislature and Governor of the Board's activities; (2) provide a basis for ascertaining whether or not changes are needed in the Board's powers; and (3) provide a record of the Board's activities for the benefit of the public, and in particular for future applicants and their counsel.

The salaries provided in section 205 should be substantial enough to attract competent persons who are willing to spend a considerable amount of time in these duties. Fifty dollars per diem would probably accomplish that purpose.

Part III. Initiation of Proceedings

Section 301 provides for initiation of boundary adjustment proceedings by the Board. It is envisioned that the usual methods for setting the procedure into motion will be those prescribed in 302. However, the Board is empowered to initiate proceedings for boundary adjustment because it is in the best position to determine what adjustments will be in the best interests of the state. The need for this overview is a primary motivation for this statute. It should be noted, however, that Board initiation does not assure passage of any adjustments since they are treated in the same manner as 302 proposals. It is thus possible that after hearings and study the committee may reject them.

Seven alternative sources of petitions are provided for in section 302 so that everyone interested in promoting a boundary adjustment may petition for it. The percentages prescribed in 302(e), (f), and (g) should be small enough to preclude an inordinate amount of door-to-door canvassing for signatures, but large enough to avoid frivolous petitions for adjustments desired by only a few. The percentage of registered voters suggested is 10 percent. In 301(g), because of the likelihood of absentee ownership, the percentage of the assessed value of the property should be higher—25 percent is suggested.

Section 303 requires a substantial amount of information to be

supplied by the applicants for two reasons: it will serve to discourage frivolous applications, and it provides the Board with a basis for judgment as to whether or not the petition should be dismissed under section 304. However, the amount of information required is not so large that submitting petitions would be prohibitively expensive.

Subsection 304(c) refers to repetitive petitions which would require the Board to waste time with futile hearings and the state to bear unnecessary expenditures for hearings and local representatives. The effect of this will be, for example, to prevent a municipality from badgering an unwilling territory for annexation. The word "substantially" is used to prevent a municipality from simply changing a few boundaries and reapplying immediately. It does not, however, prevent a different municipality from petitioning for annexation of the same territory, since wholly different considerations might be involved. "Substantially," while undefined in the statute, would encompass at least such changes as the committee has power to make under section 405.

The combination of conflicting or complementary petitions is allowed in the interests of efficiency, consistency, and uniformity. It dovetails with the Board's power to enact proposals of its own, since the Board might, for example, think detachment should be allowed only if it is followed by annexation to another municipality. Thus it can initiate the second proceeding and combine the two.

Part IV. Committee

Section 401 provides for a committee to decide each petition. The committee will consist of the Board and two or more local representatives appointed only for that particular petition. The representatives will provide the committee with necessary insights into the local situation and will also aid in communication with the applicants and other citizens involved. They will tend naturally to represent the interests of the county or municipality from which they are appointed. The residence requirement in section 402 was adopted with this in mind. Local representatives are appointed for each individual proceeding rather than permanently because permanent representatives in areas where boundary adjustments are rare would tend to become mere patronage posi-

tions. Under paragraph (b), each county involved is represented because of the different problems contiguous counties often face. Paragraph (d) avoids proliferation of representatives on the grounds that this would make the size of the committee unwieldy. Paragraphs (e) and (f) provide that each municipality is to be represented in the case of consolidation, regardless of the total number of municipalities involved.

Considerations similar to those involved in determining the salaries of Board members should be used in section 403. The same per diem salary might be in order.

In section 405 the committee is given power to make minor changes in the scope of the proposed boundary adjustment without starting the whole petition process over again. Section 407 makes certain that the Board members will always have a controlling vote if they all agree. This is in keeping with one of the assumptions involved in establishing the Board: that expert statewide planning should outweigh local interests. Nevertheless, the state control is not overwhelming since the local representatives can produce a majority by persuading only one Board member.

Part V. Hearings

The 90-day period in section 501 was chosen with the thought that the proceedings ought not to drag on but that sufficient time ought to be given so that all concerned will be able to prepare adequately for the hearing. The main reason for the 30-day notice requirement of section 503 is to allow time for the preparation of information. Section 504 assures that all considerations about which anyone feels at all strongly will be laid before the committee. The same considerations govern in sections 505 and 506.

Parts VI through IX. Standards and Criteria

These parts provide standards and criteria to assist and promote logical, reasonable, and consistent judgment by the committee. The standards provide the necessary legislative mandate to the committee without being too constrictive. Without these, the statute might be struck down in some states as an unconstitutional delegation of legislative power. These provisions are much more acceptable, in view of their relative exactness, than most existing boundary adjustment standards. For example, in Ohio, where

the county commissioners approve incorporation petitions, the only standard is that "it is right" that the incorporation be allowed.[1] Likewise, Virginia provides that its courts must find that an annexation is "necessary" and "expedient." [2] The constitutionality of this vague standard is no doubt enhanced by the fact that this decision is made by a three-judge court. Finally, New York simply requires that in light of the effects on the areas involved, annexation be found "in the over-all public interest." [3] In contrast, the North Carolina legislation presents an example of the use of specific mandates. That statute strictly defines all relevant standards. For example, to be urban an area must already be 60 percent developed for urban purposes.[4]

The criteria are included to give legislative suggestions of tests by which compliance with the standards can be judged. They are, by their terms, not exclusive. Examples of the use of criteria can be found in legislation in Minnesota, Virginia, Washington, and California. The use of criteria without standards would seem to present some constitutional delegation questions, especially if the criteria are not exclusive.[5]

With this general framework in mind, a discussion of the specific standards and criteria follows.

