HOUSE STUDY GROUP • TEXAS HOUSE OF REPRESENTATIVES
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HOUSE STUDY GROUP special legislative report

1977 CONSTITUTIONAL AMENDMENTS--ANALYSIS

This report contains detailed analyses of each proposed amendment.

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The elections division of the Secretary of State's office has a toll free number to answer citizens questions:

1-800-252-9602

Procedure for Adoption of Constitutional Amendments

1. The Legislature approves a joint resolution by 2/3 vote of the membership of each house. The amendment specifies when it is to be presented to the citizens for a vote.

2. The Secretary of State prepares an explanation (in English and Spanish) of each amendment. The Attorney General approves the explanation.

3. The order amendments appear on the ballot is determined in a drawing by the Secretary of State. Each amendment is accompanied by the description of the proposition contained in the joint resolution.

4. Public notice of the amendment is published by the Secretary of State in newspapers with general circulation in each county of the state. The notice contains the date of the election, an explanation of each amendment, and the wording as it is to appear on the ballot. Publication occurs twice--first, between the 60th and 50th days preceding the election, and then one week later. The notices are bilingual.

5. The entire text of the amendment and the sample ballot (in English and Spanish) are sent to each county clerk. The text is posted in the County Courthouse at least 30 days prior to the election.

6. The counties have bilingual ballots printed at their own expense.

7. Approval by a majority of the votes cast is required for passage.

8. The Governor proclaims the adoption of the amendments which pass.

Seven amendments will be voted on this fall. Eight amendments will come before the voters in November of 1978:

HJR 37 Expanding jurisdiction of the Justices of the Peace to include civil cases where the amount in controversy is $1,000 or less

HJR 42 Authorizing use of water district funds for fire-fighting purposes

SJR 44 Permitting the legislature to authorize cities to issue bonds to finance redevelopment of certain areas

SJR 45 Providing for additional associate justices on a court of civil appeals

SJR 48 Abolishing the State Building Commission

SJR 50 Allowing the state to purchase certain products manufactured by handicapped persons

SJR 53 Exempting solar energy devices from property taxes

SJR 55 Permitting political subdivisions to develop employment opportunities

HOUSE STUDY GROUP

SJR 3

Constitutional Amendment Analysis

SUBJECT: Denial of bail

BACKGROUND: The constitution currently provides that bail may be denied to a person accused of a felony if he has previously been convicted of two separate felonies. The accused must be granted a hearing at which the prosecutor must produce evidence that "substantially" shows the guilt of the accused. The accused must be tried within 60 days or the order denying bail is set aside. The accused has the right to appeal the denial of bail to the Court of Criminal Appeals. This provision has been in the Texas Constitution since 1956.

DIGEST: SJR 3 amends Article 1, Section 11a, of the Texas Constitution by allowing denial of bail to two additional classes of accused felons. The new classes are (1) those accused of a felony less than capital, committed while on bail for an indictment for a prior felony, and (2) those accused of a felony involving the use of a deadly weapon, after conviction of a prior felony.

The amendment contains limits on bail denials. Some of these are completely new, and some are new only in the sense that they apply to bail denials on the two new grounds. Only a district judge may order a bail denial. (Currently any judge of a court of record or any magistrate may deny bail.) The order must be issued within seven days of the time the accused is jailed (new). The order is set aside if the accused is not brought to trial within 60 days after arrest. The order will not be set aside if the accused has asked for a continuance of the case. The defendant may appeal the denial of bail to the Court of Criminal Appeals. The Court is directed to give preference to these appeals (new).

PRO: This amendment has two basic purposes: (1) to reduce the crime rate, and (2) to provide safeguards against abuse of the bail denial procedure.

(1) It is a common occurrence for someone to commit a felony while out on bail after indictment for another felony. The Dallas District Attorney's office estimates that it is common for the police to pick up about 5 such cases a day. These cases overwhelmingly involve burglary. Robbery, hot checks, and forgery are other types of crimes that have frequent repeaters. Of all the convicted criminals in Texas, approximately 1/3 of them have been convicted of more than one crime.

Defendants usually do not want a speedy trial; they would prefer to delay the proceedings in order to make it more difficult for the prosecution to get witnesses together and to get them to remember the incident in question. Consequently, there is a long period of time in which the accused is out on bail and has the opportunity to commit another crime. Passage of this amendment will help the police and the prosecutors keep criminals off the streets. If the categories of bail denial are expanded, our percent of repeat-criminals will decline, and thus the crime rate itself will be reduced.

(2) This amendment is written in such a way as to protect the constitutional rights of defendants. It would be very difficult for police or prosecutors to use denial of bail in a way that would violate the rights of the accused. The order denying bail must be issued within seven days after incarceration of the accused. It cannot be used to delay proceedings while keeping the defendant jailed. The order must also come from a district judge, rather than any judge in the state. Again, this means that adequate attention and scrutiny will be given to the case. A hearing must be held before denial of bail, and the prosecution must show, by substantial evidence, that the accused is guilty of a felony. If bail is denied, the accused must be tried within 60 days or the bail denial order is revoked. Whenever bail is denied, the accused is given the right to appeal the case, and the Court of Criminal Appeals must give preference to such cases.

It is apparent, then, that SJR 3 will not result in too much concentration of power in the hands of police and prosecutors. It will be difficult for them to get denial of bail, which will insure that only those who should be off the streets will be denied bail. And when bail is denied, it will mean fewer criminals loose to commit more crimes, which, in turn, will mean a safer society.

CON: There are two primary objections to this expansion of bail denials. First, it will probably make no significant change in the number of bail denials and will not effect the crime rate. Second, it gives police and prosecutors an unconstitutional means to abuse individual freedoms. Even if it proves as "useful" as its proponents claim, it will have undesirable side effects.

(1) The amendment will have little impact on bail denials or the crime rate.

According to a 1970 survey of prisoners in the U.S., 52% were in prison without bail. Yet, the crime rate continued to rise. Why, if denial of bail reduces crime, has the reduction not occurred? And how will additional denial of bail reduce crime when it has not done so yet?

The current provision allowing denial of bail after two prior felony convictions is virtually never used. One reason is that the prosecution rarely has a case ready for trial within 60 days. The chief reason, however, is that the provision (and this proposed revision) is unnecessary to a prosecutor: he simply gets the bail set so high that the defendant cannot pay it. Most prisoners who are awaiting trial are in jail not because they have been denied bail, but because it is purposely set at such a level to assure that they cannot pay it. Most people involved in these instances (burglaries, drug cases, armed robbery) are simply too poor to put up even the 15% charged by a bail bondsman.

This proposed constitutional change, then, will make little if any difference in law enforcement. If bail is denied and the 60 day limit of bail denial is reached, the bail can then just be set at a high enough level to assure that the defendant must remain in jail due to inability to pay. If bail is not denied, it can still be set at a higher level.

It is rare that a person is arrested for a felony while out on bail from another felony indictment. If the figure of five a day is true in Dallas, that certainly is not the norm for the state. Austin, for instance, experiences such an occasion only once every month or two.

SJR 3, then, will simply add verbiage to the constitution. It will change our law enforcement very little, if any. Most of those who might be covered by it are already kept in jail by means of artificially high bail (which is probably also unconstitutional, but is widely used). This amendment appears to be a political ploy intended to make its proponents look good in the public eye as crime fighters.

(2) While SJR 3 will likely have little effect on the crime rate, it gives police and prosecutors a means to abuse individual freedoms.

Denial of bail is preventive detention: the jailing of a person without trial on the basis of a prediction that if not jailed he may be a danger to the community. It has no place in a free society, and is unconstitutional. It takes us a step back to governmental forms of old (and of current dictatorial regimes) where the government could jail anyone for anything in order to suppress opposition. While this extremity may or may not happen here, this proposal would certainly open the way for government to misuse that potential power. The last few years have proved that our governmental agencies are not worthy of such trust.

If this amendment is passed, it will place too much power in the hands of the police. Such power lends itself to abuse. This amendment will allow police to harass those that they do not like. Suppose the police pick up someone and he is subsequently indicted for a felony and released on bail. The police could simply pick him up again and charge him with a felony. This would result in his imprisonment--even though he had never been convicted of any crime.

Requiring an indictment for a prior felony is not a sufficient protection for the innocent accused. Indictments are very easy to obtain. Grand juries frequently rubber stamp the wishes of the prosecutors, without an independent investigation of the case. Proposals for reform of the grand jury system have been made for several years. Unless or until changes are made in the indictment procedure, this constitutional amendment will not be able to provide safeguards for defendants.

