

10-27-1978

## City Club of Portland Bulletin vol. 59, no. 23

City Club of Portland (Portland, Or.)

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City Club of Portland (Portland, Or.), "City Club of Portland Bulletin vol. 59, no. 23" (1978). *City Club of Portland*. 325.

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# **City Club** of Portland

**BULLETIN**

Portland, Oregon

Vol. 59, No. 23

**Benson Hotel, Mayfair Room**

**12:00 Noon**

**Friday, Oct. 27, 1978**

**THE PROGRAM:**

**PRESENTATION, DISCUSSION AND VOTE ON  
NOVEMBER 1978 BALLOT MEASURE REPORTS**

**PRINTED HEREIN FOR DISCUSSION AND VOTE  
ON FRIDAY, OCTOBER 27, 1978:**

**REPORT ON STATE MEASURE NO. 1**

**APPELLATE JUDGE SELECTION, RUNNING ON RECORD**

*The Committee:* Lynn Berg, Millard H. McClung, Stuart Mechlin, C. William Muter,  
Milan Stoyanov, Don S. Willner, *Chairman.*

**REPORT ON STATE MEASURE NO. 2**

**AUTHORIZES SENATE CONFIRMATION OF GOVERNOR'S  
APPOINTMENTS**

*The Committee:* Marilyn L. Day, Marva Graham, Charles Markley, John L. Rian,  
Mary Ropicquet, Thomas H. Hammann, *Chairman.*

**REPORT ON STATE MEASURE NO. 4**

**SHORTENS FORMATION PROCEDURES FOR  
PEOPLE'S UTILITY DISTRICTS**

*The Committee:* Owen P. Cramer, David M. Crow, Baird French, Frank Lagesen,  
Thomas Stimmel, Nina Westerdahl, Royald V. Caldwell, *Chairman.*

**REPORT ON STATE MEASURE NO. 8**

**REQUIRES DEATH PENALTY FOR MURDER  
UNDER SPECIFIED CONDITIONS**

*For the Majority:* Mary Ann Hague, D. Richard Hammersley, Charlotte M. Schwartz,  
Brian Gard.

*For the Minority:* Lee M. Parker, A. M. Whitaker, *Chairman.*

### DUES REMINDER

A second billing notice was mailed September 15 to a number of City Club members who had not paid their dues. Members who are still in arrears on October 31 will be suspended by the Board of Governors. If you have a question about your billing, please call the City Club office at 228-7231. Thank you.

### LAW COMMITTEE NEEDS MEMBERS

The Standing Committee on Law and Public Safety is looking for new members to fill recent vacancies. Committee chairman Jim Mitchell asks that members interested in meeting about once a month to discuss issues in this category of concern call the City Club office to volunteer. No experience necessary!

### PSU COMMITTEE MEETS STATE BOARD

Chairman Leigh Stephenson and members of the City Club committee which studied "The Role of Portland State Uni-

versity in the Community" met in Portland October 20 with the Oregon State Board of Higher Education to discuss the report's recommendations.

Chancellor Lieuallen extended a special invitation to the committee as part of the Board's examination of PSU's goals and its relationship to the community. The report was adopted by the City Club on March 31, 1978.

### BALLOT MEASURE SUMMARY NEXT WEEK

Next week's *Bulletin* (issue of November 3) will contain a summary of City Club recommendations on November ballot measures:

The *Club's* position will appear for those measures already voted on by November 3. The summary will show the *committees'* recommendations for the three reports which will be up for a Club vote on the 3rd.

Several state and local measures were not studied by the Club this year. Next week's *Bulletin* will contain a statement by the Research Board on those measures for the information of the membership.

### PROPOSED FOR MEMBERSHIP

If no objections are received by the Executive Secretary prior to November 10, 1978, the following applicants will be accepted for membership:

*Carole L. Thomas*, Research Assistant, Oregon Regional Primate Center. Sponsored by Dianna Gentry.

*Gregory E. Niedermeyer*, Accountant, Arthur Young & Co. Sponsored by Janet King.

*Richard G. Helzer*, Attorney, in practice. Sponsored by A. M. Whitaker, Jr.

*Eva Veazie*, Insurance Agent, Owner, Eva Veazie Insurance. Sponsored by A. M. Whitaker, Jr.

*Pat Borunda*, Management Consultant, Deloitte, Haskins & Sells. Sponsored by Stephen R. Frank.

*Belinda Kinyon*, Administrative Services Manager, Crown Zellerbach Corp. Sponsored by Jack R. Brown.

#### CITY CLUB OF PORTLAND BULLETIN

Published each Friday by the

#### CITY CLUB OF PORTLAND

730 Southwest First Portland, Oregon 97204  
Phone 228-7231

CHRISTINE A. TOBKIN, *Editor  
and Executive Secretary*

Second Class Postage Paid at Portland, Ore.  
Subscription rates \$6.00 per year included in annual dues.

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**REPORT ON**  
**STATE MEASURE NO. 1**  
**APPELLATE JUDGE SELECTION, RUNNING ON RECORD**

Purpose: Amends constitution to provide new selection, reelection method for judges of Supreme Court, Appeals Court, and Tax Court judge. Governor fills vacancy from "well-qualified" list submitted by nonpartisan nominating commission consisting of Chief Justice plus three lawyers, three laymen appointed by Governor pursuant to law. Appointed judges serve until second general election after appointment. Incumbent judges reelected for six years by "yes" vote majority in general election; if majority vote "no," office becomes vacant.

To the Board of Governors,  
The City Club of Portland:

**I. INTRODUCTION**

This Measure would amend the Oregon Constitution to change the method of selection and retention of judges of the Supreme Court, Court of Appeals and Tax Court, our three statewide courts. At present these judges are elected on a non-partisan basis for a six year term. If a judge resigns or dies during his term of office, the governor appoints a successor who serves until the next general election.

Measure 1 provides that the initial selection shall be made by the governor from persons designated as well qualified by a non-partisan judicial nominating commission consisting of the Chief Justice, three attorneys and three non-attorneys appointed by the governor as provided by law. At the general election following two years in office, the voters shall vote yes or no on the question, "Shall Judge (naming him or her) be elected to succeed (himself or herself, as appropriate) as judge of the (name of court)?" A majority of "yes" votes means a six year term followed by the same election procedure. A majority of "no" votes vacates the office at the expiration of the term and the governor appoints a successor in the same way. The text of the present constitutional provisions and the Measure are in the Appendix. Existing methods for removal of judges by the Judicial Fitness Commission and by a recall election initiated by the voters would remain.

**II. SCOPE OF RESEARCH AND BIBLIOGRAPHY**

The members of your Committee represented a broad range of professions: a sales representative, a museum director, a parks administrator, a life insurance agent, a lumber broker and a partner in a law firm.

Your Committee listened to presentations from proponent David Landis, Portland attorney, who represented the Oregon State Bar at the 1977 legislative committee hearings and opponent Marion County Circuit Judge Wallace Carson who, during the 1977 session, was a member of the Senate Judiciary Committee. In addition, committee members talked to Judge Robert Thornton, Judge George Van Hoomissen, Senator Victor Atiyeh, Senator Ted Hallock, Rep. Vera Katz, Rep. Roger Martin, and James Griffin and other Portland attorneys.

Your Committee studied the minutes of the House and Senate committee hearings and comparative material from around the country obtained from the American Judicature Society.

**III. BACKGROUND**

In 1940 Missouri was the first state to adopt a plan similar to the one now proposed for Oregon. The "Missouri Plan," as it has come to be called, has since been adopted in whole or part in 21 other states. On the west coast, California has a Missouri plan only

for the appellate courts. Currently in that state there is a major campaign in progress over the retention of recently appointed Chief Justice Rose Bird. Washington elects all its judges in a fashion similar to Oregon. Alaska has a Missouri plan for all courts.

Many of the states that have gone to the Missouri plan replaced a partisan election system in which judges ran as Democrats or Republicans and their career often depended upon the success of their political party at the polls. It is generally agreed that it is very difficult to defeat a judge running on his record without a "live" opponent. In Alaska in 1974 the state bar association opposed two judges, both of whom were reelected by particularly wide margins in a yes or no vote. In 1976, the Alaska Judicial Council opposed one judge, and he too was reelected by an overwhelming margin.

In Oregon, four of the present supreme court justices were initially elected to the court (Chief Justice Denecke, Acting Chief Justice Holman, and Justices Bryson and Lent), and three were initially appointed (Justices Tongue, Howell and Linde). Most statewide judges have been reelected without opposition. They are helped by the ability to have a ballot slogan which tells the voters that they are incumbents. Only one incumbent supreme court judge has been defeated for reelection in recent memory. In 1970, Justice Sloan of Astoria was defeated by Multnomah County presiding Circuit Court Judge Bryson, who had previously been a state senator and president of the Oregon State Bar. The only other recent major effort to defeat an incumbent supreme court judge was in 1974 when then Multnomah Circuit Judge Lent, who previously had been majority leader of the Oregon Senate, failed to defeat Judge McAllister of Medford. Lent subsequently was elected to the Supreme Court in 1976.

The Court of Appeals was created in 1969 with five judges. One more judge was added in 1973, and four more judges were added in 1977. All members were initially appointed, except then Attorney General Lee Johnson who was elected to a new seat in 1976. Former Attorney General Robert Thornton of Salem defeated Judge Branchfield of Eugene in 1970; Jason Lee of Salem defeated Judge Tanzer of Portland in 1974; and, Multnomah District Court Judge Richardson defeated Judge Fort of Eugene in 1976. Judge Tanzer was elected back on to the Court in 1976, replacing a retiring judge.

Thus, of the present Court of Appeals Judges, six were initially appointed and four initially elected (four of these six appointees were added in 1977).

The Oregon Tax Court was created in 1961. It is a specialized court with only two judges in its history, both appointed.

Though their supporters were disappointed, there was little public outcry over the defeats of Justice Sloan, Judge Branchfield and Judge Fort. The unofficial poll of the attorneys in the state favored the incumbent in all three cases, but their opponents were generally felt to be qualified.