Part VI. Annexation

Standard (a) is the most universal boundary adjustment standard—though often it is phrased without any consideration of the future.[6] It reflects the policy of this statute that urban areas should be under urban government and rural areas under county government.[7] Other phrasing such as in Minnesota and California seems too limiting. Minnesota says "now, or about to become urban," and California, in a criterion, looks to the likelihood of growth in the next ten years.[8] Instead this draft's requirement has been phrased rather generally in order to reflect the state's policy set out above while still allowing consideration of unusual factors which might require boundary adjustment prior to any actual urbanization. Such generality can also be found in the line of cases establishing judicial standards for annexation.[9]

Paragraph (b) is a subject of particular concern in recent legislation.[10] Since extending the availability of municipal services is the principal reason for annexation in most cases, it is logically

a standard for annexation. In a similar solution, a California criterion cites "need for organized community services." [11] But North Carolina requires the municipality to submit a statement of its plans for extending services, some of which must be begun within one year of annexation.[12] That municipal services as a principal standard is not so obviously required can be seen from the fact that it is not considered in the *Vestal* line of cases.[13]

Paragraphs (c) and (d) are, of course, typical generalized standards which are nevertheless vital considerations in boundary adjustment. Similar standards can be found in Virginia (where they are exclusive), Indiana, New York, and Washington.[14] However, paragraph (c) is different from the usual standards since it refers to the interests of the state and the community, rather than the territory and municipality. This reflects the belief that state policy is intimately involved in municipal boundary decisions. Further, over-all interests should prevail over the interests of the territory or municipality since the latter tend to be limited largely to short-run considerations.

Paragraph (e) requires the committee to take special note of the other boundary adjustment forms before settling on a solution. Thus subsequent detachment and consolidation will be less likely. Cities therefore can plan with more certainty since an adjustment is more likely to be permanent.

Paragraph (f) is sometimes the sole stated standard in annexation legislation.[15] Here North Carolina has again been quite specific in requiring one-eighth of the territory's boundaries to be contiguous to the municipality.[16] Such an extreme degree of specificity is rejected in this draft as an unwarranted limitation, especially since the committee is likely to be a sufficient sieve to prevent annexation gerrymandering. At the same time, the Indiana requirement of a "compact area" is equally confining since in rare instances odd shapes become warranted.[17] Thus in this draft the least confining solution has again been adopted.

The criteria of section 602, which are merely the factors to be studied, need not all be favorable to the annexation in order for it to proceed. They are meant instead to aid in resolving the question of whether the standards have been fulfilled.

Any study of the necessity of annexation should begin with criteria (a) and (b). Criteria similar to paragraph (a) can be

found in the California, Minnesota, and Washington statutes.[18] The only distinction between them and this draft is that those statutes often have more verbose phrasing as in Minnesota, which puts paragraph (a) into four separate criteria. While paragraph (b) is equally common in its reference to area, the word "topography" is rarely included.[19] It should be noted that peculiar land formations such as mountains, bays, and lakes might be real limitations on the feasibility of urban expansion plans.

Paragraph (c) aids, in part, in determining whether other boundary adjustments might be better. If the territory's interdependence is with other cities or if it is independent, then the proposed annexation must be seriously questioned. This is an important factor since difficult transportation and civic problems could easily result if the territory has greater affinity with another city and its people were naturally drawn in that direction for shopping, business, and recreation. Such a criterion is considered so important as to be a standard in Indiana.[20] But making it a standard would be unnecessarily restrictive, especially since the committee is available to review the problem. The judicial articulation of this standard in the *Vestal* line of cases includes a reference to the territory's representing "the actual growth of the municipality beyond its legal boundaries." [21]

Paragraph (d) is rarely mentioned in boundary adjustment legislation though it seems indispensable if long-range predictions and planning are to be used effectively to promote orderly growth in the whole area.

Paragraph (e) provides for the consideration of the likelihood of improvement of the municipality through annexation. For example, territories might be needed to end isolation of irregularly-shaped parts of a city or to eliminate the frustration of municipal police and fire protection. Criteria similar to paragraph (e) can be found in the *Vestal* line of cases: "When [territories] are needed for any proper urban purpose as for the extension of streets or sewers, drainage, electric, gas or water system or to supply places for the abode or business of residents, or for the extension of needed police regulation." [22] This kind of provision, though directed specifically toward the development of the municipality, rather than to all municipal improvements, can be found in Washington, Indiana, and Missouri.[23]

Paragraph (f) is self-explanatory, but omitted in some statutes.[24] Several methods of expressing this need can be found. In Washington, there is a lengthy listing of services which seems unnecessary and dangerous if any court were greatly addicted to the use of the maxim, *inclusio unis est exclusio alterius.*[25] The California act merely looks to whether there is a need for community services.[26] The latter course has been adopted in this draft so that no unique needs will be overlooked. It is interesting to note that such questions were not considered at all in the *Vestal* line of cases.

