



**Second Meeting
2004 Interim
October 20 & 21, 2004**

**LCR 1 & 2
State Capitol Building
Pierre, South Dakota**

Wednesday, October 20, 2004

The second meeting of the Constitutional Revision Commission was called to order by Chair Robert A. Miller, at 9:00 a.m. (CT), October 20, 2004, in LCR 1 and 2 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Mr. James Abbott, Mr. Mark Barnett, Vice Chair Robert Burns, Mr. Steve Cutler, Vice Chair Donald Dahlin, Lieutenant Governor Dennis Daugaard, Mr. Robert Drake, Dr. Sean Flynn, Mr. Gene Lebrun, Mr. Larry Lucas, Ms. Mary McClure Bibby, Chair Robert A. Miller, Mr. Ronald Olinger, Mr. Robert Roe, Mr. Brent Wilbur, and Supreme Court Justice Steven Zinter. Mr. Jim Hutmacher was excused.

Staff members present included David L. Ortbahn, Principal Research Analyst; Reed Holwegner, Chief Fiscal Analyst; and Teri Retrum, Senior Legislative Secretary.

(NOTE: For sake of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents are on file with the Master Minutes.)

Approval of Minutes

DR. DAHLIN MOVED, SECONDED BY MR. LEBRUN, THAT THE MINUTES OF THE AUGUST 12, 2004, MEETING BE APPROVED. The motion prevailed unanimously on a voice vote.

Commission Materials

Mr. Dave Ortbahn, LRC, distributed copies of a letter from Dr. Hank Kosters in which Dr. Kosters provided input into the commission's proceedings.

MR. LEBRUN MOVED, SECONDED BY MS. MC CLURE BIBBY, THAT DR. KOSTERS' LETTER BE MADE PART OF THE PERMANENT RECORD. The motion prevailed unanimously on a voice vote.

(The letter will be placed behind the "correspondence" tab in the three-ring binder previously given to commission members—the binder is labeled Document #1 and will be periodically updated.)

MR. LEBRUN MOVED, SECONDED BY MS. MC CLURE BIBBY, THAT THE COMMISSION ATTACH TO THESE MINUTES A LIST OF THE LOBBYISTS TO WHOM THE INVITATION TO PROVIDE INPUT TO THE COMMISSION WAS SENT. The motion prevailed unanimously on a voice vote. (The list is attached to these minutes and labeled ATTACHMENT.)

Characteristics of an Efficient and Effective Legislature

Speaking from a letter that he sent to Mr. Ortbahn, **Dr. Robert Burns** provided the commission with a theoretical framework in which the commission could operate in its discussion of Article III. **(The letter will be placed behind the "correspondence" tab in the three-ring binder.)**

Dr. Burns said that in the late 1960s, the Citizens Conference Legislative Evaluation Study formulated the five major characteristics of an effective, efficient, and high performance legislature—Functional, Accountable, Informed, Independent, and Representative (FAIR). He said that the commission might want to be mindful of these indicators in its deliberations.

Noting his prepared remarks, Dr. Burns briefly discussed the following:

- Bicameralism;
- Term limits;
- Conflict of interest;
- Compensation;
- Initiative and referendum;
- Single-member districts;
- Lt. Governor;
- Twenty-one age requirement;
- Filling vacancies; and
- Line of succession.

Dr. Burns said that the commission will grapple with some of the noted issues and that he hopes that the commission will be cognizant throughout its study of what will make a more effective and high performance assembly.

Dr. Donald Dahlin complimented Dr. Burns' remarks and said that the public needs to know why an amendment to the constitution is being proposed.

Dr. Burns agreed and said that, conceptually, the public most likely will view any proposed changes positively if they understand the reasoning behind the proposals.

Dr. Dahlin said that he would like to discuss comments made by **Representative Bill Peterson** at the commission's first meeting about the independence and strength of the legislature. Dr. Dahlin said that **Senator John Koskan** also expressed the same concerns.

Mr. Robert Roe said he believes that the letter from the Executive Board regarding the style and form veto is outside the purview of the commission's directive.

Mr. Gene Lebrun said that in his opinion the veto topic is within the scope of the commission's study and that since the Executive Board wants the commission to review it, the commission should honor that request.

Chair Robert A. Miller said that the veto function is outlined in the Executive Article, not the Legislative Article of the South Dakota Constitution.

MR. BARNETT MOVED, SECONDED BY MR. CUTLER, THAT THE COMMISSION FOLLOW THE PARAMETERS SET OUT IN HB 1153 FROM THE 2004 LEGISLATIVE SESSION IN REGARD TO ITS STUDY AND NOT TAKE UP THE STYLE AND FORM VETO.

Ms. Mary McClure Bibby said that the veto topic strikes at the "heart of an independent legislature."

MS. MC CLURE BIBBY MADE A SUBSTITUTE MOTION, SECONDED BY MR. LEBRUN, THAT THE COMMISSION TAKE UP THE STYLE AND FORM VETO.

Mr. Robert Drake spoke against the motion and said that the legislature should decide in January how it wants the commission to handle the veto issue.

THE SUBSTITUTE MOTION FAILED ON A VOICE VOTE.

Dr. Burns expressed his hope that the veto issue would be addressed but agreed that it should be following an affirmative vote of the legislature.

Mr. Ronald Olinger said that the commission should formulate its response to the Executive Board.

MR. BARNETT'S MOTION PREVAILED ON A VOICE VOTE.

