COMMENTS

Comment, County Government Reorganization in Arkansas

Foreword

Soon after the proposed Arkansas Constitution of 1970[1] was reduced to a shambles by the Arkansas voters' rejection of it in November, 1970, Governor-elect Dale Bumpers of Charleston named a committee to study the possibility of presenting fragments of the document to the voters. Soon after his inauguration, this committee, chaired by Clark County Judge Randall Mathis, one of the few county officials in the state who had supported the Constitution of 1970, began studying the matter. The committee turned its attention from the beginning to that portion of the Constitution of 1970 which had purported to deal with county government.

During 1971, Mathis' committee consulted with legislators, members of the Governor's staff, former Constitutional Convention delegates and county officials in an effort to draft a proposal which would be acceptable to members of those diverse groups. The committee actually began its work by using county government provisions of the Local Government Article of the Constitution of 1970 as a springboard and sought ways to make it, standing alone, palatable to various interest groups and voters of Arkansas. The committee continued to function in 1972, and in 1973 submitted its proposal to the General Assembly. The General Assembly voted[2] to propose the amendment to the Constitution and place it before the people of Arkansas on the November, 1974, general election ballot.[3] Parts of the amend-

1. *Proposed Arkansas Constitution of 1970, with comments.* A Report to the people of Arkansas by the 7th Arkansas Constitutional Convention, February 10, 1970, cited hereinafter as Constitution of 1970.
2. House Joint Resolution 20, 1973 Acts of Arkansas.
3. The text of the Amendment is as follows:

SECTION 1. (a) A county acting through its Quorum Court may exercise local legislative authority not denied by the Consitution or by law.

(b) No county may declare any act a felony or exercise any authority not relating to county affairs.

(c) A county may, for any public purpose, contract, cooper-

ment will become effective January 1, 1975, and the remaining provisions will become effective January 1, 1977. The approval of the amendment by the voters of Arkansas will affect local government and local politics for many years to come. The voters' decision will also have significant legal ramifications of which every practitioner of the law should be aware. Because of the unusual subject matter of this discourse, it will be dis-

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ate, or join with any other county, or with any political subdivisions of the State or in any other states or their political subdivisions, or with the United States.

SECTION 2. (a) No county's Quorum Court shall be comprised of fewer than nine (9) justices of the peace, nor comprised of more than fifteen (15) justices of the peace. The number of justices of the peace that comprise a county's Quorum Court shall be determined by law. The county's Election Commission shall, after each decennial census, divide the county into convenient and single member districts so that the Quorum Court shall be based upon the inhabitants of the county with each member representing, as nearly as practicable, an equal number thereof.

(b) The Quorum Court may create, consolidate, separate, revise, or abandon any *elective* county office or offices except during the term thereof; provided, however, that a majority of those voting on the question at a general election have approved said action.

SECTION 3. The County Judge, in addition to other powers and duties provided for by the Constitution and by law, shall preside over the Quorum Court without a vote but with the power of veto; authorize and approve disbursement of appropriated county funds; operate the system of county roads; administer ordinances enacted by the Quorum Court; have custody of county property; hire county employees, except those persons employed by other elected officials of the county.

SECTION 4. In addition to other powers conferred by the Constitution and by law, the Quorum Court shall have the power to override the veto of the County Judge by a vote of three-fifths of the total membership; fix the number and compensation of deputies and county employees; fill vacancies in elective county offices; and adopt ordinances necessary for the government of the county. The Quorum Court shall meet and exercise all such powers as provided by law.

SECTION 5. Compensation of each county officer shall be fixed by the Quorum Court within a minimum and maximum to be determined by law. Compensation may not be decreased during a current term; provided, however, during the interim, from the date of adoption of this Amendment until the first day of the next succeeding month following the date of approval of salaries by the Quorum Court, salaries of county officials shall be determined by law. Fees of the office shall not be the basis of compensation for officers or employees of county offices. Per diem compensation for members of the Quorum Court shall be fixed by law.

SECTION 6. *All* county officers shall be bonded as provided by law.

SECTION 7. Sections 1 and 4 of this Amendment shall be effective January 1, 1977, and all other provisions hereof shall be effective when this Amendment is adopted.

SECTION 8. All parts of the Constitution of Arkansas in conflict with this Amendment are repealed.

cussed in a section-by-section format. Each section is reprinted within the text of the article and analysis of that section follows immediately thereafter.

> SECTION 1(a). A county, acting through its Quorum Court may exercise local legislative authority not denied it by the Constitution or by law.