Every discussion of the desirability of the Missouri plan in Oregon inevitably comes to Jason Lee's successful challenge to Judge Jacob Tanzer in 1974, and this report cannot be meaningful without a candid review of that situation. Salem attorney Jason Lee, bearing the name of a famous Oregon pioneer to whom he is not related, had previously run for political offices and had substantial name familiarity. When he ran against Judge Tanzer the bar poll was 2,217 for Tanzer and 177 for Lee. Lee ran a skillful campaign, including attacks on Tanzer's integrity in that Watergate year. Tanzer ran an inadequate campaign. Lee won by a narrow margin, 236,706 to 235,053. Tanzer challenged the results in court and a Marion County Circuit Court jury found Lee guilty of fraudulent campaign practices and took away his victory, only to have it reversed by the Oregon Supreme Court. Judge Lee's early performance on the Court of Appeals was criticized in some quarters, though there has been less public criticism lately. He will next face the electorate in 1980.

It is generally felt that able people have been appointed to the Oregon appellate courts and Oregon governors have taken great pride in their appointments. The appointments to Circuit and District Courts have sometimes been criticized as being too political, but these lower courts are not affected by this Measure.

The Missouri plan has been before the Oregon legislature at previous sessions, but this is the first time that the proposal has passed both houses and been referred to the people.

#### **1. Selection**      **IV. ARGUMENTS IN FAVOR OF THE MEASURE**

Judges should be selected upon merit. Screening by the non-partisan judicial nominating commission will provide better candidates and minimize the chance of appointment based on politics or friendship.

#### **2. Retention**

Where the incumbent judge runs on the record rather than against a "live" opponent there is a greater chance that the incumbent will win. This will tend to minimize the necessity for judicial campaigning and campaign fund raising. The increased job security will mean greater judicial independence and more able attorneys willing to leave their practices to seek judicial appointment.

#### **3. Oregon Experience**

Under the existing system, incumbent appellate judges with little name familiarity can be defeated by less qualified, popular challengers well known to the voters in the Portland metropolitan area.

#### **4. The Particular Measure**

(a) The plan should be limited to the appellate courts because the people have more familiarity with the local judges and therefore can cast a more informed vote at the local level.

(b) The legislature can be trusted to write into law qualifications for the members of the nominating commission.

#### **1. Selection**      **V. ARGUMENTS AGAINST THE MEASURE**

Screening by the nominating commission may result in

(a) a more political process because the governor appoints six out of seven members of the nominating commission, or

(b) this elitist group substituting its views for the judgment of the people.

#### **2. Retention**

The Missouri plan will result, in most cases, in life tenure for judges with the possibility of a resulting loss of humility and humanity.

#### **3. Oregon Experience**

Qualified Justices have been appointed or elected to the Supreme Court. Though there has been some turnover in these first few years of the Court of Appeals, the present system has worked well. Oregon has respected the independence of appellate judges as well as other elected officials.

#### **4. The Particular Measure**

(a) At the circuit and district court level more appointments have been criticized and more incumbents defeated, yet the proposal only includes the statewide courts.

(b) No one knows what the legislature will do about qualifications of nominating commission members in a law not yet written.

### **VI. DISCUSSION**

This measure is too often discussed in slogans. Proponents call it a "merit system" while opponents argue against "taking away the right of the people to elect their judges." Actually, merit is often dependent upon the eyes of the beholder, and the argument for more popular elections could lead to every major agency head being on the ballot.

Any present or future selection process will involve "politicking," that is, attempts to persuade the person or group that does the choosing. In reviewing the evidence your Committee felt that the Oregon system of selection and retention of judges has worked well. Our state has not experienced the evils of partisan judicial elections. Our appellate courts are well respected. The evils that have caused other states to change their systems have not occurred here. The criticisms that have resulted from one instance of an allegedly less qualified judge being elected only emphasize that in the overwhelming majority of times the electorate has done its work well. Alternative plans can be reviewed in the future if the need is demonstrated. There is no need to risk a new system at this time.

One effect of Measure 1 that troubled the Committee would be the extreme difficulty of defeating an incumbent judge when there was no "live" opponent.

The Alaska experience with the "Missouri plan" shows that even judges whose records are criticized in an organized campaign are retained by large majorities on a yes or no vote. There is no reason to think that the old political adage that you cannot beat someone with no one would be any different here.

The Committee also felt that the Measure is inadequate since it does not define the composition, term or procedure of the nominating commission, and therefore there is no way of knowing on what basis judges would be selected.

The voters are often accused by those with 20-20 hindsight of making the wrong decision on elective offices. Nominating commissions can also make mistakes. The cure for better voter decision making, however, is greater participation in the campaigning and election process. This may mean that Oregonians will have to devote greater effort to insuring a continuation of a high quality judiciary, but then no one ever argued that democracy was easy.

#### VII. RECOMMENDATION

Your Committee recommends a "NO" vote on Measure No. 1 at the November 7, 1978 general election.

Respectfully submitted,  
Lynn Berg  
Millard H. McClung  
Stuart Mechlin  
C. William Muter  
Milan Stoyanov  
Don S. Willner, *Chairman*

#### APPENDIX A

#### ARTICLE VII

(Amended)

#### JUDICIAL DEPARTMENT

Section 1. Courts; election of judges; term of office; compensation. The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.

(Created through initiative petition filed July 7, 1910, adopted by people Nov. 8, 1910.)

## APPENDIX B

## TEXT OF STATE MEASURE NO. 1

BE IT RESOLVED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON:

Paragraph 1. Section 1, Article VII (Amended) of the Constitution of the State of Oregon is amended, and the Constitution of the State of Oregon is amended by creating a new section 10 to be added to and made a part of Article VII (Amended), such section to read:

Sec. 1 (1) The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. The judges of the Supreme Court and such other courts as possess state-wide territorial jurisdiction, except circuit courts, shall be selected as provided by subsections (2) to (5) of this section. The judges of the circuit courts and such other courts as do not possess state-wide territorial jurisdiction shall be elected by the legal voters [*of the state or*] of their respective districts for a term of six years [, *and*]. All judges shall receive compensation as may be provided by law, which compensation shall not be diminished during the term for which they are selected or elected.

(2) Notwithstanding section 16, Article V of this Constitution, when a vacancy occurs in the office of judge of the Supreme Court or other court that possesses state-wide territorial jurisdiction, except a circuit court, the Governor shall fill the vacancy by appointing one person from those persons who are designated well-qualified for judicial office in a report presented to the Governor by a nonpartisan judicial nominating commission. The commission shall consist of the Chief Justice of the Supreme Court, three members of the Oregon State Bar appointed by the Governor from among recommendations of the Oregon State Bar selected as provided by law, and three persons not attorneys, appointed by the Governor, and whose qualifications shall be provided by law.

(3) Further provisions governing membership and procedures of the commission and the appointment of judges by the Governor shall be established by law.

(4) A person appointed as a judge under subsection (2) of this section shall hold office for a term extending until the first Monday in January following the date of the regular general biennial election next following the expiration of 24 months' service in his office or until his successor is selected and qualifies.

(5) Not later than 90 days before the date of the regular general biennial election immediately preceding the expiration of his term of office, a person holding the office of a judge of the Supreme Court or other court that possesses state-wide territorial jurisdiction, except a circuit court, whose initial selection is governed by this section, or who was elected or appointed to such office prior to the effective date of this constitutional amendment, may file with the Secretary of State a statement of his candidacy to succeed himself. If such statement is filed, at such election there shall be placed on the ballot the question, "Shall Judge (naming him or her) be elected to succeed (himself or herself, as appropriate) as judge of the (name of court)?," with an appropriate place provided on the ballot for the voter to indicate "YES" or "NO." No other person's name may be placed on the ballot as a candidate for election to the office. If a majority of those voting upon the question vote "YES," the judge shall be elected to succeed himself. If less than a majority so vote "YES," the office shall be vacant at the expiration of the judge's current term of office. A judge elected to succeed himself as provided in this section shall serve for a term of six years.

SECTION 10. The amendment proposed by this resolution shall become operative on July 1, 1979. This section shall expire and stand repealed on July 2, 1979.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general biennial election held throughout the state.



**NOTES**

**REPORT ON**  
**STATE MEASURE NO. 2**  
**AUTHORIZES SENATE CONFIRMATION OF GOVERNOR'S**  
**APPOINTMENTS**

**Purpose:** Proposed constitutional amendment authorizes legislation requiring confirmation by the State Senate of all appointments and reappointments to state public office by the Governor, including vacancies in elective office except judges, United States Senator or Representative, and district, county and precinct offices. Appointees are not eligible to serve until and unless confirmed as required by law.

To the Board of Governors,  
The City Club of Portland:

**I. INTRODUCTION**

Measure No. 2 is a proposed amendment that would add a new section to the Oregon Constitution. It is not a replacement of an existing provision. It was adopted by the 1977 legislature to be voted on at the general election on November 7, 1978. The full text of the proposed amendment is included in this report as Appendix A.

**II. SCOPE OF RESEARCH AND BIBLIOGRAPHY**

Resource persons interviewed by the Committee and materials considered are listed in Appendix B of this report. The interviews included persons directly associated with the governor's office and with the legislature, as well as others who are professional observers of the Oregon governmental process.

**II. HISTORY AND BACKGROUND**

**A. Statutory Framework**

Oregon has an existing statutory framework providing for Senate confirmation of gubernatorial appointments. This consists of two statutes providing for the mechanics of confirmation which require a majority vote of the full Senate if it is in session or a favorable vote of four of the six members of the standing Committee on Executive Appointments in the interim between legislative sessions. Statutes which establish the boards and commissions indicate whether the appointments made to them are subject to confirmation.

The Oregon Constitution does not, however, include any provision pertaining to Senate confirmation of gubernatorial appointments.

The substance of the statutory framework was first enacted in 1929. Prior to that time there were two instances (the first one in 1872) in which statutes were enacted designating the Governor to make an appointment subject to Senate confirmation. In each case the Senate was in session when confirmation was required. Apparently there have been no instances where the confirmation power was exercised when the Senate was not in session. Other appointments either were made directly by the legislature or were made solely by the Governor pursuant to the statute creating the position. On at least three occasions the Governor made appointments for vacancies occurring between legislative sessions to positions that had originally been appointed by the legislature, presumably under the general interim appointment power of the Oregon Constitution.

