HARVARD JOURNAL ON LEGISLATION

VOLUME 3 MAY, 1966 NUMBER 3

CONTENTS

Published three times at regular intervals during the academic year by the Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

Subscriptions per year : United States, $4.00 (single copy, $1.50) ; United States, student rate, $3.50 (single copy, $1.25) ; foreign, $5.00 (single copy, $1.75). Subscriptions are automatically renewed unless a request for discontinuance is received.

Foreword: Assisting the Inevitable

HENRY J. FRIENDLY*

"God's mill grinds slow, but sure," wrote George Herbert the year the Long Parliament met. Up to this time the movement for a systematic approach to law revision in the United States has quite notably fulfilled the first half of Herbert's sentence. These drafts are an effort to help the second along; sometimes the inevitable requires assistance.

Three years ago I wrote a piece on this subject, "The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't,"[1] in which I noted the almost complete paralysis of law revision in the federal area, with which I was most familiar. The paralysis has endured. This is in no way to say that Congress has been neglecting its legislative function; on the contrary, we have had most important new federal statues on civil rights, social security, immigration, and aid to education and the poor. Yet, during this Lyndonian age of legislative efflorescence, little heed has been paid to the hundreds of statutes which, whether through initial inadvertence or because of changed conditions, no longer serve their intended purpose. The contrast is by no means paradoxical. The necessary concentration of Congress on great new measures and its continuing responsibility for appropriations, foreign affairs and the national defense account or at least serve as reasonable excuses for inattention to "the petty tinkering of the legal system which is necessary to keep it in running order"[2] — a subject of small interest to most Congressmen and of still less to their constituents. Yet the subject presses. A great nation must not be shackled with outmoded and ill worded laws which hardly anyone would defend if only the deficiencies were exposed.

The beginning of a remedy, as has been recognized since the early nineteenth century, is to place someone in charge of the store, as the following drafts suggest for the federal govern-

*Judge, United States Court of Appeals for the Second Circuit.

1. This was delivered as the Charles Evans Hughes Lecture before the New York County Lawyers Association on March 21, 1963, was published in 63 COLUM. L. REV. 787 (1963), and will be reprinted in a book to be published next winter by the University of Chicago Press. Some excerpts will be found in HONNOLD, THE LIFE OF THE LAW 337 (1964).

2. Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142, 145 (1919).

ment where nothing of the sort exists, and for the states where notable successes have been scored in a pitifully few. I say the beginning because the creation of a law revision commission is still a long way from the end. Enactment of a fair proportion of the commission's recommendations would depend on the ability and prestige of its members, the competence of its staff and advisers, the wisdom of its choices of subject, the quality of its performance both in substance and in presentation, its relations with legislative committees and their staffs, and perhaps also the revision of legislative procedures to create something like a consent calendar for commission recommendations that have cleared the appropriate committees by a sufficient vote. At least with such a commission *in esse* we would have solid ground for hope of continued and ordered progress; without it we shall remain at the mercy of the waves — or rather of the undertow.

The Harvard Student Legislative Research Bureau has opted for a somewhat restrictive frame of reference for the commission it would have Congress create. This is a debatable choice, and the proposed commission's role may seem to lack lustre when contrasted with the broad conception taken by the recently created Law Commission in England.[3] Yet there is something to be said for starting the commission's journey in placid waters; it is better not to risk sinking the ship until the skipper has learned and demonstrated his skills. Moreover, I should think that on balance a fairly modest proposal — not necessarily quite so modest as the attached — would be more likely than a bolder one to gain enactment.

That, after all, is the immediate and vital task. What Senator and what Representative will have the imagination to realize that here is an opportunity both to deserve well of the republic and to earn enduring fame, and to do this without the slightest political risk? A man can hardly go wrong when he links his name with a noble company that includes Bentham, Brougham, Westbury, Stephen and Gardiner in England, and Pound, Cardozo and Traynor in our own land.

3. See Sir Leslie Scarman's paper, *The Role of the Legal Profession in Law Reform*, 21 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 11 (1966); and Law Commissions Act 1965, First Programme of the Law Commission.

The Law Revision Commission

The following pages contain a Bureau draft for the creation of a Federal Law Revision Commission and one for the creation of a state law revision commission. The explanatory memorandum succeeding the second draft juxtaposes similar provisions of both acts.

An Act to Create a Federal Law Revision Commission

Article 1. Short Title and Findings

Section 101. *Short title.*

This act may be cited as the "Federal Law Revision Commission Act of 1966."

Section 102. *Findings.*

Each year Congress must make scores of major policy decisions which are of great importance to the Nation. Because of demands on its time Congress often cannot consider problems of less than major importance or reconsider, in the light of subsequent experience, statutes enacted in prior years.

The judiciary must apply these statutes in their existing form, however, and, as a consequence, injustices result. Often these injustices do not have sufficient public impact to command a legislative remedy. Thus, procedure comes to hinder the achievement of substantive goals; rules outlive their reasons; and people in like circumstances are treated inconsistently.

To remedy these and other injustices, an agency is needed which will take note of everyday legal experience and call to the attention of Congress those changes conducive to just and efficient functioning of the legal system.

Article 2. Establishment and Membership

Section 201. *Establishment of the Commission.*

There is hereby established the Federal Law Revision Commision (hereinafter referred to as the "Commission").

Section 202. *Membership.*

The Commission shall be composed of seven members, two of whom shall be the Chairman of the Committee on the Judiciary of the Senate of the United States and the Chairman of the Committee on the Judiciary of the House of Representatives and shall serve ex officio. The remaining five members shall be appointed by the President, by and with the advice and consent of the Senate. Each person appointed to the Commission shall have been admitted to the practice of law before a federal court. [At least two of the five appointed members shall be professors of law on the

faculties of accredited law schools.] The President shall designate one of the five to serve as Chairman of the Commission until the expiration of his term of office as a member.

SECTION 203. *Term of members.*

The term of each appointed member of the Commission shall be five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that

(a) any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term; and

(b) the commissioners first appointed shall serve for one, two, three, four, and five years, respectively, from the date of their appointment, the term of each individual to be designated by the President at the time of nomination.

SECTION 204. *Reappointment of members.*

The President shall have the power, by and with the advice and consent of the Senate, to reappoint any member of the Commission.

SECTION 205. *Vacancies.*

A vacancy in the Commission shall not affect its powers; all vacancies shall be filled in accordance with the rules and procedures for appointment of members contained in this article.

SECTION 206. *Compensation of appointed members.*

The members of the Commission shall serve without compensation, except that each appointed member shall receive compensation in the sum of $75 for each day spent on the work of the Commission. In addition, each appointed member shall be paid actual travel expenses incurred in attending meetings of the Commission and per diem in lieu of subsistence expenses when away from his usual place of residence, in accordance with section 73b-2 of Title 5.

SECTION 207. *Compensation of ex officio members.*

The members of the Commission ex officio shall serve without compensation.

ARTICLE 3. FUNCTIONS

SECTION 301. *Technical deficiencies; inequities.*

The Commission shall examine the statutes of the United States, in the

light of administrative and judicial construction, and recommend such changes as it deems necessary

(a) to rectify technical deficiencies which impair the attainment of the objectives of the statutes, or which may produce unintended consequences in the administration or enforcement of the statutes; or

(b) to eliminate or to rectify inequitable rules of law, and to bring the law into harmony with present circumstances.

SECTION 302. *Receipt of suggested reforms.*

The Commission shall, in its discretion, receive, consider, and prepare comments and recommendations on proposed changes in the existing law of the United States submitted to the Commission by the American Law Institute, the Judicial Conference of the United States, a bar association or other learned body; or by Congress or any agency or department of government; or by an official of the United States or of a State or of a political subdivision of a State; or by judges, lawyers, members of Congress or of administrative agencies; or by other qualified individuals.

SECTION 303. *Report to Congress.*

The Commission shall submit to the Congress in January of each year an annual report with proposed legislative drafts. The report shall include a description of the research and projects initiated, pending, or completed during the preceding year with recommendations and comments, and an itemized list of expenditures made by the Commission during the preceding year.

The above requirement shall in no way affect the freedom of the Commission to submit recommendations and legislative proposals whenever it considers it appropriate to do so. Congress and its committees shall receive such proposals whenever submitted.

ARTICLE 4. PERSONNEL

SECTION 401. *Executive Secretary.*

The Commission shall appoint a full-time Executive Secretary who shall serve at the pleasure of the Commission and whose compensation shall be that of a judge of a United States District Court.

SECTION 402. *Staff.*

The Executive Secretary shall have power, at his discretion, to appoint such staff personnel as are necessary for the work of the Commission. Such appointments shall be in accordance with civil service laws and the Classification Act of 1949.

ARTICLE 5. POWERS

SECTION 501. *Procurement of outside services.*

The Commission may procure, without regard to the civil service laws or the classification laws, temporary and intermittent professional services to the same extent as authorized for the executive departments by section 55a of Title 5, but at rates for individuals not in excess of $75 per diem. The Commission may also contract for such services with colleges, universities, schools of law, or other research institutions and may cooperate generally with any learned or professional association or institution.

SECTION 502. *Procurement of information; government agencies.*

The Commission may procure information, advice, and assistance from any agency, department, Congressional committee, or other instrumentality of the government, with the consent of the head thereof. All government agencies, and other official government organizations, and all persons connected with them shall give the Commission all relevant information and reasonable assistance on any matters of research requiring recourse to them, or to data within their knowledge or control. Reports, exhibits, and proposed legislative drafts shall be printed by the Government Printing Office under the supervision of the Commission.

SECTION 503. *Rules and regulations.*

The Commission shall have the power to make such rules and regulations for the conduct of its business as are necessary to carry out the purposes of this Act.

ARTICLE 6. APPROPRIATIONS AND USE OF FUNDS

SECTION 601. *Appropriations.*

There are hereby authorized to be appropriated to the Commission, out of money in the Treasury not otherwise appropriated, such sums not in excess of ..... per annum as may be necessary to carry out the purposes of this Act. Funds may remain available until expended.

SECTION 602. *Use of funds.*

Funds appropriated for the purposes of this Act or transferred to the Commission by other government agencies for such purposes are available for the exercise of any authority granted by this Act.

AN ACT TO CREATE A STATE LAW REVISION COMMISSION

ARTICLE 1. SHORT TITLE AND FINDINGS

SECTION 101. *Short title.*

This Act may be cited as the "Law Revision Commission Act of 1966."

SECTION 102. *Findings.*

Each year the legislature must make scores of major policy decisions which affect important segments of the state. Because of demands on its time, the legislature can neither consider less important problems nor re-examine past decisions. On the other hand, the judiciary must apply statute law as enacted, and this factor combined with considerations of limited time and reliance requires the judiciary to eschew extensive remedial innovation.

When neither the legislature nor the judiciary reopen prior decisions in the light of experience, injustices result. Often these injustices do not have sufficient public impact to command a legislative remedy. Thus, procedure comes to hinder the achievement of substantive goals; rules outlive their reasons; and people in like circumstances are treated inconsistently.

To remedy these and other injustices, an agency is needed which will take note of everyday legal experience and call to the attention of the legislature those changes conducive to the just and efficient functioning of the legal system.

ARTICLE 2. ESTABLISHMENT AND MEMBERSHIP

SECTION 201. *Establishment of the Commission.*

There is hereby established the ..... Law Revision Commission (hereinafter referred to as the "Commission").

SECTION 202. *Membership.*

The Commission shall be composed of seven members, two of whom shall be the Chairman of the Committee on the Judiciary of the Senate and the Chairman of the Committee on the Judiciary of the Assembly and shall serve ex officio. The remaining five members shall be appointed by the Governor, by and with the advice and consent of the Senate. Each person appointed to the Commission shall have been admitted to the practice of law before the courts of this state. [At least two of the five appointed members shall be professors of law on the faculties of accredited law schools within this state.] The Governor shall designate one of the five to serve as Chairman of the Commission until the expiration of his term of office as a member.

SECTION 203. *Term of members.*

The term of each appointed member of the Commission shall be five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that

(a) any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term; and

(b) the commissioners first appointed shall serve for one, two, three, four, and five years, respectively, from the date of their appointment, the term of each individual to be designated by the Governor at the time of nomination.

SECTION 204. *Reappointment of members.*

The Governor shall have the power, by and with the advice and consent of the Senate, to reappoint any member of the Commission.

SECTION 205. *Vacancies.*

A vacancy in the Commission shall not affect its powers; all vacancies shall be filled in accordance with the rules and procedures for appointment of members contained in this article.

SECTION 206. *Compensation of members.*

The members of the Commission shall serve without compensation, except that each appointed member shall be paid a per diem of ..... dollars for each day spent on the work of the Commission. In addition, each member shall be allowed actual expenses incurred in the discharge of his duties, including travel expenses.

ARTICLE 3. FUNCTIONS

SECTION 301. *Technical deficiencies; inequities.*

The Commission shall examine the common law and statutes of the state, in the light of administrative and judicial construction, and recommend such changes as it deems necessary

(a) to rectify technical deficiencies which impair the attainment of the objectives of the laws or which may produce unintended consequences in the administration or enforcement of the laws; or

(b) to eliminate or to rectify inequitable rules of law and to bring the law into harmony with present circumstances.

SECTION 302. *Receipt of suggested reforms.*

The Commission shall, in its discretion, receive, consider, and prepare comments and recommendations on proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, a bar association, or other learned body, or by judges, lawyers, public officials, or other qualified individuals.

SECTION 303. *Report to legislature.*

The Commission shall submit to the legislature [in January of each year] an annual report with proposed legislative drafts. The report shall include a description of the research and projects initiated, pending, or completed

during the preceding year with recommendations and comments, and an itemized list of expenditures made by the Commission during the preceding year.

The above requirement shall in no way affect the freedom of the Commission to submit recommendations and legislative proposals whenever it considers it appropriate to do so. The legislature and its committees shall receive such proposals whenever submitted.

ARTICLE 4. PERSONNEL

SECTION 401. *Executive Secretary.*

The Commission may appoint an Executive Secretary, who shall serve at the pleasure of the Commission, and may fix his compensation within the amount appropriated for the Commission. The Commission [or the Executive Secretary] shall appoint such additional personnel as are necessary for the work of the Commission.

ARTICLE 5. POWERS

SECTION 501. *Procurement of outside services.*

The Commission may procure temporary and intermittent professional services and render compensation therefor within the amount appropriated for the work of the Commission. The Commission may also contract for such services with colleges, universities, schools of law, or other research institutions and may cooperate generally with any learned or professional association or institution.

SECTION 502. *Procurement of information; state agencies.*

The Commission may procure information, advice, and assistance from any agency, department, legislative committee, or other instrumentality of the state, with the consent of the head thereof. All state agencies, and other official state organizations, and all persons connected with them shall give the Commission all relevant information and reasonable assistance on any matters of research requiring recourse to them or to data within their knowledge or control.

SECTION 503. *Rules and regulations.*

The Commission shall have the power to make such rules and regulations for the conduct of its business as are necessary to carry out the purposes of this Act.

ARTICLE 6. APPROPRIATIONS AND USE OF FUNDS

SECTION 601. *Appropriations.*

There are hereby authorized to be appropriated to the Commission such

sums not in excess of ..... per annum as may be necessary to carry out the purposes of this Act. Funds may remain available until expended.

SECTION 602. *Use of funds.*

Funds appropriated for the purposes of this Act or transferred to the Commission by other state agencies for such purposes are available for the exercise of any authority granted by this Act.

MEMORANDUM

The following memorandum comments on both the federal and state model statutes, which are, in many sections, identical or nearly so. Generally, the memorandum refers in terms to the federal statute, but it will be understood that, except where we have separately discussed state statute clauses, all remarks are equally applicable to the state draft.

SECTION 102. *Findings.*

The need for a Law Revision Commission, on both the federal and state levels, arises from a gap in the lawmaking process.[1] In the field of statute law, the judge must adhere to the decisions of a legislature unable to foresee every possible application of its words and often forced to deal sporadically with closely-related problems. In the field of judge-made state law, the judge's theoretical common-law flexibility is now considerably restricted in practice. Modification of a past decision is frequently impractical because many parties may have relied on it. Furthermore, crowded dockets preclude reconsideration of many issues, once decided.

In theory, problems with which the judge is unable to cope should be solved by the legislature. But legislative solutions are not always forthcoming. Pressed for time on major political issues, Congress and the state legislatures may be unaware of less important legal problems. If it is aware of these legal problems, it may not know to which it should devote its time or in what manner it should attempt to solve them. The result is a mass of

1. Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

legal injustices, many of long standing, which are not subject to either judicial or legislative redress.

This proposed legislation creates an agency to fill the gap in the lawmaking process. As long as fifty years ago Dean Pound proposed creation of an agency to ascertain needs for law revision "in the light of everyday judicial experience and to work out definite, consistent, lawyer-like programs of improvement"; this agency would advise the legislature on the "petty tinkering of the legal system which is necessary to keep it in running order."[2]

If this agency is not to be handcuffed in the performance of its duties, the manner in which it fills the gap in lawmaking must be largely discretionary. Section 102 of the drafts states the intention of the legislature: the agency created shall advise the legislature in areas of the law which are not now being adequately considered, since they do not stimulate general public concern. This clearly implies that the work of the agency shall include *neither* the burning political and constitutional issues of the day *nor* the kinds of problems which are handled as a matter of course by legislative committees. The fact that the Commission is advisory and must depend on legislative approval of its recommendations assures adherence to the legislatively-declared function.

A questionnaire prepared by the Harvard Student Legislative Research Bureau and sent to many state agencies connected with drafting legislative bills revealed a widespread lack of organizations devoted primarily to substantive law revision on the state level. Law Revision Commissions, similar to the one proposed by the Model Act, exist only in California, Louisiana, Michigan, New York, and Tennessee. Most of the states have one or more legislative service agencies such as legislative reference services, legislative councils, revisors of statutes, and commissions on statutory revision. The usual functions of these agencies are to provide research and information facilities for the legislature, to draft bills for individual legislators, to codify newly-enacted statutes so that they conform in format to published statutes, and to publish session laws. Most revision undertaken by these agencies is confined to such minor technical matters as the proper

2. Pound, *Anachronisms in Law,* 3 J. AM. JUD. SOC'Y 142, 145, 146 (1919). Section 102 of each statutes borrows occasionally from Dean Pound's language.

numbering of a section of a statute. These agencies do not fill the gap in the lawmaking process.

Even when these agencies are used as the means to acccomplish substantive law revision, which is rare, the project is originated elsewhere; an individual legislator or a legislative committee or study group usually initiates the change. The legislative service agencies ordinarily do not even have discretion to refuse such projects. On the other hand, the Law Revision Commission, where it exists, originates the revisions and recommends their enactment. This does not mean that Commission members should become lobbyists, but they should be ready to explain and answer questions relating to their proposals. The ability to initiate and advocate projects of revision distinguishes the Commission from the ordinary bill-drafting bureau which is inherently a neutral and passive body vis-à-vis the legislature.

SECTION 202. *Membership.*

1. Size. Any group charged with advising the government of a diverse nation should be large enough to afford at least occasional representation to major geographical areas, political viewpoints, and professional interests. The Commission would operate at a disadvantage if its work were thought to represent only the preoccupations of "Wall Street lawyers," academicians, or any other group. Appointment of five members allows some leeway for fulfilling a representative function.

While a larger number of members makes representation easier, a smaller number facilitates internal efficiency. Past experience of state commissions reveals that seven members is not so large a number as unduly to encumber committee functioning.

The same considerations of representation and efficiency apply at the state level, where local interests deserve spokesmen.

2. Ex officio members. The Commission's primary purpose is to advise the legislature. It achieves results only insofar as the legislature accepts its advice. State experience is that participation and support by legislative members of Commissions are crucial to obtaining legislative acceptance.

The legislative members know the people and their problems, and they can temper idealistic solutions with pragmatic realism.

They are helpful in making policy decisions, and can anticipate the legislative reaction to the Commission's proposals. They also provide ready sponsorship and a source of explanation for the Commission's bills in the legislature.

These drafts provide membership for the two committee chairmen who would be initially responsible for Congressional or state legislative action on many Commission proposals. Congressional committees will exercise their usual jurisdiction in regard to these proposals.

In state experience legislative members of commissions have had the time to participate meaningfully in commission work, although perhaps not as deeply as appointed members. Since Commission membership is not to be a full-time job, and since Congressmen spend by far the greater part of each year in Washington, where we expect the Commission to meet, attendance at Commission meetings should not work any great hardship on ex officio members.

3. Bipartisanship. Since the Commission's work will be "legal" and not "political" — to use Dean Pound's distinction[3] — no requirements of bipartisan membership have been imposed on it. State commissions have operated in an effective non-partisan manner without such requirements.

4. Qualifications. The Bureau recommends that all appointed Federal Commission members be lawyers previously admitted to practice before a federal court; state commissioners, before the courts of the state. Since the Commission's work will be highly technical in large part, any broadening of outlook which non-legal members are supposed to provide would be largely illusory. Laymen would often need extensive explanations or would be at a severe disadvantage in discussing legal concepts with lawyers. This is not desirable.

5. Law Professors. The Bureau is undecided as to whether to require law professors on the Commission. It agrees that they should regularly be chosen, as they are intelligent professionals in touch with the movement of the law; but differs on whether to force the choice in regard to two of the five appointed members.

---

3. Pound, *supra* note 2, at 142.

The arguments in favor of the optional clause are as follows:

(a) the explicit requirement helps to characterize the Commission as a body of educated and experienced men, rather than "political" appointees; this provision would be in keeping with the deliberate omission of the bipartisanship requirement;

(b) a major portion of the research work of the Commission will be done by law professors and other legal scholars from outside; law professors, as part of the scholarly community, will often know best where the most pertinent research has already been undertaken and which individuals will, by their interests and current works projects, be of most assistance. They are, in a sense, liaisons with the academic world, as the ex officio members are liaisons with Congress;

(c) response to the Bureau questionnaire indicates that, in the experience of the various state legislative service agencies, professors have usually had more time to devote to agency work than practicing lawyers.

The arguments against requiring membership of law professors are:

(a) regardless of other requirements, the President and Congress are responsible for the quality of Commission membership; hopefully, they will want it to be high and some academicians will naturally be chosen; on the other hand, if they want political "hacks," such may be found among the nation's law professors;

(b) Congress should not be misled into thinking that the Commission is really a delegation of legislative responsibility to a group of ivory-tower intellectuals; this argument has been raised by the conservative opponents of a Law Revision Commission in at least one state legislature — with the ultimate result of striking down the "professor requirement";

(c) law professors will inevitably influence the work of the Commission anyway because of the assignment of designated problems to independent consultants for analysis and development.

SECTIONS 203-204. *Term of members; reappointment of members.*

The use of five-year, staggered terms, with power to reappoint, provides for continuity of membership — and hopefully a resul-

tant continuity of policy. On the other hand, it does not impose stagnation.

SECTIONS 206-207. *Compensation of members.*

These drafts are premised on the belief that the Commission will function best if its principal jobs are decision-making and supervision, with research and drafting left to be assigned to outside professionals under the Commission's control. This means that Commission membership will be a part-time job, at least initially. (Conceivably, at some date in the future an increased work load will require full-time members.) Consequently compensation is on a part-time basis. The compensation of $75 for each day of Commission work is equivalent to that of the members of the United States Civil Rights Commission, as are the travel-expense and per diem allowances. 5 U.S.C. § 73b-2 covers compensation of part-time consultants or experts. Since, as already noted (section 202, paragraph 2), we expect the Commission to meet in Washington, no provision is made for travel expenses or per diem of the ex officio members.

In the proposed state draft, section 206 of which is modelled on Cal. Gov't Code § 10302, the size of the per diem of the appointed members is left to state discretion, and provision is made for reimbursement of all expenses, travel as well as other. This standard should permit the state legislature maximum freedom in determining the per diem. Further, since state commissions may not meet at state capitals or during legislative sessions, ex officio members as well as appointed members are to be reimbursed for expenses.

The Bureau notes that in some states legislators are paid a per diem during the legislative session rather than a flat annual salary as contemplated in the draft. These states may wish to pay the ex officio members a per diem for commission work.

SECTION 301. *Technical deficiencies; inequities.*

Section 301 is the main operative provision of both statutes. It should provide the Commission with all the authority that it requires in order to pursue an effective program of federal- or state-law revision. Paragraph (a) is aimed mainly at statutory

law that is unclear and statutes that have been administratively or judicially construed in a manner inconsistent with their intended objectives. The technical deficiencies mentioned include duplications, inconsistencies, and ambiguities. Further, problems occasionally arise which cannot be anticipated by even the ablest legislator or judge at the time of the enactment of a statute or the writing of a judicial opinion; experience in dealing with a statute or a decision may reveal a set of cases mistakenly included within or omitted from its coverage.

Paragraph (b) aims at those areas of law — both statutory law and, especially in the states, common law — which are essentially clear and unambiguous, but which are considered to be incorrect or inequitable approaches to the relevant problem. It gives the Commission authority to propose alterations of the statute which has succeeded in saying literally something that the legislature did not mean,[4] or the statute which proposes a solution to a problem which time has proved inadequate or ineffective, or rules of law which must be changed because the underlying conditions which originally prompted such rules have changed.

The Commission should devote all of its time to revision of existing law, as opposed to proposing legislation in new areas, not heretofore covered by legislation. The latter should be the function exclusively of the legislature, which will have to make the public policy decisions as to whether legislation is necessary. It is also not anticipated that the Commission would attempt to revise, on the grounds of policy, any recently-enacted statute. Such action by the Commission would transcend the bounds of revision and impinge upon the legislative prerogative of policy-making. The Commission is not designed to be a "super-legislature." From a practical point of view, of course, the legislature would not ordinarily consider changing a recently-enacted statute; accordingly, the Commission would have to show that over a period of time the statute had not worked well.

The preceding should not suggest that the Commission must

4. According to one view, such statutory revision is unnecessary because judges can read words in or out of statutes to obviate absurd results. In other words, the courts should give effect to what the legislature meant rather than what it plainly said. The Bureau accepts the opposing view that courts ought not to rewrite statutes and that citizens should be able to plan their activities by reference to the law as written.

not or should not make policy decisions. In revising laws and proposing changes in the common law, the Commission will necessarily be confronting questions of policy. Revising existing statutes in the light of administrative and judicial construction is intended to provide the Commission with a wide field of permissible activity.

Section 302. *Receipt of suggested reforms.*

Besides the projects undertaken by the Commission on its own initiative, the Commission is authorized to receive and consider suggestions from appropriate organizations and individuals. The extent of the Commission's activity (receipt and consideration of suggestions, preparation of comments, etc.) is to be left entirely to the discretion of the Commission. The Bureau believes that the Commission can serve as a funnel to the legislature, or as a clearinghouse for suggested revisions of federal law. This would eliminate possible duplications of activity by different organizations and persons concerned with federal law revision. Also, it would enable the Commission to make use of the vast amount of knowledge possessed by these groups.

The relationship between the Commission and Congress should be one of cooperation. The Bureau believes that the Commission will not be usurping any of the functions of Congress or the Congressional committee staffs. The work of the Commission will be in areas with which the committee staffs are unable, for whatever reason, to deal. The desired result of the Commission's operations will be Congressional approval and passage of proposed legislation. However, the Commission, in order to be effective, must be independent in its choice of projects to be undertaken.

These drafts do not specify any guidelines to be followed by the Commission in choosing projects or accepting projects from outside sources. Such guidelines, if any, should be developed by the members of the Commission themselves.

