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THE LEGISLATURE: THE LEGISLATIVE COUNCIL

by

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The vast amount, diversity and complexity of subject matter which our legislators must deal with today, due to the ever-broadening scope of governmental activity, requires an extraordinary amount of technical knowledge and understanding in a great number of unrelated fields on their part if they are effectively to discharge their duty to the people. The situation of necessity calls for division of work, sound planning and adequate fact-finding facilities. New Jersey has tried to meet the problem in part through joint legislative committees, the Law Revision and Bill Drafting Commission, and the establishment of various independent commissions which, with the aid of research staffs, study some of the more important and difficult legislation and then submit their findings and recommendations.

As opposed to the legislative council idea, there is much merit to the argument that New Jersey has been especially fortunate in the extent of voluntary citizen participation on ad hoc study commissions. This type of agency may be specially constituted as best fits the needs of each problem, and has the advantage of enlisting the participation and judgment of leading citizens as well as legislators in the process of legislative planning and development. By contrast, the legislative council, being a regular state agency, is subject to the political difficulties of staff relationships and the restrictions of annual appropriation acts.

Fifteen states, preferring to retain legislative responsibilities for the legislative program, have created legislative councils or committees on legislative research made up from their own membership. A number of the earlier legislative councils were composed of representatives from the executive department as well as from the legislature, but one by one the states have eliminated members of the executive branch from their councils. With the repeal in 1944 of a provision that the governor and five administrative officials be members of the Kentucky council, all legislative councils became entirely legislative.

Whether or not this newer form of council composition will suffice remains a question whose answer must await longer experience with the legislative councils. In Michigan, antagonism between the governor and the all-legislator council contributed to the council's downfall. In Kansas, and elsewhere, similarly organized councils have not come into serious conflict with the governors, although the Kansas council's research director testifies to some gubernatorial "skepticism" of the council.¹ The possibilities of conflict between such councils and the governors increase in proportion both to the frequency of party differences between the governor and the majority in the legislature and council, and the tendency of the councils to develop

1. Guild, Frederic H., "The Development of the Legislative Council Idea," Annals of the American Academy of Political and Social Science, 195:144, 149. See also Maryland State Planning Commission, Publication 21, p. 37 ff.

the capacity for aggressive legislative leadership in competition with the governor's. Where partisan differences prevail between governor and council majority, however, conflicts between the two agencies could hardly be avoided merely by giving the governor or his representative a seat upon the council, although such a device might serve to insure that gubernatorial views receive a fair and continuous presentation to the council.

The main purpose of the legislative council, as it was originally conceived, was to give continuity to the legislative process between sessions and to provide planning and study facilities in anticipating the work of the next session. It was particularly applicable to the biennial session states. The legislative council was first proposed by the Council of State Governments in its Model State Constitution in 1921. Today legislative councils or comparable agencies are in operation in the following states:^{1a}

Kansas	1933	Pennsylvania	1939
Kentucky	1936	Maine	1940
Virginia	1936	Missouri	1943
Connecticut	1937	Indiana	1945
Illinois	1937	Alabama	1945
Nebraska	1937	Colorado	1945
Maryland	1939		

Most of the above councils were set up to fulfill the legislative planning function, to act as a method of coordinating the work of various legislative committees and agencies, to save legislative time, to weaken the influence of pressure groups, and to save unnecessary expense. Very important to the success of the

1a. Arkansas, Minnesota and Washington provided for legislative councils in 1947.

of the idea has been the work of the councils' research agencies. Not only did they aid the councils in studying proposed legislation, but they also offered individual legislators impartial assistance in the technical problems of lawmaking. The size of the legislative councils varies from 5 to 27 members. The larger ones, as in Illinois, Kansas, Maryland, and Nebraska, usually are broken up into subcommittees to study particular problems. In general, members serve for a fixed term of two years and receive no additional compensation other than expenses for their service on the council, except in states which pay per diem compensation.