At the present time the statutory framework requires Senate confirmation of appointments made to 55 of the current total of 130 boards and commissions to which the Governor makes appointments.

## B. Nature of Controversy

In the past few years before this Measure was adopted by the legislature, there were at least two occasions when the Senate refused to confirm an appointment, and on one of them the appointee served in the office under Governor McCall, notwithstanding the Senate denial of confirmation. This fact underscores the nature of the controversy involved here. Basically, it is a confrontation between the governor's office, which maintains essentially that the statutory framework is unconstitutional, and the legislature, which maintains the statutory framework is constitutional and that the Governor is violating the law when appointees hold office after denial of confirmation.

The testimony heard by the Committee indicated that some members of the legislature had been searching for a means to clarify the constitutional authority of the statutes providing for Senate confirmation, and in July, 1977, this resulted in the adoption and referral of Measure 2 to the voters.

Shortly thereafter the controversy surfaced again and received public attention after the appointment by Governor Straub on August 10, 1977 of Mr. Ronald L. Wyden to the Board of Examiners of Nursing Home Administrators. The Senate Committee on Executive Appointments denied confirmation of Mr. Wyden's appointment on November 30, 1977, and on the same day Mr. Wyden took an oath of office as a member of the board and still serves in that capacity.

As a result, nine members of the Senate brought an action in the Oregon Supreme Court to compel the Governor to appoint a person to the Board of Nursing Home Administrators, subject to confirmation by the Senate Committee on Executive Appointments pursuant to applicable Oregon statutes.<sup>1</sup> The substance of the legal briefs to the Court from both plaintiffs and defendant were mainly devoted to constitutional issues. The Court dismissed the action, however, on the procedural ground that the plaintiffs had chosen the wrong remedy (i.e. to compel the Governor to make an appointment) because there was a specific statutory remedy applicable.<sup>2</sup>

## C. Constitutional Issues

The constitutional issues, then, are a significant consideration in evaluating the necessity or desirability of this proposed amendment. They include questions about the separation of powers, the legal presumption that statutes are constitutional, the plenary powers of the legislature, the "one person-one vote" concept, the executive or legislative nature of the appointment process, the delegation of legislative power, and the federal guarantee of a republican form of government. Some of these are brought out later in this report under the arguments and discussion sections.

The Committee found that approximately 30 states have some form of constitutional authority and some others have statutory provisions pertaining to legislative confirmation of gubernatorial appointments and, also, that the U.S. Senate is vested with confirmation power over some of the President's appointments. The authority in the other states varies widely as to the scope and procedures involved, and none seem to have exactly the same provisions as proposed in Measure 2. There are some important distinctions between the rationale for and operation of the federal confirmation process and the process in Oregon, which will be pointed out later.

The testimony to your Committee indicated that the confirmation process in Oregon is often routine and perfunctory, but the legislative review can be more thorough than

<sup>1</sup>*State of Oregon ex rel Jason Boe, Victor Atiyeh, Lenn L. Hannon, Fred W. Heard, Kenneth Jernstedt, Anthony Meeker, E. D. Potts, John Powell and Blaine Whipple v. Robert W. Straub, Governor of the State of Oregon.*

<sup>2</sup>The statutory remedy would require the plaintiffs to proceed against Mr. Wyden, rather than Governor Straub, and the testimony heard by your Committee indicated that the plaintiffs had not selected that form of action originally because they did not want the suit to be interpreted by the public as a political battle when the intent was to obtain a Court ruling on the constitutionality of the statutory confirmation authority.

that made by the governor's office. Some instances were cited where the legislative review found that certain candidates for appointment were not eligible for technical reasons<sup>3</sup> that the governor's office had not discovered. Other testimony was heard to the effect that the confirmation process was often meaningless, was an inconvenience to the appointees or reappointees, and generally made it more difficult to secure a cross section of people representing different portions of society who would be willing to serve on citizen boards and commissions.

Based upon the testimony it appears that the legislature's concern for how its policies are being carried out has developed mostly in the past twenty years. One evidence of this has been the recognition, and recently the exercise, of the capability to deny confirmation (compared to merely "confirming") as a vehicle for monitoring the execution of its policies.

#### IV. ARGUMENTS FOR THE MEASURE

1. The confirmation procedure has been a part of Oregon statutory law for 50 years and has worked very well during that time. In recent years, for example, there have been hundreds of confirmations and only a handful of denials of confirmation.

2. Measure 2 does not represent a change in the confirmation procedure, the intent is only to provide a constitutional section that will specifically cover the issue.

3. Passage of Measure 2 will avoid the necessity of future litigation since the authority for Senate confirmation would be a part of the Constitution.

4. The very existence of the confirmation process, perhaps as much as the exercise of it, serves as a check on the Governor's power.

5. The power of appointment is not so inherently executive that it cannot be shared with or altered by the legislature. In fact, in the early days of Oregon history, the legislature directly made many appointments. Under the operative theory of the Oregon Constitution, the Legislative Assembly is given all power not specifically reserved to the people, whereas the Governor is given a grant of power, and appointments to boards and commissions are not included.

6. The federal Constitution provides for presidential appointments to be made with the advice and consent of the Senate. Over 30 states have this concept embodied in their constitutions and some of the rest have statutory authority for it.

7. Oregon governors have never vetoed any of the statutes pertaining to the confirmation process which have been enacted or re-enacted over the years, and most governors have cooperated with the implementation of the process. This indicates that the governors see a value in the additional review of appointees by the Senate.

8. The confirmation process precludes a concentration of power in one person, the Governor.

#### V. ARGUMENTS AGAINST THE MEASURE

1. The historical existence of statutory law does not by itself mean the statutes are constitutional, and the provisions for many gubernatorial appointments made since the early years have been without confirmation.

2. Measure 2 represents a change in the existing framework by providing for confirmation of appointments made to state elective offices and by including all boards and commissions within its scope.

3. Passage of Measure 2 will not avoid the prospect of future litigation because there are several flaws in it that would be subject to legal challenge.

4. The Governor's accountability should not be diluted because citizen involvement on the various boards and commissions has been a keystone to the basically good government we have enjoyed in Oregon.

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<sup>3</sup>as, for example, where a reappointee no longer met an occupational requirement.

5. The power of appointment is an executive function that should be construed as an implied grant of power under the Oregon Constitution. The unwieldy nature of leaving this in the hands of the legislature historically was the impetus for the switch to appointments being made by the governors under the statutes.

6. There are significant differences between the situation at the federal level and at the state level. These are: the U.S. Senate is in session full time; the advice and consent function was adopted as a compromise to satisfy the states with less geographic area and smaller populations (Oregon's legislative districts are equally populous); the final authority is not delegated to a committee; the President of the United States is not directly elected by popular vote because of the electoral college and is not subject to recall by the people; and the appointments are not for citizen boards and commissions, but in some instances, such as judges, are appointments for life.

The governor's office in recent years has taken the position that the confirmation statutes are unconstitutional and that the legislature's assertion of authority to deny confirmation under the statute is a relatively recent development in Oregon.

7. Confirmation is generally a perfunctory or meaningless process that inconveniences appointees and reappointees. This makes it more difficult to secure competent people and to fulfill goals of obtaining a balanced cross section of citizens to serve on boards and commissions.

8. The present confirmation process vests a concentration of power during the interim in six legislators, each responsible only to the voters in one district, three of whom could bottleneck gubernatorial appointments. All six members of the interim committee are appointed by one person, the president of the Senate. If Measure 2 passes, it appears that this statutory process would be re-enacted pursuant to the constitutional provisions.

## VI. DISCUSSION

With certain qualifications and conditions, almost everyone the Committee interviewed agreed that the legislative confirmation process is an important element in the system of checks and balances commonly thought to be desirable for a democracy with a republican form of government. Those qualifications and conditions include: a) that the legislative body is in session on a full time basis, b) that the confirmation process pertains only to major appointments, c) that the authority is not delegated to a committee, and d) that certain standards are adopted as criteria for review, so that denial of confirmation is based on the question of the competency of the appointee and not on differences in political persuasion or philosophy. Under the existing statutory framework none of those qualifications and conditions are met.

Measure 2 states that the Legislative Assembly "in the manner provided by law may require that all appointments and reappointments to state public offices made by the Governor shall be subject to confirmation by the Senate." Three questions come to mind in reading that language.

The first is what form of enabling legislation would be adopted "in the manner provided by law"? The testimony consistently held that the new statutes would probably be very similar to the existing statutory framework. If so, then the qualifications and conditions discussed above would still be unsatisfied.

The second question concerns how to interpret the meaning of "may" require "all" appointments to be subject to confirmation. Literally this can be construed to read that if any appointments are made subject to confirmation, then all appointments would have to be. Proponents of the Measure argue that the language can be reasonably construed to mean that the Legislative Assembly could pick and choose which appointments would be subject to confirmation. In sum, it is an unresolved situation.

The third question concerns the scope of the number of offices that are includable under the term "state public office," particularly when considered along with the question raised about the meaning of "all" appointments. The additional administrative tasks involved in following the confirmation process could become very time consuming and

could conceivably be expanded, to include appointments of the Governor's own personal staff within the definition of "state public office."

One of the strongest arguments made by proponents is that Measure 2 does not represent a change in the procedures that have been followed, successfully, in the past 50 years. However, a careful reading discloses that there is one significant change made by including state elective offices as appointments subject to confirmation. There were at least five such appointments to the offices of secretary of state, state treasurer and superintendent of public instruction during the Hatfield and subsequent administrations. Also, depending on how the words "state public office" are construed, the scope of the confirmation process may well be expanded.

The testimony concerning the successful operation of the confirmation process over the years indicated that none of the governors have vetoed any of the changes in the statutes concerning confirmation, and that some governors, including the present one, have been very cooperative in working with the Senate. Further, only a handful of appointments have been rejected. On the other hand, many of the confirmation hearings, if held at all, are perfunctory, and, of course, the last two governors both have taken the position that an appointee can serve in office notwithstanding a denial of confirmation by the Senate Committee.

This raises a subjective question as to the effect which the very existence of a confirmation hearing process might have on the Governor's selection of appointees. A few instances were cited where it was thought that a particular person was excluded by a governor as a candidate for appointment on the grounds that he or she would not receive confirmation. Whether this determination was based on purely political grounds or for a legitimate concern about competency is speculative.