SJR 3 goes a long way toward reversing the presumption of innocence that our constitutional system is based on. The mere accusation of a crime results in the punishment of jailing without proof of guilt. Furthermore, the bail hearing merely requires evidence substantially showing guilt, not proof beyond a reasonable doubt. The hearing cannot protect the constitutional rights of the defendant. If it is not a full-blown hearing, with all available witnesses and testimony considered, then a decision to deny bail could easily send an innocent person to jail. If it is a full-blown hearing, then why not go ahead and have the trial?

A denial of bail (and its ensuing publicity) is prejudicial to the defendant. Statistics from the Law Enforcement Assistance Administration and other sources show that a person in jail has less chance of being acquitted than does someone who is out on bail.

The 8th and 14th Amendments to the U.S. Constitution would be violated by this bail denial provision. The U.S. Supreme Court stated in Stack v. Boyle (1951) that "This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of a punishment prior to conviction....Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." While the Supreme Court has not ruled directly on the applicability of the 8th Amendment to the states through the 14th, there are indications that the Court would hold that it is applicable, and two circuit courts have held that the excessive bail prohibition of the 8th Amendment is applicable to the states through the 14th. The Second Circuit Court stated, in 1972, that "Although this provision of the Bill of Rights has not yet been held by the Supreme Court to be one of those made applicable to the States through the Fourteenth Amendment, we entertain little doubt that it will be." (U.S. ex. rel. Goodman v. Kehl).

Even if denial of bail in some circumstances is constitutional, the Texas provisions, both current and proposed, are not written in such a way as to be constitutional. The District of Columbia's Code for denial of bail has been ruled constitutional by a circuit court. It allows denial of bail to those charged with a dangerous crime where there exist no conditions of release which would guarantee the safety of the community, and it allows denial of bond where the accused was convicted of a crime of violence within the preceding ten years. The Supreme Court has also stated that a "Statutory classification based upon suspect criteria or affecting "fundamental rights" will encounter equal protection difficulties unless justified by a 'compelling governmental interest.'" SJR 3 sets forth no compelling governmental interest. Its constitutionality is suspect.

(3) If it is as "useful" as its proponents claim, it will have undesirable side effects.

It will further jam our overcrowded court dockets. The current bail denial procedure is rarely used. But when it is used--as in the Frank Smith and the Cullen Davis cases--it results in more litigation. Successful use of the proposed revision would mean longer court dockets, longer wait for trial, and more state expense for new courts and judges.

It will create a crisis in our prisons. These jails are already overcrowded. More overcrowding cannot be tolerated. It will require greater outlay of state funds to build more prisons and hire more guards. The U.S. already has a higher percent of its population in prison than any other country in the world. Our crime rate has shown that having more jails does nothing to reduce the causes of crime.

COMMENTARY: The proposed amendment applies to felonies less than capital. The constitution currently allows denial of bail in capital offenses "when the proof is evident." This means there must be evidence that the accused, with a cool and deliberate mind and formed design, maliciously killed the deceased, and a dispassionate jury would, upon presentation of evidence, not only convict, but assess the dealth penalty.

SB 52, passed during the regular session, regulated bail after conviction pending appeal. A defendant convicted of a felony and assessed a penalty of more than 15 years was and is not able to get bail pending appeal. If the penalty was less than 15 years, bail was automatic. SB 52 changed this. A person convicted for less than 15 years is entitled to bail at the discretion of the trial court, and the court is permitted to impose reasonable conditions on bail.

One reason that the current bail denial provision is not used is that prosecutors must have their case ready for trial within 60 days. This is not easy to do. Another reason is that the prosecution must reveal at least part of its case in the bail denial hearing. Few prosecutors are willing to do so.

The amendment is supported by the Texas District and County Attorneys Association. It is opposed by the Criminal Defense Lawyers Association and the Texas Civil Liberties Union.

The Texas Civil Liberties Union is considering bringing suit against the state for its bail denial provisions. If this amendment passes, the state will probably be called on immediately to defend its constitutionality. TCLU claims that it violates the provisions of the U.S. constitution concerning bail.

Seven other states have provisions for pre-trail denial of bail if a felony is committed while out on bail: Arizona, Florida, Indiana, Maryland, Nevada, Tennessee, and Utah. Provisions vary from automatic revocation or denial of bail to permitting bail but requiring that any sentence for an offense committed while on bail will be served consecutively with the previous sentence rather than concurrently. In Arizona, a felony while on bail is a separate offense and adds five years to the sentence. In Florida, the denial of bail while a crime is committed on bail applies only to appellate bond.

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SJR 5

Constitutional Amendment Analysis

SUBJECT: Tax relief for cultural, historical, or natural history resources

BACKGROUND: In the 1960s attention was drawn to preservation of the nation's historical sites. That attention has continued to grow. In 1966 Congress passed the Historic Preservation Act, which established national criteria. A tax exemption for historical sites was discussed, but was not made a part of the bill. This Act was the result of a White House Conference on National Beauty in 1965, which had recommended tax policy revisions to help in the preservation and restoration of historic sites. Historically, the exercise of state police power has been used to preserve historic properties. Increasingly changes in tax policies have been used to accomplish this purpose.

In 1959 the Texas Legislature established the Texas State Historical Survey Committee, now the Texas Historical Commission. Its duties are to furnish leadership, coordination, and services for organizations, agencies, institutions, and individuals with interest in preservation of historical heritage. It administers the state's historical marker program and the National Register Program in Texas. The owner of any property so designated must give 90 days notice to the Commission prior to its destruction. This time period can be used by conservation groups to attempt to save it or to photograph it.

The Texas Historical Foundation is a private organization that works for preservation of historic sites. This organization and other private organizations work on statewide and local levels to preserve and restore historically significant property.

In 1969 the Legislature established the Texas Conservation Foundation for similar purposes. It is to encourage gifts or sale of properties to the state. All the property that it receives or owns, and any income from property, is exempt from taxation. The property cannot be used for private benefit or profit.

The Nature Conservancy of Texas is a chapter of a national organization that seeks to preserve unique ecological features. It acquires title to land scheduled for ultimate government ownership and sells it to the government when the government has the money for it, at the same price. It also receives gifts of land as trade to acquire other lands. The Conservancy has a tax exemption on all its properties.

In 1976 Congress passed a tax reform act. It allows commercially used property listed in the National Register to recover the

cost of restoring such property through tax relief. The total expense of approved renovation can be written off over a five-year period.

DIGEST: The proposed amendment allows the legislature to pass laws providing for tax relief to preserve cultural, historical, or natural history resources. The manner of designating such property will be determined by law. The "tax relief" may be a total exemption or some other relief from state ad valorem taxes. The legislature may permit a political subdivision to designate appropriate property for exemption or other relief from its taxes.

PRO: Our civilization on the American continent is relatively new. But 300 years of living here has now given us properties and settings that made our history. Many of these sites have been demolished because of economic considerations. In urban areas land usually has a higher economic use than historically-significant improvements which exist. Consequently, preservation is difficult to sustain.

We need to preserve our past--to learn from it, to view it, to pass it on to the next generations. It is socially unifying to have historic landmarks. The Europeans know this. They made a special effort to rebuild their historic cities after World War II.

It is frequently economically infeasible for an owner of an historic building to keep up the property. It is often remodeled, renovated, or rebuilt to such an extent that it no longer resembles the original building. Or, even worse, it is demolished to make way for a new office building or a parking lot. Allowing the owner a tax break would provide incentive for him or her to maintain the building in its original state.

One method that is used to help preserve old buildings is the enactment of legislation requiring the owner of any designated historic building to obtain prior approval before altering or renovating the building. While these laws are needed to preserve property, they also have the effect of reducing the property value (since the property cannot be freely developed). The owner needs tax relief as compensation for reduction in the value of his or her property.

Our heritage is more than recent history. Our natural environment has had much to do with the development of today's society. We should preserve resources reflecting our natural history.

Some places have particular importance from a cultural standpoint. These too deserve protection.

This proposed amendment would not be a financial burden on the state. The Legislative Budget Board found that its passage would have limited impact on the state's total tax liabilities, and would have a negligible impact on state ad valorem tax revenues. Historic sites often attract tourists from other parts of the state, and from out-of-state. Preservation of these sites can mean more tourism and money for Texas.

The amendment provides the basic authorization and framework for the tax relief. It leaves the details to the legislature and to local political subdivisions. This permits flexibility while eliminating the need to amend the constitution frequently.