SECTION 303. *Report to Congress.*

This section is designed to make the Commission accountable once a year to Congress. The Commission may, however, submit proposals whenever they are ripe.

SECTION 401. *Executive Secretary.*

The Executive Secretary's job will be important no matter what shape the division of functions within the Commission finally takes. The members of the Commission will be working only part-time. The Executive Secretary will be responsible for the day-to-day operations of the Commission including the coordination and supervision of ongoing projects. Provision is made for his appointment by the Commission, since it is the Commission which he must serve and must cooperate with closely in order to achieve effective results. Hopefully, the salary level and nature of the job are such that they will attract talented professionals.

In the state draft, the appointment of an Executive Secretary is made discretionary rather than mandatory, for the Bureau expects that the work load of the various state commissions will vary widely, especially in the early years of operation. Also, in many of the less populous states the members of the Commission may well be concentrated in one or two major cities, so that the clerical and secretarial staff of the Commission offices will function with only the intermittent consultation and supervision of the members themselves.

For these reasons of flexibility, the salary and tenure — full-time or part-time — of the Executive Secretary, if appointed, are also left to the discretion of the Commission. The Bureau reasserts, however, its expectation that the Executive Secretary will be a talented professional and will receive appropriate — that is, substantial — compensation.

SECTION 501. *Procurement of outside services.*

It is expected that the Commission will employ outside experts to do the research and prepare reports on the projects undertaken by the Commission. The Commission may contract with colleges, universities, law schools, research institutes, or qualified individuals for the rendition of research and other services in the work of revision undertaken by the Commission. This procedure not only provides the Commission with invaluable expert assistance, but is economical as well, because the attorneys and law professors who serve as research consultants have already acquired the

considerable background necessary to understand the specific problems under consideration.[5]

SECTION 502. *Procurement of information; government agencies.*

The Bureau hopes that the Commission will enjoy good relations with other government agencies, for to fulfill its function of examining the effects of federal laws it will need regular recourse to government documents, surveys, statistics, and reports, many of which will naturally be in the control of existing government agencies. In the long run, interagency cooperation will depend on the courtesy and tact of the individuals involved, but the statutory mandate is intended to make clear the expectation of cooperation.

5. CALIFORNIA LAW REVISION COMMISSION, 1965 ANNUAL REPORT.

BIBLIOGRAPHY

1. Bacon, *On a Ministry of Justice,* 22 VA. L. REV. 175 (1935).
2. Cardozo, *A Ministry of Justice,* 35 HARV. L. REV. 113 (1921).
3. Conway, *Statute Revision for North Dakota,* 30 N.D.L. REV. 36 (1954).
4. Cross, *Law Revision in the State of Washington,* 27 WASH. L. REV. 193 (1952).
5. Cullen, *The Advantages of a System of Continuous Statutory Revision,* 10 MO. L. REV. 113 (1945).
6. Daggett, *The Louisiana State Law Institute,* 22 TEXAS L. REV. 29 (1943).
7. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't,* 63 COLUM. L. REV. 787 (1963).
8. Friendly, *Satisfaction, Yes—Complacency, No!,* 51 A. B. A. J. 715 (1965).
9. Fuld, *The Commission and the Courts,* 40 CORNELL L.Q. 646 (1955).
10. Goodrum & Gordon, *Substantive Law Revision in Texas,* 37 TEXAS L. REV. 740 (1959).
11. Harno, *A Ministry of Justice,* 39 J. AM. JUD. SOC'Y 35 (1955).
12. Hebert, *Louisiana State Law Institute— An Ideal Project,* 25 J. AM. JUD. SOC'Y. 155 (1942).
13. Hebert, *A State Law Institute as an Agency for Code Revision and Law Reform,* 4 MERCER L. REV. 342 (1953).
14. Heineman, *A Law Revision Commission for Illinois,* 42 ILL. L. REV. 697 (1948).
15. Hollands, *The Work of the Committee to Cooperate with the Law Revision Commission,* 37 N.Y.S. BAR J. 58 (1965).
16. Honigman, *Michigan Needs a Law Revision Commission,* 42 MICH. S. BAR J. 13 (1963).
17. Keeffe, *A National Ministry of Justice: "The Time is Ripe for Betterment",* 40 A. B. A.J. 951 (1954).
18. Keeffe, *Twenty-nine Distinct Damnations of the Federal Practice—and a National Ministry of Justice,* 7 VAND. L. REV. 636 (1954).
19. Lewis, *Needed Changes in the Substantive Law through a Law Reform Agency,* 34 PA. B. A.Q. 559 (1963).
20. MacDonald, *The Law Revision Commission of the State of New York,* 26 GEO. L.J. 60 (1937).

21. MacDonald, *Legal Research Translated into Legislative Action: The New York Law Revision Commission 1934-1963*, 48 CORNELL L.Q. 401 (1963).
22. MacDonald, *The New York Law Revision Commission*, 28 MODERN L. REV. 1 (1965).
23. MacDonald, *The New York State Law Revision Commission: A Legislative Aid*, 35 A. B. A.J. 512 (1949).
24. MacDonald, *New York State Law Revision Commission: the Impact of Twenty Years — a Symposium*, 40 CORNELL L.Q. 641 (1955).
25. MacDonald & Rosenzweig, *The Law Revision Commission of the State of New York: its Organization, Procedure, Program and Accomplishment*, 20 CORNELL L.Q. 415 (1935).
26. Merrell, *Twenty Years of Law Revision*, 7 BROOKLYN BARRISTER 33 (1955).
27. Note, *Jurisprudence: Legal History: Ministry of Justice*, 20 CORNELL L.Q. 119 (1934).
28. Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142 (1920).
29. Rosenbaum, *A Ministry of Justice*, 1 J. AM. JUD. SOC'Y 155 (1918).
30. Rothschild, *Amendment Instead of Revision — New York's New Method of Judicial Reform*, 4 BROOKLYN L. REV. 367 (1935).
31. Ruud, *A Legislative Audit of Judicial Opinions — a Proposal*, 32 TEXAS L. REV. 539 (1954).
32. Sands, *Prospectus for a Program of Legal Research Aimed at a Substantive Law Revision Commission*, 22 CORNELL L.Q. 183 (1937).
33. Sanford, *The Work of the Law Revision Commission*, 32 TENN. L. REV. 11 (1964).
34. Shientag, *A Ministry of Justice in Action: the Work of the New York State Law Revision Commission*, 22 CORNELL L.Q. 183 (1937).
35. Smith, *Cooperation of the Judiciary with the Law Revision Commission (Address)*, 20 N.Y.S. BAR A. BULL. 35 (1948).
36. Smith, *Law Revision in Louisiana in Retrospect*, 19 LA. L. REV. 34 (1958).
37. Smith, *The Louisiana State Law Institute: its Purpose and Current Progress*, 5 LA. BAR J. 218 (1958).
38. Smith, *The Role of the Louisiana State Law Institute in Law Improvement and Reform*, 16 LA. L. REV. 689 (1956).
39. Stanton, *The California Law Revision Commission*, 29 CAL. S. BAR J. 196 (1954).
40. Stern, *A Law Revision Commission for Pennsylvania*, 29 PA. BAR A.Q. 180 (1958).
41. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319 (1923).
42. Stone & Pettee, *Revision of Private Law*, 54 HARV. L. REV. 221 (1940).
43. Traynor, *The Unguarded Affairs of the Semikempt Mistress*, 113 U. PA. L. REV. 485 (1965).
44. Tucker, *The Louisiana State Law Institute*, 1 LA. L. REV. 139 (1939).
45. Tucker, *Reform of the Laws*, 18 TEX. BAR J. 402 (1955).
46. Vanderbilt, *The Idea of a Ministry of Justice Considered and its Functions Distributed (Address)*, 78 REPORT OF THE BAR ASSOCIATION OF THE STATE OF NEW YORK 152 (1955).
47. Vanderbilt, *Judicial Councils a Means to a Great End*, 20 J. AM. JUD. SOC'Y 6 (1936).
48. Wigmore, *Wanted — A Chief Judicial Superintendent*, 1 J. AM. JUD SOC'Y 7 (1917).
49. Winters, *A Ministry of Justice: the Time to Act is Now*, 48 J. AM. JUD. SOC'Y 206 (1965).
50. Yiannopoulos, *The Civil Law Program of the Louisiana State Law Institute*, 12 LA. BAR J. 89 (1964).
51. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207 (1934).

The Recognition of Judgments from Foreign Countries: A Federal-State Clause for an International Convention

HOMER D. SCHAAF*

The unsettled state of the law of foreign judgments in this country tends to impede the recognition of American judgments abroad. An international convention for the reciprocal recognition of money judgments might fail of ratification by the Senate because of its effect on the present dominant position of state law. After a discussion of existing law and its constitutional basis, Mr. Schaaf offers a federal-state clause to adapt such a convention to the practicalities of American federalism.

I. INTRODUCTION

The division of responsibility and competence between state and federal legislatures has always been a subject of lively interest and dispute in the United States. The same may be said of the extent of our participation in international arrangements. This paper explores and attempts to solve the problems on one small interface of federalism and internationalism.

The subject is the recognition of money judgments from foreign countries, as it may be affected by a convention for the reciprocal recognition of such judgments now under consideration by the Hague Conference on Private International Law.[1]

The proposed solution is, by inclusion in the convention of a "federal-state clause" for the United States, to preserve the customary legislative power of the states over the recognition of foreign-country judgments, but to obtain for each state an opportunity to secure the benefits of the convention by voluntary relinquishment of some of that power. The primary purpose of this

*B.S., M.I.T., 1961; M.A., Columbia, 1962; LL.B., Harvard, 1965. The author gratefully acknowledges the advice and encouragement of Professor David F. Cavers and Professor Kurt H. Nadelmann, neither of whom is responsible for the paper's content.

1. On foreign-country judgments generally, see VON MEHREN & TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 831-994 (1965). The work of the Hague Conference is discussed at 864 n. 81, and in Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROB. 291 (1965).

paper is to devise an appropriate federal-state clause. A secondary purpose is to inquire into the constitutional basis for the dominance of state law, and the possibilities of federal preemption, in order to define the function and suggest the form of the federal-state clause.

A committee draft for a convention on foreign money judgments has been published,[2] but the form that the convention will ultimately take is now unknown. For the present it is enough to assume that the convention will have substantive standards for the recognition of judgments and procedures for their expeditious enforcement, and that it will resemble the Uniform Acts that have been promulgated for these purposes by the National Conference of Commissioners on Uniform State Laws.[3]

II. Brief Summary of the American Law of Foreign-Country Judgments

A foreign judgment may be brought into issue in a number of different ways. Probably the most common is a suit to enforce the judgment.[4] A victorious defendant may seek recognition of the judgment as a bar to another suit on the same cause of action,[5] or a defeated defendant, in another suit on the same cause, may plead as a defense either that the cause has been merged in the

2. 10 Nederlands Tijdschrift voor Internationaal Recht 328 (1963) (in French); von Mehren and Trautman, *op. cit. supra* note 1, at 863, 865 (English translation). See also the Final Act of the Tenth Session of the Hague Conference, 4 Int'l Legal Materials 338, 350 (1965), 14 Int'l & Comp. L. Q. 558, 575-77 (1965).

3. Uniform Foreign Money-Judgments Recognition Act (1962), 9B Uniform Laws Ann. 29 (Supp. 1966), 11 Am. J. Comp. L. 412 (1962). Rev. Uniform Enforcement of Foreign Judgments Act, 1964 Handbook of the National Conference of the Commissioners on Uniform State Laws 290; von Mehren & Trautman, *op cit. supra* note 1, at 1595 (excerpts). For a still simpler procedure, see 28 U.S.C. § 1963 (1964) (registration of federal judgments in other districts). The draft convention does not require a special procedure; see § 12(1), von Mehren & Trautman, *op. cit. supra* note 1, at 868.

4. Hilton v. Guyot, 159 U.S. 113 (1895); Cowans v. Ticonderoga Pulp & Paper Co., 219 App. Div. 120, 219 N.Y.S. 284 (1927), *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927).

5. MacDonald v. Grand Trunk Ry., 71 N.H. 448, 52 Atl. 982 (1902); Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 789 n. 32 (1950).

judgment[6] or that the judgment has been satisfied. Finally, a judgment may have a collateral estoppel effect in a suit on a different cause.[7]

The leading (but seldom followed) American case on the recognition of foreign-country judgments is *Hilton v. Guyot.*[8] After rather full consideration the Supreme Court ruled, 5-4, that for want of reciprocity the French judgment at issue should not be enforced by the lower federal court. That is, because an American judgment would have been subject to re-examination on the merits (the *revision au fond*) if its enforcement had been sought in a French court, the French judgment was held "not to be conclusive evidence of the merits of the claim,"[9] but only prima facie evidence. The requirement of reciprocity was to apply only to those judgments rendered in favor of a national of the country of the original forum in an action brought by him in personam against a foreigner to that country.[10] All other foreign-country judgments were to be regarded as conclusive on the merits, subject to the recognized exceptions.[11] In *Ritchie v. McMullen,*[12] decided the same day, a judgment of a court of Ontario, which province was found to grant sufficient recognition to American judgments, was held enforceable under the rule of reciprocity.

The basic rationale of recognition of foreign judgments is the rule of res judicata. "Public policy dictates that there be an end

---

6. A foreign-country judgment does not merge the cause of action. Eastern Townships Bank v. H. S. Beebe & Co., 53 Vt. 177 (1880); Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law,* 33 MICH. L. REV. 1129, 1139-40 (1935); Reese, *supra* note 5, at 788 nn. 30, 31; Smit, *International Res Judicata and Collateral Estoppel in the United States,* 9 U.C.L.A. L. REV. 44, 55 n. 78 (1962).

7. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 430e, Comment *f* and Reporter's Note (Tent. Draft No. 11, 1965); Reese, *supra* note 5, at 789 n. 33; Smit, *supra* note 6, at 62, 69-74.

8. 159 U.S. 113 (1895). The case was argued on April 10, 1894 and decided on June 3, 1895. The arguments and opinions occupy 122 pages of the United States Reports.

9. 159 U.S. at 228.

10. See STUMBERG, CONFLICT OF LAWS 128 n. 68 (3d ed. 1963). *Hilton v. Guyot* is discussed at length by Reese, *supra* note 5, at 790.

11. For the "recognized exceptions," see 159 U.S. at 202-03, quoted with approval in RESTATEMENT (SECOND), CONFLICT OF LAWS § 430e, comment *c* (Tent. Draft No. 11, 1965). See also Reese, *supra* note 5, at 793-99; Smit, *supra* note 6, at 50-52; Note, 38 CORN. L. Q. 423, 425 nn. 8-15 (1953).

12. 159 U.S. 235 (1895).

to litigation."[13] The *Hilton* case does not seem to accord with this rationale, for it would refuse recognition to some judgments and therefore demand some relitigation; the case has therefore frequently been criticized,[14] and seems to have few defenders. Professor Reese has suggested that the limitation of the *Hilton* reciprocity rule to a narrow class of cases shows that its purpose was to protect Americans against the results of unfair foreign-court proceedings.[15] However, the effect of a judgment under the reciprocity rule is determined not by the fairness or unfairness of the proceeding which produced it, but rather by the recognition or non-recognition of American judgments in the court which awarded it. Consequently, the rule seems calculated (however mistakenly) to encourage foreign courts to respect American adjudications, and thus (however indirectly) to promote the objective of repose. No instance is known where a foreign jurisdiction changed its rule because of *Hilton* to one of recognition of American judgments, but it should be noted that a similar German statutory rule was influential in France's retreat, in 1964, from the *revision au fond.*[16]

The Supreme Court has not imposed the rule of reciprocity, in either its *Hilton* or its *Ritchie* branch, on the state courts[17] and the state courts have not adopted it.[18] The heaviest judicial counterweight to *Hilton* is *Johnston v. Compagnie Générale Transatlantique,*[19] where the New York Court of Appeals went out of its way to reject the rule of reciprocity and federal supremacy on the grounds that the rule was unjust and the

13. Baldwin v. Iowa State Traveling Men's Assoc., 283 U.S. 522, 525 (1931). See also Smit, *supra* note 6, at 56-75; VON MEHREN & TRAUTMAN, *op. cit. supra* note 1, at 835.

14. See Reese, *supra* note 5, at 793 & n. 52; Smit, *supra* note 6, at 49-50.

15. Reese, *supra* note 5, at 792.

16. Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More To Go,* 13 AM. J. COMP. L. 72, 77-78 (1964).

17. In Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912), the Maine court had refused to recognize a Canadian judgment as a defense. Assuming that the federal courts would grant recognition, the Supreme Court dismissed the writ of error "for want of jurisdiction" (at 190). (This case holds, if citation is necessary, that the full faith and credit clause does not apply to foreign-country judgments.)

18. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It,* 42 IOWA L. REV. 236, 241 nn. 36, 37 (1957). *Cf.* Bata v. Bata, 39 Del. Ch. 258, 278, 163 A.2d 493 (1960), *cert. denied,* 366 U.S. 964 (1961).

19. 242 N.Y. 381, 152 N.E. 121 (1926).

question "one of private rather than public international law."[20] *Johnston* was soon followed in *Cowans v. Ticonderoga Pulp & Paper Co.*,[21] a case squarely in conflict with *Hilton*. Even when talking the language of reciprocity, state courts have considered the recognition of foreign-country judgments to be governed by state law.[22]

California has provided by statute for recognition of foreign judgments regardless of reciprocity.[23] A New Hampshire statute, on the other hand, adopts the rule of reciprocity for Canadian judgments.[24] (The latter is probably not invalid as an intrusion into the federal field of foreign affairs; a state law providing for reciprocity in the inheritability of land by aliens has been upheld.[25]) The *Hilton* rule was rejected by the first *Restatement*[26] and the Uniform Foreign Money-Judgments Recognition Act.[27]

Despite the unpopularity of the *Hilton* rule of reciprocity,[28] there may be grounds for its application as a uniform rule of federal law by both state and federal courts. If foreign nations either treat the United States as a unit in applying their own rules of reciprocity or are confused by the vagaries of American federalism,[29] and if the rule does promote the national interest in recognition of American judgments abroad (as there is reason to believe that it might[30]), then it would be appropriate for differing state policies to yield to that national interest. (If the *Johnston*

20. *Id.* at 387, 152 N.E. at 123.

21. 219 App. Div. 120, 219 N.Y.S. 284 (1927), *aff'd*, 246 N.Y. 603, 157 N.E. 862 (1927).

22. Reese, *supra* note 5, at 787 n. 25, 792 n. 47. *But cf.* Baxter v. New England Marine Ins. Co., 6 Mass. 277, 299-300, 4 Am. Dec. 125 (1810), EHRENZWEIG, CONFLICT OF LAWS 164 n. 1 (1962).

23. Cal. Civ. Proc. Code § 1915. In another respect, this statute has been given something less than full faith and credit by the California courts. Ryder v. Ryder, 37 P.2d 1069 (Dist. Ct. App. 1934).

24. N.H. Rev. Stat. Ann. ch. 524, § 11 (Supp. 1965).

25. Clark v. Allen, 331 U.S. 503, 516-17 (1947). *But cf.* Hines v. Davidowitz, 312 U.S. 52 (1941).

26. RESTATEMENT, CONFLICT OF LAWS § 434, comment *b* (1934); 2 BEALE, CONFLICT OF LAWS § 434.3 (1925).

27. See note 3 *supra*.

28. See note 14 *supra*.

29. See Nadelmann, *The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments*, 1 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 156, 160-61 (1953).

30. See note 16 *supra*.

rule is better calculated to achieve the objective of foreign recognition of American judgments, the desirability of its adoption as federal common law binding on state courts follows a fortiori.[31]) On Reese's theory,[32] that *Hilton* was designed to protect Americans against unfair foreign-court proceedings, there would be less need for a uniform federal rule; state courts are presumably not lacking in distrust of foreigners and their legal systems. But this much is clear without regard to *Hilton*. If Americans are uncertain of their own law, foreigners (who may have their own rules of reciprocity to administer) are even more in doubt.[33] These doubts, in conjunction with the unwillingness of those trained in the civil law to rely on the principle of stare decisis,[34] and their distrust of Anglo-American suit-on-the-judgment enforcement procedure,[35] make the adoption of an international convention especially desirable.[36]

The reconciliation of *Hilton* with *Erie R.R. v. Tompkins*[37] is a problem of some complexity and controversy,[38] at present unresolved,[39] and further complicated by the recent *Sabbatino*

---

31. See Moore, *Federalism and Foreign Relations*, 1965 DUKE L. J. 248, 265.

32. Reese, *supra* note 5, at 729.

33. Nadelmann, *supra* note 29.

34. *Id.* at 158.

35. Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184, 1187-89 (1952). The French *exequatur* procedure is described IN KATZ & BREWSTER, THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS 442-43 (1960).

36. Britain has a number of bilateral arrangements covering both procedure and substantive standards of recognition. See 7 HALSBURY, LAWS OF ENGLAND 160 & n. (e) (7th ed. Simonds 1954, Supp. 1965).

37. 304 U.S. 64 (1938).

38. See, to the effect that *Erie R.R. v. Tompkins* applies to cases with international elements, Nadelmann, *supra* note 29, at 160-61, Smit, *supra* note 6, at 47-48, Comment, *Enforcement of Foreign Judgments in Personam: Reciprocity*, 10 LA. L. REV. 319, 327-29 (1950), Bergman v. DeSieyes, 170 F.2d 360 (2d Cir. 1948); to the effect that it does not, Reese, *supra* note 5, at 786-88, Cheatham, *Sources of Rules for Conflict of Laws*, 89 U.PA. L. REV. 430, 445-47 (1941), Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939), Moore, *supra* note 31, at 263-77.

39. The two post-*Erie* federal cases are inconclusive. In Compania Mexicana Rediodifusora Franterizia v. Spann, 41 F. Supp. 907 (N.D. Texas 1941), 30 GEO. L.J. 428 (1942), the court enforced a Mexican judgment, finding that Mexico would reciprocate, with a dictum that a clear public policy of Texas would prevail over *Hilton* under *Erie*. In Gull v. Constam, 105 F. Supp. 107 (D. Colo. 1952), 38 CORN. L.Q. 423 (1953), the defense of lack of reciprocity was rejected because it had not been pleaded and proved.

case.[40] The *Erie* problem will be discussed below in a larger context.

III. The Uneasy Supremacy of State Law

Since the need for a federal-state clause in any treaty arises from the division of powers between local and national governments in federal states, it will be useful to consider here the constitutional power of the federal government in the United States to determine the effect to be given to foreign-country judgments in the courts.

A. The Powers of Congress

Setting aside for a moment the treaty power itself, and taking for granted that the Tenth Amendment expresses the most basic principle of American federalism, what warrant is there in the Constitution for congressional regulation in the field of foreign judgments?

One begins with, or rather without, the full faith and credit clause. That clause authorizes Congress to require, if it does not itself compel, recognition of sister-state judgments "in each State," and Congress has acted to implement the clause, indeed exceeding its scope.[41] But that clause has no application to foreign-country judgments[42] so a substitute must be found.

Congress' power to regulate commerce [43] extends, of course, to foreign commerce. The relationship between foreign judgments and foreign commerce was first perceived in an 1810 decision,[44] but later cases, while not rejecting that insight, have not confirmed it. Congress has not attempted to prescribe the effect of foreign-country judgments, and its regulations with respect to American judgments have had other bases than the commerce clause.[45] Recourse must therefore be had to general principles, but their implications seem clear.

Throughout our history, from *Gibbons v. Ogden*[46] to *The*

40. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
41. 28 U.S.C. § 1738 (1964). See Embry v. Palmer, 107 U.S. 3, 9-10 (1882).
42. Aetna Life Ins. Co. v. Tremblay, *supra* note 17.
43. U.S. Const. art. I, § 8, cl. 3.
44. See Baxter v. New England Marine Ins. Co., *supra* note 22.
45. See note 41 *supra*.
46. 22 U.S. (9 Wheat.) 1 (1824).

Shreveport Case,[47] from *The Daniel Ball*[48] to *Wickard v. Filburn*[49] and quite recent decisions,[50] the Supreme Court has, with only an occasional aberration,[51] upheld and enforced under the commerce power congressional regulation in fields where the previous dominance of state law had been thought by many to be constitutionally ordained.

The commerce power extends beyond interstate commerce itself to the regulation, for the purpose of facilitating that commerce, of events occurring wholly within a state;[52] it reaches such events, no matter how insignificant individually, if they may in the aggregate have a "substantial economic effect" on interstate commerce;[53] and at least for some purposes "commerce" is not limited to trade but encompasses as well the movement of persons who have nothing to trade.[54] It appears, therefore, that if a federal statute prescribing the conditions and procedure for the recognition of sister-state judgments were thought desirable by Congress as a means of promoting or otherwise regulating interstate trade or travel, such a statute would be within the commerce power. If the full faith and credit clause did not exist, it would not be necessary to invent it; the commerce clause would serve.

What has been said of interstate commerce applies a fortiori to foreign commerce and to foreign judgments, as far as the power of Congress vis-à-vis the states is concerned. The special authority and responsibility of the federal government with respect to foreign affairs are our next concern.

> The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government

47. 234 U.S. 342 (1914).
48. 77 U.S. (10 Wall.) 557 (1870).
49. 317 U.S. 111 (1942).
50. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
51. Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled*, United States v. Darby, 312 U.S. 100 (1941).
52. The Shreveport Case, *supra* note 47.
53. Wickard v. Filburn, *supra* note 49.
54. Edwards v. California, 314 U.S. 160 (1941). For a more agreeable sort of noncommercial "commerce," see Caminetti v. United States, 242 U.S. 470 (1917).

> must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.[55]

If *Perez v. Brownell* is not safely embedded in our constitutional law, it is not the above quotation that makes it vulnerable. In finding a congressional power to legislate "in matters touching [the] dignity and interests" of foreign nations, Mr. Justice Frankfurter was drawing an almost inevitable corollary from the war power and the treaty power and confirming and restating the holdings of cases of some antiquity (as that is measured in constitutional law).[56] Support for his argument may be found in *The Federalist*[57] and in this morning's New York *Times*. But if the existence of a legislative foreign affairs power is attested by history and required by all that we can foresee of the future, it is still appropriate to subject the sources of that power to some analysis in order to determine its applicability to the subject of present interest.

Perhaps the war power should be set aside. That power is at once too broad and too narrow to be helpful in the present context. It has been suggested[58] that the liquidation of one war may only infrequently be completed before it becomes necessary to commence preparation for the next, so that the power has no end and hardly any judicially cognizable limits. But even if the power to make war includes (as it must) the power to prevent it, only by a substantial act of the imagination could one find that power relevant to the recognition of foreign judgments.

More to the point (and less inspirational of apocalyptic visions) are two complementary constitutional clauses, the treaty power of the federal government and the corresponding in-

55. Perez v. Brownell, 356 U.S. 44, 57 (1958) (Frankfurter, J.)

56. Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). As Mr. Justice Frankfurter demonstrated, the existence of the foreign affairs power does not depend on the theory of the latter case that the power comes from a different source than that of the powers expressly granted in the Constitution.