The councils are reported to be working more or less satisfactorily in the majority of the states that have them, and their efficiency and desirability has been recognized. However, the Michigan legislative council, which was established in 1935, was abolished in 1939 mainly as a result of difficulties between the council and the governor. The Oklahoma council, authorized in 1939, is inoperative today and the legislature has failed to make an appropriation for it since 1941. The Rhode Island legislative council, which was authorized in 1939, is inoperative today because the appointees of the minority party have always refused to serve. It is interesting to note that Rhode Island is the only state with annual sessions that has set up a legislative council.

In general, bills prepared by the councils have been well received and their research reports have been of great value.

The Book of the States, 1943-44, reports (page 148):

"Especially notable has been the work done by the legislative councils during the past decade on taxation and finance, public welfare, and education. The councils have made it possible for their legislatures to act promptly on the basis of current factual information as problems have come up. Heretofore, the solution of these problems has frequently lagged behind by at least a biennium, while data was being collected on which to base legislative action. Further, the councils have been able to minimize hasty and ill-considered legislation."

The early criticism that the councils might tend to become "little legislatures" -- that they might result in the centralization of legislative powers in the members of the council -- has proved unfounded. Although the majority of councils were set up to plan a legislative program, in the last few years a number of the councils, particularly those in the larger states, have avoided active participation in developing a legislative program and have confined themselves to the preparation of factual reports. Although the fact-finding agencies in Illinois, Missouri, and Nebraska have the statutory power to recommend legislation, they do not use it. The Connecticut legislative council does not exercise its authority to formulate policy and assists mainly in the preparation of material for the legislature. Today it would seem that the research activity of the legislative council is its most important and popular function, and that it has managed to survive by avoiding one of the principal purposes for its creation -- that of legislative planning.

Constitutional Status

Missouri is the only state which has followed the Model State Constitution in giving the legislative council constitutional status. All other legislative councils owe their existence to statute. The Commission on Revision of the Constitution, 1942, recommended a legislative council for New Jersey with constitutional status.²

"1. There shall be a legislative council, ex officio, of the Governor or, in his absence, the Attorney-General, the President of the Senate and the Speaker of the House of Assembly, the majority leaders and the leaders of the ranking minority party, for the time being, of each house of the Legislature. Members of the legislative council except the Governor and Attorney-General, shall receive the sum of one thousand five hundred dollars per annum while they serve as members thereof.

"2. The legislative council shall: (a) make or cause to be made sound technical studies of the governmental needs of the State, and shall plan and formulate a program of necessary legislative measures predicated thereon in the form of draft bills, for consideration during each session of the Legislature; (b) provide independent research and consultative services in aid of its other powers and duties, within the limits of available appropriations, and co-operate with such other legislative agencies as may be established by law; (c) hold its first meeting at the call of the President of the Senate at such time and place as he shall designate, organize for the transaction of its business, adopt such rules of procedure as it may deem necessary, except as such rules may be established by law, and report at the opening session of each Legislature, and at such times thereafter and with respect to such matters as the council may deem in the public interest; (d) have such other powers and duties, not inconsistent with the foregoing, as may be from time to time prescribed by law."

Commenting on this proposal, the Commission said:³

"A major cause of legislative confusion has been the lack of opportunity for full and careful consideration of legislative matters. Each member of the Legislature is expected to be familiar with criminal laws, state departmental needs, the tax structure and a host of other intricate and involved questions.

2. Report of the Commission on Revision of the New Jersey Constitution, 1942, p. 38, Art. III, Sec. V of proposed revised Constitution.
3. Ibid, p. 18

Meanwhile, most committees in the Legislature meet neither long nor often. To aid in consideration of legislative affairs, many states have set up legislative councils which devote all their time to the study of proposed legislation, with a full-time research staff assisting.

"The council as established in the proposed constitution promises guidance, coordination and planning for the legislative process. Between biennial sessions, the council would investigate important legislative problems which require technical competence. During the session, its program would form a guide for the most efficient use of legislative time. After each session, the council will follow up important new legislation to check upon its practical results in operation."