Paragraph (g) is more solicitous of the territory's residents than most other legislation, though similar considerations were raised in Minnesota.[27] In reality such a criterion must be discussed by the committee in order for it to derive a meaningful picture of the fairness and equity of the boundary adjustment.

Paragraph (h). While it is tempting to limit consideration to the effect of the adjustment on the territory and the municipality (and this is done[28]), this approach could often result in leaving unincorporated fragments of townships and counties which are unable to provide adequate necessary services to the remaining residents. Blighted rural areas are likely to result. This criterion is also included in California and Minnesota.[29]

Without the allocations and transfers required by part X, annexation could impose extreme hardship on nearly all areas losing territory by annexation. Thus the ability of the municipality to assume those burdens is considered in paragraph (i). Some allocation is included in most legislation, but it is rarely mentioned in the criteria for the annexation itself.[30] This seems improper.

Section 603 makes it clear that there may be annexation which results in a municipality located in more than one county. Some states prohibit multi-county annexation.[31] Such limitations are, as a rule, quite artificial and detrimental to sound development.

Part VII. Detachment

While there is almost a presumption in favor of annexation in this draft, quite the opposite situation exists in the case of detachment. Fragmentation in this way is counter to present trends and should be strictly limited. However, the opposite situation now exists in California, New York, Missouri, and Washington, where detachment is possible simply by a vote of the inhabitants of the

whole municipality—a surprisingly easy procedure.[32] In Ohio, detachment can be effected by a vote of the inhabitants of the territory instead.[33] Virginia and Minnesota both have standards for determining the propriety of the detachment. Virginia merely requires that the general good of the community not be "materially affected." [34] That formulation makes detachment too easy.

Section 701 establishes five standards for detachment. Paragraph (a) implicitly declares that a municipality has an interest in developing surrounding areas—an interest which must be taken into consideration before a detachment can be approved. This standard is more limiting than Virginia's. A similar provision can be found among the standards enumerated in the Minnesota statute,[35] which also considers the loss of municipal "symmetry"—an unfortunate standard since the destruction of geometric patterns sometimes may be warranted and not disruptive of proper municipal government.

Paragraph (b) is also restrictive since not only must the detachment be in the interest of a majority of the people of the territory, a standard tending to favor detachment, but also there must be real hardship produced by the continued existence of the present system. If no hardship is now imposed it is improper to reduce the scope of municipal control.

Paragraphs (c) and (d) are, of course, the same as 601 (c) and (d); and further elaboration is unnecessary.

Paragraph (e) is needed to prevent chunks from being excluded from the center of the city, since this would never be warranted because of the difficulty of administration which is certain to result. This provision is in the Minnesota statute[36] and is also a limitation in several states without standards.[37] Also, even though it is not included in many states, the synonyms used for the detachment action seem to impart this requirement.[38]

Paragraphs (a), (b), and (d) of section 702 are parallel to annexation. Criterion (c) has been made a standard in Minnesota which requires that all the land be agricultural.[39] This may be restrictive, but nevertheless the rural character of the territory is quite important in determining both 701 (a) and (b).

Paragraph (e) is meant to call attention to prior strip or other annexations which have imposed undue burdens on the municipality as well as to the considerations described in section 602

(e). This is not mentioned in the Minnesota legislation which has no criteria for detachment.

Paragraphs (f) and (g) are used in the comparison of municipal benefits and burdens required by 701(b).

Paragraphs (h) and (i) are the converse of paragraphs 602 (h) and (i) and would seem equally important here since no boundary adjustment which produces heavy financial burdens on any governmental entity is likely to be in the best interests of the state and community or fair and equitable.

Part VIII. Incorporation

Part VIII presents the standards and criteria for incorporation. In several states the only standards are reasonable compactness and a given population.[40] In contrast, total flexibility as to the requisite population is allowed in this draft since the concern is with the purposes of incorporation. Mechanical limits are out of place because the minimum size requirement for incorporation in densely populated areas will be different from those requirements in sparsely populated sections of the state. A third approach is to combine standards and numerical limits.[41] Paragraph (a), the key standard in this section, requires first that the territory be amenable to municipal government.[42] In addition paragraph (a) requires that the territory be amenable to *separate* municipal government. Thus besides being urban in character there must be the requisite separateness which makes incorporation more desirable than annexation. The separateness requirement is promoted in other states by a limitation on annexation within a certain distance from an unincorporated municipality.[43] Such restrictions are unnecessary when the committee is available to base a judgment on the degree of separateness, rather than on some arbitrary standard of distance.

Since the principal reason for establishing municipal government is to organize for better services, standard (b) has been included. This requirement is present as a criterion in Minnesota.[44] Indiana, in an objective standard,[45] requires that a majority of the property owners must agree to provide at least six from a list of eleven municipal services. Certainly this is unnecessarily limiting and may have a retrogressive effect since owners may feel that no more than six need ever be supplied. In another vein, Virginia

permits incorporation only if services are not forthcoming from the present government.[46] Minnesota puts forth a similar standard for incorporation which is limited to the consideration of land use controls.[47] This seems to be an unnecessary presumption in favor of the township form of government which is by its nature less suited to handling urban needs and development. Thus it is not among the standards of this draft.