Local governments would not be forced to grant the exemptions. They will have the option to do so. They will also have the ability to determine exactly what form of tax exemption would be best for their community. The enabling legislation already passed does not restrict local governments to a particular kind of exemption. Cities and counties that can afford to grant such relief will do the state a favor by helping to preserve its historic sites. An exemption can be fitted to local needs. Those localities that cannot afford to do so would not be forced to.

CON: Any tax exemption increases the regressive nature of the property tax by requiring non-exempt property owners--mainly the individual homeowner--to subsidize exempt properties by paying higher taxes. This proposal would place an inequitable burden on the community for the benefit of a few. Property tax exemptions impair or constrain the ability of cities to generate tax revenues, thus causing higher tax rates. Texas already has too many tax exemptions. We simply do not need more, for whatever purpose.

This exemption will probably have the effect of allowing commercial business organizations, who happen to operate from an old building, to get a tax break. The citizens of the state, then, will help a few businesses to make a greater profit by paying higher taxes themselves.

Tax exemptions for historic sites will come with strings attached. Private property owners will have to give up some of the rights to their property to get the tax break. Already some cities in Texas have enacted zoning statutes which forbid owners of buildings that are designated as historic from altering or improving those buildings without prior approval. Dallas, Georgetown, Galveston, San Antonio, Austin, and Granbury have such zoning restrictions. Some of the historic zoning restrictions are now being fought in court.

SJR 5 in no way assures public access to the state's historic sites. If the building is privately owned, the tax exemption

does not mean that the public will ever be allowed to see the historic site that their taxes help to underwrite. There seems to be much more private benefit than public benefit.

SJR 5 simply will not help much in the preservation of historic sites. We need a comprehensive plan. We need designation of historic zones, public acquisition, easement rights, requirements for similar architectural design in certain areas, etc. Other states, and some localities in Texas, have such programs. Tax relief alone may give the appearance that the state is helping, but will actually do little to solve the problem.

Neither this amendment nor the "enabling" legislation (SB 595, passed during the regular session) provides specific definitions. What is meant by "cultural resources" or "natural history resources"? What is "other" tax relief? The amendment is too vague and open-ended.

COMMENTARY: SB 595, passed during the 65th regular session, allows local tax relief for historical sites if this amendment passes. It does not appear to cover cultural or natural history resources. It provides no relief from state taxes. The act allows the governing board of a political subdivision to exempt from taxation all or part of a structure and the land necessary for access and use. The site must be specifically designated for tax relief by the political subdivision.

Texas has over 1,700 recorded historic landmarks. The Commission has only been working for eight years, and has many other sites that it has not had time to scrutinize. This figure should continue to grow.

Many landmarks are already exempt from taxation because they are churches or educational facilities. The Conservation Foundation, however, owns very little property. Consequently, the tax exemptions granted in the 1969 statutes do not, at this time, affect many sites.

Deductions for property taxes may be claimed on Federal income tax returns; however, this provision is precarious. President Carter has indicated that he may move to strike this exemption in his tax reform proposal.

Areas of the state that would probably benefit most from a tax exemption for historic sites would be Galveston and San Antonio. El Paso, Dallas, and Austin also have local historic landmark commissions.

Many states grant a particular historical society tax exemption on properties that it may own. The Society for the Preservation of New England Antiquities, for example, is

given tax exemptions in several states for the purpose of saving as much of the region's landmarks as possible. While Texas grants tax exemptions to properties controlled by the Conservation Foundation, this organization is virtually dormant.

The actual form of the tax relief is to be determined by the legislature and the political subdivisions. Tax relief options are many and varied:

exemptions for maintenance and repair--The cost of specified alterations and improvements may be deducted from the taxable value over a given period of time.

tax credits--Maryland allows a tax credit of up to 10% of the owner's expenses for restoration, and up to 5% of the expenses for designing new construction architecturally compatible with historic structures. The credit is deducted from local property taxes over a five-year period.

assessments at less than market value--Property could be exempted on a certain amount of the full assessed value, or property could be assessed at less than full value or a previous full value, or taxes could just be held constant over a period of years.

partial exemptions--Missouri provides a schedule of partial real property tax exemption for 25 years. For the first 10 years the developer is required to pay taxes only on the land at its present assessment and to make a contribution in lieu of taxes on the former improvements. For the following 15 years the tax is levied on one-half of the assessed valuatiion of the land and improvements. This exemption does not reduce the existing tax base, and encourages redevelopment of deteriorated property.

SUBJECT: Veterans' Land Fund

BACKGROUND: Historically governments have provided special awards to their soldiers after they have completed active service during a war. Many have awarded cash bonuses. The Republic of Texas reserved large tracts of its public land to grant to its soldiers. The State of Texas continued this practice. With the large influx of veterans after World War II, this method was impractical. The Veterans' Land Fund was authorized by state constitutional amendment in 1946. The sale of general obligation bonds provided $25 million. This was then used to purchase some 5,000 tracts of land for resale at favorable terms to veterans of World War II.

Since 1946, the constitution has been amended several times to provide for increases in the Land Fund. Approximately 17,000 veterans purchased land from a $100 million authorization in 1956. About 20,000 veterans purchased land from a $200 million authorization in 1967. The last $25 million is currently being sold from a $100 million authorization in 1973. Constitutional amendments asking for $150 million in 1963 and $200 million in 1965 were defeated by the voters.

The current constitutional provision (Article III, Section 49-b) authorizes the issuance of full faith and credit bonds in the amount of $500 million. Proceeds are used to purchase land for resale to veterans. Money from the sales to veterans pays off the bonds. Any profit from the program goes into the state's general revenue fund. The program is governed by the Veterans' Land Board consisting of two citizens and the Land Commissioner.

In general, a veteran is eligible if he:
(1) has served at least 90 continuous days in active duty,
(2) was a Texas resident when he entered the military or has been a Texas resident for five years, and
(3) has not been dishonorably discharged.

The land to be purchased must be at least ten acres. The maximum loan is $15,000. The loan terms are 40 years at 6% interest, with a 5% down payment.

DIGEST:

The proposed Constitutional Amendment will make two changes in the existing law:

(1)

It authorizes the veterans' Land Board to issue and sell an additional $200 million worth of bonds, and

(2)

It makes the unmarried surviving spouse of a veteran who died in the line of duty eligible for the program.

PRO: The Veterans' Land program is the best way to demonstrate the deep appreciation felt toward the veterans of this state for their great service to country and state. There are many veterans who have not yet been able to participate in the land program. The program has been slowed by a lack of funds to purchase land.

Although veterans of World War II and Korea still apply, the greatest impact will be upon Vietnam veterans. They have not had an adequate opportunity to take advantage of the program.

The program is completely self-sustaining. In fact, the program has made money from such operations as the resale of land and rents from land not yet sold. The default rate has been very low. The defaulted lands can easily be sold to other veterans. There is no financial reason to discontinue this healthy and beneficial progam.

The addition of the unmarried surviving spouses of veterans killed in the line of duty to those eligible for the program is simply another small gesture of gratitute. Their number is small and surely will not affect the program.

CON: The program has to a certain extent outlived its original purpose. The wars which the program recognizes are now in the distant past. The state and people of Texas have adequately demonstrated their gratitude. A further authorization of funds will only make discontinuing the program more difficult. The last $100 million worth of authorized bonds is just now being sold. This is an adequate amount to wrap up the program.

If allowed to continue, the program should at least be limited to Vietnam veterans; other veterans have had an adequate opportunity to avail themselves of these benefits.

The program is used by only a small number of veterans. In the 28 years of its existence only 61,000 of the many eligible veterans have purchased land through the program.

Veterans already receive many benefits from the federal VA program. It provides them with lower interest rates on loans, no down payments and guaranteed bank loans. The VA program allows more freedom in the choice of land than the Veterans' Land Program. The state program should be ended because it overlaps and is inferior to the federal program. Other states have already eliminated their veterans' land programs.

COMMENTARY: Since its creation in 1946, over 61,000 veterans have participated in the program. Over 23,000 of the loans have been paid off in full. The program accounts for over 3.8 million acres of land at an average price of $134 per acre. Since January of this year there have been almost 15,000 requests for applications.

Alaska, Hawaii, and Oregon also have a veterans' loan program. The Alaska program is the most extensive. It allows personal loans of $10,000, farm and home loans of $55,000, and business loans of $100,000. California abolished their veterans loan program in 1957 and Oklahoma did the same in 1975.

HOUSE STUDY GROUP

SJR 18

Constitutional Amendment Analysis

SUBJECT: Expanding the Court of Criminal Appeals from five to nine judges and allowing it to meet in panels of three judges.