57. See, especially, Nos. 3, 4, 5, 42 and 80.

58. By Prof. Arthur E. Sutherland, commenting on Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), and Woods v. Miller Co., 333 U.S. 138 (1948). See also SUTHERLAND, CONSTITUTIONALISM IN AMERICA 502-03 (1965).

capacity of the states.[59] These provisions are illustrative (as is Article I, § 8, cl. 10, granting power "to define and punish . . . offenses against the law of nations") of an intention to entrust the care of foreign relations to federal authority. But their specific implications are less clear. It does not follow inevitably from the treaty power that the federal government may achieve the same goals by statute that it might pursue by treaty, especially since the lawmaking and treaty-making organs are not the same. There is, however, an inference, more practical than logical, that legislation may be passed to make treaties unnecessary, and that inference is bolstered by the commerce power, the war power, and the exclusivity of the treaty power.

Any argument that federal legislative power may be based on the incapacity of the states to make treaties must be suggestive rather than conclusive. The states are not wholly barred from dealing with foreign nations,[60] and if they were that would not determine the permissible means of federal action. The federal legislative power over foreign affairs cannot be derived from a corresponding total incapacity of the states; absent congressional pre-emption, they can pass legislation intended to affect foreign nations.[61] But with respect to legislation as well as treaties it remains true that the states cannot act as effectively as the nation in protecting the international interests of the whole. If the need for federal power were not tantamount to its existence, the Constitution would not have lasted as long as it has. In view of the present unsatisfactory state of the law, with its potentialities for injustice to Americans seeking recognition of American judgments abroad, a congressional finding of need for national legislation would probably not be overturned by the courts.

The *Johnston*[62] court deemed itself free to reject the federal rule of *Hilton v. Guyot*[63] because it found the question to be "one of private rather than public international law."[64] In its context,

59. U.S. CONST. art. II, § 2, cl. 2; art. I, § 10, cl. 1. A state may, with the consent of Congress, enter into an "agreement or compact . . . with a foreign power." Art. I, § 10, cl. 3.

60. *Id.* Art. I, § 10, cl. 3.

61. See note 25 *supra.*

62. Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926).

63. 159 U.S. 113 (1895).

64. 242 N.Y. at 387, 152 N.E. at 123.

that distinction must represent a balancing of the need for a uniform federal rule, calculated, as the *Hilton* rule was, with an eye to its effect on foreign nations, against the tradition of state control of the effect to be given foreign judgments. Even if the court was right in finding that the international interests of the United States did not demand uniformity at the expense of local judicial independence, a wholly different problem would be presented if a contrary determination were made by Congress. It seems unlikely that a state or federal court would attempt either to restrict Congress to the regulation of "public rather than private international law," or to substitute its own judgment for that of Congress in determining the side of the line between them on which foreign judgments fall, clear as that line may be.

There is one other possible basis for the enactment of a uniform national rule. The due process clause and section 5 of the Fourteenth Amendment might authorize a federal statute requiring state courts to enforce foreign judgments that meet a specified standard of acceptability.[65] If foreign judgments are considered property,[66] then it would seem to be within the province of Congress to make reasonable provision for their recognition by the states. The present trend of adjudication is away from extensive protection for rights in broadly-defined "property,"[67] but that trend would not necessarily prevail over a federal statute based on a different premise. Such a statute, however, would have little connection with any purpose the Fourteenth Amendment may have had in 1868, or with the purposes ordinarily attributed to it by legislation.[68]

It is perhaps more likely that the due process clause will be invoked to *prevent* enforcement of foreign judgments.[69]

The power to create a federal rule to be applied in only the federal courts may exist under Article III and the necessary and

65. See Smit, *supra* note 6, at 48 n. 23.

66. A similar view seems to have been held by the dissenters in *Hilton v. Guyot*, 159 U.S. at 233.

67. See, *e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

68. See, *e. g.*, 18 U.S.C. § 242 (1964); 42 U.S.C. § 1983 (1964). The full faith and credit statute, 28 U.S.C. § 1738, does not appear to have been based on the Fourteenth Amendment, but perhaps it might have been.

69. See EHRENZWEIG, CONFLICT OF LAWS 164 (1962); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 55 n. 78 (1962).

proper clause[70] as a corollary of Congress' power to "ordain and establish" the lower federal courts. The *locus classicus* of this theory is the concurring opinion of Mr. Justice Reed in *Erie R.R. v Tompkins*.[71] The citation does not inspire confidence in the theory, however, since it was deliberately rejected by a majority of the Court.

Article III and the necessary and proper clause do authorize Congressional legislation in the admiralty area,[72] but the federal law is required to be applied by all courts,[73] and at least for the reason that the jurisdiction of the federal courts, as courts of admiralty, is exclusive,[74] admiralty should probably be regarded as sui generis.

Aside from "procedure,"[75] the power of Congress to legislate for the federal courts alone seems to be more doubted than accepted. At any rate, a statute thus limited is not anticipated where, as here, more effective power to legislate is likely to be recognized.

Coming full circle, one may ask whether any inference is to be drawn from the full faith and credit clause unfavorable to federal control of the recognition of foreign-country judgments. Since that clause authorizes congressional regulation of the effect of sister-state judgments, it might be thought to imply that Congress has no such control over other judgments. That inference seems unsound. The full faith and credit clause is not merely a grant of power; it is partially self-executing. Therefore it serves to unify the states of the Union whether or not reinforced by legislation. A similar unity with foreign nations, even if desirable, is not attainable by unilateral action.[76] The Constitution's failure itself to solve the problems of the recognition of foreign-country

70. U.S. CONST. art. I, § 8, cl. 18.

71. 304 U.S. 64, 90-92 (1938). See, rejecting Mr. Justice Reed's thesis, Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 445-47 (1958); for an inquiry into its limits, see Friendly, *In Praise of Erie — And of the New Federal Common Law*, 19 RECORD of N.Y.C.B.A. 64, 73-75 (1964), reprinted, 39 N.Y.U.L. REV. 383 (1964).

72. Panama R.R. v. Johnson, 264 U.S. 375, 385-88 (1924).

73. Hill, *supra* note 71, at 445-46.

74. 28 U.S.C. § 1333(1) (1964). Se the text accompanying notes 110-18 *infra*.

75. See Hanna v. Plumer, 380 U.S. 460 (1965). Federal procedure is discussed in the text accompanying notes 185-92 *infra*.

76. See Smit, *supra* note 69, at 45-46.

judgments is not inconsistent with their later solution by the national government.

From the foregoing discussion two conclusions may be drawn. It is reasonably certain that Congress has power to legislate with respect to the subject of the proposed convention. To put it less strongly, it is not clear that the Constitution has reserved the subject of foreign-country judgments exclusively to the states. It follows that a federal-state clause intended to permit the states to disregard a foreign-judgments convention cannot be certain of achieving its objective if it merely incorporates by reference the constitutional division of powers,[77] as the traditional division of power over foreign judgments is not necessarily incorporated in the Constitution.

B. Federal Common Law

Even in the absence of congressional regulation, federal control over some or all of the law of foreign-country judgments might be exerted by the federal judiciary, using its power to make and enforce "specialized federal common law."[78] Whether that power extends to this subject is a difficult question[79] which would not be answered by the clearest demonstration of congressional power.

The basic rule of federal jurisprudence, the "*Erie* doctrine," is that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."[80] The law has never been precisely as that

77. See, *e.g.*, the federal-state clause included in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958 by the United Nations Conference on International Commercial Arbitration, discussed and quoted in Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414 (1959). The clause provides in part as follows (*Id.* at 423):

> In the case of a federal or non-unitary state, the following provisions shall apply:
>
> (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal government shall to this extent be the same as those of Contracting States which are not federal states . . . .

78. See Friendly, *supra* note 71, at 79-92.

79. See note 38 *supra*.

80. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). See also 28 U.S.C. § 1652 (1964).

statement would have it,[81] but the quotation expresses a principle from which the courts do not deviate without justification.

The international significance of the law of foreign judgments may furnish such a justification,[82] but has not universally been recognized to do so. The theories of some commentators favoring absorption into federal law of international law,[83] or international conflict of laws rules,[84] or the law of nations (in a very broad sense),[85] find more support in logic than in the relevant decisions of courts of high standing.[86]

It was long ago suggested[87] that the foreign-commerce power of Congress added special weight to the federal decisions on foreign judgments. If that is so, the applicable law does not thereby become federal. *Erie R.R. v. Tompkins,* while not discussing the commerce power, seems to hold that the commerce clause does not of its own force authorize the federal courts to make the private law governing commerce; one of the cases that would have been deemed controlling if *Erie* had gone the other way, *Baltimore & O.R.R. v. Baugh,*[88] expressly relied on the

81. See Hinderlider v. LaPlata Co., 304 U.S. 92 (1938); WRIGHT, FEDERAL COURTS 213-18 (1963).

82. See Moore, *supra* note 31, at 263-77; Reese, *The Status in This Country of Judgments Rendered Abroad,* 50 COLUM. L. Rev. 783, 786-88 (1950). *But see* Smit, *supra* note 69, at 47-48.

83. Jessup, *supra* note 38, at 743.

84. Cheatham, *supra* note 38, at 445-47.

85. Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie,* 74 YALE L.J. 325 (1964). The argument that the "law of nations" is federal law is buttressed by the fact that 28 U.S.C. § 1350 (1964) gives (and has always given; its predecessor was enacted in 1789, 1 Stat. 77) the federal courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations . . . ." The constitutionality of the section has never been determined, but its existence carries an implication, as does *The Federalist* No. 80, that "the laws of the United States" (Art. III, § 2) include the law of nations, whatever that term may mean. Of course, as every student of constitutional law learns very quickly, not all of the Judiciary Act of 1789 was constitutional. Jurisdiction under § 1350 and its predecessors has only rarely been invoked, but the facts of those few cases are as exotic as any in the books.

86. See Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912) (foreign judgment); Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926) (foreign judgment); Bergman v. DeSieyes, 170 F.2d 360 (2d Cir. 1948) (diplomatic immunity). In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), where federal law was applied, it was found not to be derived from international law. *Id.* at 421.

87. Baxter v. New England Marine Ins. Co., 6 Mass. 277, 299-300, 4 Am. Dec. 125 (1810)

88. 149 U.S. 368 (1893).

commerce clause as well as on *Swift v. Tyson*[89] in holding the tort liability of an interstate railroad, in a diversity case, to be governed by federal common law.

The international concerns involved in foreign-judgment cases also suggest an analogy to the admiralty jurisdiction. What Hamilton wrote in *The Federalist*, No. 80, in quite a different context (justification of a constitutional grant of jurisdiction), is not inapposite.

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[90]

Similar considerations motivated both the judicial self-denial and the assertion of federal supremacy in *Banco Nacional de Cuba v. Sabbatino*.[91] In adopting its version of the "act of state" doctrine,[92] the Court declined to consider the law of New York, because "the problems involved are uniquely federal in nature,"[93] and declared its decision binding on state courts (to the extent that they were barred from more extensive inquiry into expropriations by foreign governments).[94]

Sabbatino was a case of judicial deference and absention rather than self-assertion,[95] and the "uniquely federal" principle of separation of powers among the branches of the national government supported, if it did not compel, the result; but the case is not without significance in the present discussion. There was no deference to the states, and the "uniquely federal" responsibility for foreign relations is involved in the recognition of foreign

89. 41 U.S. (16 Pet.) 1 (1842).

90. Modern Library ed. at 519.

91. 376 U.S. 398 (1964).

92. 376 U.S. at 428. Congress has rejected that doctrine in its *Sabbatino* form. See § 620(e)(2) of the Foreign Assistance Act of 1965, P.L. 89-171, 79 Stat. 653 (1965); Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AM. J. INT'L. L. 899 (1965); Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), 60 AM. J. INT'L L. 107 (1966) (earlier version of statute applied to *Sabbatino* on remand).

93. 376 U.S. at 424.

94. *Id.* at 425 n. 23.

95. The dichotomy implied by the text is not necessarily real; one thinks of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

judgments. Professor Henkin[96] suggests four bases for the *Sabbatino* decision, each of which tends to support an assumption by the federal courts of responsibility for the development of the law of foreign judgments: the act of state doctrine is "particularly for the guidance of courts," courts have traditionally made conflict of laws rules, the federal interest is greater than that of the states, and uniformity is desirable.

Reasons have been considered for the creation of a uniform federal rule binding state as well as federal courts. Although the tendency of the law is otherwise, there might be justification for a special federal rule to be applied only in the federal courts.

The recognition of foreign judgments, like choice of law, is a subdivision of the conflict of laws. Despite *Klaxon Co. v. Stentor Elec. Mfg. Co.*,[97] an independent lawmaking authority in the federal courts over some questions of the conflict of laws may one day be asserted. The *Klaxon* decision has been criticized by some commentators[98] and regarded by others as not constitutionally compelled.[99] Like *Erie*, the case was purely domestic one in which the federal responsibility for foreign relations was not even remotely involved.

A special federal rule, for some federal cases, might be based on a recognition of the duality of the diversity jurisdiction. *Erie* and *Klaxon* were controversies between "citizens of different States,"[100] but the jurisdiction also extends to controversies between "citizens of a State, and foreign states or citizens or subjects thereof."[101] A suit on a foreign judgment is likely to fall in the latter category, and it is by no means clear that the same law should govern both kinds of cases. There is a greater federal interest in foreign-party cases than in ordinary diversity cases

96. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819 (1964).

97. 313 U.S. 487 (1941).

98. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 633-36 (1953); *cf.* Baxter, *Choice of Law and The Federal System*, 16 STAN. L. REV. 1, 22-42 (1963).

99. Friendly, *supra* note 71, at 77; WRIGHT, *op. cit. supra* note 81, at 199-200; Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732 n. 3 (1963). *But cf.* Hill, *supra* note 71, at 455-56, 543-46, 556-68.

100. 28 U.S.C. § 1332(a)(1)(1964).

101. 28 U.S.C. § 1332(a)(2)(1964).

because the former may embarrass the national government among its sovereign equals. The difference between a foreigner and an American is substantial enough so that application of a different rule of law to the former need not constitute arbitrary "discrimination,"[102] and diversity of citizenship between a foreigner and an American is not an "accident."[103] Moreover, the foreign-party jurisdiction does not easily lend itself to such abuses as the *Taxicab* case.[104]

The trouble with this argument is that, in a practical sense, it proves too much. The federal courts are not likely to undertake the task of creating all the law to be applied to foreigners. They might, however, develop some independence of judgment in those foreign-party cases that are of more than ordinary international interest.

There are also weighty countervailing considerations to the other arguments sketched above for lawmaking by the federal courts, as the reader is doubtless aware. One is the *Klaxon* "principle of uniformity within a state,"[105] which would be violated by any substantial differences between the rules of law applied in state and federal courts. There are, of course, two ways of achieving uniformity within a state, and uniform application of a federal rule is one of them. But that alternative presents even more sharply than the other the fundamental difficulty in the creation of a federal common law for foreign-country judgments. The subject is one traditionally governed by state law, and there is no apparent statutory basis for an assertion of lawmaking power by the federal courts.

The Rules of Decision Act[106] and considerations of representative federalism counsel that the federal judiciary should not oust state law from its accustomed places unless Congress, in Judge Friendly's words, "has manifested, be it ever so lightly, an inten-

102. Erie R.R. v. Tompkins, 304 U.S. 64, 74-78 (1938).

103. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

104. Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928). Diversity would not now exist on similar facts; 28 U.S.C. § 1332(c) (1964).

105. 313 U.S. at 496.

106. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1964).

tion to that end."[107] Since *Erie,* the federal courts have been willing to make law without statutory sanction only in cases of necessity[108] and cases where the judge-made law has a constitutional or (as in *Sabbatino*) a quasi-constitutional basis.

Perhaps the closest approach to an adequate statutory basis for the development of a federal law of foreign judgments is the previously discussed grant of jurisdiction, in 28 U.S.C. § 1332(a)(2), over suits between aliens and citizens of a state. That might seem to be no basis at all, but jurisdictional grants have been held, in at least two well-known instances of less than absolute necessity, to confer lawmaking power. One example is § 301 of the Taft-Hartley Act;[109] a more relevant one is the admiralty jurisdiction.

The constitutional and statutory grants of admiralty jurisdiction to the federal courts have had truly remarkable consequences at which it is possible here only to hint. As a corollary of their jurisdiction, the federal courts determine for themselves the content of the maritime law, which is mainly (but not exclusively[110]) federal. The law thus made is subject to the oversight of Congress, despite the lack of any more specific authorization in Article I than the necessary and proper clause,[111] and both the judge-made and statutory branches of the law are binding on state courts[112] and on federal courts not exercising admiralty jurisdiction.[113]

The capacity of an "express grant of Article III jurisdiction"[114] to support this structure seems very doubtful in the light of *Erie R.R. v. Tompkins,* but the grant is supplemented by the considerations advanced in the 80th *Federalist,*[115] the felt need for uni-

107. Friendly, *supra* note 71, at 82.
108. See Hinderlider v. LaPlata Co., *supra* note 81; Texas v. New Jersey, 379 U.S. 674 (1965); WRIGHT, *op. cit. supra* note 81, at 214.
109. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
110. The Tungus v. Skovgaard, 358 U.S. 588 (1959).
111. Panama R.R. v. Johnson, 264 US. 375, 385-88 (1924). See also Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century,* 67 HARV. L. REV. 1214 (1954), citing *In re* Garnett, 141 U.S. 1 (1891).
112. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).
113. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
114. See Note, *supra* note 85, at 328.
115. See text accompanying note 90 *supra.*

formity,[116] the exclusivity of the true admiralty jurisdiction,[117] and the thought that "the spectacle of federal judges being able to make law without possibility of Congressional correction would not be a happy one."[118] A similar federal interest and desire for uniformity would tend to support a federal common law based on the foreign-party jurisdiction (and possibly applicable outside that jurisdiction), but the foreign-party jurisdiction is after all only another kind of diversity jurisdiction (and is not exclusive). As has been noted, the potentialities of the foreign-party jurisdiction as a basis for lawmaking are so great that they are not likely to be more than partially realized, if that.

The state courts' enforcement of such a federal common law could presumably be supervised by the Supreme Court under 28 U.S.C. § 1257,[119] although the frequent use of the word "statute" in that section might be troublesome to literal-minded judges. There is a further possibility that original federal-question jurisdiction might arise under § 1331.[120] The purposes of that jurisdiction, uniformity in federal law and the vindication of federal rights, exist whether or not the governing rule is derived from a statute. If the lack of a statute does not prevent the creation of federal law, it should not prevent its effective enforcement; 28 U.S.C. § 1652 (the Rules of Decision Act), referring to "Acts of Congress," is in this respect a higher hurdle than § 1331, with its more permissive reference to "laws."[121]

The *Romero* case,[122] holding that there is no original federal-question jurisdiction over claims based on the general maritime law made by federal judges, is not to the contrary.[123] That deci-

116. See Note, *supra* note 111, at 1235 & n. 156.

117. 28 U.S.C. § 1333(1) (1964).

118. Friendly, *supra* note 71, at 73.

119. See Garrett v. Moore-McCormack Co., *supra* note 112, at 245-46.

120. The existence of federal-question jurisdiction was left open in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 n. 20 (1964). In Mater v. Holley, 200 F.2d 123 (5th Cir. 1952), the jurisdiction was found to exist in a suit for personal injuries received in a federal enclave.

121. *But see* HART & WECHSLER, *op. cit. supra* note 98, at 19, suggesting that the "laws of the United States" comprehended by Art. III are statutes only. Erie R.R. v. Tompkins, *supra* note 102, *shows* that it is at least possible for "laws" to include judicial decisions; see Kurland, *The Romero Case and Some Problems of Federal Jurisdiction,* 73 HARV. L. REV. 817, 832-33 (1960). See also Moore, *Federalism and Foreign Relations,* 1965 DUKE L.J. 248, 277-84, 291-97.

122. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

123. See Kurland, *supra* note 121, at 827-33.

sion left open a federal forum for the claim, the district court as an admiralty court, so that there was no need for federal-question jurisdiction to preserve uniformity or to render harmless any antipathy of state courts to the federal law. Moreover, it was not decided that the case failed to arise under the laws of the United States,[124] but that, as a suit on the general maritime law alone, it was not a "civil action."[125]

In summary, there appear to be grounds for the development of a federal common law of foreign-country judgments, but such a law probably will not, and probably should not, be developed without a more explicit statutory mandate than now exists.[126]

C. The Treaty Power

If some doubt remains about the power of Congress to pre-empt state regulation of foreign-country judgments by legislation, such doubt can hardly exist with respect to the treaty power.[127]

A treaty may override conflicting state law on a matter previously of exclusive state concern in either of two ways: it may itself have the force of law, or it may validate congressional legislation that would otherwise be unconstitutional. The first of these modes of effect of a treaty was recognized by the Supreme Court even before the days of John Marshall.[128] The second is identified with the case of *Missouri v. Holland*,[129] which provides a convenient focus for inquiry into the limits of both branches of the treaty power. In that case an act of Congress regulating the taking of migratory birds was held constitutional as authorized by a treaty with Canada, despite the fact that before the conclusion

124. That question was expressly left open, 358 U.S. at 375.

125. See Kurland, *supra* note 121, at 824-27. An amusing article on *Romero* is Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U.CHI. L. REV. 1 (1959).

126. A rather different conclusion is reached by Moore, *supra* note 121.

127. Such doubts have, however, been stated on high authority. For discussion of examples, see Nadelmann, *The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments*, 1 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 156, 161-63 (1953); Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U.PA. L. REV. 323 (1954).

128. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). This self-executing effect of treaties is not inevitable; unless implemented by Parliament, English treaties are not sources of law for courts (except prize courts). Wright, *The Legal Nature of Treaties*, 10 AM. J. INT'L L. 706, 708 n. 6 (1916).

129. 252 U.S. 416 (1920).

of the treaty a similar statute had been held invalid by two federal district courts.[130] The Supreme Court said, per Holmes, J., that "[w]hether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power."[131]

Since it found the statute unexceptionable as an implementation of the treaty, the Court's main concern was the constitutionality of the treaty itself. It noted that treaties are the "supreme law of the land" under Article VI if made "under the authority of the United States," while statutes are subject to the presumably stricter test of being "made in pursuance" of the Constitution. Without defining precisely the meaning of "authority," the Court found that the national interest vindicated by the treaty was strong enough to prevail over the states' interests in their own programs for the protection (or destruction) of migratory birds.[132]

Missouri v. Holland is notable in at least three respects. The treaty-implementing power was analyzed as an element of the treaty power, not dependent on the other grants of power to Congress;[133] the treaty power was given a wide scope;[134] and that scope was not found to be unlimited. The possibility of the treaty's invalidity was acknowledged and two possible grounds of invalidity were recognized:[135]

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the

130. United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 Fed. 288 (D. Kan. 1915).

131. 252 U.S. at 433.

132. The claims of the state for continued supremacy, although ultimately rejected, were considered more carefully than similar claims have been in other cases, notably United States v. Belmont, 301 U.S. 324, 331 (1937) ("In respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.") (Sutherland, J.).

133. "The federal/State distribution of powers set forth in the Constitution of the United States is not an obstacle to treaty implementation, since the treaty-making and the treaty-implementing powers are co-extensive and alike vested in the federal Government." Looper, *"Federal State" Clauses in Multilateral Instruments*, 1960 U. ILL. L. F. 375, 396, reprinted from 32 BRIT. YB. INT'L L. 162 (1957).

134. It has been said that the treaty did not affect "possible international relations." Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242, 247 (1923). Since migratory birds do cross national boundaries, the statement seems clearly false. Still, the treaty was motivated perhaps more by considerations of federalism than of international cooperation.

135. 252 U.S. at 433-34.

> general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

"Prohibitory words" were found in the Sixth Amendment in *Reid v. Covert.*[136] That case is of present interest only because in a deeply divided Court (there was no majority opinion) none of the Justices disputed the proposition that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution."[137] (The special language of the supremacy clause with reference to treaties was thought to have been intended only to validate treaties made before the adoption of the Constitution.[138])

A reasonable treaty on foreign judgments would not raise civil liberties issues like those of *Reid v. Covert,* nor would it or an implementing statute contravene other "prohibitory words" in the Constitution. The problem is one of "invisible radiation," but *Reid v. Covert* underlines the possibility that such radiation may someday be found in sufficient intensity to invalidate a treaty partially or wholly.

Although power conferred on the federal government by a treaty is not "free from the restraints of the Constitution," it may still exceed the power that would exist in the absence of the treaty. That is the meaning of *Missouri v. Holland,* which in its reservation of the question of "prohibitory words" is consistent with *Reid v. Covert.* The additional power is conferred when it is appropriate to our foreign (and not too inappropriate to our domestic) relations for it to be conferred,[139] and the determination of appropriateness must be made in the first instance by the President and two-thirds of the Senate, the only bodies competent

136. 354 U.S. 1 (1957).

137. *Id.* at 16 (Black, J.). See Looper, *Limitations on the Treaty Power in Federal States,* 34 N.Y.U.L. REV. 1045, 1050-52 (1959).

138. *Id.* at 16-19. For a suggestion that the supremacy clause made its special provision for treaties with a dual purpose, to preserve the force of existing treaties *and* to authorize new treaties that would otherwise be unconstitutional, see Wright, *The Constitutionality of Treaties,* 13 AM. J. INT'L L. 242, 251 n. 23 (1919).

139. "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations. . . ." Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (Hughes, C.J.). See Looper, *supra* note 137, at 1056-61.

to act to protect the international interests of the country by treaties. When the fundamental liberties of the people are not at stake, but only the traditional powers of the states, the courts are not likely to reject the judgment of the treaty-making branches in favor of their own, except in cases of bad faith (that is, even worse faith than might have been found in *Missouri v. Holland*), or where the local elements of the treaty clearly outweigh the international, or, indeed, perhaps only where there is no real international concern at all.[140] The tendency of judges to trust the political branches in this respect is undoubtedly reinforced by their knowledge that the Senate, at least, is not unmindful of the virtues of parochialism.[141]

It would be exceedingly difficult not to conclude that the subject of the recognition of foreign judgments is an appropriate one for international negotiation, and that the courts would respect a determination of the President and the Senate that the benefits of a treaty causing federal pre-emption were sufficient to justify the resulting neutralization of contrary state law. It follows that a federal-state clause in such a treaty is not a constitutional necessity, but rather a device to make the treaty more acceptable to the political branches of the government and to preserve for the states a role that would otherwise be lost to them in the development of the law.

The breadth of the treaty power has been a source of apprehension to many people. Fear of its misuse motivated the proposed "Bricker Amendment" (which would, among other things, have overruled *Missouri v. Holland*) that failed to gain the necessary two-thirds vote in the Senate by only one vote in 1954. Despite the defeat of the Amendment (and the subsequent passing from the national scene of some of its senatorial supporters, including the most prominent one) its proponents were successful

140. See Wright, *supra* note 138, at 252-59. See also MITCHELL, STATE INTERESTS IN AMERICAN TREATIES 155 (1936). *But cf.* Power Authority v. FPC, 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957), criticized, Note, 34 IND. L.J. 56 (1958), criticized in advance, Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956).