Paragraphs (c) and (d) have counterparts in 601 and 701 and the discussion there is equally applicable here. Virginia requires similarly that "the general good of the community be promoted," and that it be "reasonable" and "to the best interest of the inhabitants."[48] In Missouri, in a similar vein, the sole criterion is reasonableness.[49] Indiana considers only the "surrounding area," [50] while California looks to the interests of adjacent areas and the county as well.[51] As with other boundary adjustment forms, the state interest is never mentioned.

Likewise paragraph (e) is included as in 601(e). It is interesting to note that rather than considering several boundary adjustments together some states require that all other petitions be suspended if an incorporation is pending.[52] Note how section 803 of this draft handles this problem in almost a reverse fashion.

In section 802 many of the criteria are once again quite similar to those in 602 and are not additionally elaborated.

Paragraphs (a) and (b) can be found in California and Minnesota in almost the same form.[53] Area is an absolute limitation in some states, such as New York.[54] In most other states such things as reasonable compactness are substituted.[55] Even this restriction seems unnecessary in a committee system statute.

Paragraph (c), of course, goes to the adaptability of the territory for municipal government and is discussed above in connection with 801(a). Paragraph (d) also aids in finding whether 801(a) is fulfilled.

Paragraph (e) has been discussed adequately above as has paragraph (f), which is provided in California and Minnesota.[56]

The factors in paragraphs (g), (h), and (j) are likewise discussed under annexation. Paragraph (g) is a standard in Indiana and in a general way in California.[57] Both paragraph (h) and paragraph (j) are original with this draft. The affirmative form

of paragraph (i) is a standard in Indiana and Virginia and is a criterion in Minnesota.[58] This provision is more logically a criterion here since this draft assumes that township and county governments are inadequate to handle many urban problems. Further, if the township or county government is adequate, it is likely that the territory is not "amenable" to municipal government.

Section 803. As is pointed out in the discussion of 801(a), several states have absolute prohibitions on incorporation near other cities. Instead, this draft requires the committee to consider whether annexation is a better boundary adjustment before it proceeds with an application for incorporation. This, of course, promotes as well the consideration of 801(e). Similarly, the Minnesota statute contains a directive to the commission that "[t]he petition should be denied if it appears that annexation to an adjoining municipality would better serve the interests of the area." [59]

Section 804 is based on the same considerations as section 603.

Part IX. Consolidation

The fourth type of boundary adjustment, consolidation, is dealt with in part IX. This is called annexation of incorporated areas in some states. A common requirement is the existence of an agreement among the governing bodies of the municipalities.[60] This is rejected here as not consonant with the scheme of putting control and decision-making solely in the committee. Besides following the usual requirements of paragraphs (b), (c), and (d), the municipalities to be consolidated must form one community. The problems of community interests are similar to those posed in 701(a) on incorporation, which requires a determination as to whether the territory is independent. Here the committee must decide whether the two or more municipalities involved are susceptible to unified government. The Minnesota standard is similar—"so conditioned and so located" as to be "properly" consolidated.[61]

Minnesota further requires that the consolidation be in the best interest of the municipalities. Again the broad considerations of paragraph (b) are more conducive to the ultimate statutory goals.

Paragraph (e) is the one standard which is quite common in consolidation statutes.[62] Its value is discussed further under 601(f).

The criteria are much less extensive in 902 because most of the decisions on the need for municipal government required in the criteria for other boundary adjustments have already been made. The goal is simply to decide between separate or consolidated municipal government. Because these considerations pose questions of economy of scale, once again paragraphs (a) and (b) should be the starting points for analysis. The omission of these factors in the Minnesota statute, after their being included for the other three forms of boundary adjustment, seems rather surprising since area and population are quite important in determining service economies as well as the likelihood of a community of interests.[63]

Interdependence in paragraph (c), of course, goes directly to the question of standard (a). Paragraph (d) is as important in considering consolidation as in the other boundary adjustment forms.

Paragraph (e) relates to 901(b) and (c). It is not a deterrent unless services will be substantially decreased. The same treatment should be given to criterion (f). One of the difficulties with consolidation is that it often involves the joining of a prosperous satellite city to a less well-to-do central city. Thus tax rates and services may be adversely affected to some extent in one of the municipalities even though the consolidation will yield the greatest benefit to the state and community. Thus these considerations must be balanced, and (e) and (f) should never be absolute bars, but only criteria. Minnesota requires that consolidation be denied if the "primary motive for the [consolidation] is to increase the revenues of the annexing municipality and such increase bears no reasonable relation to the value of benefits conferred upon the annexed municipality."[64] This is a hindrance to creating more well-rounded and solvent municipalities and should be avoided.

Section 903 is based on the same considerations as section 603.

Part X. Financial Allocations

As has been pointed out above in connection with the criteria of parts VI through IX, one of the most important questions which

a boundary adjustment poses is what is to be done with the indebtedness and property of the entity which is losing the territory in order to adjust for its loss. Four general approaches have been tried in other legislation.

1) No indebtedness changes are effected and the financial status quo is maintained. This solution is common in incorporation legislation. California and North Carolina, for example, require no changes.[65] But it can also be found occasionally in annexation[66] and detachment.[67] This is a highly unrealistic approach which will have two possible results. Either great unfairness will result from the decreased tax base and continued indebtedness, or needed boundary adjustments will not be effected because undue financial burdens are likely to result.