The legislative council proposal was strongly supported in the hearings before the Joint Legislative Committee which considered the Revision Committee Report. One of the speakers had this to say:⁴

"It is practically impossible for all of the members of the Legislature to be expertly conversant with the great variety of legislative subjects which they must consider, many of which are technical and complex. It is well known that much of such legislation is drafted and promoted by special interests which are specially concerned and that the full meaning and effect thereof are not fully comprehended by all of the legislators who vote thereon, and this is because the Legislature lacks the facilities with which to do its own research and to do its own bill drafting. An approach toward it has been made in our friends the Commission on Statutes, who do excellent work in coordinating legislation with the Revised Statutes, but the functions of such a legislative council are really necessary. Legislators must rely upon the representation oftentimes of the sponsors of such legislation -- and I say this advisedly, oftentimes it is of dubious quality with respect both to draftsmanship and contents, and specific instances can be cited, recent ones, too. Committee meetings have been irregular and infrequent. That is inherent in the one meeting a week system, and cannot be avoided. The establishment of a legislative council consisting of the Governor, or in his absence, the Attorney General, the President of the Senate, the Speaker, and the Majority and Minority Leaders of both Houses, adequately staffed for the preparation of legislative programs, accurate and thorough research and the drafting of legislation would at once improve the quality of bills and, by reason of their source, would inspire the confidence of the legislators in their purpose and integrity. This council of six legislative members, consisting of the duly elected officers of the Legislature itself, would be at all times subject to the direction and control of the Legislature, and certainly then, as now, the Legislature would

4. Record of Proceedings before the Joint Legislative Committee... to Ascertain the Sentiment of the People....as to Change..., 1942, pp. 123-24.

be the seat of legislative power. Here again there is no diminution whatever of legislative power or authority. Another consideration in this connection is that the representation of the Governor upon the council would make for better understanding between the executive and legislative branches.

One of the few who opposed the proposal claimed that the presence of the Governor on the legislative council was inconsistent with the principle of the separation of powers and that the council idea had "nothing of substance in it except insofar as you might substitute.... a legislative reference bureau."⁵ Another called the Commission's proposal a "questionable innovation" and suggested that "the Legislature itself, to its own advantage, might create a council of its own members."⁶ One speaker favored the council but recommended that minority parties be given representation on it,⁷ and another suggested that provision be made for public hearings before the council.⁸

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The revised Constitution submitted to the people in 1944 contained no provision for a legislative council.

The chief advantage to be expected from the constitutional creation of a council are the obvious ones of security against legislative abolition and the prestige of constitutional status. The latter is an intangible factor; the former is subject to important qualifications:

1. Unless the council in New Jersey is made something more than the purely advisory agency that it is in other states, the successful performance of its function depends altogether upon the capacity to secure the confidence of the legislature. If the council secures that confidence, it will stand in little jeopardy of abolition, even if its basis be purely statutory. If the council has not that confidence, a constitutional basis will not preserve it as a vital factor in government but may only assure

5. Ibid, pp. 142-44 and 146-47

6. Ibid, pp. 192-93

7. Ibid, 172

8. Ibid, 178

the continued existence of a useless agency. On balance, constitutional status would seem, in this aspect, to have significant value in preventing an over-hasty abolition of the council by a temporarily exercised legislature.

2. If constitutional creation of the council is effectively to prevent legislative abolition, the constitutional provisions must organize the council definitely and in detail. Whatever the constitutional detail, the matter of appropriations must be left largely in legislative hands, and, with it, the practical fate of the council. More significantly, however, too detailed constitutional specification or organization seems undesirable in the present state of fluidity of the council idea.