BACKGROUND: Overloaded dockets persistently plague the Texas courts. Reformers have pushed several plans to relieve the problem. The Texas Constitution contains detailed provisions for the court system. Most major reforms require a constitutional amendment.

The Constitution of 1876 created a Court of Appeals to take over some of the caseload from the Supreme Court. The Court of Appeals was given jurisdiction over all criminal appeals and some civil appeals.

Fifteen years later, in 1891, the voters adopted an amendment to the Constitution that changed the Court of Appeals to the Court of Criminal Appeals. The court had jurisdiction over criminal appeals only. The amendment also created a Court of Civil Appeals as an intermediate court for civil cases. The Court of Criminal Appeals had final say in criminal cases while the Supreme Court was the court of last resort in civil cases.

Large case loads and undue delays spurred additional changes. A 1925 law created a two-member Commission in aid of the Court of Criminal Appeals. A constitutional amendment adopted in 1966 expanded the Court of Criminal Appeals from three judges to five judges. Two other commissioners were added in 1971.

The current court system follows the basic outlines set down in the 1891 amendments. District courts hear both criminal and civil cases. Civil cases are appealed first to the Court of Civil Appeals and finally to the Supreme Court. The Supreme Court can decide whether it wants to review a particular case. Criminal cases go directly to the Court of Criminal Appeals, which is the court of last resort. It must review all appeals brought to it.

The number of cases brought to the Court of Criminal Appeals has increased substantially over the last ten years. The following table shows the number of new cases filed each year.

TABLE 1. Number of new cases appealed to the Court of Criminal Appeals from 1967 to 1976.

Year	Number of new cases	Percent change over previous year
1967	947	n/a
1968	867	-8%
1969	893	+3%
1970	1057	+18%
1971	1328	+26%
1972	1394	+5%
1973	1628	+17%
1974	1546	-5%
1975	1863	+21%
1976	2458	+32%

Source: Court Clerk of the Court of Criminal Appeals.

These figures are only new cases. They do not include cases carried over from the previous year, applications for writs of habeas corpus, and other motions.

The Court carried over 696 cases from 1975 into 1976. It carried over 1075 cases from 1976 into 1977.

As of August 19 of this year, 1,920 new cases have been filed with the Court. The Court Clerk estimates that the Court is an average of one year behind on its docket.

Reformers have at least three proposals. One suggestion is to combine the civil courts and the criminal courts into one, unified system. Another proposal is to set up intermediate criminal appeals courts between the district courts and the Court of Criminal Appeals. These two proposals are explained in more detail in the Commentary section below. The third suggestion is to expand the Court from five to nine judges and to allow them to sit in three panels of three judges to hear cases. S.J.R 18 proposes the last idea.

DIGEST: This resolution proposes a constitutional amendment to enlarge the Court of Criminal Appeals from five to nine judges. The Court will be able to sit in panels of three judges designated by rules of the Court. The Presiding Judge under rules of the Court will convene the Court en banc to hear capital punishment and other cases as required by law. The two members of the Commission in aid of the Court will become judges. The governor will appoint the other two new judges. The Court will be given the power to issue writs of mandamus, procedendo, prohibition, certiorari, and certain others it needs to protect its jurisdiction in criminal matters.

PRO: The Court of Criminal Appeals is an average of one year behind on its case docket. This kind of delay is unfair to society and defendants alike. In some cases, people wrongfully convicted of serious crimes sit in jail during their appeal. In other cases, people rightfully convicted are out on bail during their appeal. This amendment offers the best way to deal with the backlog within the present system and end this injustice. Three panels can hear more cases than one full court can. The full court will only meet to resolve conflicts between the panels and to hear capital punishment cases. Appeals will move more quickly through the system.

It is not unfair to the defendants to have three judges hear a case instead of nine judges. The Court of Criminal Appeals had only three judges from 1891 until 1967.

Enlarging the Court is faster and less expensive than setting up intermediate criminal appeals courts. Intermediate appeals courts prolong the appeals process by imposing an additional step. Also, the full court can resolve conflicts between its own panels more easily than conflicts between autonomous courts.

The voters rejected an integrated court system with intermediate courts in 1975. It would be foolish to resubmit the proposal so that it can be defeated again.

Many of the proponents look for additional reforms in the future. Some of them support a unified system - others support intermediate courts. All of them believe that SJR 18 is the only politically acceptable solution at this time.

CON: This amendment is patchwork - a band-aid solution to a serious problem. What is really needed to reform the Texas court system is to combine civil and criminal jurisdiction under one supreme court with one system of intermediate appeals courts. The system now encourages two separate types of justice. Criminal judges become cynical to the human side of justice. The dual system produces judges with narrow points of view. This amendment will hinder efforts to get an integrated system.

Short of total integration, a system of intermediate criminal appeals courts should be set up. According to former Supreme Court Justice Robert Calvert, experience in other states shows that intermediate courts will cut the caseload of the highest court by one-half to five-sixths while still guaranteeing each case one appellate review. He points out than in Texas Civil Appeals Courts, 52% of the appeals stop at the intermediate court level.

Adding judges to the Court of Criminal Appeals will not solve the problem. Texas already has twice as many judges on its highest courts as any of the seven most populous states. More judges means more opinions and more time on every case. Besides, counting the Commissioners, the Court already has nine judges.

Texas experience also shows that panels of judges are undesirable. A 1945 amendment to the constitution allows the Supreme Court of Texas to meet in sections. The Court tried and quickly abandoned the practice. Lawyers and judges preferred to have the full court hear each case. They felt that it was unfair to the parties to have only three judges hear a case - it's like having six judges sleeping and only three listening. Opponents of this amendment think that the Court of Criminal Appeals will feel the same way.

Furthermore, the panels will eventually disagree on a point of law. In effect, the court of last resort could hand down conflicting decisions on identical points. This is a more serious and confusing problem than having conflicts between intermediate courts.

In a way, the panels are intermediate courts. A defendant may ask the full court to rehear a panel's decision. The panels cannot meet when the full court meets. It's better to set up intermediate courts that sit continuously instead of panels that meet off and on.

COMMENTARY: Some details involving implementation of the amendment (should it pass) include:

-- The amendment will take effect on January 1, 1978.

-- The five present judges will serve the remainder of their six-year terms.

-- The two Commissioners who become judges will decide between themselves who will serve a three-year term and who will serve a five-year term.

-- The two judges appointed by the Governor (with the consent of the Senate) will serve until the 1978 general election.

Presiding Judge Onion and Judge Roberts spoke in favor of the resolution. All of the judges on the Court of Criminal Appeals support the amendment. Some of them prefer other solutions, but felt that this amendment was the only one which would pass the Legislature.

The Texas Criminal Defense Lawyers Association also supports the amendment.

The Texas Judicial Council supports unification of the court system.

Former Supreme Court Chief Justice Robert W. Calvert opposes the amendment in favor of a unified system.

Some reformers think that SJR 18 does not go far enough (see con argument). They advocate either adding intermediate criminal appeals courts or unifying the civil and criminal appeals courts. Some specific proposals are discussed below.

Intermediate Criminal Appeals Courts

HB 2056, introduced by Representative Baker during the 65th Legislature, would have created six intermediate appellate courts called Circuit Courts of Criminal Appeals. These courts would have the jurisdiction over criminal cases that is now placed with the Court of Criminal Appeals. The bill provided for an immediate reduction in the docket backlog facing the Court. Any case pending but not yet heard by the Court of Criminal Appeals can be transferred to the circuit courts. Thereafter, the circuit courts would be the final voice in most cases. An appeal could still be taken to the Court of Criminal Appeals but only under the limited circumstances similar to those governing appeals from the courts of civil appeals to the Supreme Court. These circumstances are: where a dissenting opinion has been filed in the intermediate court, where the intermediate court's ruling conflicts either with a ruling of another intermediate court or the Court of Criminal Appeals, or where a ruling of the intermediate court invalidates a criminal law.

Proponents of the intermediate court system point out that it will immediately reduce the backlog facing the court and it will help prevent the recurrence of a backlog by limiting the appeals which can be taken to the Court of Criminal Appeals.

By making the criminal appellate system similar to the civil system, proponents believe it will be easier to combine the two systems. Many believe that such unification of the judicial system is inevitable.

The Unified (or Integrated) System

A unified system would join the civil and criminal appeals courts. Voters rejected such a system in a constitutional amendment proposed in 1975. That system was composed of the following courts:

-- A supreme court would administer the judicial system and would be the court of last resort for civil and criminal matters.

-- Courts of appeal would be intermediate appellate courts to review appeals of civil and criminal matters.