2) The second approach is to base allocations of indebtedness upon a formula which can be applied unswervingly in each case. For example, in Indiana the municipality shall be liable upon annexation or incorporation for "so much of such indebtedness of such civil townships in proportion that the assessed valuation of property in such . . . territory is to the valuation of all property in such townships . . . prior to the [boundary adjustment]. . . ." [68] The approach is a perfect solution in the normal case; but too often extraneous factors arise such as the degree of amortization, the ability of the territory's residents to continue to use the facilities for which the indebtedness was incurred, the provisions of bonds limiting assignments, the existence of presently-contracted future obligations, and the degree to which the facility for which the indebtedness was incurred is revenue-producing. Such occurrences make a formula unattractive since it will too often produce inequities which can be avoided by a more flexible system. That this is the case is illustrated by the great number of caveats appended to the formula in the New York legislation.[69]

3) The third method is to require the territory to continue to be liable for all prior indebtedness and to be subject to municipal indebtedness only if it is incurred in the period after the boundary adjustment. Such a system is usual in detachment legislation,[70] but it can be found in other contexts.[71] It has not been widely adopted probably because of the administrative difficulties which would tend to result when different parts of the municipality are taxed at different rates by different entities. Further, political, and per-

haps debt ceiling, problems might arise whenever the municipality wished to impose higher tax rates for new improvements since various areas would have different tax rates. Differing assessment practices might further complicate the situation. In addition, a problem might arise as to whether land should be assessed for the purpose of the old township tax on the basis of improvements made after the territory became part of the municipality, or on the value at the time of the boundary adjustment. Thus if a scheme can be established to eliminate overlapping tax jurisdiction, it would seem to be preferable.

4) The fourth method seems to be the most acceptable. A general standard is prescribed as to how the allocation should be carried out and some board or court is empowered to adjust indebtedness in light of that standard. For example, in Virginia on incorporation the standard for the court's allocation is "just and equitable" and on annexation is "fair and reasonable" and "just." [72] In Ohio, upon incorporation the county probate court must make a "proper" allocation of indebtedness and funds.[73] In Minnesota, the Municipal Commission apportions indebtedness upon incorporation, annexation, and detachment on the basis of what is "just and equitable." [74]

This draft adopts this fourth method and uses "fairness and equity" as its basic standard, but is more specific in that it requires consideration of the interests of the four groups most directly affected. Further the determination is made in light of the burdens and benefits resulting from the boundary adjustments as a whole and not just in light of the financial considerations. Thus the detriments of the other allocation methods—unfairness, bars to boundary adjustment, inability to adjust to situations outside the norm, and multiplicity of governments taxing in the territory—are all avoided. The only drawback left is the dependence upon the committee for the determination. However, their high degree of expertise should make their decisions highly respected as well as highly satisfactory. This is especially true since the standard allows adjustment to be made in light of other non-financial inequities which result from the boundary adjustment.

Subparagraphs 1001(a)(2) and 1002(a)(2) provide that property such as schools and waterworks, and equipment used to maintain facilities in the territory can be purchased by the municipality.

These purchases will be determined by the same factors used in the indebtedness allocations. Similar provisions exist in New York, Ohio, and Virginia.[75] In general, the logic which has resulted in indebtedness allocations is equally present here. One difference is involved, however, since the county or township must request that the purchase be made. This provision has been added since counties or townships may wish to retain large capital facilities such as water and sewage disposal plants, rather than reconstruct new ones in other locations.

Paragraph 1001(c) assures that counties with county-wide taxing powers which impose taxes equally in the municipality and outside cannot have their indebtedness altered by a boundary adjustment. This is logical since no change in the tax base is brought about.

Section 1003 is the only way to provide for the indebtedness and property of the consolidated municipality. Similar provisions exist in California, Indiana, Minnesota, Virginia, and Washington.[76]

Part XI. Voting; Effective Date; Opinions; Notification

Section 1101 requires formal votes on the two essential questions: whether to approve the boundary adjustment and what financial allocations should be made.

In section 1102 the Board has considerable discretion in fixing the effective date of the boundary adjustment. The Board may set the effective date as much as one year later since, for example, it might be more convenient for the boundary adjustment to become effective upon the start of a new fiscal year.

The committee must publish a formal opinion under section 1103 to explain its decision on the application for boundary adjustment and indebtedness allocation. Such a procedure is calculated to assure, along with the criteria of parts VI–IX, that a more reasoned judgment will result. A reasoned opinion will lead to the development of a consistent set of rules in this area that will be useful to the courts on appeal and will provide a guide to parties contemplating the submission of an application for boundary adjustment. By including in the opinion the votes of the members on all matters decided by the committee and by providing each member with the opportunity to issue a separate opinion, the legislature

will be able to make an informed judgment in any review of the Board's work.

Part XII. Charter Commission Elections

Sections 1201 and 1202 adopt present state procedures for establishing a new local government by means of a charter commission.