This first provision, while couched as a general grant of local autonomy, contemplates several significant alterations in the governmental authority and structure of county government. The first change, which is apparent but not necessarily obvious at first blush, is the creation of a new legislative body called the Quorum Court with a grant of extensive legislative powers over local affairs. The term Quorum Court is, of course, not a new one; many Arkansas residents now consider it a legislative body. However, its present legislative powers are severely limited. It now has authority only to "assist with" the levy of taxes and appropriate county funds.[4] While the Arkansas Supreme Court has held that a county judge, acting as judge of the County Court, is required to honor a claim based on an appropriation of the Quorum Court,[5] it has held that the county court can contract to spend county funds which had not been appropriated by the Quorum Court as well.[6] This latter decision came in the face of a constitutional provision which requires an appropriation before public money can be expended.[7] The 1874 Constitution further vests in the county court exclusive jurisdiction over ". . . all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the county."[8]

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4. 1874 Ark Const., art. 7, § 30 states:

> The justices of the peace of each county shall sit with and assist the county judge in levying the county taxes, and in making appropriations for the expenses of the county in the manner to be prescribed by law; and the County Judge, together with a majority of the said justices, shall constitute a quorum for such purposes; and in the absence of the County Judge a majority of the justices of the peace may constitute the court, who shall elect one of their number to preside. The General Assembly shall regulate by law the manner of compelling attendance of such quorum.

5. Parker v. Adkins, 223 Ark. 455, 266 S.W.2d 799 (1954).

6. State *ex rel.* Prairie County v. E.F. Leathem Co., 170 Ark. 1004, 282 S.W.2d 367 (1926).

7. ARK. CONST. Art. 16, § 12: "No money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation."

8. 1874 ARK. CONST., art. 7, § 28.

While orders of the county court do not contain penal provisions and are not laws and ordinances within the common and conventional understanding of the word, many such orders necessarily result from a need for some kind of expression of general policy rules and are thus, at least, quasi-legislative. The General Assembly itself enacts much special legislation for the benefit of one or a handful of counties, despite a constitutional ban on local acts,[9] because there is no clear vestment of legislative authority to set policy for county government in Arkansas. The effect of this first proposed change would then be to shear off from the county court its quasi-legislative authority and remove the need for action by the General Assembly except in those specific instances where the General Assembly might be impelled to "deny by law" (supra) some specifically-designated exercise of local legislative authority. The general power, plus the specific powers conferred by Section 4 (infra) would then be vested in the Quorum Court under the amendment.

The second significant change which would result from the adoption of the section set forth above is the reversal of the concept known to students of government and the law as the "Dillon Rule."[10] Under existing Arkansas common law, counties, like municipalities, have only those powers specifically granted to them by the General Assembly plus whatever additional authority is necessary and incident to the exercise of those powers. As early as four years after the adoption of the 1874 Constitution, the Arkansas Supreme Court said counties, like cities and towns, are municipal corporations created by the legislature and derive all their powers from it, unless otherwise provided by the State Constitution.[11] The court has re-articulated this position on repeated occasions and the principle was reaffirmed again in 1967.[12]

The practical effect of this general grant of authority to a locally-elected governing body should be to give that local gov-

9. 1874 ARK. CONST., amend. 14.

10. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, 5th ed. (1911). The rule is set forth as follows:

> [A] municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or in incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensible. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

11. Eagel v. Beard, 33 Ark. 497, 504 (1878).

12. City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967).

erning body sufficient flexibility to handle local matters and obviate any inclination it might have to run to the General Assembly for special local authority over specific subject matter. The proposed amendment does state, however, that not only the General Assembly but the Constitution can deny or limit the exercise of local legislative authority. Thus it appears to contemplate that existing limitations on local property taxing authority of counties prescribed by the 1874 Constitution and its amendments would remain in force.[13]

Questions regarding the scope and application of the proposed amendment and its effects on the jurisdiction and authority of the County Court are raised in the discussion following Section 3 (infra).

> SECTION 1(b). No county may declare any act a felony or exercise any local legislative authority not relating to county affairs.

The Arkansas court has never been called upon to ascertain precisely what constitutes a "county affair." It has made some case-by-case determinations that specific acts of the county court did or did not constitute a valid local concern within the purview of the county court. The court found in *Ward v. Boone*[14] that the county court has jurisdiction to hear an election contest suit resulting from a local option election. That holding was based in part on the court's belief that the question of selling liquor related to the ". . . internal improvements and local concerns, . . ." over which the county court has exclusive, original jurisdiction.[15] The court later found, in *Kendall v. Henderson*,[16] that maintenance of a historical museum was a legitimate "county purpose," despite the fact that the establishment and maintenance of the museum was also a matter of interest to the state. That holding reversed a chancery court injunction granted against the county and contains a recapitulation of specific exercises of local authority which were found to be a county purpose.[17] In an earlier case, the Arkansas court said that ". . . local

13. 1874 ARK. CONST. art. 16 § 1, § 9; amends. 3, 17, 32, 38, 49, 52.

14. Ward v. Boone, 231 Ark. 655, 331 S.W.2d 875 (1960).

15. 1874 ARK. CONST., art. 7, § 28: County Court jurisdiction includes: ". . . every other case that may be necessary to the internal improvement and local concerns of the respective counties."