Dr. Dahlin said that it would make sense to at least offer the opportunity to broaden the scope of the commission's study—not just the style and form veto but also look at all sections of the Constitution wherever the legislature is involved.

Mr. Lebrun suggested that the commission may want to consider asking the legislature to add an additional year to the commission's study so the commission's recommendations do not come out in a general election year.

MR. OLINGER MOVED, SECONDED BY DR. BURNS, THAT THE COMMISSION RESPOND TO THE EXECUTIVE BOARD INDICATING THAT THE COMMISSION DOES NOT BELIEVE THAT THE STYLE AND FORM VETO AND THE LINE ITEM VETO ARE WITHIN THE SCOPE OF AUTHORITY GRANTED BY HB 1153 AND REQUESTS THAT THE LEGISLATURE GIVE THE COMMISSION AUTHORITY TO LOOK AT THE LEGISLATURE BROADER THAN ARTICLE III, INCLUDING BALANCE OF POWER ISSUES, AND TO

CONSIDER THE EXTENSION OF THE COMMISSION BY ONE YEAR. The motion prevailed on a voice vote.

Chair Miller directed staff to draft a letter stating such for his signature.

Mr. Lucas indicated that in the regard to the balance of power, many legislators have a concern with the General Appropriations Act. He commented that the General Appropriations Act does not fall into the hands of most legislators until the last day or two of the session. Mr. Lucas said that if the commission is concerned about the balance of power, then spending taxpayers' dollars should be at the top of the commission's list to study.

Mr. Olinger commented that it takes a two-thirds vote to pass spending bills and a simple majority to pass the General Appropriations Act. He indicated that the general bill should not be used as a vehicle to transfer money from one fund to another. If the General Appropriations Act is used to transfer such moneys around, it denies legislators the opportunity to vote on the transfers and makes the appropriations committee extremely strong. Mr. Olinger said that these transfers should be done in special appropriations bills.

Mr. Steve Cutler said that the legislature does not have the resources or the time to do the appropriations research and budget process. He said that the state tried zero-based budgeting once, and it did not work. Now, Mr. Cutler said that the legislature relies on the Executive Branch to propose the budget and proceeds from there.

Mr. Reed Holwegner said that Article XII limits what is in the General Appropriations Act. He said that appropriating money is an inherent legislative power, and when the legislature is not in session is delegated to a special committee, comprised of members of the House and Senate Appropriations Committees. Mr. Holwegner added that the general appropriations bill should be ready for introduction at the beginning of the 2005 session.

Mr. Drake said that, because of logistics and in order to tie everything together, the general bill almost has to be addressed at the end of session. He agreed with Mr. Olinger that at times there may be some special appropriations in the general appropriations bill that should not be there; however, he does not feel that the commission has the authority to address the problem.

MR. OLINGER MOVED, SECONDED BY MR. LUCAS, THAT THE COMMISSION INCLUDE IN THE LETTER TO THE EXECUTIVE BOARD THE COMMISSION'S REQUEST FOR PERMISSION TO DISCUSS THE GENERAL APPROPRIATIONS PROCESS INCLUDING THE APPROPRIATIONS BILL AND SPECIAL APPROPRIATIONS BILLS. The motion prevailed on a voice vote.

The commission recessed at 9:50 a.m. and reconvened at 10:05 p.m.

Mr. Karl Kurtz, Director of State Services, National Conference of State Legislatures (NCSL), distributed copies of his PowerPoint presentation on how South Dakota's Legislature compares with other states (**Document #1**). Mr. Kurtz also distributed copies of the following:

- National Conference of State Legislatures—Full-time and Part-time legislatures (**Document #2**); and
- National Conference of State Legislatures—Legislative Term Limits: An Overview (**Document #3**).

Mr. Kurtz gave examples of two states that represent the extremes in the makeup of state legislatures:

1. New Hampshire with less than one million people and 400-persons in its House of Representatives. 2,500 people is an average size district. Legislators are paid \$100 per year with mileage but no per diem; the legislature has a staff of about 100.
2. California with a population of approximately 31 to 32 million. There are 800,000 people in a single-member senate district. Legislators are paid \$100,000 per year. The legislature has a full-time staff of about 3,000.

For the purposes of his presentation, Mr. Kurtz divided the country's states into five different categories. For definition purposes only, among the states termed to be the most professionalized because they have year-round staff and operate most like Congress are New York, Pennsylvania, Michigan, and California. States that operate similarly but do not have full-time legislatures: Massachusetts, New Jersey, Ohio, Wisconsin, and Florida. The most traditional/citizen legislatures include South Dakota, North Dakota, New Hampshire, Montana, Wyoming, and Utah. Idaho, Nevada, and New Mexico have a little bit higher legislative salary. Texas has very large districts and meets every other year for six months with an annual salary of \$7,200. Mr. Kurtz commented on responses to a survey sent to legislators asking them how much time they spend on the job, including session time, interim time, constituent time, and campaign time. The average response showed that 85 percent of the respondents from the professionalized states consider their legislative job to be full time; South Dakota respondents considered their legislative work to constitute thirty-nine percent of their time. South Dakota legislators earn \$10-11 thousand a year including per diem. This represents a slight increase in pay since 1972. Mr. Kurtz said that South Dakota tends to enact fewer bills than other states. In Connecticut, any citizen can introduce a bill.