141. See Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954). For examples of the exasperation of members (including a very eminent one) of the executive branch at the Senate's way with treaties, see Wright, *supra* note 138, at 248 n. 17.

in creating a cautious atmosphere in the executive branch with regard to the making of treaties.[142]

The objections to the full use of the treaty power, as it presently exists, have been stated at length elsewhere.[143] Briefly, there are fears that through treaties (and especially through multilateral conventions[144]) the usual political processes may be bypassed on matters thought to be primarily of domestic concern, with resulting disruption of the normal or ordinary distribution of powers between (a) the government and the citizen,[145] (b) the federal government and the states,[146] and (c) the Senate and the House.[147] Of these three aspects of the fear of treaties, the first has no application to a convention regulating the effect of foreign judgments, as long as safeguards equivalent to due process of law are retained. The issues raised by the second are the main concern of this paper. Of the third, little need be said; if it is thought appropriate, a treaty may be so drafted as to be ineffective except as implemented by legislation.[148]

A treaty on foreign judgments would not seem likely to be criticized as an abuse of the treaty power. The subject is not a politically sensitive one, and there is a manifest need for international cooperation; uniformity within the United States is highly desirable, and a treaty should not be regarded as too disingenuous a means of achieving it. Nevertheless, the health of federalism may be thought, at least by the Senate, to require a limited role for the federal government in the implementation of the convention. One may doubt the present strength of the Brickerites,[149] or deem other fields more appropriate for the continued dominance of state law, but the claims of the states for more authority than

142. See, *e.g.*, Looper, *supra* note 133, at 412 n. 117 (forced labor convention).

143. See articles cited in 1 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 388 (2d ed. 1961).

144. Looper, *supra* note 137, at 1061-64.

145. See Reid v. Covert, 354 U.S. 1 (1957), discussed in the text.

146. See Missouri v. Holland, 252 U.S. 416 (1920), discussed in the text.

147. This fear is not of recent origin. See Anderson, *The Extent and Limitations of the Treaty-Making Power under the Constitution,* 1 AM. J. INT'L L. 636, 647-55 (1907).

148. *But cf.* Power Authority v. FPC, *supra* note 140.

149. In 1954, when the Bricker Amendment came closest to adoption, the Republicans controlled both houses of Congress, *Lady Chatterley's Lover* was considered too vividly descriptive for American tastes, and the Cleveland Indians won the American League pennant. When this paper was being written 1954 seemed long ago.

the federal government is compelled to leave them are constitutionally legitimate and may properly be vindicated by the Senate.[150]

The objectives of the federal-state clause to be proposed are to preserve state laws as pre-eminent in the field of foreign-country judgments, but to permit any states that so desire to take advantage of the provisions of the treaty so that their own judgments may be recognized in the other signatory nations. The federal government's principal role will be to give international effect to favorable action by the states.

IV. The Federal-State Clause in General

A. Efforts to Solve the Federal-State Problem

The theme of this paper is not an original one. The federal-state clause and alternative devices have been thoughtfully considered by dipomats and legal writers for many years. Some of the proposals that have been made will be briefly noted here.

One suggestion for state participation in the resolution of international legal difficulties was advanced by Professor Wigmore[151] in the following terms:[152]

> The federal constitution, for a century and a quarter, has read "No state shall without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power." *Let Congress,* then, *consent* that such compacts may be made. The several states may then send their own delegates to the international conferences on commercial paper, maritime law, and the like; and these delegates may return and lay before their state legislatures the international drafts for ratification.

The advantages of state compacts with foreign nations were more apparent to Wigmore than they have been to others.[153]

150. See Wechsler, *supra* note 141.

151. See Wigmore, *The International Assimilation of Law—Its Needs and Its Possibilities from an American Standpoint,* 10 Ill. L. Rev. 385, 396 (1916); Wigmore, *Problems of World-Legislation and America's Share Therein,* 4 Va. L. Rev. 423, 436 (1917); 1921 Handbook of the National Conference of Commissioners on Uniform State Laws 297, 321-28, 345-50; Wigmore, Comment, 23 Ill. L. Rev. 734 (1929).

152. 10 Ill. L. Rev. at 396-97.

153. See Coudert, 23 Proceedings, Am. Soc'y Int'l L. 25, 36-37 (1929); Butler, *id.* at 176-183; Concurring Memorandum of Commissioner Freund, 1921 Handbook, *supra* note 151, at 357.

Perhaps the most devastating criticism of the compact proposal, however, was implied by its principal advocate, who suggested as one of its advantages that "the enormous intellectual and moral obstacle of the intervening third party, the federal government, is removed from the path."[154] To call the federal government of the United States an "obstacle" to the convenient conduct of international negotiations by the states seems a repudiation of a basic constitutional premise. The present paper assumes that the tradition of national conduct of foreign relations, whatever its difficulties, is a resource of the federal system from which all the states and their people should benefit.

It does not follow that Wigmore's proposal is without value. It may be quite appropriate in the development of programs affecting only local interests in a few states as well as one or more foreign countries.[155] Indeed, there is an interstate fire-prevention compact open (after further congressional action) to Canadian provinces.[156]

A very different suggestion was made by Professor Quincy Wright in 1929.[157] It would have involved a very simple federal-state clause providing that the treaty of which it was a part would not be effective within the territory of any state of the United States until declared effective there by the President, who would make the appropriate declaration for each state after its enactment of legislation conforming to the requirements of the treaty. The proposal is probably not invalid as an unconstitutional delegation of the treaty-making power to the President alone;[158] nor is it obviously unworkable. In the context of foreign-country judgments, Professor Nadelmann has advanced similar suggestions for "adaptation to our internal needs of the practice of 'accession.' "[159]

A federal-state clause like the one proposed by Professor Wright, but referring to "legal systems" rather than geographical

154. 10 ILL. L. REV. at 397.

155. See Freund, *supra* note 153.

156. 63 Stat. 271 (1949). See Nadelmann, *Ignored State Interests, supra* note 127, at 358 n. 176.

157 23 PROCEEDINGS, AM. SOC'Y INT'L L. 25, 39-40 (1929).

158. *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

159. See Nadelmann, *supra* note 18, at 259-60; Nadelmann, *The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments, supra* note 127, at 167-68. See also CAVERS, THE CHOICE-OF-LAW PROCESS 265 (1965).

areas, was included, as Article 16, in the October 1965 draft of a Convention on Recognition of Foreign Divorces and Legal Separations prepared by the Special Committee on Divorce, of which Dean Griswold was a member, of the Hague Conference on Private International Law. It provides as follows:[160]

> If a state has more than one legal system it may, at the time of signature, ratification or accession, declare that the present Convention shall extend only to one or more of its systems, and may modify its declaration at any time thereafter.
>
> Declarations contemplated in the preceding paragraph shall be notified to the Ministry of Foreign Affairs of the Netherlands and shall state expressly the systems to which they apply.
>
> [No contracting State shall be bound to recognize a divorce or a legal separation granted in a State having more than one legal system unless the particular system in which the divorce or the legal separation was granted is still covered by the declarations contemplated in the foregoing paragraph.]

The federal-state clause proposed herein is similar in purpose and phrasing to the above,[161] but its subject requires it to be more complex. In the area of matrimonal causes it is unnecessary to consider the problems raised by the existence within the states of federal district courts, because matrimonal causes are not heard in those courts;[162] but since money judgments come from and may be enforced in the district courts, it seems desirable to make provision for those courts' jurisdiction, procedure, and choice of substantive law, in diversity and federal-question cases.

Federal-state clauses, of varying usefulness but little suitability to a situation where each party requires a precise definition of the others' commitments, may be found in the texts and histories of the United Nations Arbitration Convention,[163] the Constitution of the International Labor Organization,[164] and the United

160. 5 INT'L LEGAL MATERIALS 389, 392(1966). A Preliminary Report appears at 393.

161. This paper was written in the spring of 1965 and revised in early 1966 after the clause quoted in the text had been called to the attention of the author.

162. See WRIGHT, FEDERAL COURTS 73 (1963); HART & WECHSLER, *op. cit. supra* note 98, at 1016-18.

163. Domke, *supra* note 77.

164. Looper, *supra* note 133, at 377-400.

Nations Draft Covenant on Human Rights.[165] A close analogue of the federal-state clause is the "Commonwealth Clause" incorporated in British treaties affecting private international law to permit the Commonwealth countries to accede to the treaties by legislative action.[166]

B. Applicability and Effectiveness of the Clause

The foregoing analysis has been concerned with the actual and potential law of foreign judgments in only one country, the United States of America. Its results probably have no wider application. Federal-state clauses intended to apply to all signatory federations of the conventions to which they were attached have been drafted,[167] but these clauses (at least if highly articulated) present problems much more difficult than those that arise in a single federation.

Setting aside political differences, the constitutional differences among federations are such that a formula attempting to cover them all may be satisfactory to none. In Canada, to take an obvious example, treaties are concluded by the executive alone,[168] but are not effective as sources of law for courts unless implemented by legislation;[169] the Canadian counterpart of *Missouri v. Holland* was decided the other way;[170] the division of legislative power between the two levels of government is different from that in the United States; and there is no system of federal trial courts. In India the national legislature may act to implement not only treaties but also mere recommendations of international conferences; the same may be true of Australia,[171] even though

165. *Id.* at 400-17; Liang, *Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments,* 45 AM. J. INT'L L. 108, 119-21 (1951); Sorenson, *Federal States and the International Protection of Human Rights,* 46 AM. J. INT'L L. 195 (1952).

166. STEWART, TREATY RELATIONS OF THE BRITISH COMMONWEALTH OF NATIONS 247 (1939).

167. See the clause quoted in the text following note 160, and the authorities cited at notes 163-65 *supra.*

168. The same is true in the other Commonwealth federations. Looper, *supra* note 137, at 1048 n. 12.

169. Lederman, *A Comparison of Principal Elements of the Legal Systems and Constitutions of Canada and the United States,* 11 AM. J. COMP. L. 286, 291-92 (1962).

170. Atty. Gen. for Canada v. Atty. Gen. for Ontario, [1937] A.C. 326. Lederman, *supra* note 169.

171. Looper, *supra* note 137, at 1054-55.

in the latter country there is no treaty-implementing power as such.[172]

If these and other differences among federations (including differences in custom, upon which rests, for example, present state control of the recognition of foreign-country judgments in the United States) are sufficient to require that a federal-state clause be drafted for the United States alone, that clause need not be incorporated in the treaty, but may be appended by the Senate as a reservation. The latter alternative would lead to international complications and is also undesirable as a matter of domestic law. In *The Niagara Reservation Case* the District of Columbia Court of Appeals held a reservation to a treaty ineffective on the ground that it was "a matter of purely municipal application, neither affecting nor intended to affect the other party," and regarded the treaty as valid without the reservation.[173] The reasoning of the decision has been severely criticized, both before and after the judgment was handed down,[174] and it is easy to doubt that it would be followed by the Supreme Court; yet the case suggests a danger in the use of reservations that should be avoided if possible.

The same case raises other issues that are potentially more troublesome. It seems implicit in the reasoning of the Court that a treaty cannot be made nonself-executing, as some have been and others may profitably be in the future.[175] There is the further possibility that a federal-state clause, whether a reservation or part of the original text of a treaty, would be held ineffective because of its "purely municipal application." That should not happen, both because the court's standard is not an appropriate one,[176] and because the significance of such a clause to other nations is apparent, especially where the obligations of the treaty are limited by reciprocity.

Two more constitutional problems may be briefly noted. Such a federal-state clause as is here contemplated may conceivably be attacked as either an attempted delegation of the treaty power to

172. *Id.* at 1061.

173. Power Authority v. FPC, 247 F.2d 538, (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957).

174. See note 140 *supra*.

175. Henkin, *supra* note 140, at 1164, 1171 n. 34.

176. *Id.* at 1164-67.

the states or an invalid discrimination among them. To the first objection it may be replied that there is no delegation of the treaty power but rather a limited exercise of it, and that federal power is delegable to the states at least under proper circumstances;[177] to the second, that the treaty power is necessarily very broad and the discrimination solidly grounded in the realities of federalism.

V. A Federal-State Clause for a Foreign-Judgments Convention

The Prince of Denmark must make an entrance before the play is over. It is time to consider in more detail the specific objectives of this particular federal-state clause and the means by which they may be accomplished. (The proposed federal-state clause is set forth in the Appendix *infra.*)

The purpose of the federal-state clause is to provide that the treaty will not necessarily affect the law of any state, while making available for each state an option to accept the obligations and receive the benefits of the treaty. Therefore the federal government, with some exceptions, will pledge itself to recognize or to secure the recognition of judgments of the other signatory nations only in certain named states, those requesting coverage by the convention. The other parties to the treaty, in accordance with its scheme of reciprocity, will be required to recognize, among American judgments, only those from the same designated states.

The possible modes of action by the states need not be specified. With due regard for the purpose of the clause, the President and the Senate may reach an understanding as to the circumstances under which a state will be deemed to have requested application of the convention. Foreign nations should not deal directly with the states, nor should they have to determine for themselves which states have requested coverage. The federal government may declare to them the states to which the convention extends, such declarations being, under the treaty power, the law of the land.

A few words may nevertheless be said here on the means by which a state might request extension of the treaty to itself.

177. *Compare* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851), *with* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

Most obviously, it could pass a statute. Either an act expressly adopting the convention's standards (stating them in full, incorporating them by reference, or merely assenting to the application of the treaty) or one providing for recognition of foreign judgments on even more favorable terms should be sufficient if intended by the legislature to have the appropriate federal and international consequences. Another possibility is that a state might gain the benefits of the treaty on the basis of its decisional law, without codification of that law.

Whatever technique is used by a state, the final operative act, invoking the treaty power, should be that of the federal government, which presumably would not act until notified by the state of its desire to receive the benefits of the treaty. Such notification could be accomplished, in the case of a statute, by the legislature's directing the statute to be forwarded to the federal government as a request for extension of the convention to the state. In the absence of legislation, a state's governor, perhaps in conjunction with its attorney general, might certify to the national government that the state's decisional law is consistent with the convention and that the state desires coverage thereunder.[178] This is an unlikely possibility, and the effect of such a certification (whether or not authorized by the legislature) under the laws of the 50 states has not been investigated; however, state law, as that term is usually understood, might not have the last word in determining the validity of the governor's act.[179]

The United States has not only a federal legislative and executive authority with power to make laws and otherwise to govern, but a system of federal courts as well, whose jurisdiction is by no means coextensive with the "legislative jurisdiction" of the Congress. Problems created by the judicial power of the federal courts are especially prominent in the present context, and the federal-state clause may resolve a number of them. The basic plan adopted here is for federal courts to follow the courts of

178. *Cf.* § 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021 (1964), authorizing the Atomic Energy Commission to enter into agreements with state governors for state assumption of some of the regulatory functions of the Commission. The state must establish an adequate program of regulation, but no participation by its legislature in the agreement is required.

179. *Cf.* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951).

the states in which they sit, according to the *Erie-Klaxon* rule. This plan has two distinct sides and several complications.

After extension of the treaty to a state there would be no reason for a federal court in that state to diverge from the state rule by refusing recognition to a judgment the state courts would recognize under the convention. It is less clear that a federal court should not grant recognition under the standards of the treaty before a request for coverage by the state in which it sits. But full vindication of the federal interest in recognition would call for recognition in all courts; as long as the basic policy is to be continued state development of the law, there is more to be lost than gained by occasional deviations in the federal courts.

Among the complications are federal jurisdiction under the treaty, the general federal-question jurisdiction, and federal procedure.

Unless contrary provision were made, 28 U.S.C. § 1331 would presumably confer on the district courts federal-question jurisdiction of suits to enforce judgments for more than $10,000 from courts of signatory nations, in states covered by the convention. The *Erie* doctrine is not wholly inapplicable to such federal-question cases, but has in them a more limited scope than in diversity cases,[180] so that federal judges might find warrant for assumption of more lawmaking power than enforcement of the convention would require. The previously outlined provisions of the federal-state clause, which indicate only a limited federal interest in uniformity, would probably limit judicial inventiveness on other questions in convention cases (and would eliminate federal-question jurisdiction based on the convention in states outside its area of applicability). But since the Supreme Court may unify interpretation of the convention, and the diversity jurisdiction under § 1332(a)(2) guards against chauvinism in the state courts, it might be well to provide against the treaty's giving rise to original federal-question jurisdiction.

Recognition of a foreign judgment in a federal court may also be sought in a case that is *otherwise* one of federal-question

180. Holmberg v. Armbrecht, 327 U.S. 392 (1946); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 694 (1953); WRIGHT, FEDERAL COURTS 217 (1963); Mishkin, *The Variousness of "Federal Law"*, 105 U. PA. L. REV. 797 (1957).

jurisdiction. State law may govern some issues in such a case, but will do so only if consistent with the spirit of the applicable federal law.[181] Under those circumstances it would not be clearly inappropriate for the federal court to determine by its own standards the effect of the foreign judgment, and the same might be true in a diversity case governed largely by federal law.[182]

Federal-question and other cases where the applicable law is mainly federal also arise in state courts. If there is to be a federal law of foreign-country judgments, applied in such cases in the federal courts, it should be applied in the state courts as well. *Erie* cuts both ways.[183]

If the convention is made immediately applicable to cases governed principally by federal law, and the rule of reciprocity is carried to its logical conclusion, a foreign court in which recognition of American judgments is sought may have serious difficulties in deciding whether or not those judgments are entitled to recognition as based on federal law. One solution to the problem is to make the rule of reciprocity inapplicable to such cases; that is, to permit foreign courts to apply the convention to American judgments on a strictly geographical basis. As a consequence of that solution, the United States would, in a very narrow sense, give up more than it would gain by signing the convention; if that is thought undesirable, the convention need not apply of its own force to federal-law cases.

Once a state has acted to avail itself of the treaty, and thereby procured the past or prospective recognition of its judgments abroad, the decisions of its courts interpreting the treaty or implementing statute should, to avoid international embarrassment to the United States, be subject to Supreme Court review. Existence of appellate jurisdiction in the Supreme Court is not inconsistent with a lack of original jurisdiction in the federal district courts, even though a suit on a foreign judgment does not "arise under" federal law for purposes of 28 U.S.C. § 1331 (or jurisdiction

181. See authorities cited *supra* note 180.

182. Banco Nacional de Cuba v. Sabbatino, 386 U.S. 398 (1964), is such a case. Other examples are Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), and Francis v. Southern Pacific Co., 333 U.S. 445 (1948).

183. See Pope & Talbot, Inc. v. Hawn, *supra* note 182, at 410; Friendly, *In Praise of Erie — And of the New Federal Common Law,* 19 THE RECORD 64 (1964), reprinted, 39 N.Y.U. L. REV. 383 (1964).

under that section has expressly been withheld), a claim that a state-court judgment is inconsistent with the international obligations of the United States may be a claim of right under the applicable treaty for purposes of § 1257(3).[184]

Another marginal area for the *Erie* doctrine is federal "procedure." Reconciliation of all the relevant cases is a task not to be undertaken here,[185] but it is clear that there is some room for the application of federal procedural rules different from those that would be applied in the state court across the street.[186] Since *Hanna v. Plumer*,[187] there can be little doubt of the effectiveness, as treaty-implementation or otherwise, of the incorporation of procedural provisions of a foreign-judgments convention into the Federal Rules of Civil Procedure.[188] There is not now an expeditious federal procedure for the enforcement of foreign-country judgments,[189] and the creation of one would alleviate international anxiety without substantially derogating from the states' control over the standards of recognition. Simplified procedure and searching re-examination of the merits of the cause are not inconsistent, as the French *exequatur* demonstrated for many years.[190]

It is possible, however, that a federal procedural rule might clash with a state rule thought to embody substantive law. *Hanna* implies that the federal rule would prevail, but Mr. Justice Harlan[191] and at least one commentator[192] suggest that state law should be applied in the absence of federal competence in the

184. See, on the different functions of district court and Supreme Court jurisdiction, Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 163-84 (1953); on federal protection of state-created rights, HART & WECHSLER, *op. cit. supra* note 180, at 465.

185. See *e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958); Simler v. Conner, 372 U.S. 221 (1963); Hanna v. Plumer, 380 U.S. 460 (1965).

186. Friendly, *supra* note 183, at 78.

187. *Supra* note 185.

188. This discussion may be moot, as the convention may not include significant procedural provisions; see note 3 *supra*.

189. Compare 28 U.S.C. §§ 1963-1964.

190. See Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184, 1187-89 (1952). The re-examination is no longer so searching. Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72 (1964).

191. Concurring opinion, 380 U.S. at 474.

192. McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965).

relevant area of substantive law. A provision in the federal-state clause might end all doubt and ensure that if Congress or (under 28 U.S.C. § 2072) the Supreme Court should determine to make procedural provisions applicable to all cases in the federal courts, that determination would be fully effective as treaty-implementation.

When the substantive standards of recognition of the convention are to be applied in a federal court, for whatever reason, the Federal Rules of Civil Procedure should not bar use of any new expeditious procedure. The treaty might be sufficient to override the rules, but in the absence of a stronger amendment the rules should be amended to require use of the convention's procedure by district courts when its substance is applicable.

The convention may, and should, be fully applicable to cases in the District of Columbia and other areas within the jurisdiction of the United States but not a part of any state. The willingness of the federal government to make the convention effective in such areas should encourage favorable action by the states.

A draft federal-state clause intended to accomplish the stated objectives is set forth below. Provisions that might reasonably either be included or omitted have been included, on the theory that the reader will find it easier to ignore what he deems unsuitable than to supply for himself what he considers necessary and proper.[193]

APPENDIX

Federal-State Clause

§1. The United States of America may, at the time of signature, ratification or accession, declare that the present Convention shall extend only to one or more of its constituent states, and may modify its declaration at any time thereafter.

§2. Declarations contemplated by §1 shall be presented to the Ministry of Foreign Affairs of the Netherlands and shall expressly indicate the states to which this Convention shall extend.

§3. This Convention shall govern the recognition of judgments in the following classes of cases in the United States:

193. For example, § 6 may be thought either inappropriate for inclusion in a treaty or substantively undesirable.

(a) All cases in state and federal courts sitting in states covered by the declarations contemplated by § §1 and 2;

(b) Cases in the federal courts wherein jurisdiction is not founded solely on diversity of citizenship;

(c) Cases governed predominantly by federal law; and

(d) All cases originating in courts of the United States not sitting in the constituent states thereof.

§4. [Designated procedural provisions] shall be applied in the federal courts of the United States if provision for their application is made by Act of Congress or by amendment of the Federal Rules of Civil Procedure.

§5. No contracting party shall be bound to recognize a judgment from a state or federal court of the United States other than the courts referred to in §§3(a) and 3(d).

§6. The jurisdiction of those federal courts of the United States that sit in the constituent states thereof shall not be founded solely on this Convention as a treaty of the United States. Cases arising under this Convention may be heard in those courts if an independent basis of jurisdiction exists. The jurisdiction of the Supreme Court, and of other courts of the United States not sitting in any state, may be founded on this Convention as a treaty of the United States.

A State Labor Relations Act

Despite an increase in the number of labor disputes properly within the jurisdiction of the states, there are only a few states with labor relations acts adequate to deal with labor problems. Most states leave labor relations to the courts, which have proven to be inadequate forums. The proposed statute substantially alters existing state law, drawing extensively upon the National Labor Relations Act. Among the significant alterations are provisions expanding restrictions on secondary boycotts and disruptive picketing, encouraging the unambiguous separation of prosecution and adjudication functions, and conferring finality on Board orders, violations of which are punishable as contempt.

The need for an administrative agency to deal with labor disputes was expressly recognized by Congress in the Wagner Act[1] of 1935. Although this federal statute has pre-empted the field with respect to industries affecting interstate commerce, there is a considerable area of labor relations which does not affect such commerce and which is not subject to the jurisdiction of the National Labor Relations Board.[2] That this "non-federal" body of labor relations demands the attention of the states was recognized by a few legislatures almost immediately after the passage of the Wagner Act. New York and Pennsylvania, for example, enacted state labor relations acts in 1937[3] which were roughly patterned after the federal model. Despite the rapid increase of industrialization across the country, at the present writing only sixteen states have labor relations acts.[4] Of the remaining states,

---

1. 49 Stat. 449 (1935), 29 U.S.C. §§ 141-68. (1964).

2. See Cox & Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950).

3. N.Y. Lab. Law §§ 700-717; Pa. Stat. Ann. tit. 43, §§ 211.1-211.13 (1964).

4. Ariz. Rev. Stat. Ann. §§ 23-1301 to -1361 (1956); Colo. Rev. Stat. Ann. §§ 80-4-1 to -4-22, 80-11-1,2, 80-11-10 to -11-14 (1964); Conn. Gen. Stat. Ann. §§ 31-101 to -111 (1960); Hawaii Rev. Laws §§ 90-1 to -19 (1955), § 14 A-26 (Supp. 1961); Kan. Gen. Stat. Ann. §§ 44-801 to -817 (1964); Mass. Gen. Laws Ann. ch. 150A, §§ 1-12 (1958, Supp. 1965); Mich. Stat. Ann. § 17.454 (1960, Supp. 1965); Minn. Stat. Ann. §§ 179.01-179.26 (1946, Supp. 1965); Mo. Ann. Stat. §§ 295.010-295.210 (1965); N.D. Cent. Code §§ 34-12-01 to -12-14 (Supp. 1965); N.Y. Lab. Law §§ 700-717; Ore. Rev. Stat. §§ 662.505-662.655 (1965); Pa. Stat. Ann. tit. 43, §§ 211.1-211.13 (1964); R.I. Gen. Laws Ann. §§28-7-1 to -7-47 (1956, Supp. 1965); Utah Code Ann. §§ 34-1-1 to -1-34 (1953, Supp. 1965); Wis. Stat. Ann. §§ 111.01-111.19 (1957, Supp. 1966).

a few have provided for mediation and arbitration,[5] while others have scattered provisions outlawing such activity as mass picketing or secondary boycotts.[6] Thus for the most part, the states have left the settlement of labor disputes to the courts. Yet it has become increasingly clear that the courts are ill-equipped to handle the delicate problems of industrial relations. Several recent state court decisions illustrate the problems. In *Krystod v. Lau*,[7] a Washington state court held that employees discharged because of their union activity were entitled to reinstatement. Yet in order to reach this result the court felt bound to survey the entire history of English and American labor laws beginning with the Statute of Labourers of 1349 (dealing with the shortage of employees caused by the Plague) and to conclude that these statutes in effect established a common-law right not to be discharged for organizational activity. The result would have followed as a matter of course under a labor relations act. In *Johnson v. Christ Hospital*[8] the Supreme Court of New Jersey stretched an organizational rights provision of the state constitution[9] so far as to hold that the court could not only order the employer to bargain with his employees, but that it could determine the appropriate bargaining unit and hold an election.

The utter incapacity of a court to administer the sort of decree which was handed down in the *Christ Hospital* case was recently discussed by California's Chief Justice Traynor. In *Petri Cleaners v. Automotive Employees*,[10] the Supreme Court of California was confronted with a jurisdictional strike in which the petitioning union requested that an employer bargain with it as the representative of the employees. The court, speaking through Traynor, denied the request, stating that any duty on the part of an employer to bargain must be prescribed by the legislature. Moreover, Traynor further observed that the court was not a labor relations board, and that only an administrative

5. Mont. Rev. Code tit. 41, §§ 41-901 to -909 (1961, Supp. 1965); N.J. Rev. Stat. §§ 34:13-1 to :13-9; 34:13A-1 to :13A-13 (1965); W.Va. Code Ann. § 2316 (Supp. 1965).

6. *E.g.*, Cal. Labor Code §§ 1115-1122 (1955, Supp. 1965); S.D. Code §§ 17.1108, 17.1112 (Supp. 1960).

7. 65 Wash. Dec.2d 803, 400 P.2d 72 (1965).

8. 45 N.J. 108, 211 A.2d 376 (1965).