16. Kendall v. Henderson, 238 Ark. 832, 384 S.W.2d 954 (1964).

17. Some representative exercises of authority which have been determined to have been a county purpose include: (a) the hiring of a local registrar for birth and death certificates, Burgess v. Johnson County, 158 Ark. 218, 250 S.W. 10 (1923); (b) hiring an agricultural and home demonstration agent, Watson & Smith v. Union County, 193 Ark.

concerns over which County Courts have exclusive jurisdiction are those which relate specifically to county affairs. . . ."[18]

Describing the need for a relationship between the power and purpose of the local government, McQuillen, a municipal affairs expert says:

> [I]n the delegation of powers to municipal corporations to enact and enforce legislation, of necessity whether stated or not, an effort is made to restrict such legislation to matters *consonant with* and *germane to the general purpose of the local government* to which prerogatives may be granted . . . . (emphasis supplied.)[19]

Definitions of local or county legislative authority have developed primarily in the courts of states where municipalities and counties are chartered under either a constitutional or statutory home rule power. The Ohio court glossed its definition with language that termed local affairs ". . . such powers of government as, in view of their nature and the field of their operation, are local and municipal in character."[20] The Arizona court attempted to gain greater specificity when it stated that whether a matter is one of local interest depends on whether the activity is carried on by the city as an agent of the state or is exercised by the city in its proprietary capacity.[21] The Colorado court approached the definitional problem by reversing its field: "Subjects local and municipal or of local concern are held [in Colorado] to include any power which the Legislature might have granted [a municipality] [without unconstitutionally delegating its legislative authority] . . . ."[22] One can safely predict that if the amendment passes, it will only be a matter of time until some practitioner is called upon to help the court make some law and at that time a definition may be forthcoming.

Discussing the Local Government Article of the Constitution of 1970, one Arkansas writer appeared to believe that the provisions which have become Section 1 of the proposed amendment would better the lot of those who rely on the counties for basic services. The writer declared:

> County government in Arkansas has developed within a stagnant constitutional framework which has never delegated to

559, 101 S.W.2d 791 (1937); and (c) county fair buildings, Gordon v. Woodruff County, 217 Ark. 653, 232 S.W.2d 832 (1950).

18. Little Rock v. North Little Rock, 72 Ark. 195, 200, 79 S.W. 785, 788 (1904).

19. 2 McQUILLIN, MUNICIPAL CORPORATIONS 36, § 4.13 (1966).

20. State v. Lynch, 88 Ohio St. 71, 102 N.E. 670, 673 (1913).

21. Luhrs v. Phoenix, 52 Ariz. 438, 83 P.2d 283, 285 (1938).

22. Pueblo v. Kurtz, 66 Colo. 447, 182 P. 884, 885 (1919).

> it the power to provide for its own affairs. In this system, the county's government exists at the pleasure of the legislature. Therefore, the constitutional position of the Arkansas county is equally inflexible—it has such powers, and only such powers, as the state legislature has granted to it.[23]

The comments are as applicable to the amendment as they were to the language of its predecessor. The purpose of the amendment is greater flexibility and it would seem that a flexible definition of "county affairs" would fall neatly in the path of voters' approval of the proposal. While one might not predict what kind of definition the Arkansas court would formulate for the amorphic term, an interpretation consistent with the placement of local control over local institutions would be preferred. The Colorado court's definition, which superficially might appear to be doubletalk, may represent the most sensible approach. It would require the court on a case-by-case basis to first determine the extent of general legislative power before analyzing the appropriateness of the exercise of that authority by the local governing body.[24]

> SECTION 1(c). A county may, for any public purpose, contract, cooperate or join with any other county, or with any political subdivisions of the state or any other states or their political subdivisions, or with the United States.

This provision, along with the two foregoing subsections, was pulled with minor changes from the Constitution of 1970.[25] Its purpose there was to assure the constitutionality of any local entity's effort at intergovernmental cooperation. Such authority is already conferred on local government and extensive procedures for its exercise are set forth in existing law.[26]

> SECTION 2(a). No county's Quorum Court shall be comprised of fewer than nine (9) justices of the peace, nor comprised of more than fifteen (15) justices of the peace. The number of justices of the peace that comprise a county's Quorum Court shall be determined by law. The county's election commission shall, after each decennial census, divide the county into convenient and single member districts so that the Quorum Court shall be based upon the inhabitants of the county with each member representing, as nearly as practicable, an equal number thereof.

The section's language is self-explanatory, setting forth in some detail the composition of the legislative body created by

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23. Comment, *County Government—An Analysis of the Changes Proposed in the Const. of 1970*, 24 ARK. L. REV. 197, 198 (1970).

24. Note 22 *supra*.

25. Const. of 1970, art. 6, § 15.

26. Interlocal Cooperation Act, ARK. STAT. ANN. §§ 14-901-08 (Repl. 1968).

section 1 of the amendment and providing a means of establishing districts from which they would be elected. The impact of the decrease in justices of the peace on the state's judicial system will be discussed later. The primary impact of the section would be to restructure the political strata of the county and provide a local legislative body small enough to conduct business on a periodic basis.