In summary, it would seem desirable to restrict any constitutional basis for the council to a statement of principle and such additional elements as prestige may require. If the legislative council is given constitutional status in New Jersey, the Constitution should possibly contain a provision allowing for an adjustment in salary for the members of the Legislature who serve on the council, since membership will entail considerable time and work. Should the Convention be convinced of the desirability of a legislative council but believe that it should be created by statute, the Constitution should be so drawn as to make possible extra compensation to the council members.

APPENDIX

MISSOURI, CONSTITUTION, 1945, Art. III, Sec. 35:

Committee on Legislative Research -- There shall be a permanent joint committee on legislative research, selected by and from the members of each house as provided by law. The general assembly, by a majority vote of the elected members, may discharge any or all of the members of the committee at any time and select their successors. The committee may employ a staff as provided by law. The committee shall meet when necessary to perform the duties, advisory to the general assembly, assigned to it by law. The members of the committee shall receive no compensation in addition to their salary as members of the general assembly, but may receive their necessary expenses while attending the meetings of the committee.

MODEL STATE CONSTITUTION, Partial Revision of 1946, Sec. 317:

Legislative Council -- There shall be a legislative council consisting of not less than seven nor more than fifteen members, chosen by and from the legislature. Members of the legislative council shall be chosen by the legislature at its first session after the adoption of this constitution and at each subsequent session following a general election. Members of the legislative council shall be elected in such manner as the legislature shall direct, and when elected shall continue in office until their successors are chosen and have qualified. The legislature, by a majority vote of all its members, may dissolve the legislative council at any time and proceed to the election of a successor thereto.

Explanatory Article: "III. The Legislature"⁹

"The Legislative Council

"Previous recommendations concerning a legislative council have been continued except that the governor is no longer a member. The legislative councils which have been making the most progress in the last few years apparently have been those composed solely of legislators, developing more legislative sense of responsibility, without interfering with the governor's legislative leadership. This has given the legislature greater assurance that it would have available adequate information from its own sources on which to judge the merits of measures presented to it, with a staff of its own to which to turn for such information, and with its own committees continuously at work on major problems. The legislative task

9. National Municipal League, Model State Constitution, Partial Revision, 1946, pp. 29-30

of considering recommendations of the administration or arguments of lobbyists is greatly simplified.

"On the whole, existing legislative councils have borne out recommendations upon which provisions for such a council were included in the 1933 revision of the Model State Constitution. They have already made substantial progress in making legislation more of a continuous operation, have been fairly successful in demonstrating that the legislature itself can prepare a legislative program, have subjected the administration to observation and criticism in keeping with the fundamental responsibility of the legislature therefor without acrimonious debate or attempts to interfere with administration itself. In most instances they have brought the administration and the legislature closer together, guaranteeing to the administration more careful consideration of some of its needs and of policies suggested, and assuring the legislature itself of better understanding of administrative problems.

"A new departure is the provision permitting delegation of authority to the legislative council to supplement existing legislation by general orders. Delegation of quasi-legislative powers to administrative boards has been common, but in the United States no agency of the legislature itself has as yet been given rule-making powers comparable to those exercised by administrative boards or commissions. Since the council would have available the recommendations and advice of any administrative agencies affected, it would be acting as an additional review agency, representing the legislature, in coming to any final decision concerning general orders which it might issue. In the numerous instances where inconsistencies or omissions are found after legislation is enacted, this might solve the present dilemma of relying on opinions of the attorney-general to bridge the administrative gap or of requiring the courts to legislate. And not least it would force the legislature itself to follow legislation through to administrative adequacy and practicability.

"With the ever increasing complaint that administrative bodies, through their rules and regulations, exercise an important function of legislation without adequate check by the legislature itself, this authorization would place a legislative agency on a par with administrative agencies as the recipient of delegated authority. With the extent of the power to be exercised and the procedures to be followed determined by the legislature, this provision would permit experimentation as to the proper exercise of this important and necessary function of sub-legislation. As section 300 also requires that all administrative regulations be submitted to the legislative council, the latter would become a clearing house for the entire field of delegation of legislative powers."

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