Another argument raised by proponents that at first appears compelling is the proposition that if voters pass Measure 2 it will serve to avoid future litigation relating to the basic controversy on the grounds that the authority for Senate confirmation would then be constitutional. Were this the case, the time and costs saved by avoiding litigation would be very beneficial. This Committee, however, was persuaded that the more likely result would be that the parties to the action would only be interchanged.

Measure 2, if enacted, would itself be subject to constitutional attack on several grounds that would be sufficient to probably require a Supreme Court decision. Notable among these are the arguments pertaining to the violation of the rigid separation of powers specified in the Oregon Constitution, the delegation of legislative power, the federal guarantee of a republican form of government, and, perhaps, the "one person-one vote" requirement. The Committee has not formed an opinion as to whether these are compelling, but does feel the arguments are sufficient to be the basis for further court challenges.

The strongest argument raised by the opponents concerns the delegation of the confirmation authority to the Committee on Executive Appointments. Since the Senate regularly convenes only about 6 months out of each 24 months, it has in several areas delegated legislative business during the interim to committees, and this is one of them. Not only does this raise the constitutional questions described above, it also could become an arena for more political game playing. It is common knowledge that a great deal of power and influence in legislative bodies (at both the state and federal levels) is concentrated in the control of various committees. A further danger inherent in the Committee on Executive Appointments is that all of the members are appointed by one person, the president of the Senate. The end result could be that only three senators, each directly responsible only to his or her own district, could effectively bottleneck gubernatorial appointments for a period of up to 18 months. This could happen despite the fact, as proponents argue, that the president of the Senate must be elected by and retain the continued support of a majority of the Senators.

This leads to another subjective evaluation, namely, whether there is potential for greater mischief when gubernatorial appointments are not subject to Senate confirma-

tion, or when only three legislators, appointed by one person, can use the control over confirmations as political trading stock. Two factors were pointed out to this Committee, however, which serve as a check on the Governor, regardless of the confirmation procedure. The first is the high caliber of persons who have held the Governor's office during recent years and of those currently seeking the office. To these people adverse publicity and damage to personal reputation could result from a blatant abuse of the appointment power. The second is that if the adverse publicity is not a sufficient check, the people of Oregon do have the power to recall the Governor.

Historically, the Oregon legislature did exercise appointment power in early years, but the trend of modern thinking clearly seems to be that the appointment power is an exercise of executive authority. This concept also was expressed in the *Federalist Papers* during the early days of our own nation's history. The Governor is elected by all of the people in Oregon, and should be accountable to all of the people. Opponents of Measure 2 argue, with some merit, that confirmation of gubernatorial appointments is a diffusion of that accountability. Although the Oregon Constitution does not "grant" a general appointment power to the Governor (it only provides for the Governor to appoint for vacancies which occur in the interim between legislative sessions and to state elective offices and judges), the Oregon Supreme Court has found an implied grant of power for "the inherent right to accomplish all objects naturally within the orbit of that department."<sup>4</sup>

This Committee recognizes that the advice and consent concept embodied in the confirmation process has long been related to the principles of democracy, and has been traced back to 759 A.D. when the Northumbrian King made appointments. In examining the rationale for its usefulness as a check on executive power, the differences between the federal situation and Oregon are substantial, and the voters of Oregon do have the right to recall the Governor, which is a check on executive power not found in federal government.

Other measures on the Oregon ballot, as well as elsewhere in the country, indicate that voters are anxious to reduce the cost of government, and on balance, in looking at the effective operation of Oregon government legally, structurally and operationally, it does not seem wise or necessary at this time to increase the work load of our Legislative Assembly.

#### VII. CONCLUSION

This Committee concludes that on close examination there are several serious flaws in both the constitutional and political aspects of Measure 2. Even though a good prima facie case could be made in favor of it, the Committee believes passage of Measure 2 would create as many problems as it solves.

#### VIII. RECOMMENDATION

Your Committee recommends that the City Club go on record as favoring a "NO" vote on Measure No. 2 at the general election on November 7, 1978.

Respectfully submitted,  
 Marilyn L. Day  
 Marva Graham  
 Charles Markley  
 John L. Rian  
 Mary Ropiequet  
 Thomas H. Hamann, *Chairman*

Approved by the Research Board on September 20, 1978 for transmittal to the Board of Governors. Received by the Board of Governors October 9, 1978 and approved for publication and distribution.

<sup>4</sup>*Sadler v. Oregon State Bar*, 275 Or. 279 (1976)

**APPENDIX A****TEXT OF STATE MEASURE NO. 2**

Paragraph 1. The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article III and to read:

**SECTION 4.** (1) The Legislative Assembly in the manner provided by law may require that all appointments and reappointments to state public office made by the Governor shall be subject to confirmation by the Senate.

(2) The appointee shall not be eligible to serve until confirmed in the manner required by law and if not confirmed in that manner, shall not be eligible to serve in the public office.

(3) In addition to appointive offices, the provisions of this section shall apply to any state elective office when the Governor is authorized by law or this Constitution to fill any vacancy therein, except the office of judge of any court, United States Senator or Representative and a district, county or precinct office.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.

**APPENDIX B****RESOURCE PERSONS INTERVIEWED**

Kathleen Beufait, Chief Deputy, Legislative Counsel Committee

Jim Brown, Attorney, Legal Counsel to Governor Bob Straub

David Cargo, Attorney, former governor of New Mexico

David Dierdorff, Attorney, Executive Assistant to Senate President Jason Boe

Cecil Edwards, Senate Historian, Past Clerk of the House, and Secretary and Parliamentarian of the Senate

Marko Haggard, Professor of Political Science, Portland State University

Floyd McKay, News Analyst, KGW-KING Broadcasting Company

Maggie Pendleton, Assistant to Governor Bob Straub for Boards and Commissions

Russell Sadler, Reporter for a syndicated group of radio and television stations

Arden Shenker, Attorney, Tooze, Kerr, Peterson, Marshall & Shenker, Counsel for the Governor in matter of *State of Oregon ex rel Jason Boe, et al. v. Robert Straub, Governor of the State of Oregon*.

**OTHER SOURCE MATERIALS**

1. Briefs filed with the Oregon Supreme Court for the *State of Oregon ex rel Jason Boe, et al. v. Robert W. Straub, Governor of the State of Oregon*, proceedings in mandamus.
2. Attorney General's opinion on request OP-4425.
3. Selected copies of the Journal of the Senate and the Journal of the Constitutional Convention, provided by Mr. Cecil Edwards, as follows:  
Journal of the Constitutional Convention of the State of Oregon, W. H. Byars, State Printer, 1882, pp 41-43.  
Deady, General Laws of Oregon, 1845-1864, pp 761-763.  
Journal of the Senate (for 1891) pp 854-857.
4. Oregon Voters Pamphlet (proof copy). Secretary of State, Salem, Oregon.
5. League of Women Voters of Oregon. Study on Measure No. 2 (draft copy).



**REPORT ON**  
**STATE MEASURE NO. 4**  
**SHORTENS FORMATION PROCEDURES FOR**  
**PEOPLE'S UTILITY DISTRICTS**

**Purpose:** "Allows single election authorizing People's Utility District formation, including authority for revenue bond issuance for initial facilities, subject to qualified engineer's certificate that district revenues will be sufficient to repay bonds. Shortens formation, annexation, consolidation procedures, substituting county governing body for State Energy Director. Authorizes PUDs to supply public utility service. Allows exclusion of electric cooperatives, municipalities. Protects some existing benefits for employees of acquired private utilities. General obligation bond issuance requires voter approval."

To the Board of Governors,  
The City Club of Portland:

**I. INTRODUCTION**

The purpose of this initiative, a proposed revision of Oregon law (ORS Chapter 261), is to simplify the existing procedures for establishing a Peoples' Utility District (PUD).

In one sense, the initiative is simple; in another sense it is complex. It is simple because it merely eases the manner in which PUDs are formed. It is complex because beyond it (and beyond the scope of this report) lies the controversy of public vs. private power and the belief of its sponsors that its passage would permit many Oregon communities to form PUDs that could obtain electrical power from the Bonneville Power Administration (BPA) at minimum rates.

The sponsors (Oregon State Grange, Oregon-Washington Farmers' Union, Oregon PUD Directors Assn., and Consumer Power League) have anguished for years at the disparity of charges for electricity between areas served by investor-owned or "private" utilities and areas served by a PUD. For example, Portland customers of Pacific Power and Light Co. (PP&L) and Portland General Electric (PGE) pay \$27 for 1,000 kilowatt hours of electric power. Vancouver customers of the Clark County PUD pay \$11. An analysis of why such a large difference exists is beyond the scope of this report.

Within our assignment the Committee sought a breadth of information to make our recommendation valid. We interviewed 22 people and reviewed 37 documents. The names and publications are listed in the appendix.

**A. Nature of a PUD in Oregon**

A PUD is a non-profit, quasi-public corporation operating within a special service district in which it develops and distributes electricity and/or water.

It is operated by a manager. The manager is hired by a board of five directors elected to alternating four-year terms, serving with nominal pay. This form of administration provides and maintains the "home rule."

The PUD is financed by revenue bonds authorized by voters, by limited taxes it may levy subject to provisions of the Oregon Constitution, and by revenue from the sale of power or water.

It is primarily responsible to the voters of its territory, but also must:

1. Use an accounting system prescribed by the Federal Power Commission;
2. File an annual report with the Director of the Department of Energy, and County Commissioners in the form required by the Federal Power Commission; and
3. File a copy of an annual audit with the county clerk, secretary of state and director of the Department of Energy.

A PUD has the power of eminent domain in order to acquire generation and/or transmission facilities. The right of eminent domain allows the will of the majority to be exercised.

As a non-profit institution it pays no income taxes. It pays property taxes, the same as private utilities. In order for a PUD to pay expenses prior to its acquisition of a power system, it may levy a tax, subject to provisions of the Oregon Constitution. Such a tax may not exceed in any one year 1/20th of one percent of the true cash value of all taxable property in the PUD and may not exceed a total of 1/4 of one percent over a ten year period.