According to Mr. Kurtz, twenty-one states have adopted term limit laws. Idaho and Utah have repealed term limits. The courts have overturned term limits in Massachusetts, Oregon, Washington, and Wyoming. Regarding term limits, Mr. Kurtz said that there is more movement from the House to the Senate than the opposite. He said that the effects of term limits vary depending on the type of legislature. In general, term limits result in loss of experienced legislators—less knowledge of substantive issues, less institutional knowledge, and more chaotic legislatures. Oftentimes, the governors and executive agencies gained power. Term limited legislators can sometimes give less attention to constituents' issues. Mr.

Kurtz said that the effect of term limits are most obvious at the level of leaders and committee chairs.

Responding to Mr. Lebrun, Mr. Kurtz said that it is difficult to extrapolate data concerning any discernable effect of change of party dominance regarding term limits. It is very difficult to prove one way or another.

Justice Steven Zinter asked how the change in the balance of power is measured regarding term limits. Mr. Kurtz responded that the balance of power change is determined in a variety of ways, and it is pretty consistent in the states with term limits.

Mr. Roe asked if term limits have had any effect on contested races. Mr. Kurtz responded affirmatively. He said that, under term limits, often people will wait until a legislative seat becomes open before they run for the legislature.

Responding to **Mr. Mark Barnett**, Mr. Kurtz said that term limits do not result in a significant movement from the Senate to the House.

Regarding initiatives, Mr. Kurtz said that South Dakota fell into the 10 to 19 category for initiatives in the years 1990-2001. Four states had more than thirty ballot initiatives—Oregon, California, Colorado, and Washington. Idaho, Michigan, Ohio, Oklahoma, Wyoming, Utah, Mississippi, and Illinois had fewer than ten initiatives. Mr. Kurtz referenced a book titled, "National Conference of State Legislatures The Forum for America's Ideas Initiative and Referendum in the 21st Century" as a valuable tool for initiative information.

Mr. Lebrun asked whether there was any trend toward adding or removing the initiative process. Mr. Kurtz said that no state has tried to remove it though some have tried to modify it. He said that one of the concerns about the initiative process is that the process lacks debate and compromise.

Mr. Olinger asked if this is something the commission should consider because in South Dakota changes to the Constitution have been tried through the initiative process that should not be.

Ms. McClure Bibby said that the legislature already has the power to review the initiative and referendum process.

Mr. Olinger said that the power is statutory not constitutional.

Dr. Sean Flynn said that in his opinion there is not an initiative problem in South Dakota and if the commission wants to continue with a citizen legislature, the process should remain status quo.

Dr. Dahlin said that he would be interested in the appropriations process in other states. Mr. Kurtz said that he will provide the information.

Mr. Cutler said that he was in support of term limits and that he now has changed his mind. He asked if more states have attempted to repeal term limits.

Mr. Kurtz said that in his opinion if the term limit issue were on the ballot today, it would still pass.

Mr. Roe said that perhaps the commission can look at modifying the terms of office for legislative leadership.

Mr. Kurtz said that term limits have "lost steam." It is somewhat less of an attraction than it used to be; however, term limits is still an issue.

Dr. Dahlin asked if NCSL has any comparable data on committee structures. Mr. Kurtz said that committee structure really varies.

Dr. Burns asked what should be legislative prerogatives and what should be constitutional matters that direct legislatures.

Mr. Kurtz said that a constitution should be as limited as possible in terms of establishing a basic structure and not get into internal organization.

Mr. Roe asked about biennial budgets. Mr. Kurtz said that he would like to come back to the commission with information from other NCSL staff members who know more about that subject.

Commission Discussion

Mr. Brent Wilbur said that the commission should review the initiative and referendum process. He indicated that with the rise of special interest groups there will be more and more initiatives and referendums. Mr. Wilbur said that he would be interested in what other states do to give initiatives a legal review to avoid future legal problems.

Mr. Barnett agreed.

MR. OLINGER MOVED, SECONDED BY MS. MC CLURE BIBBY, THAT THE COMMISSION ASK THE EXECUTIVE BOARD'S PERMISSION TO REVIEW CONSTITUTIONAL INITIATIVES.

DR. DAHLIN MADE A SUBSTITUTE MOTION, SECONDED BY MR. LEBRUN, THAT THE COMMISSION REVIEW, IN GENERAL, THE LEGISLATURE'S ROLE UNDER THE SOUTH DAKOTA CONSTITUTION.

Mr. Drake said that initiated constitutional amendments are outside the purview of the legislature.

Mr. Lebrun said that perhaps it could be limited to parts of the constitution and statutes that affect the legislature.

Chair Miller appointed Dr. Dahlin, Mr. Olinger, and Mr. Lebrun as a subcommittee to formulate a motion to address this issue during the October 21, 2004, portion of the commission's two-day meeting.

There was no action taken on Mr. Olinger's motion or Dr. Dahlin's substitute motion.

The commission recessed at 11:40 a.m. and reconvened at 1:05 p.m.

The Legislative Article—A Comparative Analysis

Professor Michael Libonati, Temple University, said that creating a legislative article is a challenging task. He said that today's legislatures are process driven institutions. In discussing the initiative and referendum process, Professor Libonati said that 21 states have statutory initiatives; 18 states have constitutional initiatives; South Dakota has both statutory and constitutional initiatives. Professor Libonati referenced the following web site as a helpful site regarding initiatives and referendums: www.INRIstitute.org.

Professor Libonati said that some states are interested in legislative input into the initiative and referendum processes, such as permitting a legislature to put an opposing initiative on the ballot. In some states, a public hearing is held regarding a proposed initiative. He said that initiatives should have one subject and a clear title.

Professor Libonati said that there is a trend in some states to change the age qualifications in order for someone to run for the legislature; 17 states have made 18 year olds eligible.