> SECTION 2(b). The Quorum Court may create, consolidate, separate, revise or abandon any elective county office or offices except during the term thereof; provided, however, that a majority of those voting on the question at a general election have approved said action.

This provision was taken intact from the proposed Constitution of 1970.[27] The County Government Committee of the 7th Constitutional Convention recommended the provision as a device for allowing a great deal of county-by-county innovation and as a supplement to the more general home rule language of what has become section 1(a) of the amendment (supra); under section 1(a)'s language, standing alone, it is not clear whether a county governing body, of the people themselves, could make alterations in the system of government. The greatest significance of the section reprinted above lies in its potential for making flexible some stringent structural lines of authority which exist in county government under the 1874 Constitution.

Writing of the Constitution of 1970's inclusion of the same passage the Arkansas Law Review stated:

> Since the new document empowers the county council [the counterpart of the Quorum Court], with the consent of a majority of those voting at a general election to 'create, consolidate, separate, revise, or abandon any county office or offices' the governmental scheme provided may be rearranged by local initiative . . . when read in conjunction with . . . [Section 1(a) of the Amendment] . . . [t]hey illustrate the concept of local control over local affairs. . . .[28]

> SECTION 3. The County Judge, *in addition to other powers and duties provided for by the Constitution* and by law, shall preside over the Quorum Court without a vote but with the power of veto; authorize and approve disbursement of appropriated funds; operate the system of county roads; administer ordinances enacted by the Quorum Court; have custody of county property; hire county employees, except those persons employed by other elected officials of the county. (emphasis supplied.)

This section is similar to one found in the Constitution of 1970 which provided the springboard for the amendment's draft-

27. Const. of 1970, art. 6, § 4(c).
28. See *Comment, supra* note 23, at 203-04.

ing committee.[29] It attempts to define the extent of the county judge's executive power and would balance it against the legislative authority of the new Quorum Court. The specific powers and duties authorized by the section are drawn in part from present ministerial duties the county judge enjoys as an executive and in part from his judicial function as presiding officer over the county court. Specific authority to authorize and approve the disbursement of appropriated county funds, operate the system of county roads, and have custody of county property at present lies within the "exclusive original jurisdiction" of the county court.[30] Presiding authority over the Quorum Court is already vested in the county judge under the 1874 Constitution,[31] and the authority to hire county employees arises as a necessary incident to the exercise of both kinds of power.

The Arkansas Supreme Court has long recognized a legal difference between the county judge and the county court. One of the most frequently cited cases states that ". . . County Judges have no authority to make contracts on behalf of the county, such authority being conferred on the County Court. . . ."[32] The court held as recently as 1968 that a county court order authorizing the use of county equipment on private property would be ". . . in the nature of an affirmative defense to be produced by the County Judge [who was responsible for having the work performed] . . . ,"[33] even though it would have been signed by the same judge who authorized informally the construction. This distinction, which carries into the 1970's a long interpretive tradition, is significant in the analysis of the amendment because it does not explicitly recognize a distinction between the judicial and executive duties of the county judge. It juxtaposes his personal executive authority against the legislative power granted the Quorum Court; but it does not mention the county court at all, either to dismantle it or provide for the specific exercise of its authority.

The Constitution of 1970 proposed to place the judicial authority now exercised by the county courts within the jurisdiction of a "County Trial Court" and so provided in the Judicial Article.[34] But the amendment, though drawn from the ground-

29. Const. of 1970, art. 6, § 5.
30. See text accompanying note 8 *supra.*
31. Note 4 *supra.*
32. Lyons Mach. Co. v. Pike County, 192 Ark. 531, 93 S.W.2d 130, 131 (1936).
33. McGhee v. Glenn, 244 Ark. 1000, 428 S.W.2d 258, 261 (1968).
34. Const. of 1970, art. 5, § 7.

work laid by the constitutional convention, fails to mention it. The convention delegates could afford to ignore the existence of the county court since they started with a clean slate and attempted to write an all-inclusive document. However, Arkansas today is operating with government, and the courts, as they exist under the 1874 Constitution. One of the early questions which is bound to arise will be whether section 3 of the amendment is designed to displace the existing authority of the county court in toto or only insofar as the provisions of the amendment specifically contradict other provisions of the 1874 Constitution and its many amendments.

Except for the language that's emphasized in the section above, a practical-minded court might well construe the amendment to be a total displacement of the existing scheme of county government. However, the phrase ". . . in addition to other powers provided for by the Constitution and by law . . .," (supra) raises the implication that the provision which grants specific authority to the county judge is meant to be supplemental rather than displacemental. The 1874 Constitution created the county court, established the county judge as the presiding judicial officer[35] and assigned it jurisdiction over specific subject matter.[36] Not all of that subject matter is the sort which would be subject to displacement by the legislative and executive authority conferred respectively on the Quorum Court and county judge by the amendment.