-- District courts would be trial courts of general, original jurisdiction.

-- Circuit courts would be trial courts of original jurisdiction for special types of cases.

County, justice, and municipal courts would not be included in the unified system. These courts would remain local courts with limited jurisdiciton. County and municipal governments would continue to finance them. Many special courts would be eliminated.

Cases would enter the unified system at the district or circuit court level. The courts of appeals would receive all the appeals of trial court decisions. There would be thirteen or fourteen courts of appeals, each with three judges. (The present system has fourteen courts of civil appeals. The constitutional revision, proposed in 1976, planned to join the two Houston courts into one court with six judges.)

The supreme court would be the court of last resort in both civil and criminal matters. The supreme court would sit as a second reviewing court to produce uniformity in the law across the state and to correct major errors of the courts of appeals. It would review cases when decisions of an appeals court conflicted with previous decisions by other courts (including trial courts), or when an appeals court ruled a law to be unconstitutional. Decisions on facts of a case would not be appealable to the high court. The supreme court would retain its responsibility of administering the court system.

Proponents of the unified system advance several arguments in its favor. It is more efficient and less costly than keeping up two separate appeals systems. It is a more rational, simpler design than the current hodge-podge of courts. The unified system would avoid the move to two brands of justice found in the present set up and would thereby produce higher quality justice. It is a more flexible arrangement that would end bloated backlogs in the courts.

Some proponents speculate that the Governor would oppose any effort to set up intermediate criminal courts or an integrated court system. (The Governor's Office would only say that the Governor opposed the court system in the proposed constitution of 1975.)

HOUSE STUDY GROUP

SJR 19

Constitutional Amendment Analysis

SUBJECT: Formation of and assessment of fees by agricultural or marine commodity groups.

BACKGROUND: In 1967 the Legislature passed the Texas Commodity Referendum Act. It provides a means to have a referendum among the producers of a particular agricultural commodity. The producers of a commodity choose whether to create a commodity board and whether to assess a fee on the product. Agricultural commodities are broadly defined, encompassing plants, bees, livestock, poultry, and products therefrom. However, rice, flax, and cattle are exempt from the act.

Each commodity board is a state agency. The fees it collects on a product may be used for research, predator control, disease and insect control, education, promotion, and administration. The board is prohibited from spending the money for political purposes, such as legislative lobbying. It may adopt rules and cooperate with others to carry out its responsibilities.

A favorable vote by 2/3 of the producers or by the producers of 50% or more of the product is required to create a commodity board and permit it to assess producers. A referendum can be held either statewide or in a designated area. Since the act was passed, commodity boards have been authorized by producers of grain sorghum, mohair, peanuts, pecans, pork, soybeans, turkey, and wheat. A 1972 referendum among sheep and goat raisers and a 1977 referendum among corn growers did not receive approval.

The vote which approves creation of the board also approves the assessment rate. The fee is generally collected at the point of sale by the producer. Under a 1969 amendment to the act, all producers within the area must pay the fee. However, a producer may request a refund of the fees he has paid.

In 1975 the Texas Supreme Court ruled that the mandatory fees violated Article 8, Section 1 of the Constitution, which states that "persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." Since the ruling producers have been able to exempt their products from the fees before payment, as well as asking for a refund after any payment. This has resulted in a substantial decline in revenues for the boards.

The finance article of the constitutional revision proposed in 1975 allowed such mandatory fees. It was defeated overwelmingly by the voters.

DIGEST: This amendment would add Section 68 to Article 16 of the Texas Constitution. It allows the legislature to authorize formation of associations for agricultural and marine commodities, and the collection of assessments of their product sales voted by the

producers. It stipulates that the assessments may not be considered a tax if provision is made for refund of the assessments on request of individual producers. The 1967 act (as amended) and the referenda and actions taken under it are validated. However, assessments may not be required until November 8, 1977.

PRO: Commodity boards are worthwhile ventures. Money contributed to the boards has been used to increase sales, and this means more money for the farmers. For instance, after a visit to Poland by the sorghum people, Poland bought 30 million bushels. They had been buying virtually none. Money also goes to research to make better products. After the "greenbug" began destroying sorghum crops in 1968, the board contributed money to research the problem. It resulted in a workable short-range pesticide and a bug-resistant strain of sorghum. Price support levels for some commodities have been raised due to efforts by the boards.

Without mandatory collection of the fees, the boards are suffering from lack of revenue, and are having to cut back on programs. Before 1975, for example, the sorghum board collected on about 90% of the production. Now it collects on about 60%.

Producers have shown that they want to participate in the board programs and assessments. Six of the eight boards were established with a vote of over 80% of the voting producers for the proposal. Only two elections have resulted in a vote against establishment of the boards. The Turkey Producers Board has never paid a refund or had an exemption request in its seven-year history, which shows strong support for the Board and its programs The Turkey Board is the only one not suffering financially because of the Supreme Court ruling.

The drop in collections is not because of resistance from the farmers. It is chiefly due to reluctance on the part of the processors and grain elevator personnel to collect the fee. There have been instances where grain elevators, where the assessment is collected, have signed the exemption forms for the farmers, without the farmer's knowledge, so that they would not have to do the bookkeeping work. There have also been instances where one elevator has collected 100% from its farmers, and an elevator across the street has collected none. A recent survey of wheat producers and sorghum producers showed that most of those who signed exemption forms did not know they had declined assessment. Uniform assessment of all producers at the point of sale is the simplest way of collecting funds and assuring that those who wish to support a board are not discouraged from participation.

The amount of money that it costs an individual producer is not very much. An average sorghum producer may be assessed about $25 per year. Nevertheless, a full refund is available to any farmer objecting to payment of the fees. Further, the

boards and their assessment rates must be approved in advance by a vote of the producers.

CON: Mandatory assessments, even with the refund option, do constitute a tax on agriculture. The extra time and paperwork necessary to get a refund discourages people from requesting their assessments.

Commodity boards are not useful to many producers. That is why contributions declined when mandatory fees were removed. Farmers and ranchers are capable of watching out for their own interests. If some producers want a commodity board, let them participate voluntarily. Other farmers and ranchers should not be forced to contribute along with them.

Mandatory assessments are just an attempt on the part of private producer associations to get more money for their interests. While the money collected by the boards is kept separate from the associations' monies, it is essentially used by the associations for their own purposes. For example, money from the assessments frees up the association's money for use in lobbying. Every one of the eight boards works in conjunction with commodity organizations. Seven of the eight boards have directing officers who are also directing officers of the private associations.

Creation of the boards just sets up more bureaucracy and red tape and plush jobs for non-farmers. Much of the money collected by the boards goes for salaries, not for programs that benefit farmers. The trickle down effect just does not work.

The voters rejected this amendment before, and with good reason. Those who pushed this amendment two years ago lost, and are just trying once again to mount a public relations campaign to get the farmer's money.

USDA has recently implemented a national check-off system similar to this proposed one. Though no overlap now exists in the commodities covered, there is no provision to prevent such overlap. Why should producers be forced to pay fees to state and national organizations? Payment of such fees would be wasting money because it finances duplication of effort.

COMMENTARY: The law currently does not cover marine products. The constitutional amendment lets the legislature authorize commodity boards and assessments for marine products.

The eight products with commodity boards and their present assessments are given on the next page:

COMMODITY	ASSESSMENT
Peanuts	$1 per net ton
Grain sorghum	5¢ per ton
Turkeys	2¢ per live hundredweight plus 1¢ per head on mature birds
Soybeans	1/2¢ per bushel
Wheat	5 mills per bushel
Pecans	50¢ per 100 lbs.
Pork	10¢ per head
Mohair	2-1/2¢ per lb.

Commodity boards, in most cases, work in conjunction with producer associations. For instance, the grain sorghum commodity board collects the fees and contracts the services to the Grain Sorghum Producers Association (GSPA). The Executive Director of the GSPA also directs the commodity boards. The boards usually have no staffs of their own, but use the staffs of the associations. The GSPA, for instance, has a staff of 2 people, plus secretaries, and works with state and federal officials in obtaining governmental funds for projects, as well as contracting out research and other programs to Texas Tech, Texas A&M, and other agricultural research organizations.

The boards, and the associations, carry out market development programs and research on production and utilization problems. These programs include visits to foreign countries to conduct seminars and to attract new customers; sponsoring visits from foreign agricultural officials to view (and hopefully buy) American products, educational seminars for farmers, research into better strains of the products, research into pest control.