### **B. History**

In 1930 both Washington and Oregon voted to create PUDs; in Washington, it meant Public Utility District; in Oregon, People's Utility District.

Since 1931 both Oregon and Washington have had procedures for creating PUDs. Washington's procedure was less complicated. In Oregon, of the 52 initiative petitions that began the process of PUD formation between 1931 and 1962, only 12 passed the first election. Of these, only four became operating electric PUDs. Nine stopped with the final report of the Department of Energy (DOE) or its predecessor. During the same period, 22 electric PUDs were placed in operation by the people of Washington. In Oregon at this time there are three non-operating PUDs; two others have been dissolved by the voters.

Attempts to form PUDs in Oregon have been spasmodic. Seventeen were on various ballots in 1940—six passed. Eleven proposals were before the voters in 1946—all failed. Until the passage of the Umatilla County PUD in 1977, no PUD has received voter approval since 1940. It should be noted that Umatilla is not now operating because BPA claims inability to furnish power to any new PUD. The most recently energized PUD was Northern Wasco in 1949. It was approved by the voters in 1939. No new PUDs have been approved between 1960 and 1977. Two formation proposals and one annexation will be before Oregon voters this November.

In the 1930's and 1940's, PUD formation proposals could be placed before the voters at special elections. This permitted resubmission of a defeated proposal to the voters in the same or following year. The legislature, in 1949, moved to halt this practice by deleting the option of the special election for PUD formation. Over at least the past 15 years, attempts have been made to enact legislation that would simplify the PUD formation procedure in Oregon. One such measure was approved by the House in the last session, but it failed in the Senate. This is the first time simplification of the procedure has been placed before the voters.

### **C. Presentation**

The initiative (State Measure No. 4) appears at a critical period in the history of electric power in the Pacific Northwest. In 1976, Bonneville Power Administration (BPA) issued a "Notice of Insufficiency" indicating inability to meet load growth of preference utilities (public bodies and cooperatives) after 1983. Since 1973, BPA has not renewed contracts with investor-owned utilities for firm power. Previous experience with power abundance has changed to warnings of serious future shortages, resulting in a search for solutions:

1. Congress has before it a proposal for revision of the Bonneville Power Act.
2. The State of Oregon's Domestic and Rural Power Authority (DRPA) would make the entire State a publicly-owned power district.
2. The major utility companies serving the state have filed legal actions in an attempt to obtain low-cost federal power for their customers.

Your Committee is aware that these legislative and judicial developments would probably have a controlling effect on the use of PUDs in Oregon. But these possibilities are beyond the scope of Ballot Measure No. 4, and hence are beyond the assignment of this Committee.

## II. DESCRIPTION OF THE MEASURE

This initiative measure changes the existing procedure for forming a People's Utility District (PUD) in the following ways:

1. Several major procedural steps are eliminated. These are:
  - a. Preliminary petition to D.O.E. requesting investigation of advisability of creating a proposed PUD or annexation or consolidation.
  - b. Investigation of advisability by the Director of the Department of Energy (DOE) involving: (1) Preliminary report, (2) Public hearing, (3) Final report to sponsors.
  - c. Second election to authorize revenue bonds for purchase or construction of generating and/or distributing facilities.
2. The proposed single petition requests a single election that will:
  - a. Create a PUD and elect its 5 directors; and
  - b. Give directors authority to issue revenue bonds for purchase or construction of initial facilities.
3. Before the initial bonds may be issued, the PUD must have certification by a nationally recognized engineering firm experienced with utilities, to the effect that net revenue will be sufficient to retire the bonds.
4. The county governing body replaces the Director of DOE as responsible for checking petitions, calling PUD-related elections, and other administrative functions relative to PUDs.
5. Where proposed PUD and county boundaries do not coincide, boundary adjustments are made by the county governing bodies following a hearing, instead of by the DOE.
6. Under the proposed law, PUD formation, including authorization of revenue bonds, may be placed before the voters at a special election. Under the present law formation and bond issue approval must each be presented at separate general elections.
7. A majority of the votes cast is substituted for majority of qualified voters in the district for:
  - a. Annexation and consolidation of PUDs
  - b. Acquisition of facilities outside the district
  - c. Conversion of an existing municipal district into a PUD.
8. An additional 10 days for collecting petition signatures is allowed when county clerk finds petition has insufficient valid signatures, as is the procedure in the State of Washington.
9. The petition may be passed by resolution of county or municipal governing body.
10. If some portions of a county or municipality reject the PUD formation proposal, approval of the DOE is no longer required for the approving portions to become a PUD.
11. Amount of the bond issue need no longer be mentioned in the election notice or the ballot title.
12. After PUD formation, if bonds are not issued within 10 years, then an election must be held to authorize revenue bonds, the issue must have voter approval.
13. Retains for a year union contracts, health and welfare benefits, and other existing rights of employees of acquired companies.

This measure would make the Oregon PUD formation procedure similar to that in the State of Washington. The major similarities to the Washington procedure are:

1. Single petition with 10 days extra if needed for more signatures.
2. Allows vote on PUD formation at special or general election.
3. Boundaries fixed as necessary by county after hearings.
4. PUD established, directors elected, and financing authorized at single election.

A summary of these proposed changes may be found in Appendix C.

**Effects of State Measure No. 4**

This measure, without question, does present a simpler and shorter procedure for the formation of PUDs. It has no bearing on the ability of any PUD so formed to provide electric power at lower rates. The questions of power availability to new PUDs and of rates are specific to each individual PUD and the economic and power availability environment into which it is injected.

**III. ARGUMENTS IN FAVOR OF THE MEASURE**

1. The Measure simplifies and shortens PUD formation procedures. This is desirable because:

- a. Historically PUDs have provided electric power at lower rates than the investor-owned utilities.
- b. Should low cost BPA power again become available, PUDs qualify as preference customers while investor-owned utilities do not.
- c. Citizens in effect may have been denied the choice between public and private power by an excessively onerous, drawn out procedure for PUD formation.
- d. No other type of service district has such a complex formation procedure.

2. The Measure provides the following simplifications.

- a. Reduces the present requirement of two petitions and two elections to one petition and one election.
- b. Provides for simultaneous approval of PUD formation and the financing of its facilities at a single election instead of separately at two elections two years apart.
- c. Eliminates the time-consuming pre-election hearing, investigation, and published report on the proposal by DOE and the petition to DOE requesting these actions.
- d. Permits formation of a PUD to be presented at a special election eliminating the wait for the next general biennial election.

3. The Measure provides a more efficient procedure.

- a. Before any revenue bonds may be sold, the feasibility of paying them off must be certified by a nationally recognized engineering firm with expertise in the utility field.
- b. PUD boundary decisions are to be made, not by DOE, but by the counties which are more likely to be familiar with potential problems.
- c. Formation efforts would no longer be cancelled out by certain minor technicalities: an additional 10-day period is allowed for additional petition signatures if needed, and boundary description errors may be corrected by the county.
- d. The engineering firm's feasibility analysis of bond issue retirement may be more thorough and pertinent than the DOE's informational investigation of a proposed PUD.
- e. It is modeled after the successful Washington State system of PUD laws under which many PUDs have been formed.

**IV. ARGUMENTS AGAINST THE MEASURE**

1. The authority granted by the Measure is too broad in that in a single election it activates a PUD and approves the issuance of bonds to finance its initial facilities.

2. The special election permitted under the Measure is inappropriate for such an important issue in that voter turnout at special elections is historically poor. In 1947 the use of the special election for PUD formation was discontinued by the legislature.

3. The financing authority granted the PUD Board of Directors in the formation election is too broad in that the amount of the revenue bonds they are authorized to issue is specifically not required in either the initiative petition or the election ballot title.

4. The Measure eliminates the DOE's public hearing, investigation, and final informational report on various aspects of the proposed PUD. There is no provision in the new Measure for a published appraisal of proposals by an unbiased source with expertise in the PUD field.

5. The Measure eliminates the mechanism for routine public input on the entire issue of PUD formation now provided for in the DOE hearing. A hearing would be required only if proposed PUD boundaries do not conform to county boundaries, and would be limited to issues related to boundaries.

6. The fact that the Umatilla PUD was formed in 1977 indicates that the present procedure does work. Umatilla's present inability to buy power from BPA also is significant.

7. The existing procedure provides more time and therefore more opportunity for the voters to become familiar with a PUD proposal.

8. Since BPA firm power is increasingly in short supply, such that BPA denies the ability to supply any new PUDs, this Measure carries no assurance that a new PUD will be able to acquire cheap power.

9. The additional ten-day period authorized for collection of additional signatures, when a petition is found to have insufficient signatures, is not in accord with Oregon's traditional initiative procedures and will result in confusion.

## V. DISCUSSION AND FINDINGS OF THE COMMITTEE

### 1. Elimination of Department of Energy (DOE) responsibilities

The hearing, investigation, and report are peripheral tasks of DOE, whose primary purpose is to make predictions of power demand and availability. DOE does not now have the staff or expertise for an in-depth investigation of proposals, and its final report is an informational summary of evidence presented at the hearing and from other sources. DOE'S present budget funds one-third of an engineer for PUD matters. The DOE report is binding only with respect to recommendations made on boundaries. It is not, according to DOE, in any sense a feasibility study.

Additionally, the DOE checks petitions, calls PUD elections, and performs minor administrative functions with respect to PUD operation that are more reasonably performed by the county government as provided in the proposed Measure. Resolution of boundaries also seems more appropriately a county function. Although the public hearing and informational report are useful, we conclude that there is no critical weakening of information processes, technical appraisal, or administrative control of PUD formation and operation to be suffered by removal of DOE from the process.

### 2. Removal of advisability hearing

The public hearing required to be held by the DOE does provide a public platform for the airing of information pro and con to a specific PUD formation proposal. However, the election campaign also presents opportunity for presentation of reasons and arguments to the electorate.

The proposed Measure also provides for a public hearing by the county if the boundaries for the proposed PUD do not conform to county boundaries. This hearing is authorized to consider such matters as efficiency of utility service, low cost power, district size sufficiency for retiring bonds, and benefits to the area.

Special expertise is introduced by a new requirement that prior to the issuance of bonds, there must be on file a certification by a nationally recognized consulting engineering firm to the effect that income from facilities purchased or constructed will be sufficient to retire the bonds.