Although the Arkansas Supreme Court has meticulously separated the judicial and executive functions of the county judge on a case-by-case basis, there is still great confusion in Arkansas with respect to what the county court is. The court has held that the county court is a court of record,[37] implying that it must, at a minimum, have a judge, a clerk and a record of some sort. The court has also held that only one judge may preside over the county court.[38] However, confusion exists not only in the minds of poolhall lawyers, but at least to a limited extent among the judiciary. The trial court in the recent case of *McGhee v. Glenn*[39] had used the terms quorum court and county court interchangeably. It is the Arkansas court's tradition of meticulous insistence on precision in delineating the executive function from

35. See note 4 *supra.*
36. See text accompanying note 8 *supra.*
37. Fisher v. Cowan, 205 Ark. 722, 170 S.W.2d 603 (1943).
38. Nixon v. Allen, 150 Ark. 244, 234 S.W. 45 (1921).
39. 244 Ark. 1000, 428 S.W.2d 258 (1968).

the judicial function of the county judge which could logically lead the court to conclude that this particular section of the amendment was not designed to displace the county court it does not even mention.

The significance of such a result would be that the county court, presided over by a ". . . man of good business education . . .,"[40] would still have original, exclusive jurisdiction over such critical judicial matters as paternity suits (bastardy) and juvenile justice (apprenticeship of minors). If the court should arrive at this interpretive result in its analysis of the amendment's effect, the work of reformers who have struggled to improve juvenile justice would still lie before them. It is likely that some of the drafters of the amendment may have thought they were abolishing the county court by displacement. However, there is in the language of the amendment the unmistakeable failure to flatly abolish it so that a remnant of county court jurisdiction set forth in the 1874 Constitution will have to be picked up by some entity or authority. Whether the General Assembly will be able to assign jurisdiction over these remnants to another court will be determined by the Arkansas Supreme Court's interpretation of the total effect of the amendment. The court could arguably look to the overall intent of the amendment and the General Assembly's intentions in promulgating it and find the amendment totally displacemental; but such a result could only come in the face of language which strongly implies the continuation of the county court.

> SECTION 4. In addition to other powers conferred by the Constitution and by law, the Quorum Court shall have the power to override the veto of the County Judge by three-fifths of the total membership; fix the number and compensation of deputies and county employees; fill vacancies in elective county offices; and adopt ordinances necessary for the government of the county. The Quorum Court shall meet and exercise all such powers as provided by law.

This section carves out specific constitutional areas within which the executive authority of the county judge would be subservient to the will of the legislative authority of the county. The opening clause in this section is similar to that which is used with respect to the county judge's authority and power in section 3. It is of less importance in this context, as it relates to the Quorum Court as a body. The 1874 Constitution grants to the Quorum Court basically the power to levy taxes and the power

40. 1874 ARK. CONST. art. 7, § 29: Enumerates qualifications County Judges must meet.

to appropriate.[41] Thus it has, as a body, no constitutional duty which surpasses what is normally considered a legislative function; and the obvious intent of the amendment, specifically sections 2 and 4, is to establish the Quorum Court as the legislative body which has the last word with respect to county affairs.

The provision authorizing the Quorum Court to override the county judge's veto, while a new power, was based on a similar provision in the Constitution of 1970.[42] Under existing law, the number and compensation of deputies, subject to constitutional limitations, is fixed by the General Assembly;[43] the power to fill vacancies in elective county offices is presently vested in the governor;[44] and while there is no direct authority for the enactment of county ordinances, many county court orders signed by the county judge are similar to ordinances in their scope and application (discussion, supra). Thus, the Quorum Court's new power would come from at least three sources.

The last sentence in the section would preserve the right of the General Assembly to regulate the exercise of local legislative authority, a right apparently already granted under section 1(a) (supra) of the amendment; and a right it now has and frequently exercises.[45]

> SECTION 5. Compensation of each county officer shall be fixed by the Quorum Court within a minimum and maximum to be determined by law. Compensation may not be decreased during a current term; provided, however, during the interim, from the date of adoption of this Amendment until the first day of the next succeeding month following the date of approval of salaries by the Quorum Court, salaries of county officials shall be determined by law. Fees of the office shall not be a basis of compensation for officers or employees of county offices. Per diem compensation for members of the Quorum Court shall be fixed by law.

The first sentence of section 5 is the primary device which has attracted the support of county officials throughout the state.[46] It would remove a $5,000 limitation on the annual com-

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41. Note 4 *supra.*

42. Note 29 *supra.*

43. *E.g.*: ARK. STAT. ANN. § 12-808 (Supp. 1973) (assessors), § 12-1118 (sheriffs), § 12-1319 (Supp. 1973) (treasurers), § 22-327 (Supp. 1973) (circuit clerks), § 22-609 (Supp. 1973) (County Judges), § 23-413 (Supp. 1973) (county clerks).