Reviewing the remaining constitutional provisions in the legislative article, Professor Libonati highlighted the following:

- **§ 5—Legislative reapportionment**—Half of the states are limited by their constitutions to reapportionment once every ten years. Very few jurisdictions have multi-member districts. Most state constitutions require reapportionment based on population, but population is not defined as a criterion in reapportionment. Thirty-six states' constitutions require districts to be contiguous, and twenty-four constitutions require districts to be compact. Also, in 36 states, constitutions provide that the legislature shall do the reapportionment while in 14 states an independent commission is required to do it. In the state where their legislature does the reapportionment, if the legislature fails to perform its task in four states, the task goes to an independent commission; in seven states, it goes to the State Supreme Court.
- **§ 6—Legislative terms of office—Compensation—Regular Sessions**—All state constitutions provide for fixed legislative terms. In about half of those states, the Senate terms are staggered. Five states have four-year terms for the House of Representatives rather than the standard two-year term. The limitation on the length of session is designed to rein in legislative power. Thirty-six states like South Dakota have a limit on the length of the legislative session. In the 1940s only four states had annual sessions, but by 1980, 43 states had annual sessions. Currently, nine states

set legislative compensation in the constitution. The majority of states set legislative compensation by statute. In twenty states, compensation is first addressed by an independent commission. Professor Libonati said that term limits have neither enhanced nor put an end to political careerism. He said that unaccountability of governments is the biggest threat to democratic governments. He also recommended that Article III, § 2 could be deleted by this section because § 2 provides for annual sessions.

- **§ 8—Oath required of legislators and officers—Forfeiture of office for false swearing**—This is a unique provision to the South Dakota Constitution—an oath requirement represents a form of distrust in the legislature. The Constitutional Revision Commission in 1974 recommended the repeal of this provision.
- **§ 10—Filling legislative vacancies**—The Model State Constitution and the Constitutional Revision Commission in 1974 recommended that the procedure for filling vacancies be provided by statute.
- **§§ 12 and 28—Legislative conflicts of interest**—Professor Libonati addressed §§ 12 and 28 in tandem since they both regard legislative ethics. He commented that, like South Dakota, many states' constitutions have ethical norms that were established in the 19th Century regarding pecuniary conflicts of interest, prohibiting dual office holding, and prohibiting legislative pay raises that would go into effect during a legislator's term of office. These were implemented to ensure the integrity of the persons elected to the legislature. Most ethical reforms in states in recent years—code of ethics, final disclosure, and ethic commissions—have been addressed in statutes and not in constitutions. However, Rhode Island and Florida are examples of states which have put strict ethical provisions in their constitutions.

Mr. Barnett indicated that all attempts to repeal or revise § 12 have failed by increasingly large margins. He also indicated an attempt to establish a state ethics commission by statute was defeated. He felt that ethics commissions lead to rock-throwing by political opponents. Mr. Barnett said that in his opinion the more you allow the Governor to form contracts with legislators, the more power the Governor has over the legislature.

- **§ 13-21 and § 9 paragraph 2—Legislative procedure**—Professor Libonati commented that early legislatures were given broad autonomy to establish legislative procedures. Beginning in the mid-1800s, due to the wave of Jacksonian democracy, provisions were added to state constitutions trying to create a blueprint for the due process of deliberate, democratic, and accountable government. These provisions cover activities from drafting legislation to its final passage to ensure the process is done in a democratic manner. He indicated that some feel these provisions entrench restriction upon the legislature because of past controversies and restrict the legislature's plenary powers. On the other hand, others believe these provisions reflect the lessons learned in all states over two centuries and entrench the principles of notice, deliberations, and accountability in the legislative process.

Professor Libonati indicated that if the commission decides to include these procedural rules, the commission should decide if the courts should be allowed to enforce these provisions. Most states' judges refuse to enforce all but a few of these procedural constraints. Most state courts adhere to the "enrolled bill rule." The "enrolled bill rule" prevents any evidence outside of the text of enrolled bills to be introduced as evidence showing any constitutional violation. Also, state courts have ruled that judicial intervention violates the separation of powers doctrine and therefore have refused to hear cases involving legislative procedures. Professor Libonati felt that it should be clarified in the constitution if judicial review is contemplated. He stated that the Model State Constitution has language which clearly indicates whether or not these procedural provisions are subject to judicial review. Professor Libonati questioned if constitutional provisions were not going to be enforceable by the courts why they should be in the constitution.

Responding to a question by Mr. Lebrun, Professor Libonati indicated that the Model State Constitution has reduced the provisions regarding legislative procedure down to one section—this section covers the important matters of openness and the recording of votes. He indicated that the commission might want to tinker with the "journal entry rule." Professor Libonati commented that whenever it is required that something be recorded in the journal of the legislature that has an impact on extent to which a court will review compliance with these procedural rules in the constitution.

Mr. Roe asked how other states prohibited hoghouse amendments whereby bills by amendment were changed to a completely different bill without public notice and debate. Professor Libonati indicated there were provisions in some state constitutions which prohibited the substance of a bill to be changed through amendment. It is questionable whether these provisions are enforceable.