The amount of money collected annually varies from board to board. The grain sorghum board did collect about $200,000, but is now down to about $65,000. (Part of this decline results from a drop in the acreage used to produce sorghum.) The peanut commodity board collects about $200,000, soybeans, $20,000, and turkeys, $30,000.

HOUSE STUDY GROUP

SJR 30

Constitutional Amendment Analysis

SUBJECT: Changes in the Judicial Qualifications Commission

BACKGROUND: Prior to 1965, the Texas Constitution provided three methods for the removal of a judge. These methods were impeachment, address, and petition by ten lawyers to the Supreme Court. The last method was limited to District Court judges. There was general dissatisfaction with these methods because of delay and expense.

The Judicial Qualifications Commission was created in 1965 by an amendment to the Texas Constitution. A 1970 amendment broadened the Commission's authority. The powers of the Commission are listed in Article 5, section 1-A of the Constitution and in Article 5966a V.A.T.S.

The Commission consists of nine members. Two are Civil Appeals Court Justices, two are District Court judges, two are members of the State Bar and three are citizens.

Basically, the Commission has the authority to investigate the actions of any judge of any state court, including the Supreme Court, and recommend his/her removal or censure. A judge may be removed for "willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or the administration of justice."

The Commission is required to follow procedural rules set out by the Supreme Court. First, it hears the complaint. If the complaint appears valid, the Commission sends the judge a Notice of Preliminary Investigation. This letter tells the judge an investigation is being considered and gives him an opportunity to talk the Commission out of it. If the Commission decides to proceed, it files a formal complaint and asks the Supreme Court to appoint a master to conduct the investigation. The master may issue subpoenas to compel the attendance of witnesses and the production of documents. He conducts a full-blown evidentiary hearing with cross-examination of witnesses. The master finds whether the judge committed improper acts, based on the preponderance of the evidence. This is not a criminal proceeding, since its function is not to punish, but to maintain the high quality and integrity of the judiciary. Consequently, the findings of the master, the Commission and the Supreme Court need be established only by a preponderance of the evidence.

After receiving the report from the master, the Commission may reject the accusations and end the proceeding. Or it may recommend to the Supreme Court private reprimand, censure, removal or retirement.

Once the Commission has acted, the court may reject the recommendation, or retire, censure, reprimand, or remove the judge. The court makes the ultimate decision.

The decision of the Supreme Court is final.

Since its creation in 1965, the Commission has received about six hundred written complaints. The Commission has recommended that three District Judges be removed. Eight judges have retired while under investigation and nine judges have resigned. The Commission required the physical and psychiatric examination of two District Judges. Two District Judges were defeated at the polls while under investigation. Ten judges have received private reprimands from the Commission.

DIGEST: The proposed Constitutional amendment will make several significant changes in the Judicial Qualifications Commission. The name of the Commission will be changed to the State Commission on Judicial Conduct. The Commission's membership will be increased from nine to eleven members by adding one extra citizen representative and a Justice of the Peace. The Justice of the Peace will be selected by the Supreme Court with the approval of the Senate from a list of five nominees of the Justice of the Peace and Constables Association.

The amendment provides that the Commission may suspend a judge (with or without pay) if he is indicted for a felony offense. A judge also may be suspended after a sworn complaint has been filed for conduct inconsistent with the proper performance of duties or conduct casting public discredit on the judiciary. In that case, the Commission holds a hearing and makes a recommendation to the Supreme Court. The Supreme Court receives the record and decides whether to suspend.

The amendment lets the Commission publicly reprimand an errant judge. It now has the power to issue a private reprimand or a public censure. (However, it appears to have passed along to the Supreme Court any cases meriting censure.)

Retired justices of the Supreme Court and the Court of Criminal Appeals will be allowed to serve as masters under this amendment. Further, masters will be given the power of district judges in enforcing orders.

The amendment allows the Supreme Court to bar a judge from holding any future judicial office once the judge has been removed by the court.

The Commission would be allowed to issue a public statement at any time when sources other than the Commission cause notoriety and the best interests of the judge or the Commission would be served.

The amendment makes special provisions for removal of a Supreme Court justice. In such a situation, the Commission would make its report of a special court instead of the Supreme Court. The

special court would be comprised of seven members of the Courts of Civil Appeals selected by lot.

PRO: This amendment will make the Commission more modern and efficient. It allows it to be more responsive to its duties. Proposals such as these have been passed in California and have worked effectively in that state. The Commission method of judicial discipline is the least costly and the least time consuming removal procedure. This amendment helps make the procedure even more so.

The name, Judicial Qualifications Commission, is actually somewhat misleading since the Commission has nothing to do with qualifying judges. The new name would convey better to the public the actual function of the Commission

There are currently 903 Justices of the Peace in Texas. Since many of the complaints concern the Justices of the Peace, it is more equitable to have a Justice of the Peace on the Commission. Furthermore, the Commission will be able to take on an increased workload because of the increase in membership size. It won't cost much more because the Commissioners receive no pay for their work.

Suspension pending formal action will allow the Commission to further protect the integrity of the office and the good name of the judiciary. This protection is, after all, the purpose of the removal of any judge. Judge Carrillo and Justice Yarbrough could have been kept off the bench after their indictments.

Allowing public reprimand by the Commission increases its effectiveness without burdening the Supreme Court.

The inclusion of retired Supreme Court and Criminal Appeals Court justices as potential masters simply increases the pool from which to draw qualified individuals. It means an active judge does not have to be pulled away from his caseload.

A major defect of the Commission was its inability to bar individuals from holding office again. This provision is needed to further strengthen the authority of the Commission.

Allowing Civil Appeals Court judges to review conduct of Supreme Court Justices would avoid a situation which occurred in California. There the members of the Supreme Court were forced to sit in judgment on the disability of a colleague because of age.

CON: The Judicial Qualifications Commission is a direct affront to the maintenance of an independent judiciary. The importance of an independent judiciary has been recognized throughout the history of Anglo-American jurisprudence. It was a particular concern of the writers of the Constitution. Proponents of the amendment say that the independence of the courts is protected by the Supreme Court's role as the final decision maker. However, by then the damage to the judiciary may have already occurred. The new Commission will have only four judges. It will also have four

citizens and a Justice of the Peace who may not even hold a law degree. Furthermore, the amendment increases the power of the Commission. The greater the Commission's power of discipline over the judges becomes and the less representation judges have on the Commission, the greater is the chance that the independence of the judiciary will be compromised.

The Commission should not have the power to suspend a judge on a sworn complaint. This could open the judge to unnecessary attack from a variety of enemies. Already, most complaints to the Commission come from dissatisfied litigants. This would only make the problem worse.

The proposed procedure for allowing the Commission to make a public statement subjects judges to more harassment. The confidential nature of the proceedings is a major protection for all concerned. It would be a dangerous precedent to open up the proceedings.

Another concern is the provision allowing the Civil Appeals Justices to sit in judgment of a Supreme Court Justice. This should have been modified so that no Civil Appeals Justice already serving on the Commission would be allowed to serve on this panel.

There are other methods for maintaining judicial standards of conduct besides increasing the powers of the Commission. The Commission has not demonstrated that it can effectively use the powers that it has already been given. The Commission has never used its power of public censure. Furthermore, when it has acted, it has acted very slowly. An increase in the membership of the Commission will only exacerbate this situation.

Attention should be given instead to such things as the process by which judges are selected. If selections were made solely on the basis of merit, the need for sanctions would be greatly lessened. Many judges who eventually come under the scrutiny of the Commission would be initially screened out.

COMMENTARY: California was the first state to create a Judicial Qualifications Commission. It has been in existence for sixteen years. Many other states, including Texas, have patterned their Commission after California's. The early California plan was limited to removal for willful misconduct in office or willful failure to perform judicial duties.

Constitutional Amendment Analysis

SUBJECT: **Electronic Fund Transfers (EFT)**

BACKGROUND: Introduction

Texas is currently a unit banking state under state law. It is unlawful for the state or federally chartered bank to have a branch bank operation in Texas. A number of state courts have ruled that electronic terminals, such as automatic teller machines and point-of-sale terminals, which are capable of carrying out banking transactions in remote locations (away from the bank building itself) constitute branch banking. SJR 49 proposes a constitutional amendment which allows the legislature to pass laws to authorize the use of electronic devices or machines among state and national banks in Texas. It does not allow them to build "brick and mortar" branch banks. If the amendment passes, EFTS will not come into existence immediately. The legislature will have the power to pass legislation which will let banks begin to use EFTS and which will determine how these systems will be set up and regulated.