9. N.J. Const. art. 1, § 19.

10. 53 Cal.2d 455, 349 P.2d 76 (1960).

agency could devote the time and develop the expertise necessary to handle labor disputes. Indeed, courts lack the machinery to develop extensive familiarity with labor relations. They cannot send their representatives into the field to investigate charges. Being bound by formal rules of evidence, they cannot provide the informal but inclusive hearing which an agency offers. Moreover, the agency, which is by nature more flexible, need not be rigidly bound by precedent, but can proceed on an *ad hoc* basis.[11] This may be particularly desirable in such confusing areas as the selection of the appropriate collective bargaining unit of employees. The Board can more readily tailor its relief to the particular situation, and can often bring the parties to a settlement much as a mediator might. Finally the administrative proceeding is likely to be quicker and cheaper, and speed is essential to the effective settlement of labor disputes.

Most of the existing state labor relations acts, however, are highly unsatisfactory. Many legislatures have simply copied the New York statute, paying no heed to the Taft-Hartley amendments[12] to the Wagner Act in 1947, or the Landrum-Griffin amendments[13] in 1959. Thus changes in the problems and changes in ways of dealing with them have gone largely unrecognized. Perhaps the most universally inadequate state provisions are found among the unfair labor practices. Many restrictions on secondary boycotts or picketing, for example, are so overly simplified as to be too vague to apply, or so ambiguous as to be unintelligible. The New York statute has specified no union-employee unfair labor practices whatsoever, and a bill modelled on that law has been twice resoundingly rejected by the Iowa legislature.[14] One or two recent statutes [15] do attempt to provide a more sophisticated and balanced act than the obsolete New York prototype, yet even these have significant shortcomings.

The proposed model statute represents an extensive revision of state law. It incorporates many of the current federal pro-

11. See generally Peck, *Judicial Creativity and State Labor Law*, 40 WASH. L. REV. 743 (1965).

12. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1964).

13. 73 Stat. 519 (1959), 29 U.S.C. §§ 141-88 (1964).

14. Letter from the Iowa Federation of Labor, AFL-CIO, to the HARVARD JOURNAL ON LEGISLATION, November 16, 1965.

15. N.D. Cent. Code §§ 34-12-01 to -12-14 (Supp. 1965); Utah Code Ann. §§ 34-1-1 to -1-34 (1953, Supp. 1965).

visions which as yet have not been adopted by state legislatures. In addition, many of the terms of the federal act are modified or avoided in the interests of clarity and effectiveness. While the statute is thorough, it should be easily and efficiently administrable by the proposed three-member agency.

THE STATUTE

SECTION 1. *Short title.*

This Act may be cited as the "[State] Labor Relations Act."

SECTION 2. *Definitions.*

(a) "Commissioner" means the Commissioner of the Bureau [Department] of Labor of this state.

(b) "General Counsel' means the General Counsel provided for in section 5 of this Act.

(c) "Bureau" ["Department"] means the Bureau [Department] of Labor.

(d) "Board" means the Labor Relations Board provided for in section 3 of this Act.

(e) "Person" includes any individual, partnership, association, labor organization, corporation, trustee, trustee in bankruptcy, receiver, or the legal representative thereof.

(f) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but does not include [the United States, the State of [ ], or any political or civil subdivision, or other agency thereof; or] [any charitable or religious agency or corporation; or] any labor organization, except when acting as an employer.

(g) "Employee" means any employee, including but not limited to any individual whose employment has ceased as a consequence of any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment, and shall not be limited to the employees of a particular employer; "employee" does not include any individual employed by his parent or spouse or in the domestic service of any person in his home, [any individual employed only for the duration of a labor dispute,] any individual having the status of independent contractor, or any individual employed as a supervisor.

(h) "Representative" includes a labor organization or an individual, whether or not employed by the employer or those whom he represents.

(i) "Labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining

on behalf of employees, or of dealing with employers concerning grievances, wages, terms or conditions of employment.

(j) "Unfair labor practice" means only those unfair labor practices listed in section 7.

(k) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

SECTION 3. *State Labor Relations Board.*

(a) There is hereby established in the Bureau [Department] of Labor the [State] Labor Relations Board, which shall be composed of three members. The offices of the Board shall be in [ ]. On or before [ ], the Governor shall, with the advice and consent of the Senate, appoint the members of said Board. The Governor shall designate one member of the Board to serve as chairman. The original Board shall be composed of one member for a two year term, one member for a four year term, and one member for a six year term. The Governor shall indicate the length of term when making the appointment of the original Board. Biennially thereafter, as the term of each member expires, the Governor shall, with the advice and consent of the Senate, appoint a successor to serve for a term of six years. Each member of said Board shall have been a qualified voter in this state for at least one year next preceding his appointment.

(b) Any member may be removed by the Governor for cause shown in a public hearing after the accused shall have been given a copy of the charges made and shall have had an opportunity to answer such charges.

(c) The Governor shall fill any vacancy by appointment for the unexpired term.

(d) Each member shall receive as compensation [a salary or daily expense allowance].

(e) The Board is authorized to hold hearings at any place in this state, and to administer this Act in accordance with the authority herein granted to it. The Board shall appoint such employees for such periods as may be necessary to carry out the work of the Board and the provisions of this Act without undue delay. All files, records and documents accumulated by the Board shall be kept in offices provided by the Bureau [Department].

(f) All decisions shall be made by a majority of the Board and a written copy of each decision, stating findings of fact and conclusions of law, shall be filed with the Commissioner. At the end of each fiscal year, and more frequently if required by the Governor, the Board shall make a written report to the Governor, a copy of which shall be filed with the Commissioner.

SECTION 4. *Jurisdiction.*

The Labor Relations Board herein established shall have jurisdiction over any labor dispute which is not subject to the provisions of the Federal Railway Labor Act, and over which the National Labor Relations Board does not have, or has declined to assert, jurisdiction. For purposes of determining whether or not the National Labor Relations Board has asserted jurisdiction, the Board herein established shall respect the relevant rules and regulations, press releases, and case rulings of the National Labor Relations Board.

SECTION 5. *General Counsel.*

(a) The [Board] [Governor] shall, on or before [ ], and quadrennially thereafter, appoint a General Counsel for a term of four years at an annual salary to be set by the [state legislature]. Said General Counsel may be removed by the [Board] [Governor] for cause shown in a public hearing, after the General Counsel shall have been given written notification of the charges made and an opportunity to answer such charges. The [Board] [Governor] may fill any vacancy in this office by appointment for the unexpired term.

(b) The General Counsel shall diligently investigate any charges referred to him by the Board, and any other violations of this Act which come to his attention. He shall have final authority, on behalf of the Board, for the investigation of charges and issuance of complaints under section 9, and for the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SECTION 6. *Rights of employees.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment.

SECTION 7. *Unfair labor practices.*

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 6;

(2) to prepare, use, or circulate any blacklist the purpose or effect of which is to prevent the employment or re-employment of individuals because of their exercise of the rights set forth in section 6;

(3) to dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it; however, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay when the purpose of such conference is not in violation of subsection (1) of this section;

(4) by discrimination with respect to hire or tenure of employment, or benefits, or other terms or conditions of employment, to encourage or discourage membership in any labor organization; *Provided,* that nothing in this Act shall preclude an employer from making a lawful agreement with a labor organization, which is not established, maintained, or assisted by any action defined in section 7(a) of this Act as an unfair labor practice, to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, if such labor organization is the lawful representative of the employees as provided in section 8;

(5) to refuse to bargain collectively or discuss grievances with the representatives of his employees, subject to the provisions of section 8;

(6) to discharge or otherwise discriminate against an employee because he has filed charges or a petition or has given testimony under this Act;

(7) to deduct, collect, or assist in collecting from the wages of employees any dues, fees, assessments, or other contributions payable to any labor organization, except where he is authorized to do so with respect to dues and he receives the written authorization from each employee whose wages are to be thus affected. Any such authorization given by an employee shall be revocable after one year.

(b) It shall be an unfair labor practice for a labor organization or its members or agents —

(1) to coerce or restrain any employee in the exercise of the rights guaranteed him in section 6;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (4);

(3) to engage in, or induce any employee to engage in any picketing, strike, slowdown, or other refusal in the course of his employment to use, process, transport, or handle any goods or materials or to perform any services; or to threaten, coerce, or restrain any person, where in either case an object thereof is:

(A) to force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; however, nothing in this clause (A) of section 7(b) (3) shall be construed to make

unlawful any primary strike or primary picketing of an employer whether or not conducted at the premises of the primary employer;

(B) to force or require any employer or union to enter into an agreement which is prohibited by section 7(e);

(C) to force or require another employer to recognize or bargain with, or refuse to recognize or bargain with any labor organization;

(D) to force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order issued by the Board pursuant to section 9(g);

(4) to picket or cause to be picketed, or to threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has recognized in accordance with this Act any other labor organization as the representative of such employees and a question concerning representation may not appropriately be raised under section 8;

(B) where, within the preceding twelve months, either a valid election under section 8 of this Act has been conducted or a petition which has been filed by the picketing labor organization with respect to substantially the same group of employees has been dismissed by the Board pursuant to section 8 owing to a lack of sufficient interest among the employees; or

(C) where such picketing has been conducted without a petition under section 8 being filed within a reasonable time not to exceed thirty days.

(5) to refuse to bargain collectively with an employer, provided such labor organization is the representative of his employees subject to the provisions of section 8;

(6) to use or threaten the use of violence or sabotage against any person or property to obtain a concession from an employer; an order issued pursuant to this section 7(b) (6) shall not operate to prevent jurisdiction of any court in a criminal case or civil action for damages when the activity complained of is also the subject of an order by the Board.

(c) Nothing in section 7(b) shall be construed to make unlawful publicity or peaceful picketing for the purpose of truthfully advising the public,

including consumers and members of a labor organization, that a product is produced by an employer with whom the labor organization has a primary dispute and is handled or distributed by another employer, so long as such publicity does not have the effect of inducing any person who is not employed by the primary employer to refuse to pick up, deliver, or transport any goods or perform any services.

(d) It shall be an unfair labor practice for any employer and any labor organization to enter into any agreement, express or implied, whereby such employer ceases or refrains from or agrees to cease or refrain from doing business with any other person. Any such provisions in any such agreement are void and unenforceable. Nothing in this section 7(d) shall be construed to make unlawful any provision of an agreement the primary object of which is to preserve or obtain work fairly claimable for the bargaining unit covered by that agreement.

(e) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. Such obligation does not require either party to agree to a proposal or to make a concession.

(f) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

SECTION 8. *Election of representatives.*

(a) Representatives selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other terms or conditions of employment. However, an employer may permit employees personally to present grievances.

(b) With the objective of securing to employees the fullest benefit of this Act, the Board shall decide in each case whether the appropriate unit shall be an employer unit, craft unit, plant unit, or any other unit. The extent to which the employees have organized is not by itself a sufficient factor to support the finding of an appropriate unit. The Board shall not decide that any unit is appropriate for such purposes if it includes both professional employees and non-professional employees unless a majority in each group vote for inclusion in such unit; nor shall the Board include guards and other employees in the same unit. [The Board shall not decide that any craft unit is inappropriate for such purposes on the ground that

a different unit has been established by a prior Board determination, unless a majority of the employees in the proposd craft unit vote against separate representation.]

(c) Whenever a petition is filed with the Board —

(1) by an employee or group of employees or a labor organization acting in their behalf alleging that a substantial number of employees

(A) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 8(a); or

(B) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative no longer represents the wishes of a majority of the employees in the bargaining unit; or

(2) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 8(a);

the Board shall investigate the petition and if it has reasonable cause to believe that a bona-fide question concerning representation exists, it shall provide for a hearing upon due notice. If the Board finds on the record of the hearing that the claim concerning representation is supported by a substantial number of employees, and in any case where the claim appears to be supported by thirty percent of the employees in the appropriate bargaining unit, the Board shall conduct an election by secret ballot among the employees, and shall certify the results of such election.

(d) No election shall be directed in any bargaining unit or subdivision thereof within which, in the preceding twelve-month period, a valid election has been held.

(e) In any election in a single bargaining unit where none of the choices on the ballot receives a majority, a run-off shall be held between the two choices receiving the largest and second largest number of valid votes cast in the initial election. Where one of the questions to be decided in the election is the inclusion or exclusion of one unit with respect to another unit, successive elections shall be held in the unit to be included or excluded at which the choice on the ballot receiving the fewest number of votes shall be dropped in each succeeding election until one choice receives a majority.

(f) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations and rules prescribed by the Board.

SECTION 9. *Complaints of unfair labor practices: hearings and orders.*

(a) The Board is empowered to prevent any person from engaging in any unfair labor practice. This power shall not be affected by any other

means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

(b) The Board shall refer to the General Counsel all charges that any employer or labor organization has engaged in or is engaging in an unfair labor practice. Upon such referral by the Board, or if the General Counsel upon his own investigation considers that there is or has been a violation of this Act, the General Counsel shall issue and cause to be served a complaint upon the person against whose conduct the charge has been filed. The complaint shall set forth the violations charged and summon the named person to a hearing before the Board at the time and place therein fixed. The time and place of the hearing may be changed by the General Counsel or at the request of the Board on its own motion or on motion of any other party for cause shown. The hearing should be held not less than seven days after the service of such complaint, unless the threat of immediate and irreparable harm requires a more prompt hearing. No complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board or, in the case of an independent investigation by the General Counsel, more than six months prior to notice to such person that he is under such investigation.

(c) Any complaint may be amended by the General Counsel with the permission of the Board in its discretion at any time prior to the issuance of an order based thereon. The person complained of shall have the right to appear in person or otherwise at the hearing and give testimony. In the discretion of the Board, any person may be allowed to intervene to present testimony. [*Alternative No. 1:* In any hearing the Board shall not be bound by technical rules of evidence prevailing in the courts.] [*Alternative No. 2:* Hearings shall be conducted, insofar as practicable, in accordance with the rules of evidence applicable in the courts.]

(d) A written transcript of the testimony taken at any hearing shall be filed with the Board. The Board may then, upon notice to all parties, take further testimony, hear argument, or accept submission of briefs.

(e) If upon all the evidence the Board determines that the person complained of has engaged in or is engaging in any unfair labor practice, it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to cease and desist from such unfair labor practice, and shall order such further affirmative action as will effectuate the policies of this Act including, but not limited to:

(1) payment of back pay by the employer or labor organization responsible for the damage complained of;

(2) reinstatement of employees, with or without back pay;

(3) hiring of persons refused work in violation of section 7(a) (2) or (4);

(4) an offer of preferential future rehiring to employees displaced or replaced in violation of section 7(a);

(5) initiation or resumption of collective bargaining;

(6) withdrawal of recognition from any union established or assisted by an employer in violation of section 7(a) (3) or any union attaining recognition through a violation of section 7(b).

Such order may further require such person to make reports from time to time showing the extent to which he has complied with the order. Reinstatement of, or an award of back pay to, any individual suspended or discharged for cause shall not be ordered. If upon all the evidence the Board is not of the opinion that the person or persons complained of have engaged or are engaging in any unfair labor practice, it shall make its findings of fact and issue an order dismissing the complaint.

(f) The Board shall not require as a condition for taking jurisdiction over an employer unfair labor practice that employees engaged in any lawful strike or other lawful concerted activity shall discontinue such activity.

(g) Whenever it is charged that a person is engaging in an unfair labor practice within the terms of section 7 (b) (3) (D), the Board shall hear the dispute and make an assignment of the disputed work to such group of employees as the Board determines to be properly entitled thereto, unless the parties satisfy the Board within ten days of the filing of such charge that they have settled the dispute or have agreed upon a reasonably prompt means of settling the dispute.

(h) Until the record in a case has been filed in the [district] court, as provided in section 10, the Board may at any time, upon reasonable notice and in such manner as it deems proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

SECTION 10. *Enforcement of orders; judicial review.*

(a) The Board is empowered, upon issuance of a complaint as provided in section 9(b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition the [district] court within the county wherein the unfair labor practice in question is alleged to have occurred or wherein any person charged with the unfair labor practice resides or transacts business, or, if said court is not in session, any judge of said court, for appropriate temporary relief or a restraining order, as well as for the enforcement of any order. Where enforcement of an order is sought, the Board shall certify and file in the court a transcript of the entire record of any proceedings, including the pleadings, testimony, and findings upon which such order was made. Within five days after filing such petition in the [district] court, the Board shall cause a notice of such petition to be sent by registered mail to all parties or their representatives. The [district] court or, if said court is not in session, any judge of said court shall have jurisdiction of the proceedings and of the questions determined thereon, and is empowered to grant such relief, including temporary relief, as it deems appropriate and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board.

(b) Any person aggrieved by an order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in the [district] court for the county where the unfair labor practice was alleged to have occurred or in the county wherein such person resides or transacts business by filing in the court, within thirty days from the date of such order, a written petition in duplicate praying that the order of the Board be modified or set aside; if the court is not in session, the petition may be filed with any judge thereof. The clerk of the court shall mail the duplicate copy to the Board. The Board shall then file in said court a transcript of the entire record in the proceeding, including the pleadings, testimony and order of the Board; but, by stipulation of all parties to the review proceeding, the record may be shortened. [Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs.] The court may require or permit subsequent corrections or additions to the record when deemed desirable. The court is empowered to grant such relief, including temporary relief, as it deems appropriate and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. Any order by the Board shall become final if no appeal is taken therefrom within thirty days.

(c) No objection that has not been urged before the Board shall be considered by the court, unless the failure to urge such objection is excused because of extraordinary circumstances. If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, the court may order such additional evidence to be taken before the Board, and to be made part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken, and it shall file such modified or new findings and its recommendations, if any, for the modification or setting aside of its original order.

(d) The judgment and decree of the [district] court shall be final, except that the same shall be subject to review by the [supreme] court, on appeal, by either party, irrespective of the nature of the decree or judgment or the amount involved. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the [supreme] court, and the record so certified shall contain all that was before the lower court.

(e) Commencement of proceedings under section 10(a) or 10(b) shall not stay enforcement of the Board's decision; but the Board or the reviewing court may order a stay upon such terms as it deems proper.

(f) Petitions filed under this section shall be heard expeditiously, and if possible within ten days after they have been docketed.

(g) The review shall be conducted by a court without a jury and shall

be confined to the record. The findings of the Board, if supported by substantial evidence in view of the entire record as submitted, shall be conclusive. However, in cases of alleged irregularities in procedure before the Board, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

SECTION 11. *Investigatory powers; oaths, subpoenas; service of process.*

(a) The Board, the General Counsel, and any duly authorized agents of the Board, shall at all reasonable times have access to and the right to copy evidence relating to any person or action under investigation by it in connection with any labor dispute. The Board is empowered to administer oaths and to issue subpoenas requiring the attendance of witnesses or the production of evidence.

(b) In case of contumacy or refusal to obey a subpoena issued to any person, the [district] court, upon application by the Board, shall have jurisdiction to order such person to appear before the Board to produce evidence or to give testimony touching the matter under investigation, and any failure to obey such order may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(d) Complaints, orders and other processes and papers of the Board or the General Counsel may be served personally, by registered mail, by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return of service shall be proof of such service. Witnesses summoned before the Board or the General Counsel shall be paid the same fee and mileage allowance that are paid witnesses in the courts of this state, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this state.

(e) All processes of any court to which an application or petition may be made under this Act may be served in the county wherein the person or persons required to be served reside or may be found.

SECTION 12. *Rules and regulations.*

The Board is hereby authorized to issue and cause to be published such

rules and regulations as may be necessary to carry out the purposes of this Act.

SECTION 13. *Delegation of authority.*

The Board may in its discretion delegate the conducting of any hearing, the receiving of any evidence, or the issuance of any subpoena to one of its members or to any of its employees, as it sees fit.

SECTION 14. *Penalty for obstruction; contempt.*

Any person who willfully resists or interferes with any member of the Board, the General Counsel, or any authorized agent of the Board in the performance of duties pursuant to this Act, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both, upon conviction in a court of law of this state. Any person who willfully disobeys a final order by the Board is punishable for contempt and shall be fined not more than five hundred dollars for each day of such willful disobedience, or imprisoned not more than six months, or both, upon conviction in a court of law of this state.

SECTION 15. *Budget.*

Prior to [ ] of each year, the Board shall submit to the [state comptroller] for his approval an estimated budget of the expenses for administering this Act for the ensuing fiscal year. The [state legislature] is authorized to appropriate to the Bureau [Department] such finances as may be needed to administer this Act.

SECTION 16. *Severability.*

The provisions of this Act are severable, and if any of its provisions shall be held unconstitutional or invalid by a court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

MEMORANDUM

The National Labor Relations Act (NLRA), as referred to herein, includes the Wagner Act, as amended by the Taft-Hartley Act and the Landrum-Griffin Act.[16]

16. 49 Stat. 449 (1935), *amended,* 61 Stat. 136 (1947), and 73 Stat. 519 (1959), 29 U.S.C. §§ 141-68 (1964).

SECTION 2. *Definitions.*

The definitions used here vary but slightly from those of most labor relations acts, for example, NLRA § 2. The comments below cover only those terms which depart in any significant respect from the norm, or merit added comment for some other reason.

(a) "Commissioner." Most states have a commissioner of labor or a similar official responsible for action with respect to labor probems. The individual states should substitute for "commissioner" the appropriate administrative official, presumably in the department of labor, who would oversee labor matters and with whom periodic reports should be filed by the Board.

(f) "Employer." The definition of "employer" is closer to that prevailing in the state acts than to the NLRA terminology. The operative words "directly or indirectly in the interest of an employer" are found in a similar context in New York and Minnesota.[17] The exclusion of governmental and state employees, or employees of charitable or religious organizations, is optional here. The state may not want such employees brought under the act and may have other laws dealing with them. The problems involved in balancing the state's interest in having employees perform their jobs regularly and dependably against the employee's right to engage in organizational activity was dramatically demonstrated in the recent strike affecting New York City subways and buses by the Transport Workers Union, in which the state's no-strike Condon-Wadlin Act[18] proved ineffectual. In the federal service employees may organize, but the organization may not strike.[19]

(g) "Employee." The wording of the definition of "employee" is taken primarily from that of the federal act. This is a departure from the wording of almost all of the state acts, and particularly the older ones, which make no mention of independent contractors or supervisors. These categories are specifically excluded here to parallel the federal coverage of the particular classes of individuals named.

NLRA § 2(3) does not cover agricultural workers. Most

17 N.Y. Lab. Law § 701(2); Minn. Stat. Ann. § 179.01 (3) (1946, Supp. 1965).
18. N.Y. Civ. Serv. Law § 108.
19. Exec. Order 10998, § 2; 27 Fed. Reg. 551 (1962).

state labor relations boards likewise do not have jurisdiction over farm employees.[20] In the absence of federal jurisdiction, and in view of recent organizational agitation among agricultural employees, the state agency should be available to this group.

The bracketed section is an optional provision reflecting the view of a number of legislatures that strikebreakers should not be given "employee" status, particularly for vote-dilution purposes.

SECTION 3. *State Labor Relations Board.*

The establishment of a board of labor relations is consistent with the practice of most states having labor relations acts. A three-man board, appointed by the governor, with the advice and consent of the Senate, for six-year terms, is fairly standard.[21] Several states, however, do not set up an independent board of this nature. In its newly-passed labor relations statute, North Dakota handles disputes through an individual commissioner.[22]

It will be noted that section 3(f) requires a majority decision, and a report of findings of fact and conclusions of law which is to be filed with the Commissioner. This is intended to emphasize a requirement already imposed by many jurisdictions as a matter of administrative procedure. Should a state already have such a provision in an Administrative Procedure Act, this part of the section may be omitted.

No partisan requirements with respect to membership are provided, nor are such provisions generally found in existing state acts. A number of states have separate statutory requirements for minority representation.[23] Because of the political overtones of some labor disputes, states without such requirements may wish to provide in this section that no more than two of the three members may be of the same political party.

SECTION 4. *Jurisdiction.*

In a few statutes jurisdiction has been set forth by defining

20. *E.g.* N.Y. Lab. Law § 701(3); Pa. Stat. Ann. tit. 43, § 211.3 (d) (1964); Minn. Stat. Ann. § 179.01(4) (1946). *But see* Wis. Stat. Ann. § 111.02(3) (1957).

21. See N.Y. Lab. Law § 702; Pa. Stat. Ann. tit. 43, § 211.4 (1964); Conn. Gen. Stat. Ann. § 31-102 (1960, Supp. 1965).

22. N.D. Cent. Code § 34-12-01 to -12-14 (1964). See also Minn. Code Ann. § 179.01 to .29 (1946, Supp. 1965).

23. *E.g.,* Conn. Gen. Stat. Ann. § 9-167a (1960, Supp. 1965).

"employer" as one over whom the National Labor Relations Board has declined to assert jurisdiction, and who is not subject to the Federal Railway Labor Act.[24] Most statutes provide no explicit exception for disputes over which the NLRB has taken jurisdiction.[25] Utah ties jurisdiction to intrastate commerce.[26] Because the jurisdiction of the state board over persons and disputes is a major and often difficult question, a separate statement as to jurisdiction is appropriate.

A few states exempt an employer from coverage only when the Board agrees with him that his employees are subject to the NLRA or Railway Labor Act.[27] On this point the proposed draft is similar to the Massachusetts statute, except that the latter only excludes from its coverage unfair labor practices subject to the federal statutes.[28]

Section 14(c) of the NLRA specifically grants to the states jurisdiction over cases in which the NLRB "declines to assert jurisdiction." Although the NLRB may prescribe its jurisdictional requirements through rules and regulations and may amplify these through case decisions, the current minimal requirement of gross receipts of at least $500,000 was promulgated by press release.[29] The proposed statute directs the attention of the state board to each of these outlets in the interest of harmonious relations between the state and federal boards. Of course, since Congress in the NLRA has pre-empted the field, jurisdictional controversies between the federal and state boards are presumptively resolved in favor of the NLRB[30] and a federal district court may enjoin a state board from proceeding when the NLRB asserts jurisdiction.[31]

The draftsmen also intend that, although the board affords

24. *E.g.*, Conn. Gen. Stat. Ann. § 31-101 (1960).

25. *E.g.*, N.D. Cent. Code § 34-12-01 (Supp. 1965); Pa. Stat. Ann. tit. 43, § 211.3 (1964); Wis. Stat. Ann. § 111.02 (1957); Hawaii Rev. Laws § 90-2 (Supp. 1961).

26. Utah Code Ann. § 34-1-9(c) (1953, Supp. 1965).

27. *E.g.*, N.Y. Lab. Law § 715; R.I. Gen. Laws Ann. § 28-7-45 (Supp. 1965).

28. Mass. Gen. Laws Ann. ch. 150A, § 10(*b*) (1958).

29. NLRB Release R-576, Oct. 2, 1958.

30. NYSLRB v. Burdoff, 12 Misc.2d 535, 177 N.Y.S.2d 405, *aff'd*, 6 App. Div.2d 970, 177 N.Y.S.2d 409(1958); Kelly v. Kramer, 30 Misc.2d 713, 217 N.Y.S.2d 698 (1961).

31 NLRB v. NYSLRB, 106 F. Supp. 749 (D.C.N.Y. 1952); see also Allied Workers Union of America v. Smiley, 164 F.2d 922 (3rd Cir. 1947).

the exclusive remedy for labor disputes, like the NLRB,[32] including primarily unfair labor practices and representation cases, this will not prevent state courts from enforcing collective bargaining agreements,[33] or affording remedies for tortious or criminal conduct. Because this division of authority is generally developed along federal lines and is applicable to state proceedings, its further delineation in the statute seems unnecessary. Indeed, any attempt to codify the relationship between the courts and the board might be detrimental rather than beneficial in an area in which some flexibility is necessary.