- **Section 23—Special laws**—Professor Libonati indicated that there were two components to this section—a laundry list of prohibitions and a general prohibition. He said that the laundry list is found in 37 states and the general prohibition is found in 31 states. Most states have both. Professor Libonati commented that the section covers local laws in addition to the private and special laws. Some states, like Alabama, have a lot of local and special laws. The prohibition on such laws is to ensure equal treatment under the law across the state.
- **§ 26—Municipal powers denied to private organizations**—Professor Libonati indicated that § 26 is referred to as the "ripper clause." It is found in eight state constitutions and originated in Pennsylvania. It is a limit on the legislature's power to delegate. It is also a shield to municipalities from legislative intrusion. It is called the "ripper clause" because it prohibits a municipality of being stripped of certain powers and giving those powers to a special or private commission.

Article IX section 3 of the South Dakota Constitution authorizes intergovernmental cooperation and allows agreements with any other governmental entities. In Pennsylvania, the ripper clause had to be amended to permit binding interest arbitration in collective bargaining agreements for union personnel because it was interpreted to forbid binding interest arbitration for police and firefighters.

Dr. Burns questioned if the provisions of this section also affected counties and school districts or if it is limited to municipal government. He also asked if it in any way restricts the authority of municipalities to voluntarily delegate their decision-making authority to a private body—this gets to the binding arbitration question in South Dakota.

Professor Libonati responded to the first question by stating that it depends on how "municipality" is defined and how the definition is interpreted by the courts in South Dakota. In response to the second question, he said he would infer that since the provisions of this section only prohibit the legislature from delegating that local governments might be allowed to delegate.

Professor Libonati concluded his discussion on this section by saying that it has to be read in conjunction with Article IX of the Constitution. Article IX empowers local government and this section shields it.

Mr. Lebrun commented that laws currently exist which delegate municipal planning authority to city planning commissions which would appear to be contrary to this constitutional provision, and he is not aware of any of these being challenged.

Professor Libonati that indicated issues affecting the legislature as a body which are not included in Article III but are found in the legislative articles of other states are impeachment, confirmation, appropriation and budgetary powers, investigative and informational powers, authority of the legislature to ask for advisory opinions from the state Supreme Court, distribution of powers in inter-branch conflicts (which are currently covered in Article II), and the power to expel or discipline members for misconduct.

Professor Libonati concluded his remarks by stating that the legislative branch of government is key to identification of problems, clarification of goals, and problem-solving. He noted that problem-solving involves debate, deliberation, negotiation, are the qualities which differentiate legislative policy-making from the executive branch policy-making and from policy-making through initiated measures.

The committee recessed at 3:00 p.m. and reconvened at 3:15 p.m.

Commission Questions and Discussion

Responding to Mr. Roe, Professor Libonati said that in some states the Attorney General reviews the text of a proposed initiative; in South Dakota, the LRC reviews them.

Mr. Lebrun asked who is in charge of setting up public hearings and who pays for them.

Professor Libonati said that the hearings are at public expense.

Mr. Lebrun asked how South Dakota's compares with other states in regard to legislative qualifications. Professor Libonati said that South Dakota's qualifications are standard.

After further brief commission discussion, the commission recessed at 3:42 p.m.

Thursday, October 21, 2004

Legislative Redistricting

In discussing the background of redistricting, **Mr. Reuben Bezpaletz**, Chief of Research Analysis and Legal Services for the LRC, said that legislatures used to be very different institutions than they are now—practically unrecognizable, which explains some of the anomalies present in current legislatures. Mr. Bezpaletz briefed the commission on the evolution of the franchise. Mr. Bezpaletz distributed copies of Issue Memorandum 93-11 titled "An Historical Analysis of Urban/Rural Apportionment in the South Dakota Legislature **(Document #4)**).

Mr. Bezpaletz said that *Baker v. Carr* was a landmark case which basically ruled that all congressional districts must be based on population—one man, one vote. South Dakota's two congressional districts were split east and west along the Missouri River, so the state was required to redistrict because the population east river was greater than the population west river.

In *Reynolds v. Simms*, Mr. Bezpaletz said that the court ruled that the same principles used for congressional apportionment must be applied to drawing states' legislative districts. At that time, Mr. Bezpaletz said that Sioux Falls and Rapid City were underrepresented in the legislature based on population, so the legislature redistricted to give Sioux Falls and Rapid City more representation.

Mr. Bezpaletz said that court case *Thornburg v. Gingles* stated that the United States Supreme Court wanted to see more minorities in the legislative process and that states cannot use multi-member districts as a means of denying representation to minorities. Mr. Bezpaletz said that minority populations tend to be less politically active, poorer, and younger than majority populations. Through research, it has been determined that a super majority of approximately 65 percent is needed in order for a minority population to elect one of its own. Mr. Bezpaletz said that a legislator from a minority district told him that the Lakota population in South Dakota is very much younger than other minority populations. He said that *Thornburg v. Gingles* focused on African American minorities in larger cities, and the Lakota population in South Dakota is consistently younger than the African American and Latino populations in larger cities. Mr. Bezpaletz said that it is a difficult process when South Dakota attempts to apply national cases to the state's redistricting and that the South Dakota Legislature did everything it could to redistrict based on *Shaw v. Reno*.

In effect, Mr. Bezpaletz said that the Supreme Court rethought the *Thornburg v. Gingles* case and decided that redistricting should be done in such way as to maximize the influence of a minority population not only to elect a minority member. Consequently, due to the somewhat ambiguous language, redistricting was made more difficult. The only clear edict was that the redistricting minority representation cannot retrogress.

Focusing on South Dakota's Constitution Article III, § 5—Legislative Reapportionment, Mr. Bezpaletz said that a constitutional amendment in 1982 stated that the legislature shall be reapportioned with single-member Senate districts and that the House districts shall be created wholly within Senate districts as either single-member or dual-member House districts.