These devices are usually referred to as electronic fund transfer systems (EFTS or EFT). These systems have the potential of:

--allowing consumers to pay for goods at retail stores by using a card inserted in an electronic terminal which automatically charges one's bank account

--allowing deposit or withdrawal of cash any time of the day or night by using a card in an unattended machine

--allowing deposit of paychecks or social security checks directly in the checking or savings account without ever receiving a check

Other services could be added to EFT. Since EFT is a relatively new concept, there are many unanswered questions about it. In 1974 Congress established the National Commission on Electronic Fund Transfers to study the issue and make recommendations. The Commission issued a report in February, 1977, and will issue a final report later this year.

The machinery

Experts now agree that a fully integrated, national electronic fund transfer system will not arrive overnight. It will be a long, step-by-step process which will result in a "less check and money" society rather than a checkless and moneyless society.

EFT is now being used in other states in several ways which will eventually be expanded and integrated. Already 2,800 financial institutions are participating in offering some form of EFT. Present uses include the following:

Automated teller machines (ATM)--These terminals may be used anytime to carry out banking transactions. With the use of a bank card and a personal identification number, a bank customer may make: 1) withdrawals from checking; 2) withdrawals from savings; 3) transfers from checking to savings; 4) deposits to checking or savings; 5) overdraft checking; 6) payments to loans; 7) verification of demand balance; and 8) third party payments such as payment of utility bills.

Point-of-sale terminals (POS)--These terminals are primarily located in retail stores and may be used like ATM's with a bank card and a personal identification number to make purchases by immediately withdrawing the necessary funds from the customer's checking or savings account and depositing that amount in the store's account.

Automatic telephone payments (ATP)--Customers may pay bills and make loan payments by dialing on a touch-tone phone the appropriate account numbers and the amount of the bill being paid.

Automated clearing houses (ACH)--The activities of the automated clearing house associations, which are now operating around the country, comprise the largest segment of EFT operations. These associations are supported by member banks in various regions and work in cooperation with Federal Banks. These clearing houses sort and deliver transactions on magnetic tape in a procedure similar to that used for checks. These transactions consist mostly of recurring social security and other federal government payments as well as corporate wages and salaries being deposited directly to the recipient's account without the use of a paycheck.

In a fully integrated EFT environment all these services and more would be on-line to a nationwide computer network. A withdrawal from one account would immediately be deposited in another. A complex switching system, similar to the telephone system, must be developed so that eventually a Texas resident can use his or her bank card to buy a product in a New York department store, having his or her account at the local Texas bank immediately debited for the amount of the purchase and the store's account at its New York bank credited for the same amount. This is a difficult technical task even on a statewide scale.

Impact of EFT on financial market competition

Currently there are no restrictions on the use of EFT by savings and loans associations and credit unions in Texas. IF HB 1170 (Cartwright) had passed, it would have placed a two-year moratorium on the use of EFTS by all Texas financial institutions. The failure of HB 1170 will probably increase pressure from both the Texas Bankers Association (TBA) and the Independent Bankers Association of Texas (IBAT) on the Texas electorate to pass SJR 49 and, if it passes, on the 66th Legislature to make legislation permitting EFT by banks a top priority.

The original version of this amendment, drafted by TBA, did not call for sharing of EFT terminals and facilities but did limit EFT operations to within 25 miles of the bank. IBAT introduced the compromise which was accepted in the final form of SJR 49. It removed the 25-mile restriction and introduced mandatory sharing of EFT terminals. Some suggest that this compromise was born out of IBAT's fear of bank holding company power. IBAT seems to think that mandatory sharing will protect its members from the holding companies. IBAT is more concerned with being able to compete with the savings and loans institutions and credit unions, and the organization feels its members will need the option of EFT to compete effectively in some markets in the near future. Independent bankers in some states oppose EFT because of fear that their business will dwindle and large banks will grow even larger. Federal Employees Credit Union has installed ATM's in San Antonio. This has resulted in a significant increase in its deposits, primarily at the expense of small banks.

If SJR 49 does pass, the 66th Legislature will be faced with enacting EFT legislation which provides for sharing of EFT facilities on a "reasonable, nondiscriminatory" basis, consistent with antitrust laws." This mandatory sharing may make it necessary to set up a public-utility-like organization which will be responsible for the switching functions at automated teller machines and point-of-sale terminals. Switches will be necessary to route transactions to the various banks using any given terminal. This will not be a simple system to set up or regulate. To make the issue stickier, the legislature will have a fine line to walk to keep from enacting mechanisms which might violate antitrust laws. In its report the National Commission stated, "As things now stand, an EFT system could face the dilemma of having to choose between a violation of a state mandatory sharing law and a probable violation of United States antitrust law." The Commission endorses "pro-competitive sharing," under which "parties may share

pursuant to mutual agreement but, if challenged, sharing is permitted, required, or prohibited on a case-by-case basis, depending upon the effect such sharing would have upon competition in the market involved." Mandatory sharing may restrict competition, but procompetitive sharing may not adequately protect the independent banks.

Cost/Benefit of EFT

Cost-benefit studies of EFT systems are conspicuous by their absence. The National Commission is undertaking what promises to be the first comprehensive analysis. The regulated, limited competition in the banking industry seems to have established a pattern of minimal cost/benefit analysis. The Superintendent of Banking's 1976 EFT Report to the Iowa General Assembly states in general terms that "We have been advised that neither the public nor the banks have experienced any losses as a result of the EFT experimental program and that the dollar volume of transactions to date has been in excess of $2,000,000. Presently the public is not being assessed a special service charge for the electronic processing, however, a majority of the banks indicated that future charges will be considered." Even though the Iowa banks might not admit to losing money, EFT does cost, and the banks are considering a service charge. In fact, the report admits elsewhere that substantial increases in the volume of transactions need to take place and that bankers are presently trying to justify costs by reasoning that 1) new business will be obtained, 2) present business will be expanded, 3) internal bank costs will be reduced, and 4) added customer convenience will be provided.

EFT systems apparently can cut banking costs only when transaction volumes become sufficiently high. There is much evidence that the public is generally satisfied with the present checking system, according to a study done by Arthur D. Little, Inc., for the National Science Foundation. If banks insist on forging ahead with a system which is not now being widely accepted by the public in several areas, the consumer will probably be saddled with the cost of these failures. An April 18, 1977, Business Week article discusses several of these failures, such as the $400,000 lost by a California savings and loan association on a local POS terminal network.

Market saturation is slowing the growth of checks in a check processing network which many feel could handle ever increasing volumes. There are projects in progress to take advantage of technology to reduce the cost of the present system, such as the check image transfer system being developed by the Bank of America and NCR. Cost considerations and comparisons may be overlooked in the move by banks to bring EFT to a public that may reject it.

Although there is a present lack of evidence that EFT will cut costs for the consumer, one factor that will have a bearing on this matter is the push by some, most notably Thomas McIntyre (D-NH), to allow thrift institutions nationwide to offer interest bearing demand deposits called NOW accounts (negotiable order of withdrawal). NOW accounts are presently available in New England. NOW may lead banks to charge up to 30¢ more for each check processed, double the typical present cost. Right now most consumers see little or no cost in maintaining demand deposits. Increased public acceptance of EFT, forced by drastically higher checking costs, might sooner generate the transaction volumes needed to cost justify EFT.

Other consumer concerns

Other consumer concerns with EFT include: freedom of choice in payment methods, responsibilities and liabilities of the EFT users, the consumer's right to privacy, access to EFT benefits by lower income consumers, adequate proof of payment, alternatives to float, and right to stop payment.

The National Commission's Report makes recommendations in each of these areas, with the exception of stop-payment. Mark Leymaster of the National Consumer Law Center has expressed concern about the Commission's "lack of working particulars which leaves the 'guidelines' too general to be understood or to be implemented." He advocates performance standards rather than technical regulations, "so as to build public policy and consumer protections into the evolution of EFTS and leave to the marketplace the choice of how to meet those minimum requirements." Pros and cons of these issues are presented below.

DIGEST: This amendment allows the legislature to authorize state and national banks to use electronic devices located wherever the legislature allows by statute. The legislature must provide for sharing of such devices among banks on a "reasonable, nondiscriminatory basis," consistent with antitrust laws.

PRO: Disadvantage of banks versus other thrift institutions

Texas savings and loans and credit unions can legally implement EFT now. Some have already begun operation, and others are planning to do so. Banks should be allowed to have EFT in order to compete with the savings and loans and the credit unions.