SECTION 5. *General Counsel.*

Section 5(b) is a shortened form of NLRA § 3(d). Its purpose is to delegate to the General Counsel full powers of investigation and prosecution of suspected or alleged violations of this act and to permit the Board to delegate to the General Counsel such of its administrative burdens as it sees fit and as the act allows. Some states make no provision for such an officer, but leave all such powers with the Board.[34]

To perhaps a greater extent than most administrative agencies, a labor relations board is characterized by the public as being "pro-labor" or "pro-management." Sometimes the same board will be suspected of favoring both sides. The draftsmen believe that vesting the prosecution function in the General Counsel and leaving the adjudication function with the Board should foster confidence in the Board's impartiality.

A few states refer to this official as the "Agent".[35] The draftsmen prefer the appellation given in section 5 for two reasons. First, it is doubtful that any person not an attorney would be competent to exercise the authority given this officer for the prosecution of complaints. Secondly, if the position is to be given to an attorney, it seems appropriate to provide so explicitly.

SECTION 6. *Rights of employees.*

This provision substantially reproduces section 7 of the

32. San Diego Bldg. & Trades Council v. Garmon, 359 U.S. 236 (1959).

33. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

34. *E.g.*, Mass. Gen. Laws Ann. ch. 150A, §§ 6(*b*), 7(b); N.Y. Lab. Law §§ 706(2), 708; Pa. Stat. Ann. tit. 43, §§ 211.8(b), 211.10 (1964).

35. *E.g.*, Conn. Gen. Stat. Ann. § 31-103 (1961).

NLRA. The Taft-Hartley amendment expressly guaranteeing the right to abstain from organization is included.[36] The final clause secures the legitimacy of a union-shop clause where state law so allows.

SECTION 7. *Unfair labor practices.*

The following unfair labor practices are derived primarily from the federal statute, with minor modifications in the interest of simplicity. Some existing state law is also incorporated.

A few state acts provide only for employer unfair labor practices, without touching disruptive conduct by unions or employees.[37] More recent statutes have included some employee (or union) unfair labor practices.[38] The proposed statute adopts the latter approach, and seeks to provide a balanced act.

Section 7(a)(1) is standard. See NLRA § 8(a)(1).

Section 7(a)(2) is widely found in state statutes,[39] but is not explicitly covered in the federal statute. Because blacklisting continues among small employers, it is here proscribed, even though arguably falling within the general terms of section 7(a)(1).

Section 7(a)(3) is primarily aimed at company unions. See NLRA § 8(a)(2).

Section 7(a)(6) corresponds to NLRA § 8(a)(4), but the filing of a petition is included within employee activity for which an employer may not dismiss or discriminate. This protects the employee who files a representation petition.

Section 7(a)(7), in proscribing certain kinds of "checkoff" procedures, in fact permits a "checkoff" under the same circumstances as the federal statute.[40] The rationale behind requiring individual employee authorization for direct payment of dues by

36. The older state acts do not include this provision. *E.g.*, N.Y. Lab. Law §703. New state acts have followed the federal law. *E.g.*, N.D. Cent. Code § 34-12-02 (1960, Supp. 1965); Utah Code Ann. § 34-1-7 (1953, Supp. 1965).

37. *E.g.*, Conn. Gen. Stat. Ann. § 31-105 (1961); N.Y. Lab. Law § 704; R.I. Gen. Laws Ann. § 28-7-13 (1957).

38. Colo. Rev. Stat. Ann. § 80-4-6(2) and (3) (1963); Hawaii Rev. Laws § 90-8 (1955); Mass. Gen. Laws Ann. ch. 150A, § 4A (1958); N.D. Cent. Code § 34-12-03(2) (Supp. 1965); Wis. Stat. Ann. § 111.06(2) (1957).

39. Colo. Rev. Stat. Ann. § 80-4-6(*1*) (1963); Conn. Gen. Stat. Ann. § 31-105(2) and (9) (1961); R.I. Gen. Laws Ann. § 28-7-13(2) (1957); Wis. Stat. Ann. § 111.06 (k) (1957).

40. See Labor-Management Relations Act § 302(a) and (c) (4), 61 Stat. 157, *amended*, 73 Stat. 537, 29 U.S.C. § 186 (1964).

the employer is that an employee has a personal interest in his wages as well as in whether or not he pays his dues in person or on time. This personal interest is often distinct from collective bargaining objectives, and the employee should have the power to approve or disapprove such an automatic diversion of his wages. The policy is distinguishable from allocation in the collective bargaining agreement of certain amounts to a pension fund, which by express terms inure to the employee's economic benefit. A somewhat similar provision appears in the Pennsylvania statute.[41]

Sections 7(b)(1) and (2), beginning the union unfair labor practices, follow NLRA §§ 8(b)(1) and (2).

Section 7(b)(3), makes it an unfair labor practice to engage in certain concerted activity, or to induce other persons, whether employees or employers, to engage in such concerted activity, where an objective thereof falls within the terms of any of the four succeeding paragraphs. Following substantially the structure of the federal statute, the first part of the initial 7(b)(3) provision, "to engage in", applies to any union or its members or agents. The next part refers to the inducement of other employees to engage in disruptive activity, while the final section, ". . . to threaten, coerce, or restrain any person . . ." covers the inducement of anyone, and notably, under the definition in section 2(e), includes an employer or another union. "Picketing" is included in the ban to eliminate the ambiguity found in the corresponding federal statute, which omits the term at this point.

Paragraph (A) of section 7(b)(3) outlaws secondary boycotts. Although there exist many state laws which outlaw secondary boycotts, the language of those statutes is generally oversimplified, so that it is difficult to tell exactly what a secondary boycott is.[42] Indeed state legislatures which have not yet enacted labor relations acts have found secondary boycotts so obnoxious as to broadly outlaw them.[43] Although the federal formula is a bit more verbose, it is more precise, and precision is needed in this ticklish area. Consequently paragraph (A) constitutes a revised

41. Pa. Stat. tit. 43, § 211.6(1)(f) (1964, Supp. 1965).

42. See Pa. Stat. Ann. tit. 43, § 211.6(2)(d) and (e) (1964, Supp. 1965); Wis. Stat. Ann. § 111.02(12) (1957, Supp. 1965).

43. *E.g.*, Tex. Rev. Civ. Stat. 5154(f.),(g)(2) (1962, Supp. 1965); S.D. Code §§ 17.1108, 17.1112 (Supp. 1960).

version of NLRA § 8(b)(4)(B). The final clause, beginning "however . . . ," guarantees the right of employees to picket their own primary employer regardless of purpose or effect. The clause also permits the Board to authorize primary picketing when the primary employer (*i.e.*, the employer of the striking or picketing employees) may happen to be located at a secondary site, as in the construction or shipping industries. The precise rules should be left to the state board, and the federal rule as expressed in the *Sailors Union (Moore Dry Dock Co.)*[44] case is the rule most likely to be adopted. That case sets forth requirements relating the picketing to the primary employer without undue injury to the secondary employer.[45]

Paragraph (B) makes it unlawful to force an employer to enter a "hot cargo" agreement, as defined in section 7(d). It is desirable not only to outlaw such an agreement, as provided in 7(e), but also to prevent pressure tactics designed to force an employer to enter such an agreement.

Paragraph (C) outlaws the sympathetic stike by employees who strike or coerce their own employer in order to bring pressure on another employer. The paragraph applies whether or not the same union represents both groups of employees.

Paragraph (D) makes a strike to compel an employer to reassign work an unfair labor practice. When a work assignment dispute arises, the employer is caught no matter which union is given the work, since the other will strike in protest. This harmful disruption usually arises through no fault of the employer, but rather as a result of union rivalry. The AFL-CIO Internal Disputes Plan and the large number of jurisdictional agreements between unions, as well as the AFL-CIO National Joint Board for the settlement of jurisdictional disputes, binding on its building and construction trades affiliates, have reduced the number of these disputes in recent years. Such disputes have by no means been eliminated, however, and the damage which they may inflict can be extensive. Under section 9(g), the Board is empowered to settle the dispute, and paragraph (D) allows the Board to

44. 92 N.L.R.B. 547 (1950).

45. An excellent article by Professor Lesnick on the extremely difficult question of what constitutes primary activity and what constitutes secondary activity recently appeared in the Columbia Law Review. Lesnick, *The Gravamen of The Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

enjoin the disruptive activity as well. The provision is similar to NLRA § 8(b)(4)(D).

Section 7(b)(4) incorporates the substance of NLRA § 8(b)(7) by prohibiting improper representational picketing which the employer is otherwise helpless to prevent.

Section 7(b)(5) is the employee counterpart to 7(a)(5), imposing the duty to bargain collectively.

Section 7(b)(6) is found in a number of state acts.[46] The desirability of a remedy for such conduct seems plain enough. Because the activity may be tortious, the last clause provides for retention of the judicial forum as well.

Section 7(c) expressly authorizes peaceful publicity, including "publicity picketing", at any place, so long as the activity does not have the effect of preventing other employers or their employees from handling goods or performing services. This provision, together with the last clause of section 7(b)(3)(A), is vital in view of the ban on picketing-with-a-secondary-objective under section 7(b)(4)(A). The wording of this section is less ambiguous than the language of NLRA § 8(b)(4), and is intended to avoid stimulation of the kind of controversy which resulted from the Supreme Court's recent *Tree Fruit* decision,[47] although the result of that case is adopted to permit peaceful publicity picketing.

Section 7(d) outlaws the "hot cargo" agreement, which is regarded as an unduly harsh form of secondary activity, and is similarly outlawed under NLRA § 8(e).[48] A major amendment to the federal rule is the provision that 7(d) does not make unlawful a work preservation clause, designed to prevent an employer from subcontracting work which is generally performed or "claimable" by the bargaining unit. This qualification has already been read into the federal statute by the courts.[49]

46. *E.g.*, Pa. Stat. Ann. tit. 43, § 211.6(2) (1964, Supp. 1965).

47. NLRB v. Fruit and Vegetable Packers Union, 377 U.S. 58 (1964).

48. Although no existing state labor relations acts outlaw the "hot cargo" agreement, there are other statutory provisions which do so. *E.g.*, Ariz. Rev. Stat. Ann. § 23-1303(A) (1956); Cal. Labor Code § 1131 (1955), *repealed*, Cal. Stats. 1965, c. 1277, § 1 (1965).

49. Meat & Highway Drivers, Local 710 v. NLRB, 335 F.2d 709 (D.C. Cir. 1964).

Section 7(e) adopts the NLRA § 8(d) definition of the duty to bargain collectively in good faith.[50]

Section 7(f) adopts the vitally important protection given to free speech and expression under the federal statute, NLRA § 8(c). Such a provision has been widely neglected in state labor relations acts,[51] yet the protection which it affords will allow all parties freely to express their views. The section is particularly important to an intelligent choice by employees during a representation election campaign. It is expected that state courts will take their cue from the last clause of the subsection and follow the NLRB rules in allowing campaign propaganda but not blatant falsehoods the merit of which could not reasonably be discovered before election time.[52] Contrary to the federal rule, a speech may, in the Board's discretion, be evidence of an unfair labor practice.

SECTION 8. *Election of representatives.*

This section prescribes the procedure for the election of the collective bargaining representative by a majority of the employees in the unit which the Board finds appropriate. Much of the language follows that of the federal statute, NLRA § 9. In existing state law there are variations in both language and substance. For example, Utah presents only a brief and very vague provision concerning the appropriate bargaining unit.[53] Massachusetts expressly provides, among other things, for the "one-man bargaining unit" where the Board deems it appropriate.[54] North Dakota specifies that the petition asking for an election must involve *at least* 30% of the employees.[55] The corresponding provision in the proposed draft, section 8(c), requires only a "substantial number of employees", and "in any case where the claim appears to be supported by 30% . . . ."

50. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

51. Only Colorado expressly preserves this right. Colo. Rev. Stat. Ann. § 80-4-7(2) (1963).

52. These rules are generally set forth in American Greetings Corp. 146 N.L.R.B. 1440 (1964). See also Matter of General Shoe, 77 N.L.R.B. 124 (1948), and Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

53. Utah Code Ann. § 34-1-9 (1953, Supp. 1965).

54. Mass. Gen. Laws Ann. ch. 150A, § 5(b) (1958).

55. N.D. Cent. Code § 34-12-07(1)(a) (Supp 1965).

Subsection (b) departs from the federal provisions to some extent with respect to determination of the appropriate bargaining unit. NLRA § 9(b) reads "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act. . . ." The corresponding language in the Wagner Act reads ". . . to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act . . ." Similar language to that used in the Wagner Act appears in the Pennsylvania and New York statutes.[56] Although the current federal language seems to have been designed to reduce the Board's emphasis on extent of employee organization with the effect of granting to the union whatever unit it requests, the NLRB has run into problems with its unit policy on precisely this ground.[57] The language proposed in this draft is designed to shift the emphasis away from maximum free choice in favor of the more general concept of "benefit." This would encompass not only the section 6 right to organize, but the more general right to bargain in the kind of unit which will guarantee effective collective bargaining. The change is subtle, but designed to strike a more favorable balance between stability and self-determination, permitting the Board to emphasize long-range collective bargaining interests. In making its bargaining unit determinations, the state board should generally apply the same criteria or factors as used by the NLRB: community of interest (in terms of similar jobs, skills, and working conditions); physical or geographic proximity; functional integration; common administrative division or supervision; degree of interchange or transfer of employees (notably in and out of the proposed bargaining unit); bargaining history between the employees and the employer; and, within the limitation imposed by the second sentence of the subsection, the extent of organization. This second sentence provides that extent of organization may not be the only factor supporting the Board's determination. It is a modification of the poorly drafted NLRA § 9(c)(5), which provides Delphicly that extent of organization shall not be "controlling". Clearly if the factor is ever relevant,

56. Pa. Stat. Ann. tit. 43, § 211.7(b) (1964); N.Y. Lab. Law § 705.2.
57. See Metropolitan Life Insurance v. NLRB, 327 F.2d 906 (1st Cir. 1964).

and the legislative history plainly shows that it is, it may at some point be controlling.

The bracketed language of 8(b) corresponds to NLRA § 9(b)2, and gives some encouragement to craft unions.

Sections 8(d) and (e) are derived from NLRA § 9(c)(3), except that the election procedure in the case of self-determination elections regarding inclusion or exclusion of a smaller unit with respect to a broader unit is modified so as to maximize the effectiveness of employee choice. The latter provision is novel.

Section 8(f) allows for "consent" elections.

SECTION 9. *Complaints of unfair labor practices: hearings and orders.*

The general form of this section has been adopted from NLRA § 10. A number of substantial changes have been made within that framework.

Section 9(b) recognizes the separation of the adjudication and prosecution functions of the agency, as suggested in section 5(b).

Section 9(c) offers alternative rules on evidence. *Alternative No. 1,* which is the rule in the majority of states,[58] provides maximum flexibility to the agency, with the accompanying risk that hearsay, irrelevant, or incompetent evidence may be admitted. *Alternative No. 2* adopts substantially the stricter rule of NLRA § 10(b), requiring that the Board adhere as nearly as practicable to the rules of evidence prevailing in the courts. Such a rule may produce more accurate and reliable testimony, but may also lead to short tempers in an area which is already characterized by that quality. Several states have a similar rule.[59]

Section 9(e) lists some forms of relief which the Board is authorized to award. This provision represents a considerable expansion of the federal counterpart in NLRA § 10(c). Paragraph (3) incorporates the remedy prescribed in *Phelps Dodge Corp. v. NLRB.*[60] Paragraph (4) looks particularly to the case

58. *E.g.,* Mass. Gen. Laws Ann. ch. 150A, § 6(b) (1958). In Hawaii the board is not bound by court rules, but hearsay may not be admitted. Hawaii Rev. Laws § 90-10(a) (1955). In Pennsylvania, court rules are to be followed but are not controlling. Pa. Stat. Ann. tit. 43, § 211.8(b) (1964).

59. Utah Code Ann. § 34-1-10(b) (1953, Supp. 1965). In Colorado, equity rules control. Colo. Rev. Stat. Ann. § 80-4-8(3) (1963).

60. 313 U.S. 177 (1941).

of the "runaway shop," where it might be undesirable to demand the discharge of the workers hired at the new location, but where the employees discharged as a result of the employer's unfair labor practice are deserving of some remedy.[61] This remedy could, of course, have other applications. Paragraph (5) was suggested by the result in *Franks Bros. Co. v. NLRB*,[62] where an employer who delayed the initiation of collective bargaining with the designated union until the union's majority was dissipated was forced to bargain with the union despite its minority status. The proposed act differs in its statement of remedies from other state acts, which generally either adhere to the federal model[63] or make explicit provision only for the remedies suggested by subsections (1), (2), and (6).[64] Colorado and Wisconsin follow the NLRA generally, but also allow suspension of the "rights, immunities, privileges or remedies granted or afforded" to the violator by the act, for a period up to one year.[65]

Section 9(g) is designed to achieve a prompt settlement of any jurisdictional work dispute. Private arbitration to which the employer and the disputing groups of employees are a party is desirable. If this breaks down or is unavailable, the Board is to decide the issue itself. Nevertheless, the Board should not automatically open its doors if there is an agreed means of settlement, since it would be undesirable to undermine any private machinery by giving the loser a second chance.

SECTION 10. *Enforcement of orders: judicial review.*

The provisions for enforcement of orders and judicial review are taken mainly from the NLRA, the N.Y. Labor Relations Law[66] and the Model State Administrative Procedure Act.[67]

Subsections (a) and (b) provide, in somewhat similar terms, for petitions to the appropriate state court (a) by the Board for

61. See NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961).
62. 321 U. S. 702 (1944).
63. *E.g.*, Mass. Gen. Laws Ann. ch. 150A, § 6(*c*) (1958); Hawaii Rev. Laws § 90-10(d) (1955); Pa. Stat. Ann. tit. 43, § 211.8(c) (1964); Utah Code Ann. § 34-1-10(c) (1953).
64. *E.g.*, Conn. Gen. Stat. Ann. § 31-107(c) (1961); N.Y. Lab. Law § 706(3).
65. Colo. Rev. Stat. Ann. § 80-4-8(4) (1963); Wis. Stat. § 111.07(4) (1961).
66. N.Y. Lab. Law § 707.
67. 9C U.L.A. 179 (1957, Supp. 1965).

enforcement of its orders and (b) by any aggrieved person for judicial review of an order of the Board. The subsections give identical authority in each case, including the issuance of appropriate temporary relief or restraining orders.

The provision for the limiting of the record by stipulation is taken from section 12(4) of the Model State A.P.A. The bracketed words are offered as an option for those states which desire to encourage short records and the resulting cost reduction.

An order from which no appeal is taken within thirty days becomes final. Although the NLRA has no such provision, the Federal Trade Commission Act does.[68] This allows the Board to enforce its orders not only through the district court, but through the more powerful means of threatening a contempt proceeding under section 14.

Subsections (c) and (f) are standard, found in state acts[69] and the federal act, NLRA § 10, in substantially similar form.

Subsection (g) incorporates the present rule concerning judicial review of agency findings of fact, as expressed in the Federal A.P.A.[70] The variation in wording, from "record considered as a whole" in the federal act to "the entire record as submitted", takes into account the permissibility of limiting the record. The language is similar to that of section 12(2) of the Model State A.P.A. Corresponding provisions exist in most state acts.[71]

Those states with administrative procedure acts usually refer to them in establishing their methods for judicial review. This can create variations from the scheme presented here. Massachusetts, for example, does not follow the federal "substantial evidence" rule. Its formulation defines "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion."[72] North Dakota's procedure act allows the court to reconsider findings "not supported by the evidence".[73]

68. Federal Trade Commission Act §§ 5(g), (1), 38 Stat. 717 (1914), *amended*, 52 Stat. 111 (1938), 64 Stat. 21 (1950), 15 U.S.C. § 45 (1965).
69. *E.g.*, N.Y. Lab. Law § 707.
70. A.P.A. § 10, 60 Stat. 237 (1946), 5 U.S.C. § 1009 (1949); and NLRA § 10(e).
71. *E.g.*, Mass. Gen. Laws Ann. ch. 150A, § 6 (1958); Utah Code Ann. § 34-1-10 (1953, Supp. 1965).
72. Mass. Gen. Laws Ann. ch. 30A, § 1(6) (1958).
73. N.D. Cent. Code § 28-32-19 (1960).

Reference should be made at this point to any state administrative procedure act.

SECTION 11. *Investigatory powers; oaths, subpoenas; service of process.*

These provisions are fairly standard, and are found in NLRA § 11 as well as the state acts.[74]

Section 11(c), preventing a witness from asserting Fifth Amendment grounds for refusal to testify and granting him immunity from prosecution upon the information gained, is found verbatim in NLRA § 11(3). The same general provision is found in many state acts.

SECTION 14. *Penalty for obstruction; contempt.*

Individual state legislatures will doubtless want to tailor the penalties herein provided to correspond to existing laws. Direct cross-reference to other statutes, notably criminal contempt provisions, is recommended.

---

74. See N.Y. Lab. Law § 708; Mass. Gen. Laws Ann. ch. 150A, § 7 (1958); Utah Code Ann. § 34-1-11 (1953); N.D. Cent. Code § 28-32-01 to -22 (1960).

An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings

This Act establishes standards by means of which small businessmen, selling directly to the public and heavily dependent upon goodwill for continued earnings, may be compensated for the loss or partial destruction of that goodwill in connection with an exercise of eminent domain. The draftsmen deal both with the case in which a business is physically dislocated and that in which its patrons are dislocated.

PART I. SHORT TITLE AND DEFINITIONS

SECTION 101. *Short title.*

This Act may be called the "Goodwill Compensation Act of ."

SECTION 102. *Definitions.*

(a) "Goodwill" is the expectation of continued patronage by a regular clientele.

(b) "Injured business" is the business of a seller of goods or services directly to the public whose location has been taken, or whose regular clientele has been displaced by eminent domain.

(c) "Regular clientele" is a group of people in the vicinity who for a reasonable time have patronized a business as their customary source of goods or services.

PART II. CONDITIONS FOR RECOVERY

SECTION 201. *Required conditions.*

Damages are available for loss of goodwill when an injured business can prove:

(a) that prior to the taking a major portion of its income came, and was expected to continue to come, from its regular clientele; and

(b) that the regular clientele will not continue to patronize the injured business as a direct result of

(1) the taking of the business location, or

(2) the taking of property in the vicinity of the business which scatters the regular clientele; and

(c) that the injured business cannot serve the regular clientele from the same or a new location without a decrease in profits.

PART III. MEASURE OF DAMAGES

SECTION 301. *Damages for permanently discontinued business.*

Subject to the limitations of section 306 of this Act, if the injured business is permanently discontinued, the damages shall equal the expected future earnings of the injured business capitalized at the judgment rate of interest less the actual sale value of the assets of the business.

SECTION 302. *Damages if business is continued.*

Subject to the limitations of section 306 of this Act, if the injured business continues operating at the same or a new location, the damages shall equal the expected future earnings of the injured business capitalized at the judgment rate of interest less the actual future earnings of the injured business capitalized at the judgment rate of interest

(a) plus any increase in the net assets of the injured business, or
(b) less any decrease in the net assets of the injured business.

SECTION 303. *Estimation of average earnings.*

"Average earnings" means the average annual net income of a business during the last five years prior to the valuation date. The salary of an owner-manager to the extent that such salary is available to him in the same or similar employment shall be treated as an expense of the business and not as part of net income. If the salary of an owner-manager does not reflect his economic value to the injured business, additional salary, to the extent indicated in the preceding sentence, shall be imputed to him and treated as an expense of the injured business.

SECTION 304. *Estimation of expected future earnings.*

The expected future earnings of the injured business shall be estimated from its average earnings, adjusted to take into account extraordinary circumstances which indicate that the level of earnings would have changed in the future if there had been no eminent domain proceedings.

SECTION 305. *Estimation of actual future earnings.*

The actual future earnings of the injured business shall be estimated from its average earnings and earnings subsequent to the valuation date, so as to fairly reflect the prospects for the business under the changed conditions caused by the eminent domain proceedings.

SECTION 306. *Maximum damages payable.*

The amount of damages payable under this act shall not exceed the greater of:

(a) ten times the average earnings of the injured business; or

(b) an amount equal to the value of the physical assets of the injured business.

. . .

MEMORANDUM

I.

For centuries the law of eminent domain has adequately defined the ways in which the public could take property for the general welfare and compensate the owners for their losses. But until recently the major use of eminent domain proceedings was in connection with construction of highways and railroads, and the taking for utilities. While such projects sometimes took large amounts of land in the aggregate, they rarely took great areas in one place, in a way which could completely disrupt or destroy an entire community or way of life. Large groups of people were not displaced, and the law which grew up in that context was concerned with compensating for the value of physical property. Courts were not often faced with adverse effects on intangible interests, and no provision was made for such injury.

Urban renewal programs have changed this situation. The basic concept of such development is to alter the character of a neighborhood and make room for new housing, public facilities, and office space. In these situations, eminent domain proceedings do not merely take property. They require thousands of people to move out of an area, sometimes without attempting to resettle them in a satisfactory environment, and virtually never attempting to preserve whatever cohesive ethnic and social elements of the community there may have been.

II.

Probably the most seriously affected people are the small businessmen who served the now-uprooted community. It is relatively easy for a resident of a condemned area to find another apartment in another part of the city, so long as he can keep his job. But for the man whose business depends on his relations with the people in the neighborhood, readjustment is vastly more difficult. The classic example of this situation is the small grocery store, managed by the owner and catering to a specialized ethnic

clientele. By supermarket standards, its facilities are quite inadequate; even as compared to the ideal neighborhood grocery they may be insufficient to provide modern, economical service. The manager may own the building in which he does business, but more likely he is only a tenant. The most important assets of this business are the owner-operator's personal acquaintance with his regular clientele, his intimate knowledge of their particular needs, and his willingness to provide informal credit for them. If he were to sell the business on the open market, it would go for less than it is worth to him, because the goodwill which he has built up in the neighborhood is a large part of the reason the business has earned as much as it has. It would take time for a new operator to establish the same rapport with the customers. And if the physical assets were sold separately, they would bring only a fraction of the value of the business to the present owner.

If such a business and all of the surrounding neighborhood are taken by eminent domain, the owner-operator has no place to go. His regular customers, in all likelihood, will be scattered throughout the city, so distant from any one location that they could no longer be served profitably by the business if it were relocated. The effort to build a new clientele, perhaps with a different ethnic background, means starting from scratch with inadequate physical assets, in a new location where there may be substantial competition already. If the owner-manager is an older man, the physical and mental demands of such a readjustment may be overwhelming. Even for a younger man employment may be difficult to find, or it may entail a substantial decrease in income. Yet the law requires no compensation for lost goodwill, despite the obvious injury involved.

The situation presented above is the most dramatic case of injury resulting from the disruption of a special business environment. But there are a multitude of variations of the same problem which should be recompensed in greater or lesser degree. If, for example, the neighborhood is completely demolished, the prospects for the local shopkeeper are rather bleak. But if only part of the area is taken, the situation may be quite different. Whether or not his own location is taken, if some of his customers remain in the vicinity, the merchant may continue his original business, take some losses, and build a new clientele on

what remains of the old. He may choose to speed up the process by investing in advertising, and if the renewal project is housing, he may attempt to tap the new market. Or he may move within the neighborhood to make his services more accessible to the remainder of his regular customers. He may invest in new equipment and expand and modernize his operation.