Mr. Bezpaletz said that since some people are so far removed from their elected representation in the rural areas, the commission might want to consider creating single-member House districts in rural areas and keeping the urban areas as multi-member House districts. According to Mr. Bezpaletz, it is important for districts to be as compact and contiguous as possible with populations as nearly equal as practicable; the federal courts have allowed for a population gross deviation of ten percent. Mr. Bezpaletz said that in South Dakota local officials express opposition to splitting their counties.

Responding to committee questions, Mr. Bezpaletz said that the easiest way to attack a redistricting plan is on the basis of minority representation. Once in a while, other states' plans will be questioned on a political basis—although the federal courts recognize the political nature of redistricting and are hesitant to interfere in that regard. Mr. Bezpaletz said that nothing in the redistricting provision of the South Dakota Constitution gives cause for more alarm than the following language: "Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census." He said because "practicable" is undefined, the commission might want to consider deleting the word or define what is meant by the word. In the current federal district court decision regarding the lawsuit over South Dakota's 2001 redistricting plan, Mr. Bezpaletz said that the state has forty-five days to let the court know the intention of the legislature, not that the state has to submit a new plan in forty-five days. Mr. Bezpaletz said that if there is a move to work with a nonpartisan group regarding a redistricting plan, he would recommend the process followed in Montana where the legislature creates nine redistricting representational districts within which the legislative leadership selects five members of the legislative body to serve in each redistricting representational district. The process in Montana is set out in statute rather than in the constitution. Mr. Bezpaletz noted the Iowa redistricting system where legislative staff is required to draw a plan which then goes to the legislature. He expressed disapproval with this type of procedure. Mr. Bezpaletz said that it would be more difficult for term-limited legislators to move between houses if House districts are not nested in Senate districts. He noted that multi-districts have a devastating effect on people running for the legislature, particularly in minority districts. Mr. Bezpaletz said that single-member districts are superior for recruitment purposes. In his opinion, Mr. Bezpaletz said that South Dakota's Constitution permits a mixed system. He said that proportional representation is more of a European practice.

The commission recessed at 9:50 a.m. and reconvened at 10:05 a.m.

Commission Discussion

Mr. Brent Wilbur said that the commission might want to consider mixed districts or mandate single-member districts which would reduce geographic distance by half.

Responding to Mr. Olinger, Mr. Wilbur said that he thinks that the single-member House districts should be within the Senate districts.

Legislative Conflicts of Interest

Mr. Barnett gave the commission an introduction to the conflict of interest issue. He said that in his opinion, South Dakota Constitution Article III, § 12—Legislators ineligible for office – Contracts with state or county—and parallel statutes set a trust officer standard. He said that if a legislator receives money that is tied to the legislative process during the term for which that legislator is elected up to one year after that legislator leaves service, that legislator is in conflict of interest. If a legislator is directly or indirectly involved in any contract with the state, implied or expressed, authorized by any law passed during the term for which that legislator has been elected, that legislator is in conflict of interest.

Mr. Barnett said that it is common for a legislative candidate, or one who wishes to be a legislative candidate, to call the Attorney General's office and ask about conflict of interest. The office will give that person an opinion and advise them to seek the advice of a personal attorney also. Mr. Barnett said that the office always operates on the presumption that some day they might have to testify in a court regarding an opinion. He said that the system is not perfect and stated that he does not believe that there is any way to make it perfect. Mr. Barnett said that the reason proposed changes to Article III, § 12 go down in defeat is because the electorate does not view the process as broken; so, therefore, there is no reason to fix it. Mr. Barnett said that in his opinion Article III, § 12 should remain as written.

Mr. Barnett said that he would be willing to write a paper outlining the workability problems of trying to eliminate Article III §, 12 if the commission desires, or if the commission wishes to propose changes to this section of the Constitution, the Attorney General's Office would review the proposal, if asked.

Responding to Mr. Olinger, Mr. Barnett said that it would depend on the situation whether the conflict of interest provision would apply to legislative spouses.

Mr. Lebrun asked how South Dakota's provisions compare with other states, especially the interpretation of the term "indirectly" as it applies to spouses. **Mr. Jeff Hallem**, Attorney General's Office, said that the courts are split on the issue. Mr. Lebrun said that he would like to have information on other states' constitutions.

Anecdotally, Mr. Barnett said that there are some states that have created an ethics commission. He said that he is not in favor of such venues.

Mr. Lebrun said that there are many things that might directly or indirectly benefit a legislator in a citizen legislature.

Mr. Barnett said that he does not see it as a conflict for farmers, attorneys, etc., to be involved in the legislature; rather, he said that he views it as desirable since they are knowledgeable on issues affecting those constituencies.

Mr. Drake said that there probably is not a legislator who is not indirectly affected by state or federal monies approved during that legislator's term of service in a citizen legislature, such as for hospitals or schools. Mr. Barnett said that in 114 years, no attorney general has ever taken a position on that.

Mr. Roe asked if redefining contracts statutorily would solve the issue. Mr. Barnett said that a statute cannot override the constitution, so the issue cannot be dealt with by legislative action.

Mr. Barnett said that in the last clause of Article III, § 12 a conflict of interest comes into play only when money is involved.

Chair Miller commented that dominimus violations of this section are rightfully ignored and questioned if there was any way to address dominimus violations in the constitution. Mr. Barnett said that he feels the courts have interpreted the "any contract" language to mean no money may be involved. He said it would be difficult to draft a proposal that would declare that some contracts are okay and some are not.