Part XIII. Appeal

This part permits appeals only on the usual grounds recognized in administrative appeals. In other words, appeals are for violating the statutory mandate or for acting arbitrarily or illegally. Appeals on the merits of the decision cannot be heard since these call for expertise in boundary adjustment matters and not for legal judgments.[77]

Section 1303, in effect, puts a short statute of limitations on appeals because of the difficulties which will result when territory must be returned to its prior form of government or must languish in a state of suspended animation with neither government feeling competent or justified to make anything greater than caretaker decisions. Minnesota has a similar limitation.[78]

NOTES

1. Ohio Rev. Code Ann. § 707.07(I) (Page Supp. 1964).
2. Va. Code Ann. § 15.1–1041(b) (1964).
3. N.Y. Munic. Law § 712.
4. N.C. Gen. Stat. § 160–453.16(c)(3) (1964).
5. But California has criteria, "factors to be considered," and no standards. Cal. Gov't Code § 54765.
6. *E.g.*, Ind. Ann. Stat. § 48–702(b) (1963).
7. For a discussion of that policy in the formulation of judicial standards, see Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).
8. Minn. Stat. Ann. § 414.03 (subd. 4) (Supp. 1964); Cal. Gov't Code § 54765.
9. Vestal v. Little Rock, 54 Ark. 321, 15 S.W. 891 (1891); State *ex. inf.* Major v. Kansas City, 233 Mo. 162, 134 S.W. 1007 (1911). The development of this line of cases is fully discussed in 2 McQuillan, *Municipal Corporations* § 7.18 (3d ed. 1949) and Note, *Annexation by Municipality of*

Adjacent Area in Missouri: Judicial Attitude Toward the Sawyer Act, 1961 Wash. U.L.Q. 159, 160–62.

10. *E.g.,* Ind. Ann. Stat. § 48–702(d) (1963); Mo. Rev. Stat. § 71.015(3) (Supp. 1964).

11. Cal. Gov't Code § 54765.

12. N.C. Gen. Stat. § 160–453.15(3) (1964).

13. See authorities cited note 9 *supra.*

14. Va. Code Ann. § 15.1–1041 (1964); Ind. Ann. Stat. § 48–702 (1963) ("fair and just," "best interests"); N.Y. Munic. Law § 705 ("over-all public interest"); Wash. Rev. Code Ann. § 35.13.173 (1964) ("public interest," "public welfare").

15. *E.g.,* Ohio Rev. Code Ann. § 709.13 (Page 1953).

16. N.C. Gen. Stat. § 160–453.4(b)(2) (1964).

17. Ind. Ann. Stat. § 48–702(f) (1963). One instance where an odd shape was necessary was the extension of the boundaries of Chicago to include O'Hare Airport.

18. Cal. Gov't Code § 54765(1); Minn. Stat. Ann. § 414.03 (subd. 4) (1), (3)–(5) (Supp. 1964); Wash Rev. Code Ann. § 35.13.173 (1)–(2) (1964).

19. *But see,* Cal. Gov't Code § 54765(1).

20. Ind. Ann. Stat. § 48–702(b) (1963).

21. McQuillan, *supra* note 9, at § 7.18.

22. *Ibid.*

23. Ind. Ann. Stat. § 48–702(e) (1963); Mo. Rev. Stat. § 71.015(2) (Supp. 1964); Wash. Rev. Code Ann. § 35.13.173(4) (1964).

24. *E.g.,* Ind. Ann. Stat. § 48–702 (1963).

25. Wash. Rev. Code Ann. § 35.13.173(5) (1964).

26. Cal. Gov't Code § 54765(2).

27. Minn. Stat. Ann. § 414.03 (subd. 4)(6) (Supp. 1964).

28. *E.g.,* Ind. Ann. Stat. § 48–702 (1963); Mo. Rev. Stat. § 71.015 (Supp. 1964); Wash. Rev. Code Ann. § 35.13.173 (1964).

29. Cal. Gov't Code § 54765(3); Minn. Stat. Ann. § 414.03 (subd. 4)(9) (Supp. 1964).

30. *E.g.,* N.Y. Munic. Law § 708; Minn. Stat. Ann. § 414.03 (subd. 4) (Supp. 1964).

31. *E.g.,* N.Y. Munic. Law § 716.

32. Cal. Gov't Code § 35500; N.Y. Village Law § 349; Mo. Rev. Stat. § 75.020 (1949); Wash. Rev. Code Ann. ch. 35.16 (1964).

33. Ohio Rev. Code Ann. § 709.39 (Page 1953).

34. Va. Code Ann. § 15.1–1066 (1964); Minn. Stat. Ann. § 414.06 (subd. 4) (Supp. 1964).

35. Minn. Stat. Ann. § 414.06 (subd. 4) (Supp. 1964).

36. *Ibid.*

37. *E.g.,* Ind. Ann. Stat. § 48–906 (1963).

38. *E.g.,* N.Y. Village Law § 349 ("diminishing boundaries"); Va. Code Ann. § 15.1–1059 to –1067 (1964) ("contraction of corporate limits"); Wash. Rev. Code Ann. ch. 35.16 (1964) ("reduction of city limits").

39. Minn. Stat. Ann. § 414.06 (subd. 4) (Supp. 1964).

40. *E.g.,* N.Y. Village Law § 3–302(1)(b)(3) (500 persons); Wash. Rev. Code Ann. § 35.02.010 (1964) (300 persons).

41. *E.g.*, Minn. Stat. Ann. § 414.02 (subds. 1,3) (Supp. 1964) (500 persons); Va. Code Ann. § 15.1–967(4) (1964) (1,000 persons).

42. Similar provisions can be found in Ind. Ann. Stat. § 48–103 (1963) and Minn. Stat. Ann. § 414.02 (subd. 3) (Supp. 1964).