Any or all of these alternatives may be possible, but they should not be allowed to obscure two very basic facts. First, all require financing, which in all but the most propitious circumstances will be completely unavailable. Capital is unlikely to be loaned to the business in its crippled state, when its goodwill is no longer intact and its earning prospects are uncertain. Second, regardless of bright possibilities, the business as it was before the taking has been injured. Some of its clientele have been moved out of servicing range and can no longer contribute to the earnings of the business. Though it may still thrive, or at least survive, part of its goodwill has been taken.

The problem may also vary because of the type of business involved. Both professional men and skilled service personnel, such as doctors, lawyers, tailors, beauticians, restauranteurs, and pawnbrokers, depend to some extent on residents of a particular neighborhood as the source of their business. The ability of these people to relocate and start anew, or to retain their old customers, who may be unwilling to come great distances for their services, will vary from case to case. Yet insofar as their businesses suffer, these people have a claim for compensation equal in validity to that of the corner grocer.

III.

The present law of eminent domain developed long before the wholesale takings demanded by urban renewal were thought of. Substantial injury to going concerns was rare, and the damages involved were more easily defined. In the absence of statutory guidance, the courts have refused to award damages for loss of goodwill and other intangible assets. Three general theories were developed in support of this position, some stronger than others.[1]

1. See NICHOLS' THE LAW OF EMINENT DOMAIN §13.3 (Rev. 3rd ed. 1962) for a comprehensive treatment.

One approach was to rely on the state's right to take real property. Since any property must be surrendered whenever the public interest requires it, expenses incurred incident to such a taking are to be borne by the one surrendering the property and his neighbors. Some courts have used the phrase "damnum absque injuria" in disallowing these damages. A second theory is based on a technical interpretation of the word "taken." Goodwill is not taken by the state for its own use in these situations; it is simply destroyed. The state receives nothing but the real property. Since the goodwill is not taken it does not come under the protection of the various constitutional guarantees for compensation in eminent domain proceedings. Neither of these theories is very satisfactory from the viewpoint of human rights, and some courts have candidly held that such damages are too speculative and changeable to admit of reasonable valuation. In dealing with so difficult a problem, the courts were unwilling and perhaps unable to develop judicially the kind of precise, complex rules needed to evaluate claims of lost goodwill.

Where there was statutory authority, however, the courts were not at all adverse to awarding damages liberally to effect the purposes of the act. Shortly after the turn of the century, both New York and Massachusetts recognized the need for substantial reservoirs, which in turn required the flooding of significant portions of various small towns. In providing for these projects both states specifically allowed damages for the amount that "such business is decreased in value" by these takings. The legislation was first tested in Massachusetts, when a doctor claimed damages for loss of practice when some of his regular patients were forced to move because of the reservoir constructed in his community. Chief Justice Holmes, speaking for the court, held, in an excellent opinion, that the doctor could recover, and that the statute was constitutional:[2]

> The Commonwealth in the first place contends that the material portion of the statute, if it applies to cases like this, is unconstitutional.
>
> * * * *
>
> The test of what may be required to be paid for if destroyed or damaged under the power of eminent domain, is not whether the same thing could have been sold, nor is it whether the destruc-

2. Earle v. Commonwealth, 180 Mass. 579, 582-83, 63 N.E. 10 (1902).

> tion or harm could have been authorized without a provision for payment. Very likely the plaintiff's rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.

The New York Court of Appeals reached the same result in a similar case.[3] But other than such sporadic efforts where the legislature contemplated obvious, widespread injury, there appear to be no general statutes which award damages for the loss of goodwill resulting from eminent domain proceedings.

IV.

The first problem in drafting a statute designed to compensate for loss of goodwill is, necessarily, to adequately define this asset in terms which allow reasonably precise evaluation. The causes of goodwill are manifold. William A. Paton identifies several factors: pleasant surroundings, attentive sales force, quality of product in relation to price, customer attitude and habit, and location.[4] But goodwill itself is not any or all of these things; it is the flow of income that results from them. Paton calls it "earning power." The California Civil Code calls it the expectation of continued public patronage.[5] Goodwill itself is then the extra income a business receives over and above the return that would be expected on its physical assets. In compensating for the loss of goodwill, the object should be to replace the loss with a similar stream of income. This stream of income can only be replaced by compensating the owner with a lump sum which will return an amount of interest equal to the loss.

The actual valuation of goodwill is a very difficult and complex problem from an accounting standpoint. A technically precise formula requires an estimation of past and future earnings, "normal profits for the industry", the effects of capital structure, and "normal" return on assets. But a statute should be simpler than complicated accounting methods would require, and it must leave room for administrative and judicial discretion and develop-

3. People *ex rel.* Burhans v. City of New York, 198 N.Y. 439, 92 N.E. 18 (1910).

4. PATON, ADVANCED ACCOUNTING 398 (1947).

5. Cal. Bus. & Prof. Codes §14100 (West 1964).

ment. Furthermore, special considerations must be taken into account when the goal is compensation for lost business, rather than purchase of the business or prevention of stock watering. Various modifications of technical accounting formulas have been made to tailor them to this purpose.

For example, in ascertaining what portion of the income of the business is goodwill and what portion is produced by the physical assets themselves, the draftsmen of this statute have sought to avoid estimating the return from physical assets directly, because of the uncertainty inherent in such a judgment. Similarly, comparison of this concern's earnings with those of others of the same type has not been used, since their earning patterns will also reflect in part the goodwill they have established over the years. The owner should not be compensated less because others also depend on goodwill for their profits. Instead, the value of the whole enterprise, calculated by capitalizing estimated future earnings, is decreased by the value of the physical assets, or if the business continues, by the capitalized value of the estimated income of the business after the taking. This approach, while it may not give damages only for goodwill defined in technical accounting terms, effectively serves the general purpose of the statute. It places the businessman in approximately the same financial position that he would otherwise have maintained but for the eminent domain proceedings.

For this same reason, the calculation of net income treats as an expense of the business the salary, real or imputed, of the owner-manager only to the extent that such a salary is available elsewhere. It would be extremely difficult, if not impossible, to separate the economic worth of the business from that of the manager operating it. And though his special value to the business is not all a part of goodwill strictly defined, it does die with the business. From a practical standpoint it is only what the owner-manager can earn in some reasonable alternative employment that is relevant in determining the total injury resulting from the eminent domain proceedings. In the same way, the relevant rate of interest for capitalization under these circumstances seems to be one available to general investors. The return on assets in this type of business, or the return in this particular concern is not the controlling consideration, since there is no reason to expect

or demand that the award be reinvested in a similar business. These and other minor deviations from accepted accounting principles are designed to "make whole" the small businessman displaced in the name of public progress.

As urban renewal becomes a regular part of American life, it is essential that the law of eminent domain be modernized to take into account the intangible as well as the tangible costs of the displacement of substantial numbers of people. Laws originally developed to deal with the taking of property to widen a city street cannot be expected to serve present needs adequately. This statute is designed to remedy one of the weaknesses of the present law, which often works serious hardship on neighborhood businesses.

PART I. SHORT TITLE AND DEFINITIONS

SECTION 102. *Definitions.*

1. "Goodwill." The definition of "goodwill" differs slightly from the only definition which has a statutory basis at the present time. The states of California, Montana, North Dakota, Oklahoma, and South Dakota define "goodwill" as "the expectation of continued public patronage."[6] The definition of goodwill in this act stresses that the expectation of patronage which constitutes goodwill must be not only continued but also regular. The patronage which contributes to the goodwill of a business derives from a basically invariable and identifiable group.

2. "Injured business." The definition of "injured business" outlines both the types of injuries and the types of businesses which are covered by the provisions of this act. This act is not intended to provide compensation for all injuries resulting from a taking by eminent domain nor to all businesses which may be injured by a taking. To come under this act, the injured business must be a retail business, or one which sells directly to the public

An injury compensible under this act may arise either when the business location is taken or when the regular clientele of a business is displaced. Though the second situation is less familiar than the first, both constitute direct injuries to the goodwill of the injured business since both situations result in the loss of regular clientele.

3. "Regular clientele." The regular clientele of a business is an identifiable and basically invariable group of people. Its members must reside in reasonable proximity to the business and have patronized it for a reasonable time, as a customary source of goods and services. Unidentified and nonrepetitive customers or customers who use a business only as a secondary and irregular source of goods or services do not qualify as regular clientele.

PART II. CONDITIONS FOR RECOVERY

SECTION 201. *Required conditions.*

The existence of goodwill is inextricably bound to the existence of a regular clientele. Therefore, in order for there to be a loss of goodwill, the regular clientele or a portion thereof must in some way be prevented from maintaining their patronage. The three conditions expressed in this section all assert the requirement that there must be a loss of regular clientele before there can be a loss of goodwill. The injured business must prove the existence of all three of these conditions before there can be a recovery for loss of goodwill under this act.

Subsection (a) requires that the injured business prove that, prior to the taking, a major portion of its income came from its regular clientele. The injured business must further prove that, prior to the taking, the major portion of its income was expected to continue to come from its regular clientele.

Subsection (b) requires that the injured business prove that the regular clientele will not continue their former patronage as a direct result of the taking. The discontinuation of the patronage of the regular clientele may directly result either from the taking of the business location or the taking of property in the vicinity of the business, as the result of which the regular clientele are scattered. If the taking of the property on which the regular clientele reside does not result in the scattering of the regular clientele, the condition stated by this subsection is not satisfied. A taking which would not satisfy the requirements of this subsection would be one which displaces the regular clientele of a business from their former specific residences but which results in the relocation of the regular clientele in the vicinity of the business.

Damages are not available under subsection (b) when a business's regular clientele will not continue their patronage because a directly competitive business is established on the land taken. This situation arises when land is taken by eminent domain and then sold or leased by the condemning authority to a person or an organization which establishes a business in direct competition with another preexisting business in the vicinity. Although these circumstances may deprive a business of its regular clientele, the business is excluded from recovery under this act because of practical and political considerations. It would be undesirable to discourage the condemning authority from aiding in the creation and development of a new business by requiring it to compensate preexisting businesses for loss of regular clientele when that loss is occasioned not directly by the taking but by the competitive superiority of the new business.

Subsection (c) requires that the injured business prove that the taking of its location or of the residences of its regular clientele has resulted in the inability of the injured business to continue to serve its regular clientele from the same or a new location without a decrease in profits. Ordinarily, proof of such an inability will not be difficult. However, two situations may arise as the result of the taking of the business location or of the regular clientele which will permit the injured business, in spite of the taking, to continue to serve its regular clientele without a decrease in profits. This subsection is intended to prevent recovery when either of these situations arises.

The first situation excluded from recovery under subsection (c) is that which arises when the business location is taken and relocation in the immediate vicinity is possible and would involve no loss of profits. If it is possible for the business to relocate in the vicinity of the location taken so that it is highly unlikely that the business will suffer a decrease in profits due to inaccessibility to its regular clientele, it is not harsh to insist that the business owner either relocate or run the risk of being unable to recover damages. If relocation is not required under the circumstances so described, then the door is opened to full recovery for loss of goodwill by a business which may then relocate and be restored to its regular clientele. To allow such a business to recover for loss

of goodwill is to compensate it for an injury which it did not incur.

The second situation excluded from recovery under subsection (c) has already been adverted to in the comment to subsection (b). When the regular clientele are displaced from their residences but relocate in the vicinity of the business, the business will be able to continue at the same location without a decrease in profits due to loss of regular clientele. This situation thus does not involve a loss of goodwill and is not compensable.

PART III. MEASURE OF DAMAGES

SECTION 301. *Damages for permanently discontinued business.*

The general purpose of this act and, more particularly, of this and the following section is to place the owner of the injured business in the same position that he would have been in if there had been no taking. Therefore, the first step in compensating the injured business is to calculate the annual earnings which it could have expected if there had been no taking; these earnings can be called the expected future earnings. These expected future earnings are to be capitalized at the judgment rate of interest in order to arrive at an amount which represents the present value of the expected flow of future annual earnings over the years subsequent to the taking.

It should be noted that the judgment rate of interest is selected as the capitalization rate. An alternative would be to capitalize at the "going rate" of interest. Although this latter rate, inasmuch as it is invariably a lower rate of interest than the judgment rate, represents more accurately the return which the injured business owner can actually expect from the award of damages, it is rejected as the capitalization rate because of the difficulties inherent in determining the going rate of interest at any particular time. The going rate of interest is a vague and debatable figure whereas the judgment rate of interest is definite and readily ascertainable.

When the injured business is one that involves the sale of services and when there are no physical assets or the physical assets have no liquidated value, the permanent discontinuance of such a business will entitle the owner to recovery of the full

amount of the capitalized expected future earnings. However, in most, if not all, other cases, there will have to be an adjustment of the amount representing capitalized expected future earnings, whether the injured business is permanently discontinued or continues in operation. This section describes the deduction which must be made when the injured business is permanently discontinued and the owner elects to sell his assets. The following section describes the adjustments which must be made when the injured business continues in operation at the same or a new location. These adjustments are necessary in order that the injured business not be overcompensated.

If the business is permanently discontinued and the owner elects to sell his assets, the amount actually received from the sale of the assets must be deducted from the capitalized expected future earnings. Since the deduction required when the assets of the business are sold is the actual amount received, there is no necessity for a determination of the fair market value of the assets sold if the injured business owner is unable to realize the fair market value of the assets when he sells them. However, under ordinary circumstances, the injured business owner should be able to sell his assets for more than the fair liquidation value since he will have a long period (from the order of taking until the final determination of damages) in which to sell his assets. There need be no fear that the injured business owner will sell his assets at less than their liquidation value in order to minimize the deduction which must be made from the capitalized expected future earnings and burden the condemning authority with an inflated claim. If he elects to sell at less than the liquidation value, he is taking a risk that the assessor of damages will not agree with the owner's evaluation of damages. The injured business owner will thus rarely forsake the opportunity to sell his assets for the highest amount he can get, though this price does not have to be as high as the fair market value. The only situation in which he might sell his assets for less than the liquidation value is one which did not involve an "arm's length" sale. For example, the injured business owner might execute a collusive sale with another with the intention of splitting the profits of the sale. This subsection does not negate the ordinary principles of fraud which would invalidate a claim based upon a collusive sale of the assets.

If the injured business is permanently discontinued and the owner elects to retain his assets, the market value of the assets retained must be deducted from the capitalized expected future earnings. The market value is used in determining the deduction because the owner is benefited by the retention of any assets to the extent that he does not have to purchase similar assets at market prices. The owner of a discontinued business will not often retain his business assets after the discontinuation of the business. However, the owner may retain the business assets if he can transfer them to another business which he owns at another location, or, the owner may retain certain business assets which can be converted to his personal use.

Any damages estimated under this section are limited by the provisions of section 306.

SECTION 302. *Damages if business is continued.*

This section describes the adjustments which must be made when the business is continued at the same or a new location. If the net assets of the injured business neither increase nor decrease after the taking, then subsections (a) and (b) of this section are inoperable and the damages will equal the expected future earnings of the injured business capitalized at the judgment rate of interest less the actual future earnings of the injured business capitalized at the judgment rate of interest. However, if the continuation of the injured business results in its operation with an increase in net assets above the net assets prior to the taking, or a decrease in net assets below the net assets prior to the taking, then the actual future earnings (and, consequently, the capitalized actual future earnings) will be partially attributable to any such increase or decrease in net assets.

When net assets are increased or decreased the injured business takes on a new character. If the net assets are increased after the taking, it will almost invariably be the case that average earnings will also increase. Therefore, the average earnings which an injured business loses because of a loss of goodwill may be offset by the average earnings which the injured business gains by an increase in net assets. In fact, if the increase in net assets is significant, it may well be that capitalized actual future earn-

ings will exceed the capitalized expected future earnings so that, if the formula of this section is applied without any adjustment for the increase in assets, it may appear that there has been no loss of goodwill. But such a determination would be patently incorrect because in trying to determine the amount of goodwill which an injured business has lost, one is concerned with the average earnings of a business with a certain amount of net assets (*e. g.*, $100,000) prior to the taking as contrasted with the average earnings of the same business with the same amount of net assets after the taking. A business with increased net assets (*e.g.*, $150,000) has a new character; its average earnings, unadjusted to take into consideration the increase in net assets, are irrelevant to a determination of the amount of the goodwill that has been lost by a business with fewer net assets.

Under these circumstances, it would be unfair to the injured business owner to determine the loss of goodwill by subtracting the capitalized earnings of a business with $150,000 in net assets from the capitalized earnings of a business with $100,000 in net assets. Therefore, in order to fairly measure the loss of goodwill suffered by the injured business as a result of the taking, there must be an adjustment to account for the effect which the increase in net assets has upon capitalized actual future earnings. This adjustment consists in adding any increase in the net assets of the injured business to the difference between capitalized expected future earnings and capitalized actual future earnings.

A similar adjustment has to be made if net assets are decreased. If net assets are decreased after the taking, it will almost invariably be the case that average earnings will also decrease. Under such a circumstance, it would be unjust to the condemning authority to determine the loss of goodwill by subtracting the capitalized earnings of a business with $90,000 in net assets from the capitalized earnings of a business with $100,000 in net assets. This amount would be particularly unjust to the condemning authority if the decrease in net assets were due to a taking of assets and if the condemning authority had already compensated the injured business owner for such assets as were taken. To award damages based on the capitalized earnings of a business with decreased net assets would be equivalent to allowing the injured business owner double recovery for loss of assets. There-

fore, in order to fairly measure the loss of goodwill suffered by the injured business as a result of the taking, there must be an adjustment to account for the effect which the decrease in net assets has upon capitalized actual future earnings. This adjustment consists in subtracting any decrease in the net assets of the injured business from the difference between capitalized expected future earnings and capitalized actual future earnings.

Proper application of the formula stated in this section can best be illustrated by an example of the computations which must be carried out when net assets are increased. For the purposes of this example, assume that prior to the taking an injured business has net assets of $100,000 and average earnings of $10,000, that calculations under section 304 indicate that expected future earnings equal average earnings, or $10,000. Assume further that after the taking the injured business has net assets of $150,000 and annual earnings of $12,000 and that calculations under section 305 indicate that actual future earnings equal the annual earnings after the taking, or $12,000. Assume the judgment rate of interest to be 6 2/3%. Based on these figures, damages under this section would equal the expected future earnings of the injured business ($10,000) capitalized at the judgment rate of interest (6 2/3%) less the actual future earnings of the injured business ($12,000) capitalized at the judgment rate of interest (6 2/3%) plus any increase in the net assets of the injured business ($50,000). Damages would thus equal $20,000.

Arithmetically, the computations would be as follows:

$10,000 × 1/.0667 (or 15)	=	$150,000 —	capitalized expected future earnings
$12,000 × 1/.0667 (or 15)	=	—$180,000 —	capitalized actual future earnings
		—$ 30,000	
plus ($150,000 — $100,000)	=	+$ 50,000 —	increase in net assets
		$ 20,000 —	loss of goodwill

Whichever method is used under this section to estimate the amount of damages, any amount so estimated is limited by the provisions of section 306.

SECTION 303. *Estimation of average earnings.*

The annual net income over the last five years prior to the valuation date is chosen as the basis for determining average earnings in order that a clear pattern of business in the recent past may be established. A longer period might introduce figures that are no longer representative and a shorter period might not afford an adequate description of the trend of recent business.

If an owner-manager loses income in the form of salary because of a taking, such salary will be recoverable by him as a part of annual earnings if he is unable to find other employment. However, to the extent that such salary is available to an owner-manager after the taking in the same or similar employment, the salary of the owner-manager prior to the taking will not be recoverable but will be treated as an expense and not as a part of net income.

The salary of an owner-manager prior to the taking may be either real or imputed. The average salary received by others engaged in similar businesses may not accurately represent the economic value of an owner-manager to an injured business. If the salary which an owner-manager receives after the taking is higher than his real salary prior to the taking or a salary imputed from the average salary of those engaged in similar businesses, then it can be presumed that such salaries did not accurately represent the economic value of an owner-manager to an injured business and that, consequently, the owner-manager was underpaid prior to the taking. In such a situation, the salary received by an owner-manager after the taking will be imputed to him as his salary before the taking, whether or not he had a real salary before the taking, and such imputed salary will be treated as an expense of the injured business and not as a part of net income. The salary received by an owner-manager after the taking and used as a basis for imputing his salary prior to the taking may be derived from similar or different employment.

This section is intended to prevent an owner-manager who receives an increase in salary in consequence of the taking from excluding that increase as a deduction from the loss incurred because of the taking. Such an increase in salary is a gain to be set off against any loss incurred because of the taking.

This section is intended to require an owner-manager to mitigate loss of income due to the taking by accepting similar employment which is available to him after the taking. The rule is similar to that which requires an employee to mitigate damages arising from an employer's breach of an employment contract by accepting available similar employment. An owner-manager is not required to accept dissimilar employment which may be available after the taking. Even if an owner-manager does not actually receive the salary which is available to him in a similar employment, the mere fact that such employment is available to him justifies a set-off of the salary available against the loss incurred by the taking.

SECTION 304. *Estimation of expected future earnings.*

The expected future earnings represent the average annual net income which was expected in future years from the injured business prior to the taking. The value assigned to expected future earnings is to be derived from an analysis of its average earnings (section 303). The trend of net income over the past five years will be one indication of whether the level of earnings could have been expected to rise or to fall even if there had been no taking. In addition, certain extraordinary circumstances may indicate that the level of earnings would have risen or fallen in the future if there had been no taking.

SECTION 305. *Estimation of actual future earnings.*

The actual future earnings represent the average annual net income which is expected in the future years after the taking from the injured business as continued at the same or a new location under the changed conditions caused by the taking. The value assigned to expected future annual earnings is to be derived from an analysis of its average earnings (section 303) and its annual net income subsequent to the valuation date.

SECTION 306. *Maximum damages payable.*

In order to balance the interests of the injured business against the interests of the condemning authority, it is necessary to set a reasonable maximum upon the damages payable under

this act. It would be an unreasonable hindrance to eminent domain proceedings to permit an injured business with negligible physical assets to receive damages under this act in excess of ten times its average earnings prior to the taking. On the other hand, it would be unreasonable to limit an injured business with considerable physical assets and relatively small average earnings to a recovery less than an amount equal to the value of its physical assets. By establishing a maximum this section protects the interests of the condemning authority; by making the maximum the greater of ten times the average earnings of the injured business or an amount equal to the value of the physical assets of the injured business this section protects the interests of the injured business.

A Statute to Create a State Office of Local Affairs

The Bureau draftsmen, in seeking to deal with the growing problems of the financing and implementation of governmental services in metropolitan areas, have rejected the solution of establishing a state agency which, in the course of easing metropolitan problems, will also impinge upon the autonomy traditionally accorded local government. The Office of Local Affairs, as an instrument of the Governor, will facilitate the efficient application of federal and state assistance to local governments, without eroding the authority of those governments.

I. INTRODUCTION

Local units of government have been faced with increasingly complex problems in recent years resulting from rapid technological advances, movement and new concentrations of population, urgent demands for new services, and other similar general economic and social changes.

In about four decades, the population of the United States has changed from a half-rural population to one that is over two-thirds urban.[1] The increased concentration of population within municipal borders has augmented the burdens of local government. A concomitant of rapid urban growth has been an overlapping of governmental jurisdictions with resulting difficulty in providing adequate service for many areas.

Many metropolitan territories are not within the limits of any one political unit of government. Thus, government in metropolitan areas often stimulates bewilderment because of the number of units involved and frequent territorial overlapping. The larger the number of independent governmental jurisdictions, the more difficult becomes the process of financing and implementing governmental services needed throughout the metropolitan area.

> The growth of motor vehicle traffic and its concentration around urban centers has created air pollution problems that were either nonexistent or relatively unimportant in the past. Adequate

1. COUNCIL OF STATE GOVERNMENTS, 1962 PROGRAM OF SUGGESTED STATE LEGISLATION 10.

> supplies of water of required purity are becoming increasingly difficult to find and more costly to develop. Major efforts are necessary to control the potential pollution of existing water supplies. The problem of transporting the large concentrations of population, particularly during the rush hours for commuters, has become acute. Roads for private vehicles cannot be built fast enough to keep up with the demand, while mass transportation facilities are frequently overburdened at the two peak periods and yet do not have enough steady demand for their facilities to provide economic operation. Because of the rapidity with which these changes mentioned have taken place, frequently contradictory and uneconomic land use practices have resulted.[2]

Aside from the lack of general local governmental organizations broad enough to provide necessary services for metropolitan areas, there are disparities in different sections of these areas between service needs and financial resources. Individual governmental units may rely upon a small portion of their territory for local financial resources, and the consequence is gross inequality in tax burdens. Furthermore, people residing in overlapping governmental jurisdictions are confronted with an extremely large number of issues and personalities about which to form judgments. This proliferation of local units prevents conscientious citizens from being sufficiently well-informed about activities of their local governments to exercise very much popular control. Thus, one of the basic justifications for sustaining the traditional powers and autonomy of the localities is diminished by the inadequacy of existing governmental structure.[3]

The persistence of the metropolitan trend indicates that less populous metropolitan areas, and even embryonic ones, should make changes to avoid comparable problems. Over the years, many local governments have effected significant improvements, but too often they have focussed their attention and efforts predominantly upon the needs of the agencies of local government they represent. They have oft-times viewed with skepticism proposals involving substantial change in the traditional powers of local organizations. But cognizant of difficulties in providing additional services, the vigorous competition among local govern-

2. *Ibid.*

3. COUNCIL OF STATE GOVERNMENTS, STATE-LOCAL RELATIONS 195-99 (1946) (appraisal of local government deficiencies in finance, organization, procedure, and discretion in the use of powers).

ments for a greater share of the taxpayer's dollar, and the threat of possible new area-wide agencies of government, local officials are now eager to explore opportunities for cooperation among local agencies. Few of the modern urban problems, such as those mentioned above, can be solved on a purely local basis by existing units of government without additional assistance. Cooperation in joint undertakings by all levels and units of government has become increasingly important.[4]

Although the roles of local governments and of the federal government are indispensable, the states have primary responsibility for meeting the complex difficulties accompanying new urban growth and for insuring an orderly development of state-local relations. The federal government is not equipped to deal adequately with the immense variations of problems faced by state and local governments. Because the states are legally superior to local units and have greater financial resources, they must assume a responsibility to assist local governments in coping with these problems. The states have a dual obligation: they must encourage municipalities and metropolitan areas to deal with complex local problems, and, where desirable, must consider the provision of direct financial and technical assistance through expanded state programs.

But states should not hamper the efforts of local governments to respond to the needs of their residents. Detailed legislation which restricts local autonomy diverts state legislatures from important state-wide matters. Rather, states should grant broader discretion to local governments in the exercise of their powers and should supplement this local discretion by establishing flexible administrative supervision, consultation, and assistance at the state level.[5] "[I]f we wish to maintain democracy at the center, it is essential to retain a large measure of self-government at the extremities."[6] Central administrators, even through local officials, cannot understand local situations in all their detail and diversity, so it is desirable to have those persons most directly concerned exercise direct influence upon the administration of their affairs.

4. *Ibid.*

5. COUNCIL OF STATE GOVERNMENTS, THE STATES AND THE METROPOLITAN PROBLEM 143 (1956).

6. Finer, *The Case for Local Self Government*, 3 PUB. ADMIN. REV. 51, 57 (1943).

Although many claim that our local governments have not kept pace with dynamic advances in the public need, the creation of large new area-wide or state-wide agencies to take over local functions is neither necessary nor desirable. Instead we should explore the possibility of meeting our common needs through more effective utilization of our present system of local government. In preference to state dictation or detailed supervision of local government, we should encourage high-standard local autonomy with state guidance, cooperation, advice, and service.