Your Committee concludes that any change in hearing procedures will not seriously impede the flow of information to the public, and furthermore, that investigation of boundaries and financing are adequately provided for.

### 3. Simplification of procedure

It is probably true that the more public exposure an issue is given, the better the public may understand it. This does not warrant, however, the unique two-petition, two-

election procedure presently confronting those who would create PUDs. If this procedure is meaningful, it should have been applied to other initiative measures. This existing Oregon PUD formation procedure has produced only four currently operating PUDs, while in Washington, a procedure similar to that proposed in Measure No. 4 has resulted in 22 active electrical PUDs.

According to the sponsors of Measure 4, the primary reason for the small number of PUDs in Oregon is the complexity of the formation process. There are presently three delay periods:

- (1) between filing of the initial petition and the issuance of the DOE final Report (up to 180 days);
- (2) between the Final Report, a second petition (for election), and the first election;
- (3) between the formation election and the second election to approve financing of initial facilities (2 years).

These separate steps and intervening delays, say the sponsors, provide too many opportunities for well-financed opposition by private utilities. The same conditions put a severe burden on the citizen sponsors. As the sponsors put it, the unworkability of the present law has denied the electorate a choice between public and private power.

The PUD formation procedure should be sufficiently direct and simple to actually perform the function for which it was enacted. The proposed changes will do this even better than the proposal which passed the House in the last legislative session.

#### **4. Absence of bond issue amount on ballot title**

Under the proposed revisions to the PUD law, the issuance of bonds is authorized by the election forming the PUD, but the amount of the issue is left to the discretion of the PUD directors. This has been a satisfactory practice over the years among the PUDs in Washington. As a practical matter, the specific amount needed for construction or purchase of facilities is not known until the lowest bid is in hand or the final appeal is completed in a condemnation proceeding. However, it is also true that while the bond market provides a marketability check, if the risk looks a bit high, the bonds may still be sold, but at a higher rate of interest. The interest cost would be passed to the customer.

The consulting engineering firm can safely certify that net income will be sufficient to pay off the bonds, since rates can be adjusted to assure it. What this boils down to is that the PUD board of directors is given sufficient authority to operate the PUD. The check on their fiscal and other activities must come through attention to board meetings, rates, tests of proceedings in Circuit Court, the ballot box, and the required annual report and annual audit.

#### **5. Special election for PUD formation**

The principal objection to the special election is that the PUD issue is too important to be decided by the usually small voter turnout for special elections. The extra cost of a special election is another drawback. On the other hand, regular general elections are two years apart, a long time to wait if time is of the essence. This wait, twice for the two elections presently required, is excessive. While your Committee considers the special election feature not fully desirable, it believes that a PUD formation issue will stimulate adequate voter turnout. The special election has been part of the time-tested Washington procedure.

#### **6. Availability of low cost BPA power**

The Measure, of itself, cannot guarantee sufficient power to meet all demands. Neither can it guarantee low cost power. However, no dispenser of power can make these guarantees. But because BPA operates under the legal mandate to treat PUDs as "preference" customers, the Measure would make it easier for citizens to avail themselves of BPA power if there is a change in policy allowing BPA to supply power to new PUDs.

## VI. CONCLUSIONS

While your Committee does not fully endorse all the suggested changes, it does support the simplification and shortening of existing requirements and finds no critical weaknesses in the proposed Measure. On balance, we believe this to be a desirable Measure.

## VII. RECOMMENDATION

Your Committee recommends the City Club of Portland support a "YES" vote on State Measure No. 4 at the November 7, 1978 general election.

Respectfully submitted,  
 Owen P. Cramer, *Vice Chairman*  
 David M. Crow  
 Baird French  
 Frank Lagesen  
 Thomas Stimmel  
 Nina Westerdahl  
 Royald V. Caldwell, *Chairman*

Approved by the Research Board September 19, 1978 for transmittal to the Board of Governors. Received by the Board of Governors October 9, 1978 and ordered printed for distribution to the membership.

## APPENDIX A

### RESOURCE PERSONS

- Ed Finklea, Law Clerk with Don Willner, who worked on Measure No. 4. A third year law student at Lewis & Clark College.
- Michael W. Graine, Special Asst. to Director, DOE.
- Robert F. Harrington, Rives, Bonyhadi & Smith, attorneys for Pacific Power & Light Co.
- Kenneth W. Fitzgerald, Publication Consultant. One of the sponsors of Measure No. 4.
- Dwyte Wilson, Exec. Vice Pres. Ore.-Wash. Div. of Farmers Union.
- Carl L. Rempel, DOE.
- Al Aldrich, Communications Director, N.W. Public Power Assn., Vancouver, Washington.
- Dan W. Schausten, Asst. to Administrator-Policy BPA.
- Hector J. Durocher, Asst. Adm. for Power Mgt. BPA. (Power Mgr.).
- Ruthann Mogen, Public Affairs Rep., Public Affairs Dept., PGE.
- Nancie Fadeley, State Representative, Eugene; Chairman House Energy and Environment Committee, 1977 Session.
- Roy Hemmingway, Deputy Public Utility Commissioner.
- Walter Widmer, Private Citizen and member of Consumer Power League.
- Don Willner, Attorney for Sponsors of Measure No. 4.
- W. C. Harris, Eugene, Master of Oregon Grange and principal sponsor of Measure No. 4.
- Bill Taggart, Grants Pass, Treas. & Chr. of Sponsors' Finance Committee.
- Cary Jackson, Asst. to Portland City Commissioner Francis Ivancie.
- Gus Norwood, Asst. to the Power Mgr. BPA; former Exec. Secretary of Northwest Public Power Assoc., 1947-64.
- Roy Bessey, was on National Resources Staff in Pac. NW office which recommended BPA.
- Myron Katz, Economist, Planning Officer, BPA.
- Don Arnold, State Attorney General's Office.
- Norm Bass, Clackamas County Elections Dept.

## APPENDIX B

## BIBLIOGRAPHY AND SOURCE MATERIALS

City Club Reports: March 9, 1928; April 6, 1928; May 6, 1940; May 14, 1948; October 31, 1958; November 4, 1966; November 1, 1974; and October 22, 1976.

Initiative Petition 5675 with interpretations filed with the Committee by the following:

Ed Finklea, Law Clerk with Don Willner, Attorney for Sponsors of Measure No. 4.

Kenneth W. Fitzgerald, one of Sponsors of Measure.

Robert F. Harrington, Attorney for PP&L.

W. C. Harris, one of Sponsors of Measure.

Ruthann Mogen, Public Affairs Rep., PGE.

Walter Widmer, Consumers' Power League.

Don Willner, Attorney for the Sponsors.

Reports, Pamphlets and Books:

*Electric Rates Unbearable*, a pamphlet by Public Power Coalition, who have as members, Oregon State Grange, Oregon-Washington Farmers' Union, The Oregon PUD Directors Association, and the Consumers' Power League.

Major changes in PUD Law under proposed Measure by James L. Hunt, PGE. August 1978.

*Municipals and PUDs Retail Rate Survey*. Northwest Public Power Association. July 1978.

*Oregon PUD Status*. Pacific Power & Light Co., July 1978.

Oregon Measure No. 4; 1977 Comparative Statistics, Power Supply Sources PGE, 1974, 1975, 1976, 1977. All by Walter Widmer.

*Power Outlook Through 1988-89*. BPA, May 1978.

*Pumped Storage in Pacific Northwest*, an inventory by U.S. Army Corps of Engineers, January 1976.

United States Senate Bill introduced by Sen. Jackson, August 1978, with a News Release.

*Oregon Blue Book—1977-78*, pp 167 & 294.

*PUD Final Report Gleneden Beach*, 1978. Department of Energy, Salem, Oregon. 13 p.

*Final Report Lake Oswego People's Utility District*, 1978. Department of Energy, Salem, Oregon. 31 p.

Topaz, Lionel V. *Final Report of the Advisability of Creating the Emerald Peoples Utility*

*District Lane County, Oregon*, 1976. Oregon Department of Energy, Salem, Oregon. 32 p.

## APPENDIX C

## SUMMARY OF PROPOSED CHANGES

| ITEM                          | EXISTING  | PROPOSED  |
|-------------------------------|---|---|
| PETITIONS                     | #1 Petition requesting investigation of advisability by DOE.<br>#2 Petition requesting election to form PUD.    | Single petition requesting election to form PUD.  |
| INVESTIGATION OF ADVISABILITY | Dir. DOE investigates, holds hearing, makes final informational report.   | County investigates advisability only as it affects boundaries and only if PUD proposed boundaries different from county. |
| BOUNDARIES                    | Dir. DOE recommendations binding after hearing.   | County governing body sets boundaries after hearing.  |
| ELECTION                      | Election #1, to form PUD and elect directors.<br>Election #2 to authorize revenue bonds for initial facilities. | Forms, elects directors, and authorizes bonds for initial facilities at single election.                                  |
| FINANCIAL FEASIBILITY         | Dir. DOE considers financial aspects in Final Report.   | Certification by consulting engineer of ability to pay off bonds required before bonds issued.                            |
| ADMINISTRATIVE DUTIES         | Dir. DOE  | County governing body.  |



**REPORT ON**  
**STATE MEASURE NO. 8**  
**REQUIRES DEATH PENALTY FOR MURDER**  
**UNDER SPECIFIED CONDITIONS**

**Purpose:** Requires separate sentencing procedure before judge after murder conviction. Requires death penalty if judge, beyond reasonable doubt, finds: defendant acted deliberately with reasonable expectation death would result; and probability defendant is continuing violent threat to society; and defendant responded unreasonably to provocation, if any, by deceased. Automatic Supreme Court review. If any finding is negative, sentence is life with minimum 25 years confinement before parole. Adds homicide by air piracy or bomb to murder definition.

To the Board of Governors,  
 The City Club of Portland:

**I. INTRODUCTION AND SCOPE OF INQUIRY**

Measure No. 8 is submitted to the electorate by initiative petition. It amends ORS 163.115 and creates new provisions.

Your Committee limited its inquiry of the death penalty to the period since 1964 when Oregon voted to ban the death penalty. We refer you to the Report on Capital Punishment Bill (State Measure No. 1), submitted to the City Club on October 16, 1964, for its excellent review of the death penalty in the world, the U.S., and Oregon.