Convenience for consumers

The whole reason for EFT is that it will provide a better financial system for American consumers. EFT will expand consumer alternatives. In addition to current options of cash, check, or dredit, consumers will be able to pay directly by card and to deposit and withdraw money at any

hour. Consumers can receive a printed receipt for each transaction, plus a monthly statement. Banking will be simpler and quicker. In fact, convenience is the biggest selling point of EFT. It will be easier than the present system, and will provide more efficient access to banking. Low income people who do not have access to financial services now (checks and credit cards) will have greater access to cheaper costs. As with any new system, it will take time for people to get accustomed to EFT, but its popularity will increase once people see its convenience.

Reduced costs of financial transactions

It will not be too long before financial institutions will not be capable of handling the increasing number of paperwork transactions. The cost will become prohibitive. With computerized speed, EFT will reduce the time, labor, and paperwork that it takes for each transaction, thereby reducing the cost.

Safeguards for competition

EFT can produce more competitive markets for financial consumers. Banks and other financial institutions will have to compete with each other for customers, and thus will offer better, less expensive services. In Oklahoma, small banks have successfully installed a point of sale network, demonstrating that EFT will not be detrimental to small banks and to competition. Oklahoma banks are also offering their EFT networks to other banks, at a fee, on the wholesale level. Mandatory sharing will assure that competition will be preserved, and, if the National Commission's recommendations are adopted, pro-competitive sharing will be established to further assure competittion.

Texas' need for EFT to prevent falling behind other states

President Carter and others, including the Commission, are suggesting that the McFadden Act be amended to allow federally chartered banks to use EFTS. Should this occur, state banks would be at a disadvantage unless this amendment passes. Already the Army and a national bank in San Antonio are cooperating on an EFTS for Army paychecks. Cooperative efforts are now being made across the U.S. to begin implementation of EFTS--Nebraska, Iowa, California, Massachusetts, and Florida already have a head start. Texas is only one of nine states having no form of remote electronic banking for state banks.

An interim study committee of the Texas House of Representatives is currently studying EFT. This amendment is permissive. If it passes, it would not mean immediate implementation of EFTS. Texas should go ahead and pass it to give the legislature the option of enacting EFT after

its study and the national study are completed. We must begin the legal process now, or it may be too late. It will take about three years to pass the amendment, pass enabling legislation, and implement the system. If Texas fails to pass this amendment now, it will be well into the 1980s before we are able to catch up with the rest of the nation.

Safeguards for security and privacy

EFT will increase the security of financial transactions. Consumers will not be forced to carry a lot of cash or checks with them that can be stolen. Deposits of paychecks can be made directly by employers. Provisions can be made to assure that unauthorized persons will not be able to withdraw cash--or personal information--kept by the bank's computers. Store owners, too, will be provided more financial security--they will have fewer bad checks written, since EFT provides immediate verification of the money in an account.

CON: Less convenience and service for consumers

EFT is the first step in the elimination of the checking system. When checks are abolished, consumers will no longer have cancelled checks, and thus no way to verify payment, tax records, etc. EFT will also mean that consumers will no longer have the ability to stop payment if they discover that they have been sold a defective product. EFT will also probably eliminate "float" (the time it takes between writing a check and the bank deducting that amount from the account). Though float is not a legal part of the present system, it is simply a fact that it is counted on by consumers. About 7% of the checks presented to banks do not have funds available to pay them. This means, then, that a much larger percent of checks are written without funds immediately available, but with the knowledge that funds will be in the bank before the check is presented. If a bill is due on the 30th, but the paycheck does not come until the 1st, many people go ahead and write the check--knowing that they will have funds the next day to pay it. EFT will eliminate this possibility. Even if banks claim that they can maneuver float time into EFTS, that does not mean that they will do so. As long as free checking is available, there is really nothing in EFT for the consumer. It is not any more convenient. The real advantage to EFT is for the banking system, not the consumer.

No need or desire for EFTS by consumers

There is no demand for EFTS. Studies have shown that consumers are satisfied with the current checking system. A vice-president of Citibank of New York has indicated that current technology for processing checks could handle any conceivable number of transactions. Promotion of EFTS, then, is pure public relations ploy on the part of

the banks and the companies that sell EFTS. Research indicates that if EFTS is implemented, consumer acceptance of it will be extremely slow. Until 1977, EFTS was seen as the inevitable future system. Already, however, interest in it is dying because there is no overwhelming desire for it among consumers. Consumers are satisfied with the check system and do not see that they would benefit from EFT. Merchant acceptance of it is also unknown. A southern California savings and loans association installed 137 POS units in its area, but had to close them down because they were losing money on them--they simply were not being used. If this is any indication of how EFTS will be accepted by the public, we should stop its progress now before more of our money is wasted on it. Both consumers and financial officers agree that the current checking system is viable for quite some time.

Higher cost to consumers than the current system

The per transaction cost of EFTS has not proven to be less than the cost of processing checks. Banks must have a large volume of transactions in order to justify EFT costwise. This, of course, means that small banks that cannot generate large volumes will be liquidated by the larger banks and bank holding companies. It also means that banks will try to do away with checks, since they must create reliance on EFTS in order to make money from it. Banks may even raise checking fees to get customers to switch over to EFT. Cost-benefit studies of EFTS are now being worked on, but are incomplete. Why the big rush into such a drastic change without knowing specifically what it will cost? The National Commission has found that the cost of clearing checks is going down. Why, when the current system is becoming cheaper, should we abandon it in favor of an unknown quantity? And how do we know that EFTS will not raise consumer costs? Banks using the EFTS are considering service charges.

Damage to competition and to small banks

Mandatory sharing means that there will be less competition. Banks will not really compete with each other because they will be offering the same services. No sharing also means fewer competitors because the small banks will be eliminated. It appears that EFTS means inherently that large banks will gain, and consumers will have fewer banks to choose from.

Mandatory sharing may also produce EFT joint ventures that violate antitrust laws. A January, 1977, Department of Justice policy statement indicates that mandatory sharing undercuts incentive to innovate and reduces consumer ability to influence the range of services offered.

EFTS means the elimination of independent banks. In New York, Ohio, Hawaii, and Florida smaller banks have been unable to keep up as the large banks and bank holding companies install ATMs. The EFTS in Iowa and Nebraska are succeeding precisely because they do not have large banks. But Texas has large banks and large bank holding companies. EFT means an increase in the holdings of bank holding companies and squeezing of independent banks who can no longer compete. With EFT, Texas's branch banking prohibition will become meaningless. EFT is simply an attempt on the part of banks (and bank holding companies) to subvert that constitutional prohibition.

No provisions for consumer safeguards

EFT will not provide adequate safeguards against computer theft. In fact, it cannot do so. A Senate Government Operations Committee report issued this year on computer security indicated that more security is needed--that many computer systems are vulnerable to attack and sabotage. EFT also cannot provide adequate safeguards against theft of the operating cards--and thus access to the consumer's money. Privacy safeguards will also be inadequate. The government and other institutions could obtain personal information on any consumer without that consumer's knowledge. Computers and their operators make mistakes. Detecting and correcting them even now is sometimes very difficult.

Possible damage to the American economy

The increased uncertainty that EFTS will create, the volatility of public demand for the new "money," and the increased velocity of money will offset controls on monetary growth and will make it more difficult to set monetary policy. The Federal Reserve Board will lose its ability to regulate bank reserves adequately as banks grow increasingly larger and as transactions happen extremely rapidly. Powerful quasi-central banks will grow to challenge the authority and ability of the Federal Reserve Board to regulate banks, interest rates, and thus the overall economy. These are just a few of the possibilities of what EFT could bring about. It's not like a decision about whether to buy a new car. It's a decision on whether to buy a whole new system when the full attributes of the system are unknown. That's why it should be defeated.

Too many ambiguities

Both an interim committee of the House and a national commission are presently studying EFTS. We should wait until the results of these studies are known before

approving EFT. Otherwise a system may develop on its own before adequate regulation is begun. We don't even know yet who will regulate EFTS. There is ambiguity as to liability under EFTS. With a nationwide interconnected system this ambiguity could, in a large liability case, trigger a chain reaction throughout the whole system. Our whole economy could be affected. It is apparent that a vote on EFT is more than a vote on whether Texans should be able to deposit money at 4 a.m. Its implications are wide, and its potential for disaster is very real.

Alternative to EFT

An alternative to EFT is already being considered by the banking community. Chase Manhatten of New York backed away from EFT and is working on "GIRO." This is a system used in Europe which allows preauthorized payment of bills from consumer's accounts. Pay is deposited in one's account and bills are automatically taken out. The number of checks written is reduced, and banks would not have to invest in much of the hardware that EFT requires. Interest in GIRO is increasing.