44. 1874 ARK. CONST., amend. 29 § 1.

45. *County Government Legislative Summary*, Assoc. of Ark. Counties, 1971, listed 35 Acts relating to specific offices and five relating to county government in general.

46. *Arkansas Gazette*, Nov. 2, 1973, page 4a.

pensation an official can receive under the 1874 Constitution[47] and eliminate the need for payments provided by the General Assembly which are called "expense allowances"[48] and which are of questionable constitutional legitimacy.[49] It follows the essential approach taken by delegates to the 1970 Constitutional Convention, who felt the General Assembly should be able to fix minimum and maximum salary limitations on each county office and, within those variances, the local governing body should have authority to establish whatever local salary it deems reasonable.[50] Salaries are presently fixed by the General Assembly, which of course, does not have to account for or provide the money necessary to meet those obligations.[51]

The first provision of the second sentence was drawn from the Constitution of 1970 and is self-explanatory. The balance of the second sentence is ostensibly designed to allow the General Assembly to establish salaries for county officials from the date of the adoption of the amendment until the newly organized and empowered Quorum Court is able to act sometime after January 1, 1977. This was the apparent intent of the drafting committee.[52] However, this is not what the amendment says. It states:

> . . . from the date of adoption of this Amendment until the first day of the next succeeding month following the date of approval of salaries by the Quorum Court [created under the authority of this Amendment], salaries of county officials shall be determined by law. . . .[53]

The bracketed phrase is implied and, according to the memorandum, was intended; but without the bracketed phrase the matter of authority to fix salaries during the interim period is ambiguous. The Constitution of 1970 had no such provision.

The third sentence is pulled directly from the Constitution of 1970 and would simply provide that all officials be subject to the salary provisions of section 5. It would negate existing statutory authority for the payment of various officials' salaries from fees collected by the office.[54]

The fourth sentence authorizes the General Assembly to fix

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47. 1874 ARK. CONST. art. 19, § 23.
48. See text of statutes cited at note 43 for examples.
49. Mears v. Tedford, Pulaski Chancery No. 16236, notice of appeal filed April 2, 1974.
50. Const. of 1970, art. 6, § 7.
51. See text of statutes cited at note 43 for examples.
52. Undated memorandum mailed to interested county officials by Frank Bizzell, executive director, Assoc. of Ark. Counties, Nov. 1973.
53. *Id.*
54. ARK. STAT. ANN. § 12-1701 *et seq.* (Repl. 1968) for examples.

a per diem compensation for members of the Quorum Court and follows the same general approach offered by the Constitution of 1970.[55] Under existing law, justices of the peace receive $10.00 per day, plus ten cents per mile from their homes to the county seat for attending the annual meeting of the Quorum Court.[56]

> SECTION 6. All county officers shall be bonded as provided by law.

This provision was also drawn from the Constitution of 1970.[57] It has no counterpart in the 1874 Constitution; but the General Assembly has provided for the surety bonding of some county officials.[58]

> SECTION 7. Sections 1 and 4 of this Amendment shall be effective January 1, 1977, and all other provisions hereof shall be effective when this Amendment is adopted.

The section assures that the Quorum Court, as it exists under the 1874 Constitution with one justice of the peace for every 200 electors and a minimum of two from each township,[59] will not have the new powers granted the newly organized Quorum Court until its new composition is established by the enabling legislation necessary to effectuate Section 2(a) of the amendment. It will also delay the vestment of the home rule authority conferred by section 1(a) of the amendment until the newly organized Quorum Court convenes. Delayed application of these two sections also assures that justices of the peace elected to the Quorum Court as it is presently constituted will be allowed to serve out their respective terms.

> SECTION 8. All parts of the Constitution of Arkansas in conflict with this Amendment are repealed.

Use by the General Assembly of the standard repealer clause is one of the bases for doubt that the amendment would eradicate the authority of the county judge to preside over the county court. Use of the phrase "in conflict with" makes it just as questionable that the amendment intends to abolish the judicial authority of the justices of the peace who comprise the Quorum Court.[60]

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55. Note 50 *supra.*

56. ARK. STAT. ANN. § 17-402.1 (Repl. 1968).

57. Const. of 1970, art. 6, § 8.

58. For examples: ARK. STAT. ANN. § 12-801 (assessor), § 12-901 (coroner), § 12-1002 (recorder), § 12-1101 (Sheriff) (Repl. 1968).

59. 1874 ARK. CONST., art. 7, § 39.