This report reviews U.S. Supreme Court decisions since 1964 regarding the death penalty; summarizes the basic, recurring arguments for and against the death penalty; analyzes the procedural effects of Measure No. 8; and attempts to formulate a clear method of reviewing the inevitable personal convictions held by proponents and opponents of the death penalty. (A list of persons interviewed and bibliography are attached as Appendix A and B.)

*Your Committee determined that many of the arguments for and against the death penalty that appear factually-based are in fact extrapolations from essentially preconceived self-images or societal images that either allow or do not allow the death penalty. In almost every instance, the purported 'facts' are contradictory and inconclusive. Testimony of a cross-section of experts for and against the death penalty confirmed that approval or disapproval of the death penalty is primarily determined by personal, moral, psychological, theological, or societal 'belief.'*

*The issue of the death penalty is a crucial one for any society because it is clearly determined by the most deep-rooted feelings and beliefs that an individual has towards himself and others. The issue of the death penalty reflects our hopes and fears. It is no accident that the death penalty is alternately rejected and required: it is one of the ways we define our society.*

**II. U.S. SUPREME COURT DECISIONS RELATING TO THE DEATH PENALTY**  
**SINCE 1964**

In 1967, all executions were suspended by the federal courts until the Supreme Court resolved certain constitutional objections to the death penalty.

In 1972, the Supreme Court decided in *Furman v. Georgia*<sup>1</sup> that the imposition of the death penalty in Georgia and Texas constituted a violation of the cruel and unusual

<sup>1</sup>[408 U.S. 238 (1972)]

punishment clause of the Eighth Amendment. This decision struck down virtually all existing death penalties, as most, like Georgia and Texas, left the determination of the sentence to the "unguided discretion" of the jury or judge. The majority of the Court found this "unguided discretion" led to death sentences that were imposed infrequently and under no clear standards.

In response to *Furman*, Congress and 35 state legislatures enacted new laws that generally avoided "unguided discretion" by one of two methods: making the death penalty mandatory rather than discretionary for certain crimes, or establishing a separate sentencing procedure in which specified aggravating or mitigating factors were taken into consideration.

In 1976, the Supreme Court decided in *Woodson v. North Carolina*<sup>2</sup> and *Roberts v. Louisiana*<sup>3</sup> that mandatory death penalties were in violation of the Eighth and Fourteenth Amendments because they did not treat the defendant as an individual human being. At the same time in *Gregg v. Georgia*<sup>4</sup>, the Supreme Court decided that the death penalty could be imposed if a procedure of "guided discretion" were used, primarily through a separate sentencing procedure that considered specific factors and was subject to review to make sure the sentence was imposed with absolute fairness.

In effect, then, the Supreme Court upheld the basic constitutionality of the death penalty, subject to certain procedural requirements.

In two 1977 Ohio cases, the Supreme Court found the Ohio death penalty statutes unconstitutional because the specific factors to be considered by the sentencing courts were too restrictive and did not provide sufficient discretion for individual cases.

Measure No. 8 appears to meet the Supreme Court standards since a separate sentencing proceeding is required, specific guidelines are given the judge, sufficient discretion is given on the admissibility of evidence on a case-by-case basis, and review is automatic.

### III. EFFECT OF MEASURE NO. 8

Measure No. 8 adds homicide committed as a result of air piracy or a bombing to the definition of "murder" as described in ORS 163.115. These are in addition to the present definition of "murder" as follows:

1. it is committed intentionally and not under the influence of an extreme emotional disturbance.
2. it is committed by one or more persons when a death results from the attempt, the commission of, or flight from a first degree arson, burglary, escape, kidnapping, rape or sodomy, and robbery in any degree.

As background, "aggravated murder" as defined in ORS 163.095 is as follows:

1. murder committed for money or other consideration.
2. solicitation of murder in return for money or other consideration.
3. murder after prior conviction for murder.
4. murder by means of bombing (meaning the direct use of a bomb as the murder weapon, rather than a homicide resulting from the use of a bomb as Measure No. 8 would add).
5. murder of any officer of the justice system.
6. murder within a penal institution.
7. murder personally committed during the attempt, commission of, or flight from robbery in any degree, and certain sexual offenses in the first degree.
8. murder after prior conviction for manslaughter.

<sup>2</sup>[428 U.S. 280 (1976)]

<sup>3</sup>[428 U.S. 325 (1976)]

<sup>4</sup>[428 U.S. 153 (1976)]

Under current law, murder is punishable by life imprisonment with no minimum sentence, and aggravated murder by life imprisonment with a minimum sentence of 30 years for 1-4 above, or 20 years for 5-8 above.

Measure No. 8 redefines the minimum sentence for murder to life imprisonment of 25 years. This creates an inconsistency because, if not executed, the criminal would serve a minimum of 25 years for murder, and either 20 or 30 years for aggravated murder. Your Committee assumes that the legislature would correct this inconsistency.

Measure No. 8 also adds the possibility of the death penalty and the means of its execution. After the defendant is found guilty of murder or aggravated murder by a jury, the trial judge conducts a separate sentencing proceeding as soon as practicable. Any evidence the court deems relevant may be presented.

After all the evidence is presented, the judge is required by Measure No. 8 to consider the following:

1. whether the murder was committed "deliberately and with the reasonable expectation that death of the deceased or another would result."

2. "whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; in determining this, the judge considers any evidence offered by the defendant as well as his age, prior record, and his mental or emotional state at the time of the murder.

3. "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

If the judge finds affirmatively, beyond a reasonable doubt, on *all* of the above issues, then he *must* sentence the defendant to death. If he finds negatively on any one of the above issues, then he *must* sentence the defendant to life imprisonment as described. There is an automatic Oregon Supreme Court review 60 days after certification of the verdict of the sentencing court, subject to certain allowable delays.

Measure No. 8 then sets up the general procedures for the execution, primarily that the execution is by gas administered by the superintendent of the penitentiary within the penitentiary and attended by a limited number of defined persons.

#### IV. ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

##### Deterrence

Deterrence is one of the primary arguments used in support of the death penalty. Various efforts at statistical comparison of states with and without the death penalty indicate very little due to the variety of uncontrollable factors. Your Committee could find no conclusive statistical evidence that would indicate whether or not the death penalty was a deterrent.

Generally, proponents of the death penalty argue that it deters murder, and helps protect the community from would-be murderers. It would be especially effective with regard to the repeat murderer and the criminal who might otherwise murder witnesses to cut down his chances of capture.

In answer to critics who say that most murders are crimes of passion not likely to be deterred by a rational analysis of the consequences, proponents say that a "general atmosphere of deterrence" would result from the death penalty. This would tend to inhibit the person functioning under severe emotional stress from committing a murder.

Proponents point to the number of repeat murderers, and to the number of murderers who are released from prison after an absurdly short confinement, only to murder again. This is a shameful waste of life that could have been prevented by the death penalty. At the very least, proponents say, society and its innocent victims would be protected from executed murderers.

Opponents of the death penalty stress that no statistical evidence supports the assertion that the death penalty deters murder. They claim that murder and indeed crime in general has more to do with the size of the male 14-29 population (most crimes are

### **Effect on Society**

Proponents of the death penalty argue that society has lost respect for its criminal justice system, and that many people live in a constant, vague fear of crime. Opponents do not disagree. It is clear to your Committee that the inadequacies of the criminal justice system have led to its trivialization. Crime is common and expected, and that is not as it should be.

Proponents argue that the death penalty would increase society's respect for the judicial system, that it would give confidence and encouragement to disillusioned police officers, and that judges would respond to it by prescribing stiffer penalties in general for all crimes.

Opponents point out that the increase in crime would be better controlled by increased staffing of the police, prosecution, judicial and parole organizations, and by capital improvement and expansion of the penitentiary system. In addition, this problem should improve with time due to the new "matrix" system of determining sentences in Oregon. The death penalty, according to its opponents, might very well provide an illusory improvement of attitude but it would not deal directly with the real problems.

## **V. ARGUMENTS FOR AND AGAINST MEASURE NO. 8**

### **The Criteria for Sentencing**

Proponents argue that the separate sentencing court, the fact that the judge must find affirmatively for all three criteria in order to impose the death penalty and only find negatively on one of the criteria to waive the death penalty, and the automatic review by the Supreme Court all insure that only the most cold-blooded and heinous crimes will be punished with the death penalty.

Opponents say that the three primary criteria for determining whether to impose the death penalty only appear to give the sentencing judge discretion, when, in fact, they are already determined by jury conviction. Therefore, the burden is placed on the defendant to show why he should not be executed. Opponents argue that the burden should rest with the state.

### **The Minimum 25-Year Sentence**

Proponents argue that murderers have in the past spent far too little time in prison. The courts have been too lenient, and unnecessary murders have resulted by repeat offenders. All murderers therefore should be given substantial minimum sentences if they are not to be executed. Like the death penalty itself, the 25-year minimum sentence will increase society's confidence in the justice system, and set the tone for a less liberal attitude towards criminals.

Opponents say this long a minimum sentence will lead to District Attorney's prosecuting on lesser charges and to plea bargaining to lesser charges because certain murderers do not constitute an on-going threat to society, and should not be punished so severely. The crime of passion often occurs within a specific family framework that will not be repeated. Reasonable leniency should be allowed to take into account the special circumstances of each murder. For example, it is questionable whether a wife who murdered her husband, intentionally or not, after much physical abuse, should be sentenced to 25 years without chance of parole.

Your Committee was not unanimous in its conclusions. The majority and minority discussion, conclusions and recommendations follow.

## **VI. MAJORITY DISCUSSION**

The Majority of your Committee believes that the procedural problems with Measure No. 8 will either be corrected at a later date by the legislature or be nullified by the interpretations of the sentencing judges. The procedural problems do not appear to be of such a serious nature as to require opposition to Measure No. 8.

However, in the opinion of the Majority, deterrence of crime will clearly not be achieved with the death penalty. No statistical evidence supports it. A murderer of passion will not be affected by it except in the most subtle of ways through a potential "general atmosphere of deterrence," and the cold-blooded killer would more than likely be deterred as much by a long, minimum prison sentence.