43. *E.g.*, Ind. Ann. Stat. § 48–108 (1963) (three or four miles depending on the size of the city); N.C. Gen. Stat. § 160–196 (1964) (three miles); Ohio Rev. Code Ann. § 707.07(J) (Page Supp. 1964) (three miles). For another approach see the Virginia statute which prohibits incorporation if the density of the county exceeds 125 persons per square mile. Va. Code Ann. § 15.1–967 (1964).

44. Minn. Stat. Ann. § 414.02 (subd. 3)(8) (Supp. 1964).

45. Ind. Ann. Stat. § 48–109(b) (1963).

46. Va. Code Ann. § 15.1–967 (1964).

47. Minn. Stat. Ann. § 414.02 (subd. 3) (Supp. 1964). See also Ind. Ann. Stat. § 48–109(d)(2) (1963).

48. Va. Code Ann. § 15.1–967(1)–(3) (1964).

49. Mo. Rev. Stat. § 80.020 (1949).

50. Ind. Ann. Stat. § 48–109(d)(1) (1963).

51. Cal. Gov't Code § 54786(3).

52. *E.g.*, Cal. Gov't Code § 34302.6.

53. Cal. Gov't Code § 54786(1); Minn. Stat. Ann. § 414.02 (subd. 3) (1)–(7) (Supp. 1964).

54. N.Y. Village Law § 3–300 (three square mile maximum).

55. *E.g.*, Ind. Ann. Stat. § 48–109(a) (1963); Ohio Rev. Code Ann. § 707.07(D) (Page Supp. 1964); Va. Code Ann. § 15.1–967(5) (1964).

56. Cal. Gov't Code § 54786(2); Minn. Stat. Ann. § 414.02 (subd. 3)(8) (Supp. 1964).

57. Ind. Ann. Stat. § 48–109(c) (1963); Cal. Gov't Code § 54786(2).

58. Ind. Ann. Stat. § 48–109(d)(1) (1963); Va. Code Ann. § 15.1–967(7) (1964); Minn. Stat. Ann. § 414.02 (subd. 3)(9) (Supp. 1964).

59. Minn. Stat. Ann. § 414.02 (subd. 3) (Supp. 1964).

60. *E.g.*, Ind. Ann. Stat. § 48–601 (1963); Ohio Rev. Code Ann. §§ 709.23–.24 (Page 1953).

61. Minn. Stat. Ann. § 414.04 (subd. 3) (Supp. 1964).

62. *E.g.*, Cal. Gov't Code § 35703; Ind. Ann. Stat. § 48–601 (1963); Minn. Stat. Ann. § 414.04 (subd. 5) (Supp. 1964); Mo. Rev. Stat. § 72.150 (Supp. 1964); Ohio Rev. Code Ann. § 709.22 (Page 1953); Va. Code Ann. § 15.1–1084 (1964); Wash. Rev. Code Ann. § 35.10.010 (1964).

63. Minn. Stat. Ann. § 414.04 (Supp. 1964).

64. Minn. Stat. Ann. § 414.04 (subd. 3) (Supp. 1964).

65. Cal. Gov't Code §§ 34300–33, 54775–91; N.C. Gen. Stat. §§ 160–196 to –198 (1964).

66. *E.g.*, N.C. Gen. Stat. §§ 160–445 to –453.24 (1964).

67. *E.g.*, Wash. Rev. Code Ann. § 35.16.060 (1964).

68. Ind. Ann. Stat. §§ 48–704, –705 (1963). For similar provisions, see N.Y. Munic. Law § 708 (annexation); Ohio Rev. Code Ann. § 709.12 (annexation), § 709.40 (detachment) (Page 1953).

69. N.Y. Munic. Law § 708.

70. *E.g.*, Cal. Gov't Code §§ 35510–11; N.Y. Village Law § 349.

71. *E.g.*, Wash. Rev. Code Ann. §§ 35.11.090, 35.10.150 (1964) (consolidation).

72. Va. Code Ann. §§ 15.1–1066, 15.1–1042 (1964).

73. Ohio Rev. Code Ann. § 707.28 (Page 1953).

74. Minn. Stat. Ann. §§ 414.02 (subd. 3), 414.03 (subd. 4), 414.06 (subd. 4) (Supp. 1964).

75. N.Y. Munic. Law § 707 (annexation); Ohio Rev. Code Ann. § 707.28 (Page 1953) (incorporation); Va. Code Ann. § § 15.1–1042 (annexation), 15.1–1066 (detachment) (1964).

76. Cal. Gov't Code § 35734 (as to property only); Ind. Ann. Stat. § 48–607 (1963); Minn. Stat. Ann. § 414.04 (subd. 3) (Supp. 1964); Va. Code Ann. § 15.1–1105(3) (1964); Wash. Rev. Code Ann. §§ 35.10.100, .110 (1964).

77. For a discussion of the problems of judicial review in boundary adjustment cases, see Mandelker, *Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review,* 18 La. L. Rev. 628, 635–60 (1958); Comment, *Annexation by Municipal Corporations,* 37 Wash. L. Rev. 404, 413–23 (1962).