60. ARK. CONST. art. 7, § 40 states that justices of the peace have jurisdiction which falls into four categories: (1) They have exclusive jurisdiction in contract matters where the amount in controversy does not exceed $100, plus interest. They have concurrent jurisdiction in such

To some students of government, it might seem incongruous for an amendment such as this to separate government into two branches, legislative and executive, and allow the members of each to exercise judicial authority as well. Such a vestment of authority might be inconsistent with the thinking that led the drafters of the U.S. Constitution to establish the checks and balances inherent in our three separate branches of national government. It is not uncommon in county government as the various forms have evolved around the United States during the past 250 years.[61] Nevertheless, continuance of the county judge's authority to preside over the county court and continuance of the judicial authority of the justices of the peace is not inconsistent with county government as it has developed in Arkansas. The justices of the peace now enjoy the limited legislative power to levy taxes and appropriate county funds,[62] and each may also preside over a court of limited jurisdiction.[63] The county court's jurisdiction encompasses subject matter which is judicial, administrative and legislative in scope.[64] The subject matter within the jurisdiction of a justice of the peace court is judicial in nature.[65] The question of whether the amendment actually relieves these officials of their judicial duties will ultimately, no doubt, be answered by the Arkansas Supreme Court. Several factors may lead the court to a negative answer.

The Constitution of 1970 obviously contemplated a balanced system of government with county-wide judicial authority vested in someone other than the governing body and chief administrative official. Even though this kind of balance may not be achieved by the amendment as it is presented to the electorate of Arkansas, the amendment would splinter off power now exer-

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litigation with the Circuit Court where the amount is up to $300, plus interest. (2) They have concurrent jurisdiction with the Circuit Court in suits for the recovery of personal property and in damages to personal property where the worth of the personal property is no more than $300 and where the amount of damages in controversy is not more than $100. (3) They also have such jurisdiction over misdemeanors as may be prescribed by law. (4) They are also charged to sit as examining courts and "commit, discharge or recognize offenders" and bind them over to the court having jurisdiction.

61. Duncombe, *County Government in America*, 41 NAT. ASSOC. OF COS. RES. FDN. (1966).

62. ARK. CONST. art. 7, § 30. *See also* ARK. STAT. ANN. § 17-401 (Repl. 1968).

63. Note 60 *supra*.

64. See text accompanying note 8 *supra*.

65. Note 60 *supra*.

cised by the county court and the General Assembly and establish a locally-elected governing body of workable size to wield that power. While the overlap of judicial and executive authority on the one hand and judicial and legislative on the other might be offensive to some governmental theorists, it is not at all unusual. A large minority, if not a majority of county governments in the United States today, are structured so these traditional functions of government overlap in a variety of ways.

The County Commissioner Board system, described as the predominant form of county government,[66] is comprised of elected commissioners who constitute a legislative body. While county commissioners traditionally exercise no judicial function:

> . . . County boards of the commissioner type usually have extensive administrative powers as well as the legislative power to enact such ordinances and regulations as are permitted by state law. . . .[67]

And it is said of the township supervisor type of board, which originated in New York during colonial times, that he ". . . acts in a dual capacity: (1) as executive head of his township and (2) as a member of the county governing body. . . ."[68]

According to a 1965 study by the National Association of Counties Research Foundation, 666 of the 3,080 counties in the United States used some variation of a commission system under which either the presiding judge or the commissioners themselves exercised judicial authority as well as legislative or executive power. These forms were primarily in force in Texas, Alabama and Oregon. That same year, according to the same study, 299 counties in Arkansas, Kentucky, Georgia and South Carolina utilized some variant of the prevailing system of county government established in Arkansas by the 1874 Constitution.[69]

The amendment would, at the very least, minimize the extent of overlap of judicial, legislative and executive authority. The 1874 Constitution does allow the General Assembly to prescribe by law when the terms of the county court shall be held[70] but there is no implication in the provision that the General Assembly could prescribe the county court out of session.

The authority of the county court over bastardy and juvenile proceedings would not be within the general scope of duties

66. SATO & VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW, 1970, 394.
67. *Supra*, note 61, at 42.
68. *Id.*
69. *Id.* at 44.
70. 1874 ARK. CONST. art. 7, § 31.

assigned to either the county judge or the Quorum Court as described in the amendment. Neither would they be ". . . in conflict with . . ." the provisions of the amendment. The 1874 Constitution allows the General Assembly to establish courts of common pleas, to be presided over by the county judge;[71] and the General Assembly has established them from time to time.[72] Because the General Assembly's authority is discretionary, it could abolish common plea jurisdiction or the common plea courts themselves. Clearly, a great deal of the General Assembly's time during the 1975 session may be consumed in dealing with such matters as shifts of subject matter jurisdiction from the county court to some other body—either the Quorum Court or some court with judicial authority. Under the amendment, much of the county court's authority is shifted to the Quorum Court. However, existing law governing the incorporation of municipalities;[73] annexation of contiguous property to municipalities;[74] and acceptance of plats of proposed rural development[75] could arguably be classified as either a county affair over which the exercise of local legislative authority is appropriate[76] or a judicial matter to be resolved by an impartial judge.

Many justices of the peace in Arkansas do not act in a judicial capacity. Since the Arkansas Supreme Court's ruling in *Doty v. Goodwin*,[77] which precluded justices of the peace from accepting fees conditioned on a finding of guilt, the number has decreased. However, were the number of justices of the peace in a county to be decreased under the new amendment from 50 to five or seven and the jurisdiction of the new justices of the peace proportionately expanded, would those new justices seek to exercise or abrogate judicial authority?