Justice Zinter asked whether civil appointment should be defined. Mr. Barnett said that would be dominimus in his opinion if a legislator served on a board and just got mileage expenses.

Chair Miller asked whether a civil appointment should be defined to make it easier for the Attorney General's Office to enforce the constitution. Mr. Barnett said that if the commission wants to specify in the constitution that legislators can be placed on boards and commissions, that would be fine by him.

Chair Miller said that he would like to see a definition of civil appointment and that he looked forward to getting the paper from Mr. Barnett regarding Article III, § 12.

Mr. Barnett distributed copies of a form that anyone who is going to run for public office must complete titled "State of South Dakota Statement of Financial Interest Candidate for Public Office" (**Document #5**). The form must be filed with the Secretary of State.

Public Testimony

Ms. Christie Johnson, School Administrators of South Dakota, testified on her observation that term limits have resulted in a loss of knowledge. She said that term limits have made it more difficult to educate legislators, especially in the state-aid-to-education venue.

Ms. Johnson also said that she has found the deliberations of the commission to be informative and interesting and thanked the members for inviting participation from other individuals and the public.

Mr. Mathew McLarty, South Dakota Farmers Union, said that he, too, found the deliberations of the commission to be very interesting. He distributed copies of written testimony regarding the concerns of the South Dakota Farmers Union (**Document #6**).

Commission Discussion

Regarding civil appointments, Lieutenant Governor Dugaard commented that there are times when federal grants require the Governor to appoint legislators to the group responsible for determining how the grant monies would be distributed. There is a question whether this process conflicts with our constitutional provisions.

Mr. Olinger said that in his prior experience in the constitutional revision process, the subcommittee system did not work well. He said that there were sitting legislators on the prior deliberations and suggested that perhaps it would be beneficial for the commission to designate a legislative liaison that would keep the legislature apprised of the commission's proceedings. Mr. Olinger also suggested that the commission write to legislators soliciting their input. Also, he suggested that Mr. Ortbahn be the designee to collect all input. Mr. Olinger said that he would like to see what other states have done to strengthen their legislatures. He said that a clean-up of Article III should be available to all legislators for the upcoming session and asked for a copy of the Model State Constitution. Mr. Olinger said that the commission should focus on what is possible and expressed that he would have preferred to have current legislators on this commission because it is a political proposal.

At this time, Chair Miller asked the drafters of the motion regarding how the commission should respond to the Executive Board if they had a revised motion.

In written form (**Document #7**), **MR. LEBRUN MOVED, SECONDED BY DR. BURNS, THAT THE PREVIOUSLY ADOPTED MOTIONS REGARDING THE COMMISSION'S RESPONSE TO THE EXECUTIVE BOARD LETTER DATED AUGUST 16, 2004, BE RESCINDED AND THAT A COMMISSION RESPONSE TO THAT LETTER INCLUDE THE FOLLOWING:**

IT IS THE OPINION OF THE COMMISSION THAT THE LEGISLATION CREATING THE COMMISSION ONLY AUTHORIZES THE COMMISSION TO STUDY AND TO MAKE RECOMMENDATIONS REGARDING ARTICLE III OF THE CONSTITUTION AND RELATED STATUTES PERTAINING TO THE LEGISLATURE. THE PROVISIONS OF THE CONSTITUTION REGARDING THE STYLE AND FORM VETO AND THE LINE ITEM VETO ARE FOUND IN ARTICLE IV OF THE CONSTITUTION AND, CONSEQUENTLY, DO NOT COME UNDER THE COMMISSION'S AUTHORIZATION. HOWEVER, THE COMMISSION WOULD LIKE TO HONOR YOUR REQUEST AND REQUESTS THAT THE LEGISLATURE DURING THE 2005 LEGISLATIVE SESSION AUTHORIZE THE COMMISSION TO CONSIDER THESE VETO QUESTIONS.

THE COMMISSION ALSO RESPECTFULLY REQUESTS THE LEGISLATURE TO CONSIDER EXPANDING THE COMMISSION'S AUTHORITY TO INCLUDE OTHER PROVISIONS REGARDING THE LEGISLATIVE PROCESS THAT ARE NOT FOUND IN ARTICLE III SUCH AS THE APPROPRIATIONS PROCESS AND PROVISIONS REGARDING INITIATED CONSTITUTIONAL AMENDMENTS. THIS WOULD ALLOW THE COMMISSION TO UNDERTAKE A MORE COMPREHENSIVE STUDY OF THE LEGISLATIVE PROCESS AND THUS BE IN A POSITION TO MAKE MORE MEANINGFUL RECOMMENDATIONS FOR IMPROVEMENT OF THE LEGISLATIVE ARTICLE.

IN ADDITION, THE COMMISSION REQUESTS THAT THE LEGISLATURE GIVE CONSIDERATION TO EXTENDING THE LIFE OF THE COMMISSION FOR ONE ADDITIONAL YEAR. THIS ADDITIONAL TIME WOULD ALLOW THE COMMISSION TO COMPLETE THE EXPANDED TASK.

Mr. Cutler disagreed with the last sentence of the first paragraph of the proposed motion.

MR. CUTLER MOVED, SECONDED BY MR. WILBUR, THAT THE PENDING MOTION BE AMENDED BY DELETING THE LAST SENTENCE OF THE FIRST PARAGRAPH. The motion prevailed on a voice vote.