78. Minn. Stat. Ann. § 414.07 (Supp. 1964) (30 days).

Supplementary Index to Bureau Drafts
1964-1965

Presented below is a listing of available projects completed by the Harvard Student Legislative Research Bureau which were not listed in the index appearing in the June, 1964, issue of the *Harvard Journal on Legislation*. With the client's permission the Bureau will send a copy of the completed project upon request. A fee is charged to cover duplicating expenses, at present ten cents per page unless otherwise noted. The number of pages given includes both the statute and accompanying memorandum, if any. Address requests to the Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138, and indicate by number the project requested. The first two figures of the project number indicate the year in which the project was undertaken. Drafts published in the *Harvard Journal on Legislation* are not indexed here.

ADMINISTRATIVE AGENCIES

Annexation

6305. An act to establish an Annexation Commission in Michigan. This act creates a State Annexation Commission, and prescribes its powers and duties; provides for the annexation of a territory to a municipality and adjusts the debts and rights of the areas affected by the annexation; and provides for conducting elections to approve proposed annexations.
14 pages.

CIVIL RIGHTS

Municipal Ordinances

6406. An ordinance for Newton, Massachusetts, providing for the inclusion in municipal contracts of a provision that the contractor will comply with the fair employment practices statutes of the Commonwealth of Massachusetts. The ordinance covers both general contractors and sub-contractors. Noncompliance with this contract provision is made grounds for termination or suspension of the contract, or designation of the contractor as ineligible to bid for future business from the city until the purchasing agent receives adequate assurance of future compliance from the contractor.
12 pages.

COURTS: ADMINISTRATION AND PROCEDURE

Jury Trial

6403. An act to protect the right to trial by an impartial jury through the limitation on excessive publicity. Two approaches are suggested: a prohibition on disclosure of information prejudicial to criminal defendants by public officials to news media and a careful selection of information published

after arrest and before judgment to insure the effectiveness of traditional evidentiary and procedural safeguards.

CRIMINAL

Bail

6415. An act for Massachusetts to compel appearance in court by criminal sanction rather than through the use of bail. The Act creates a new misdemeanor for failure to appear after being released on recognizance. This so-called "bail jumping" statute is modeled partially on section 242.8 of the Model Penal Code. 9 pages.

Sentencing and Parole

6418. An act to amend the Georgia Code by providing a convicted defendant taking an appeal with the option of commencing the service of his sentence during the pendency of his appeal.

HEALTH AND SAFETY

Police and Fire Departments

6408. An act to enable cities and towns in Massachusetts to create public safety departments which combine the functions of police and fire departments and centralize training, maintenance, and other services. 21 pages.

HIGHWAYS

Moving Expenses

6303. A bill to reimburse the moving expenses of the occupiers of property in California who are displaced by federally aided highway projects. The standards of eligibility for payments are designed to entitle California to a federal subsidy for its program under 23 U.S.C. § 122; the range of compensation payable is designed to maximize the federal share of costs. 6 pages.

Outdoor Advertising

6405. A bill to render New Mexico eligible for increased federal interstate highway aid by directing the state highway commission to make agreements, upon which increased aid is conditioned, with the Secretary of Commerce for the regulation of outdoor advertising adjacent to interstate highways. To avoid a state constitutional ban on legislation by reference, the bill enumerates standards paralleling those in 23 U.S.C. § 131 to guide the commission in making agreements with the federal government and in issuing regulations. It also provides a three-year grace period for advertising lawfully in existence prior to enactment of the bill and authorizes abatement as a public nuisance of advertising in violation of the act.

8 pages.

LEGISLATIVE

Investigating Committees

6416. A federal act to revise the mandate for the House Un-American Activities Committee. This draft offers alternative proposals, each intended to restrict the scope of the Committee's jurisdiction and to confirm its authority within the new limits.

PROPERTY

Escheat

6412. An act to establish a comprehensive unclaimed property law for New Hampshire. The act bases state authority to escheat intangibles which might be claimed by other states on the standards set in *Texas v. New Jersey*, 379 U.S. 674 (1965). A reciprocal provision permits the state to sue holders of unclaimed property through officials of other states when state courts cannot otherwise obtain jurisdiction. 80 pages.

Government-owned

6407. An act creating powers and duties relating to the protection of property of the Commonwealth of Massachusetts. The broad purpose of the act is to enable Massachusetts to develop a machine inventory control system by placing accountability and responsibility for government-owned personal property on the various department heads. It also authorizes department heads to settle claims arising from the destruction or loss of Commonwealth property when the claim does not exceed a specified amount. 9 pages.

PURCHASING

6304. A bill to establish in Kentucky procedures for, and centralized supervision of, the purchase and sale of property and services by state agencies. Wide discretion vested in a central Division of Purchases is offset by provisions authorizing review by a Board of Control on the complaint of disappointed bidders or disgruntled using agencies, requiring the Division to obtain prior Board approval of certain decisions, and making Board records and the content of all bids open to public inspection. 42 pages.

SOVEREIGN IMMUNITY

6302. A bill to impose on California public entities liability for damage due to the negligent or wrongful operation of motor vehicles driven with the express or implied consent of the public entity which is the owner or bailee. The bill fixes limits on the amount of liability, prescribes the effects of the employer-employee relationship, and eliminates any requirement that the vehicle be in use in the entity's business at the time of the accident. An alternative provision substantially narrows liability to guests. 9 pages.

Cumulative Index
Harvard Journal on Legislation
Volumes I & II

References in bold-faced type are to statutory drafts prepared by the Harvard Student Legislative Research Bureau.