Some persons who appeared before the County Government Committee of the constitutional convention urged the retention of some minor judicial officials as necessary to provide a preliminary arraignment for persons charged with criminal violations, as chancery, circuit and municipal judges are often widely scattered in multi-county judicial circuits.[78]

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71. 1874 ARK. CONST. art. 7, § 32.
72. Specific acts compiled at: ARK. STAT. ANN. § 22-615 (Repl. 1962).
73. ARK. STAT. ANN. § 19-101 *et seq.* (Repl. 1968).
74. ARK. STAT. ANN. § 19-301 *et seq.* (Repl. 1968).
75. ARK. STAT. ANN. § 19-401 *et seq.* (Repl. 1968).
76. Amendment, § 1(a), *supra* note 3.
77. 246 Ark. 149, 437 S.W.2d 233 (1969).
78. Memorandum compiling minutes of June 25, 1969 meeting of

The General Assembly may be able to remedy the problem by disallowing compensation for the exercise of judicial duties or by prescribing coextensive judicial and legislative authority, but the amendment, as written, does not appear to abolish this judicial authority. Legislative efforts to restrict the authority of the justices of the peace would require careful research and drafting to avoid a constitutional confrontation. Further fuel for the argument that the amendment was meant to be supplemental rather than displacemental lies in the fact that the amendment nowhere mentions existing elective officials other than justices of the peace and the county judge. Other officials are mentioned specifically and established by either the 1874 Constitution[79] or its amendments.[80] Few would seriously suggest that the amendment should by implication abolish these other elective offices. It is questionable that the Arkansas court, if and when it should ultimately address the issue, would construe the amendment as abolishing the county court or as terminating its jurisdiction over subject matter which is neither legislative nor executive in character. According to the language of the amendment, repeal of provisions in the 1874 Constitution and its amendments is conditioned on conflict, an implication that an inconsistency not directly contradictory would remain in force. On the contrary, it is at least arguable that the existence of the county court conflicts with the intent, if not the literal language, of the amendment.

The amendment is susceptible to another interpretation. With legislative authority over county affairs vested in the Quorum Court, it is arguable that a proper county affair is the adjudication of local paternity suits, the care of illegitimate children and the administration of juvenile justice to local juveniles. If these matters were left to local governing bodies, the state would be a patchwork quilt of locally conceived and contrived courts with which no attorney could be completely familiar. However, by deeming the two subject matter areas a county affair, the General Assembly could then assert its right to preclude local government from acting in these two areas and enact its own state-wide formula for dealing with the thorny issues of bastardy and juvenile justice.

A more tenable position, though not necessarily a more de-

Assoc. of Ark. Cos.; and forwarded to members of the Co. Govt. Comm. of 7th Ark. Const. Convention.

79. 1874 ARK. CONST. art. 7, §§ 19, 46.

80. 1874 ARK. CONST., amend. 24 § 3.

sirable result, can be achieved by concluding that bastardy and juvenile justice are and should be a part of the state-wide judicial system *and as such were never a county affair and were never subject to local legislative actions.* The Arkansas court has held repeatedly that the county court has exclusive original jurisdiction over bastardy proceedings[81] and the court has further held that "[w]ithin the limits of its jurisdiction the county court is a court of superior jurisdiction" and "[n]o other court may disregard or invade that jurisdiction."[82]

CONCLUSIONS

The amendment will chip away at the concentration of legislative, executive and judicial power presently vested in the county judge, as an executive and as a judicial officer. It will divide the executive and legislative authority between the Quorum Court and the county judge. It will give the General Assembly an opportunity to make other provisions for certain types of judicial proceedings which are neither related to bastardy nor juvenile justice. To this extent, it could provide the people of the state with a more responsive, responsible structure of county government. It will provide the means by which a salary level consistent with the level of responsibility could be established. To this extent, it could attract better people into county government, and influence competent people in county government to remain in county government. However, it is not a panacea. The road toward implementation of the amendment is ripe with potential for error by the General Assembly of both judgment and constitutional conflict.

Legal questions are bound to arise immediately with respect to both the existence and remaining authority of the county court. Unless the Arkansas court decides the entire structure of county government as devised by the 1874 Constitution should be abolished by implication, the only sure way to resolve the potential influx of controversies would be by adoption of still another constitutional amendment at some future date to remove the last vestiges of judicial powers of the justices of the peace and county judge which may yet exist as a constitutional hangover from 1874.

BOYCE DAVIS[83]

81. Belford v. State, 96 Ark. 274, 131 S.W. 953 (1910).

82. Burgess v. Four States Mem. Hosp., 250 Ark. 485, 465 S.W.2d 693, 698 (1971).

83. Delegate: 7th Ark. Const. Convention, member Co. Govt. Comm.