In its report to the Governors' Conference in 1956, the Council of State Governments recommended creation of an agency of state government to "aid in determining the present and changing needs of metropolitan and non-metropolitan areas in the states."[7] The suggestion stressed that such a central agency in state government could strengthen local government generally, whether or not located in metropolitan areas. Such an agency would be a valuable tool for supplementing the present piecemeal approach to state-local relations. It would supply the needed systematic, interrelated, and continuing scrutiny of the entire field. By making continuous studies of state-local relations, publicizing relevant facts concerning them, and advising the appropriate public officials, such an agency would be a source of information for both state and local government.

> It could perform many services from encouraging the codification of laws to studying proper methods of distributing state aid; from issuing studies of comparative local costs to devising recommendations with respect to the distribution of functional responsibilities.[8]

The Council of State Governments suggests that the agency carry on active and continuous programs of research and service on such matters as:[9]

> Legal changes that are necessary for the establishment of adequate metropolitan and local levels of governments . . . .
>
> The need for subsequent adjustments in area, organization, functions and finance of reorganized governments.

7. COUNCIL OF STATE GOVERNMENTS, *op cit. supra* note 5, at 144-45.
8. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 3, at 50.
9. *Supra* note 7.

> The governmental needs of local areas as significant changes start to emerge — for example, areas that begin to take on metropolitan characteristics . . . .
>
> The merits of state advisory and technical services and administrative supervision of governments in local areas.
>
> The impact of existing and contemplated actions of the national government — such as fiscal policies, public utility regulation and civil defense directives — on local areas . . . .
>
> The results of present and planned activities of local governments, such as urban redevelopment and public housing . . . .
>
> The consequences for local areas of current and anticipated decisions of major private organizations on such matters as sites for commercial and industrial activities and locations of terminal and transfer facilities.
>
> The means of facilitating greater coordination of existing and contemplated policies of the national, state and local governments and of private associations and individuals that affect local areas.

This list is intended to be suggestive, rather than exhaustive; the agency can be of general usefulness to the governor and legislature in their consideration of proposals affecting government at metropolitan and local levels. It would also be a focal point of information in the development of preventive and remedial programs for local areas. The establishment of a state agency for local affairs is a response to new conditions and is therefore an innovation in state governmental concepts. Many states established planning commissions during the 1940's, but the result was a reallocation of functions between state and local government rather than a permanent system to provide assistance to autonomous local bodies. Virginia, North Carolina, and New Jersey had, by 1950, established state agencies for local government but the latter two confined the roles of their respective agencies to fiscal supervision of local government. Virginia's Office of Local Government was intended to suggest and promote better forms of local government, *i.e.,* to study metropolitan problems and to recommend possibilities of cooperation, consolidation, or federation among local units. Similarly, Pennsylvania created a local government commission[10] to investigate the allocation of local government functions, the feasibility of eliminating overlap in

10. Pa. Stat. Ann. tit. 46, §§ 431.1-.7 (1952, Supp. 1965).

services, and the methods of maximizing benefits from community development programs. It did not emphasize the strengthening of local governmental capabilities.

New York adopted the suggestion of the Council of State Governments by establishing an Office for Local Government in 1959 to maintain "the continued effectiveness of local governments"[11] and "to coordinate State services for assistance of local governments . . . ."[12] It functions within the Executive Department and includes both a director and a local government advisory board consisting of nine members serving without compensation, who are appointed by the Governor to represent the state's diverse interests in local government. The advisory board was helpful in organizing Local Government Workshops with participants from business, labor, agriculture, and academic life who studied local problems and solutions.[13] The Office also organized regional workshops to focus upon problems of particular regions, and municipal law seminars to propose state constitutional amendments which would facilitate the reorganization of governmental structures and operations.

In the proposed statute, the draftsmen have omitted an advisory board in the belief that such a group would unduly complicate the functioning of the Office. Flexibility is obtained by allowing the executive director to appoint such "agents, consultants, research assistants, special committees, and employees as he may deem necessary to fulfill the objectives of this Office." (Section 2.) Adequate liaison can be maintained with local officials and agencies without institutionalizing a representative advisory board. The executive director may make any arrangements which will promote dissemination of state advice and assistance. He may advise the Governor as a politically objective expert on local government matters. Elimination of the advisory board leaves the coordination of aid to local government more closely within the Governor's discretion. Finally, elimination of the advisory board accords the Office greater budgetary flexibility

11. Governor's memorandum approving Chapter 335 of Laws 1959, N. Y. Executive Law §§ 470-76.
12. *Ibid.*
13. N.Y. EXECUTIVE DEPARTMENT, 1959-60 OFFICE FOR LOCAL GOVERNMENT ANNUAL REPORT.

in maximizing the benefits it can offer as a result of its investigation.

The New York Office for Local Government was expanded in 1960 to include the Municipal Police Training Council, the fire safety responsibilities of the former Division of Safety, and the State Board of Equalization and Assessment. Such consolidation of state agencies dealing with local government problems may be found helpful, but the draftsmen believe that the new agency should not incorporate related functions until an appraisal of present state activities shows this to be necessary. The purpose at present is to provide a coordinating agency as a focal point for the basic problems of state-local relations. The program is adaptable to future requirements in this field.

The New York Office for Local Government maintains a local government library for the assistance of officials and private groups. In addition, it publishes a bi-weekly bulletin of information useful to local government. In 1963 it published its *Manual on Intergovernmental Cooperation.*[14] It discussed further possibilities for cooperation between units of local government, where the geographic boundaries of governmental units overlap. The *Manual* contains a statement of the basic law on the subject and a guide to procedures for working out cooperative action. It also presents case studies in cooperation comprehending a broad cross-section of municipal functions and operating experience. Among its other duties, the Office drafts legislation relating to local conditions, investigates public works projects in the state, and publishes community profile studies for the benefit of similar areas throughout the state. It appears that this central state agency has been of immeasurable benefit to local officials.[15]

In most states, the Office could be located administratively within an existing department of state government but the draftsmen feel strongly that the functions of this agency should not be allocated to organizations currently performing largely dissimilar services. Establishment of an independent agency is preferred because these highly significant functions may otherwise become a minor phase of some other part of state government.

14. N.Y. OFFICE FOR LOCAL GOVERNMENT, LOCAL GOVERNMENT COOPERATION (1963.)
15. *Ibid.*

The Office of Local Affairs should be assigned to the executive department because its purpose is both to assist and maintain liaison with localities and also to advise the Governor. The Office will enable the Governor more effectively to utilize the resources of the executive branch for the benefit of local government. It will assist him in coordinating all state and federal aid in utilizing the contributions of private organizations to the welfare of local areas. The Office will make the Governor aware of local difficulties, and it will encourage intergovermental cooperation and local development within the state. The problems of growth and development encountered now may be vastly different a decade from now, and solutions suitable today may be inadequate in the future. The Office of Local Affairs should be adaptable enough to satisfy the constantly changing needs of people in the state.

II. STATUTE

SECTION 1. *Legislative findings and objectives.*

The legislature finds and declares that:

(a) the political, economic, and social well-being of the state requires strong and effective local government;

(b) population shifts and other economic and social trends have brought new problems to local government in new and growing metropolitan areas throughtout the state;

(c) the state has a responsibility to provide a continuing means of assisting local governments and citizens in the determination of present and future governmental needs by establishing a central office of state government to coordinate state services and information related to local problems and to aid in the development of preventive and remedial programs in meeting local problems.

SECTION 2. *Office of Local Affairs; executive director; personnel.*

There is hereby created within the executive department an Office of Local Affairs. The head of this Office shall be the executive director of the Office of Local Affairs. He shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold office during the pleasure of the Governor. He shall receive an annual salary to be fixed by the Governor within the amount allocated for the Office. The executive director may appoint such agents, consultants, research assistants, special committees, and employees as he may deem necessary to fulfill the objectives

of this Office. He may, further, prescribe their duties, fix their compensation, and provide for reimbursement of their expenses within amounts appropriated therefor.

SECTION 3. *General functions, powers, and duties of the Office.*

The Office of Local Affairs shall have the following functions, powers, and duties:

(a) As advisor to the Governor —

(1) To advise the Governor concerning the problems of local government and to assist him in formulating policies which best utilize the resources of the executive branch of the state government for the benefit of local government.

(2) To assist the Governor in coordinating and making more effective the activities and services of those departments, agencies, and field organizations of the state which may be of service to units of local government.

(3) To study problems of local government in metropolitan areas and in other areas where major changes in population or economic activity are taking place and to recommend to the Governor such programs as may seem necessary to strengthen local government and permit its better adaptation to diverse and changing conditions.

(4) To consult with governmental, academic, and private organizations which conduct research on metropolitan and other local problems and to advise the Governor concerning the findings and recommendations of these organizations.

(b) As coordinator of assistance and services to local government —

(1) To assist the Governor in rapidly applying all available aid to disaster-stricken communities and for this purpose to provide liaison with federal agencies.

(2) To encourage the most uniform and efficient application of federal and state assistance to local government.

(3) To encourage and, when requested, to assist in the efforts of local governments to develop mutual and cooperative solutions to their common problems.

(4) To consult and cooperate with other state agencies, with local governments and officials, and with federal agencies and officials, in carrying out the functions and duties of the Office.

(c) As intergovernmental liaison —

(1) To maintain liaison with local units of government and with the field organizations of the various departments of state government regarding available state assistance, both advisory and in the form of technical services, to meet local needs in such areas as general government; public safety and defense; public works; municipal utilities; conservation; recreation and community development; and public health, education, and welfare.

(2) To maintain liaison with metropolitan area planning and opera-

ting organizations and to compile information on public works projects in construction, planning, or study.

(3) To provide a central clearing house of information by collecting and compiling all requisite information concerning intergovernmental relations, and concerning state and federal services available to assist in the solution of local problems.

(4) To refer units of local government or other interested persons to the appropriate departments and agencies of the state and federal governments for advice, assistance, and available services in connecton with particular problems.

(d) To do all things necessary or convenient to carry out the functions, powers, and duties expressly set forth in this section.

SECTION 4. *Functions, powers, and duties of other departments and agencies.*

Nothing contained in this Act shall be deemed to derogate or detract in any way from the functions, powers, and duties prescribed by law for any other department or agency of the state nor to interrupt or preclude the direct relationships of any such department or agency with units of local government for the carrying out of such functions, powers, and duties.

SECTION 5. *Assistance of other agencies.*

To effectuate the purposes of this Act, the executive director of the Office of Local Affairs may request in the name of the Governor from any department, division, board, bureau, commission, or other agency of the state or from any local unit of government, and the same are directed to provide, such information and assistance as the executive director deems necessary in the performance of his functions, powers, and duties.

III. MEMORANDUM

SECTION 1. *Legislative findings and objectives.*

This section indicates the role of the state in confronting the pressing problems of local affairs. It indicates, in broad terms, that the state can take advantage of its perspective and resources by coordinating its services in a central Office of Local Affairs, through which it can "aid in the development of preventive and remedial programs." This latter function adopts the last clause of the draft suggested by the Council of State Governments.[10]

16. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 1, at 14.

The remainder of this section is patterned after New York law.[17]

The Office will systematically and continuously focus on problems of local government and metropolitan affairs. Its unique resources will enable it to deal with problems which receive little attention either because they overlap different units of local government or because they do not fall within any convenient category of federal, state, or local concern.

The language used in the legislative findings and objectives is that of a concern for future needs. The terms "coordinate" and "aid" in section 1(c) indicate the *active* contribution of this Office to the solution of local problems. In addition to serving as a reference point within the executive branch, the Office will bring appropriate expertise to bear on current problems.

SECTION 2. *Office of Local Affairs; executive director; personnel.*

The draftsmen have noted in the introduction that the rationale for placement of this Office under the immediate supervision of the Governor is that an independent agency charged with the functions, powers, and duties enumerated in section 3 is preferable to a makeshift attachment to an already existing agency of only vaguely related function. As advisor to the Governor, the Office will maintain a close working relationship with him. It will mobilize the resources of the executive department in coordinating diversified state assistance to local goverment without preempting any function now being performed by other state agencies. (Section 4.)

It is only logical that the executive director, working closely with the Governor, should be appointed by him and serve at his pleasure. The title for the agency as proposed in the Program of Suggested State Legislation better connoted the varied activities of the office than do such alternative titles as "Office for Local Government" (New York) or "Department of Local Government" (New Jersey). "Office of Local Affairs" suggests, in the opinion of the draftsmen, a wider scope for the activities of this agency. The title "executive director" is most appropriate for the head of the Office for two reasons: first, the word "execu-

17. N.Y. Executive Law § 470.

tive" suggests the coordinating function of the Office and its close relationship to the Governor; and second, the title anticipates possible expansion of the Office into subdivisions of specialized technical competence, each with its own director.

A future development of the Office might find an executive director with three research directors in charge of technical services (public safety and defense, highways, conservation, agriculture, manufacturing, etc.), financial assistance programs, and social services (education, public health, mental hygiene, public welfare services, recreation). The fifth sentence of section 2 gives the executive director the power to make various appointments to effectuate the purpose of the Office. The draftsmen note that the executive director in his appointments must take cognizance of existing statutes and procedures governing the appointment of state personnel.

The draftsmen strongly recommend a competent research staff composed of experts in their fields as an essential aspect of the operations of the Office, but do not create it by statute, as such an enactment might unduly restrict the natural evolution of the Office and might later require amendments. Rather, the executive director is empowered to meet changing needs of the state with a concomitant growth of the Office's resources.

With modifications in terminology and language, section 2 is taken substantially from New York law.[18]

SECTION 3 AND 4. *General functions, powers, and duties of Office. Functions, powers, and duties of other departments and agencies.*

The tripartite structure of this section suggests the three functions of the Office: advisor to the Governor, coordinator of aid to local government, and intergovernmental liaison. These functions, of course, cannot be strictly compartmentalized and certain duties will inevitably overlap two or more functions of the Office. However, this structuring of the statute emphasizes the coordinating role of the executive director: he stands between the Governor and local governments, responding to both and serving both. By concentrating this broad range of functions in one

18. *Id.* at § 472.

agency, the draftsmen hope not only to provide a well-informed contact point for local government but also to solve the dilemma of the "task of no-one's concern."

The executive director's first function is as advisor to the Governor as provided in section 3(a)(1). The Governor will have available an expert in local affairs with up-to-date information, comprehensive knowledge of local problems, and resources available to solve these problems economically and efficiently.

The Governor oversees many different activities and services related to local affairs. Section 3(a)(2) gives the executive director the power and duty to assist and advise the Governor by "coordinating and making more effective" this vast range of services.

Section 3(a)(3) emphasizes that the executive director does not act only at the initiative of the Governor. He must on his own initiative undertake studies, remain informed of developments in local affairs, and, when necessary, present affirmative proposals to the Governor.

The executive director also has the duty of regularly consulting with other governmental, academic, and private organizations conducting research in the area of local affairs. (Section 3(a)(4).) As advisor to the Governor, the executive director must serve as a conduit for suggestions and findings by these groups. In short, the executive director should gain the ear of the Governor for these groups.

The second function of the Office is as coordinator of assistance to local government, including both financial and non-financial services. Here, using the powers of section 5, the Office has a more active role at the request of the Governor.

The statute, in section 3(b)(1), requires the executive director to assist the Governor in providing aid to disaster-stricken communities. "Communities" is used in a broad sense. This provision allows the Governor to give the executive director the main task of applying aid. In doing so, the executive director will utilize his knowledge of all available sources of assistance. The second clause of this provision uses the word "liaison" to mean conduit and, at the Governor's request, allows federal aid to be applied to local communities through the executive director as the Governor's representative.

Sections 3(b)(2) and 3(b)(3) use the word "encourage" in the sense of facilitation of the uniform and efficient application of federal and state assistance to local government. This is a more active function than merely "advising" the Governor, but a narrower function than "insuring" any specific policy of allocation of aid. It is in the role of a coordinator that the executive director should encourage uniform and efficient application of aid to local government.

The draftsmen have given power to the Office in section 3(b)(3) to encourage mutual and cooperative solutions to common problems of local affairs which may otherwise go untouched or suffer from overlapping solutions by different units of local government. The resources of the Office of Local Affairs are available as an aid in the solution of the common problems of local units of government and upon request the Office may render active assistance.

Section 3(b)(4) provides both for the grant of a power and the performance of a duty. The executive director's function as coordinator of aid necessarily entails consultation and cooperation with other state, local, and federal agencies. This section expressly empowers him to carry on such activities, consistent with his other functions as advisor and intergovernmental liaison. This section charges the Office with an affirmative duty of consultation and coordination distinct from the duties put forth in section 3(c)(1).

The third function of the Office is to provide intergovernmental liaison. This duty partakes less of active coordination and more of the idea of a central clearing house maintaining liaison between local governments and state field organizations, and with metropolitan areas planning and operating commissions. (3(c)(2).) The Office collects and compiles information, so that it may refer interested persons to the appropriate agencies of the state and federal governments for advice and assistance. (3(c)(4).) It is a central depository of information otherwise scattered throughout various agencies. This function is closely related to the fulfillment of the objectives stated in section 1(c).

Section 3(c)(1) assigns to the Office the duty to review activities of the local units of government and field organizations of the various departments of state government so that it may pro-

vide advice, coordination, or reference based upon the most recent information available. The enumerations are only suggestive of the interest of the Office. Within each general area it should be familiar with such state technical services as aid with election matters and management services (general government), or advice regarding fire and police protection and traffic safety (public safety and defense), or airport and highway engineering assistance (public works), or geological survey information (municipal utilities), and other services within these areas and the other areas enumerated.

The Office, as indicated in section 3(c)(2), should be aware of what metropolitan area planning and operating organizations are doing and should keep enough data on file regarding their public works projects and general development programs so that interested parties may gain access to the information upon application to the Office.

Section 3(c)(3) states in general terms the use to which the information compiled from all these sources will be put. The draftsmen suggest that an actual deposit of relevant materials a reference library of local affairs — would be most valuable, or perhaps some type of newsletter and handbook similar to that of the New York Department for Local Government. But, at least, the compilation of materials must be such that the Office is able to fulfill the reference function of section 3(c)(4).

The last section, 3(c)(4), indicates what is made clear in section 4. The office, in its advisory, coordinating, or liaison role, in no way limits the functions, powers, and duties of any department or agency of the state, nor is it meant to replace the present network of relations between local units of government and departments and agencies of the state. Its functions, powers, and duties are supplemental, organizational, and advisory; they are meant to coordinate and make more efficient the relationships among already existing agencies, services, and units of government dealing with local affairs. Section 4 is taken substantially from New York law.[19]

The draftsmen have included section 3(d) as an enabling clause to minimize the need of amendment when the Office seeks to act

19. *Id.* at § 475.

within the area set off by the functions, powers, and duties, but in a manner not specifically enumerated.

SECTION 5. *Assistance of other agencies.*

The draftsmen feel that the statutory grant of power in section 5 to the executive director gives a necessary element of seriousness to such a statutory power, and direction to these enumerated bodies. The Office could be too easily prevented from fulfilling its functions by a lack of cooperation or inability to gather and compile information. The language is broad and the information requirement could conceivably take the form of a regular report at stated intervals. The executive director's powers here are limited by the functions, powers, and duties of the Office and by the fact that he is removable by the Governor.

HARVARD JOURNAL ON LEGISLATION

VOLUME 3

1965 - 1966

Cumulative Index

Harvard Journal on Legislation

Volume III

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

Author Index

To Articles Published in Volume III

Supplementary Index to Bureau Drafts

1965-1966

Presented below is a listing of statutory drafting projects completed by the Harvard Student Legislative Research Bureau which have not heretofore been indexed in past volumes 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, but are listed instead in the Cumulative Index for each volume.

ADMINISTRATIVE AGENCIES

5409. A bill altering the composition, compensation and powers of the Savannah, Georgia, Airport Commission. It includes provisions establishing a five-man Commission, appointed by the Mayor and Aldermen for three years and barred from succeeding itself, and prohibiting appointment of any political officeholder until one year after his leaving office. 4 pages.

AUTOMOBILE SAFETY

6515. An act to establish federal motor vehicle safety standards to be imposed upon manufacturers of motor vehicles and motor vehicle equipment. The act delegates to the Secretary of Commerce (or Transportation) an obligatory duty to promulgate standards whenever an annual review of existing standards and safety reveals that the objectives of motor vehicle safety (as defined) are not being fulfilled. Further, the Secretary is obligated to carry out research and testing programs, to order the retrofitting of motor vehicles defectively constructed or designed, and to publish the results of his findings on motor vehicle behavior. The act, although federal, is capable of adoption by the states except for the necessary exclusion of certain preemptive features of the federal act.

CONFLICT-OF-INTEREST

5807. A bill imposing criminal liability for giving or offering anything of value to a federal government employee, his spouse, or minor children knowing that he has or will have an opportunity to influence, due to his official position or otherwise, government action involving a financial interest of the donor. It also makes criminal acceptance by a government employee with knowledge of a financial interest of the donor and requires federal govern-

ment employees in specified salary brackets to disclose for themselves, spouses, and minor children certain assets and liabilities, including things of value received during the reporting period from any one source other than specified family relations and businesses in which they served as officers or directors. 11 pages.

CORPORATIONS

Shareholders

5407. A memorandum discussing methods Ohio could use to handle problems due to "lost" stockholders who have been missing for more than a stated number of years. It includes suggestions for escheating to the state the lost stockholder's interest in the corporation, for omitting lost stockholders from the count of stockholders of record for purposes of determining whether a proposal requiring a two-thirds stockholder vote has been approved, and for enabling the corporation to create duplicates of the lost shareholder's certificates after notice and judicial hearing. 6 pages.

Taxation

6505. An amendment to the New York corporate tax law. This legislation would permit New York to tax the income of a foreign corporation earned in New York even though the corporation has not sufficient contact with the state to be subject to the state's franchise tax. 33 pages.

Personnel

5319. A bill providing for appointment by the Chief Justice of the Massachusetts Supreme Judicial Court of an administrator for the district, superior, and supreme judicial courts. Included among the administrator's duties, to be exercised under the Supreme Judicial Court's supervision, are the making of recommendations on assignment of judges, on improvement of administrative methods used by the judicial system, and on the amount of state appropriations required for operation of the courts. 3 pages.

CRIMINAL

Compensation of Victims

6520. This act compensates for medical expenses and two-thirds of any loss of earnings to the victim of violent crime in case of injury, or lump-sum payments to his spouse and dependents in case of death. It establishes a Commission with an expedited procedure which provides compensation on the basis of documents proving a crime and resultant loss. A hearing and judicial review are available for more difficult cases.

Fair Trial

5706. A memorandum analyzing federal legislation (18 U.S.C. § 3500) enacted in 1957 to modify the *Jencks* case by establishing standards and procedures enabling a defendant criminally prosecuted by the United States to obtain from the government any statement of a witness which relates to the subject matter about which the witness has testified. It includes discussion of how much the statute allows the judge to decide *in camera*.

10 pages.

Gambling

5609. A bill amending Massachusetts gambling laws to prohibit gambling by use of automatic amusement devices. It includes provisions making the winner liable to the loser for his loss; imposing similar liability on an owner, tenant, or occupant who knowingly consents to the proscribed gambling on his premises; fining a winner twice the value of any gains over $500; fixing lesser fines or imprisonment for any participant, operator and knowing owner, tenant, or occupant; and forbidding any person licensed to use automatic amusement devices from allowing minors access to them on penalty of revocation of license. 5 pages.

Loitering

6512. An ordinance for the city of Akron, Ohio, making it a misdemeanor to loiter or wander about in a public place in such a manner as to either obstruct traffic or annoy others to an unreasonable extent. A precondition to the offense is a refusal to obey police instruction to stop the offensive conduct or leave the premises. 7 pages.

Suspicious Persons

6512. An ordinance for the city of Akron, Ohio, making it a misdemeanor to act in such a manner as to give reasonable grounds to believe a criminal act is about to be committed. Procedural safeguards include a requirement that the suspect be afforded as soon as possible an opportunity to explain his presence and conduct. The suspected criminal act must be one which would cause immediate harm to other persons or property in the vicinity.

5 pages.

EDUCATION

Administration

5615. A bill making the state teachers colleges, community colleges, and the Massachusetts School of Art at Boston branches of the University of Massachusetts. Besides giving the trustees general powers over these schools identical to those over other branches,

it deals with such special problems as arrangements for schools for practice teaching, payment of tuition, and of faculty tenure rights acquired under prior law. 6 pages.

Federal Assistance

6507. An act to amend Title I of the Higher Education Facilities Act of 1963 providing that federal grants be given to institutions of higher education for the "achievement of excellence" and for the "maintenance of excellence" in undergraduate instruction; the amendment includes criteria by which these standards are applied.

HOUSING

5819. A proposed housing code for East Orange, New Jersey, imposing basic responsibilities on owners of all buildings and additional obligations on owners and occupants of buildings used as dwellings. The Housing Authority may investigate any violation and issue orders on its own motion, on petition by any public authority or officer whose activities involve concern about the conditions of buildings or dwellings, or on petition of five residents of the municipality. Fine or imprisonment or both may be imposed for each day a violation continues after the time limit for correction given in any final order has expired, and if occupancy of the dwelling or building is a present and imminent danger to public health, the Housing Authority may call on public utilities to stop supplying it. 27 pages.

LOCAL GOVERNMENT

Local Option on Horse Racing Licenses

5612. A bill making issuance and renewal of licenses for horse racing in New Hampshire conditional on quadrennial approval by voters of the localities immediately affected by the existence of a pari-mutuel betting operation. Town voters decide separately for each race track within town boundaries; county voters choose whether or not to permit any pari-mutuel betting in the county regardless of the track's location. A memorandum also is available suggesting that under New Hampshire law town councils have the power annually to revoke race track licenses and describing the procedures used by other states providing for local option on racing. 16 pages.

PRIVILEGE

6518. An act for Massachusetts to establish a psychiatrist-patient privilege. Modeled partially on Conn. Gen. Stat. Ann. 52-146a, the act makes privileged communications relating to diagnosis or treatment of the patient's mental condition. Exceptions to the privilege are provided with respect to waiver, threatened violence, court-ordered examination, custody contests, and malpractice suits. 31 pages.

Supplementary Index to Bureau Drafts

SEARCH AND SEIZURE

Motor Vehicles

6310. An Act to authorize the search of motor vehicles and the seizure of evidence by law enforcement officers in Maine. It revises "An Act to Authorize the Search of Vehicles", 1 HARV. J. LEGIS. 51 (1964), and codifies the constitutional law of search and seizure. 13 pages.

URBAN DEVELOPMENT

6508. An open-space preservation bill to amend Title VII of the Housing Act of 1961, 42 U.S.C. § 1500. This amendment provides federal grants to cities to encourage the establishment of parks and other forms of urban beautification. The grants would to some extent compensate the cities for the loss of tax revenue. 19 pages.

ERRATA

Table I, p. 9, opposite "Nevada" add Open Public Accommodations, Statute Only.

Table II, p. 11, opposite "1965" add Nevada to the Public Accommodations column.

Page 323, line 16. For "precedures" read "procedures."

Page 326, lines 9-10. For "since this is not an absolute but a determination" read "since this is not an absolute but a comparative determination."

Page 348, lines 16, 26. Insert bracket before "SECTION 6. *Penalties.*" Insert bracket after "Act" in line 26.