MR. WILBUR MOVED, SECONDED BY MR. OLINGER, THAT THE PENDING MOTION BE FURTHER AMENDED AS FOLLOWS: ON THE SIXTH LINE OF THE FIRST PARAGRAPH, BETWEEN THE WORDS "COMMISSION'S" AND "AUTHORIZATION" INSERT THE WORD "CURRENT". The motion prevailed unanimously on a voice vote.

MS. MC CLURE BIBBY MOVED, SECONDED BY MR. WILBUR, THAT THE PENDING MOTION BE FURTHER AMENDED AS FOLLOWS: ON THE FIRST LINE OF THE SECOND PARAGRAPH, DELETE THE WORD "ALSO". The motion prevailed on a voice vote.

Mr. Barnett said that when the commission was established, the legislature made it clear that the intent was that the commission's study would be limited to the study of the legislative article of the Constitution. In his opinion, Mr. Barnett said that the veto function lies within the function of the executive branch.

To that end, **MR. BARNETT MOVED, SECONDED BY MR. LUCAS, THAT THE PENDING MOTION BE FURTHER AMENDED BY DELETING THE SECOND SENTENCE IN THE FIRST PARAGRAPH. The motion failed on a voice vote.**

Mr. James Abbott said that the commission needs to respond to the letter from the Executive Board.

Mr. Lebrun said that if the commission does not have the authority to look at other articles of the constitution then the commission does not have the authority to review the veto process.

Dr. Burns said that there are so many articles that relate back to the legislature that the commission would be limited by only discussing revisions to the Legislative Article.

Mr. Cutler said that he is concerned that the study scope of the commission is getting too large. He said that those involved in making the appointments to the commission may have chosen differently if they had known that the scope was going to expand.

Mr. Olinger said that perhaps the commission could change the second paragraph of the proposed motion to indicate to the Executive Board that other areas of the constitution affect the legislature, and they are not covered by the commission's directive to study Article III. This would be in an informational manner and not a request.

Mr. Wilbur agreed and said that in his opinion the commission should not request expanding its authority. He said if the legislature wants the commission to have more time, it will provide the additional time.

Ms. McClure Bibby said that she does not want to tie the commission's hands and said that in her opinion the commission should at least ask for expansion of authority.

MR. WILBUR MOVED, SECONDED BY MR. OLINGER, THAT THE PENDING MOTION BE FURTHER AMENDED BY DELETING THE SECOND PARAGRAPH AND INSERTING:

"IN ADDITION, THE COMMISSION DOES NOT BELIEVE THE COMMISSION HAS AUTHORITY TO ADDRESS OTHER PROVISIONS REGARDING THE LEGISLATIVE PROCESS THAT ARE NOT FOUND IN ARTICLE III SUCH AS THE APPROPRIATIONS PROCESS AND PROVISIONS REGARDING INITIATED CONSTITUTIONAL AMENDMENTS." The motion prevailed on a show of hands.

Mr. Lebrun said that he wants to send the message that the commission wants to look at these other areas of the constitution that affect the legislature.

LIEUTENANT GOVERNOR DAUGAARD MOVED, SECONDED BY DR. FLYNN, THAT THE PENDING MOTION BE FURTHER AMENDED AS FOLLOWS: IN THE FIRST LINE OF THE THIRD PARAGRAPH, DELETE "IN ADDITION," AND DELETE THE SECOND SENTENCE. The motion prevailed unanimously on a voice vote.

MR. LEBRUN'S ORIGINAL MOTION, AS AMENDED, PASSED ON A VOICE VOTE.

MR. OLINGER MOVED, SECONDED BY MS. MC CLURE BIBBY, THAT CHAIR MILLER ATTEND THE EXECUTIVE BOARD'S NEXT MEETING TO PROVIDE THE BOARD THE BEST INFORMATION REGARDING THE COMMISSION'S RESPONSE AND TO ANSWER ANY QUESTIONS. The motion prevailed unanimously on a voice vote.

Next Meeting Date

The commission tentatively agreed to meet on December 15 or 16, 2004.

Also, the commission at the last meeting agreed to meet early in the 2005 Legislative Session with the legislators. That date has tentatively been set for Thursday, January 13, 2005.

Mr. Drake suggested that the commission have something, no matter how small, to present to the legislature in January as evidence of the commission's progress.

MR. OLINGER MOVED, SECONDED BY MR. DRAKE, THAT THE COMMISSION DIRECT STAFF TO RESEARCH HOW OTHER STATES HAVE MADE THEIR LEGISLATURES STRONGER. The motion prevailed on a voice vote.

Concerning obsolete provisions in Article III, Mr. Olinger suggested that commission members should get that information to staff for the next meeting.

Mr. Lebrun suggested that the commission should consider deleting the provisions in Sections 13 to 21, and paragraph 2 of Section 9. Justice Zinter requested that staff, when looking at these sections, include an explanation of modified journal entry rule that the South Dakota Supreme Court has always followed.

Ms. McClure Bibby also requested looking at any statutes that would be affected by any changes to Article III.

Before adjournment, Mr. Ortbahn distributed the following from Mr. Kurtz:

- Filling Legislative Vacancies (**Document #8**);
- Personal Financial Disclosure for Legislators (**Document #9**);
- Contracting with Government: Laws for Legislators (**Document #10**);
- To Vote or Not to Vote: Balancing Personal and Public Interests in the legislature (**Document #11**); and
- Representing Others Before Government (**Document #12**).

Adjournment

MR. BARNETT MOVED, SECONDED BY MR. ABBOTT, THAT THE COMMISSION ADJOURN. The motion prevailed unanimously on a voice vote.

The commission adjourned at 12:27 p.m.



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