Since even the proponents of the death penalty concur that few criminals will ever be executed, it is clear that there are only three possible reasons for reinstating the death penalty:

1. that it will in fact create "a general atmosphere of deterrence";
2. that it satisfies our need to express our anger at the increase in crime and our horror at certain specific murders recently committed; and
3. that it satisfies a legitimate need for retribution.

The Majority feels that even if the death penalty did create a deterrent atmosphere that it is wrong for society to be in the business of killing people and that a subtle, unprovable deterrent atmosphere is not worth the moral cost of lowering ourselves to the level of the murderer.

We also feel that executing a specific individual in order to satisfy a general dissatisfaction with "the way things are" borders on the criminal itself. We would be making someone a scapegoat for our society's frustrations and fears. Does one feel safer walking after dark because one or two murderers are gassed to death? We see no direct relationship between our individual fears and concerns about crime and the infrequent execution of an occasional murderer.

Execution is clearly more than retribution for the taking of a life. Albert Camus wrote in "Reflections on the Guillotine" in *Resistance, Rebellion and Death* that "... for there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." We would prefer not to encounter this "monster" in the public life of Oregon.

Frankly, the Majority of your Committee is worried about giving the impression that we think all murderers are poor, misguided creatures who only need our help. Society does deserve retribution for the awful crime of murder. It is the degree of retribution that we question. A convicted, cold-blooded murderer should be kept in prison for the rest of his life, or, at the very least, the majority of it. We feel that the current 20 and 30 year minimum sentences without possibility of parole or work release are sufficient. Psychological evidence indicates that there is a "burn-out" period that renders the criminal impotent well within the 20-30 year minimum sentences.

While we "feel" that some murderers commit acts so horrible and incomprehensible that they obviously are no longer civilized by any standard or deserving of civilized treatment, we also feel that it is not in the best interests of society to relinquish its standards of civilization in order to exact vengeance on those individuals. People have images of how they would like to be, and how they would like society to be. Even if these images are half-shattered by fear, pressure, and inadequacies, they are the dreams that we keep reaching for, and we have done so for centuries. The death penalty is one of the ways we define our society. Let us define society according to our hopes rather than our fears.

Sometimes wars must be fought, but surely no person wants to fight a war that is not necessary and vital to our survival. That is really our objection to the death penalty: it is not necessary in order to insure our protection—rather it is the indiscriminate expression of our general frustration against single individuals who become symbolic of the real causes of our anger and frustration.

In *Gregg v. Georgia* (1976) Justices in the majority recognized that punishments barred by the cruel and unusual punishment clause change over time with society's "evolving standards of decency." In effect, they went on to say that our society had not

yet evolved a high enough standard of decency to warrant a constitutional ban on the death penalty. The Majority of your Committee prefers to hope that society, at least society in Oregon, has evolved a high enough standard of decency to continue its current ban of the death penalty.

### VII. MAJORITY CONCLUSIONS

The death penalty does not deter murder to any provable degree.

Society's legitimate need for retribution should be limited by the moral imperative against the destruction of human life, except when absolutely necessary.

Current minimum punishment for aggravated murder is sufficient protection and retribution for society.

Execution by the state undermines our basic standards of decency and belies our hopes for a better world.

### VIII. MAJORITY RECOMMENDATION

The Majority of your Committee respectfully recommends that the City Club not support passage of State Measure No. 8, and recommends a "NO" vote at the November 7, 1978 General Election.

Respectfully submitted,  
 Mary Ann Hague  
 D. Richard Hammersley  
 Charlotte M. Schwartz  
 Brian Gard  
*For the Majority*

### IX. MINORITY DISCUSSION AND CONCLUSION

The Minority of your Committee believes that the passage of Measure No. 8 is a step toward bringing the scales of justice to better balance between criminals and victims.

#### 1. Measure No. 8 will be a deterrent to murder and other serious crime

Supporters and opponents of capital punishment generally agree that available statistics are not persuasive in establishing or refuting the deterrent value of capital punishment. In our opinion the majority of informed opinion worldwide recognizes the deterrent value of capital punishment. Other societies, less attentive to personal rights than are we where capital punishment is swift and sure, have substantially reduced crime levels. Thailand and Saudi Arabia are examples. It is significant that nearly all of the opponents whom we interviewed accepted the general proposition that capital punishment deters murder or felt it was a deterrent in specific instances, but opposed its application for other reasons.

#### 2. Passage of Measure No. 8 will enhance society's self-regard

The second benefit of passage of Measure No. 8, after its deterrent effect, is the increased self-respect of society. The strength of a free society is dependent upon the individual member's perception of the success of the society in meeting common needs, of which security of the individual is one of the most important. People do not now believe that criminals are being punished appropriately. The direct and present result of this belief that criminals are coddled and citizens endangered is a weakening of society's respect for the rule of law and the criminal's belief that he can violate society at will. The end danger in ignoring society's need to punish is the rise of vigilantism as a result of people's belief that they cannot rely on society for protection. In the meantime the criminal runs rampant in the streets.

### **3. Passage of Measure No. 8 will result in more severe punishment of all criminals**

When murderers who are guilty of the supreme crime against society are released from confinement after brief sentences, how can those guilty of terrible but lesser crimes, e.g., the rapists, muggers, robbers, etc., be deterred by even lesser sentences? The reinstatement of the death penalty, and the institution of the 25-year minimum imprisonment for murderers who are not executed, will tend to lead to longer sentences for other criminals in a general scaling up of punishment. This can only benefit society as a whole.

### **4. The quality of law enforcement will improve with the improved morale of police and prosecutors.**

Police officers, the protectors of society, are demoralized by the leniency of the courts and the laxity of the correction systems. It is difficult to justify the disregard of danger, dedication and hard work demanded by their job when they perceive themselves as fighting a losing battle with no support from the courts and little from the citizens they protect.

A substantial proportion of the opposition to Measure No. 8 seems to be opposition to capital punishment in general due to emotional repugnance or philosophical belief. Once this belief is established, arguments are then sought in support of this position.

The philosophical bias seems to derive from the thesis that society damages itself when it causes a life to be taken deliberately regardless of the reasons, and that the execution of a murderer is more damaging to society in general than the murder of an innocent person. We cannot accept the latter priority, and regard the basic thesis as undemonstrable.

Most people can agree that society must maintain armed forces for national defense and that it must require its soldiers to kill the enemy which attacks it. It seems to us no different if capital punishment is similarly invoked in self defense of society against the worst of its criminal offenders.

Opponents of the Measure point to its procedural problems and ambiguities. What are labeled as procedural problems are indeed safeguards for the criminal, while opponents who cite flaws agree that were they in agreement with the Measure's purpose, they would consider it reasonably well drawn and its flaws easily corrected by the next legislature.

There seems little concern among any group that the application of capital punishment would be discriminatory in Oregon, and with regard to the possibility of error, no one with whom your Committee consulted was able to cite a single example, outside the deep South in the past, of a murderer executed who was later found to be innocent.

Discussion of capital punishment generally comes around to the "crimes of passion" and the reluctance to execute such murderers. This Measure, as written, would in any event keep such killers from execution while applying appropriately lengthy prison confinement for what, regardless of the passion of the criminal, is a terrible crime—the intentional taking of life not in self defense.

The Minority of your Committee deplors the necessity for capital punishment and imprisonment of criminals. We hope for the time when other approaches may make such punishment unnecessary, but in the meantime feel that passage of Measure No. 8 will improve the public safety through:

- deterrence of serious crime
- longer sentences for proven criminals
- improved public respect for and belief in the rule of law
- better law enforcement

**X. MINORITY RECOMMENDATION**

The Minority respectfully requests that the City Club support passage of State Measure No. 8 and recommends a "YES" vote at the November 7 General Election.

Lee M. Parker  
A. M. Whitaker, *Chairman*  
*For the Minority*

Approved by the Research Board September 21, 1978 for transmittal to the Board of Governors. Received by the Board of Governors October 9, 1978 and ordered printed for distribution to the membership.

**APPENDIX A****LIST OF PERSONS INTERVIEWED**

Bruce Baker, Chief, Portland Police Bureau  
Judge John Beatty, Presiding Judge, Multnomah County Circuit Court  
Bud Byers, State Representative, Sponsor of Initiative  
Hoyt Cupp, Warden, Oregon State Penitentiary  
Harl Haas, District Attorney, Multnomah County  
Berkeley Lent, Justice, Oregon Supreme Court  
Hans Linde, Justice, Oregon Supreme Court  
Mary McGuire, convicted of solicitation of murder; currently appealing that conviction  
Diane Oldenburg, Co-Administrator of Bradley-Angle House for Battered Women, Portland  
Ray Robinette, District Attorney, Washington County  
Kristine O. Rogers, Assistant U.S. Attorney  
Sid Lezak, U.S. Attorney

**APPENDIX B****BIBLIOGRAPHY**

Oregon State Bar Civil Rights Committee, Statement before the House Committee on State Government Operations, Opposing House Bill 2321 (later became Measure No. 8).  
Report on the Capital Punishment Bill (State Measure No. 1), City Club of Portland *Bulletin*, Vol. 45, No. 20, October 16, 1964.  
Death Row Census, April 15, 1978, Compiled by National Coalition Against the Death Penalty.  
Memorandum to Chief Justice and Members of the Judicial Conference on 1977 Legislation Affecting Sentencing and Disposition of Criminal Defendants from Judge John C. Beatty, Jr., Judge, Circuit Court, 4th District, September 27, 1977.  
American Civil Liberties Union, Statement on HB 2321—Death Penalty.  
Fr. Geo. Bertels, "Death Penalty in Light of Moral Principles," *APCCA Journal*.  
Administrative Rules of Oregon State Board of Parole, Chapter 254.  
"Crime & Punishment," John Beatty, Judge, speech delivered to City Club of Portland, Feb. 18, 1977.  
McClure, Barbara, *Capital Punishment, Issue Brief IB73013*, Education & Public Welfare Division, The Library of Congress Congressional Research Service. Date Originated Dec. 8, 1973; Date updated, June 22, 1978.  
Bedau, Hugo A., *The Case Against the Death Penalty*, American Civil Liberties Union, revised, 1977.