VERMONT LAW SCHOOL

CHELSEA STREET
SOUTH ROYALTON
VERMONT 05068

TEL. 802.763.8303
FAX. 802.763.2663

November 4, 1994

Tom Lehner
Court Administrator
Vermont Supreme Court
111 State Street
Montpelier, VT 05609

Dear Tom:

Please find enclosed a memo from me to the Justices of the Court relating to two minor but important corrections or adjustments that ought to be made in the court's "proposed revision" before a final revision is certified to the Secretary of State, in the event that Proposal 11 is approved.

I appreciate your providing a copy of this memo to the Justices.

Thank you for your consideration.

Sincerely,

Peter R. Teachout
Professor of Law

cc: Greg Sanford, State Archivist
Janet Ansel, Counsel to the Governor
Jeffrey Amestoy, Attorney General
Robert Appel, Defender General

To: The Justices of the Vermont Supreme Court

From: Peter R. Teachout
Professor of Law
Vermont Law School

In re: The Need for Adjustments in the Court's "Proposed Revision" of the Vermont Constitution Before a Final Revision is Certified

Date: November 3, 1994

In the past couple of weeks, two potential problems with the court's "proposed revision" of the Vermont Constitution have been brought to my attention. The first has to do with the court's proposed substitution of "in person" for "by himself" in Article 10 of Chapter I; the second, with the court's proposed elimination of the phrase "of the freemen" without any substitute language in Section 18 of Chapter II. In each case, the argument is that the proposed revision inadvertently "alter[s] the sense, meaning or effect" of the relevant sections of the Vermont Constitution in violation of Proposal 11. After giving the matter some thought, I have come to conclude that in each case the argument has considerable merit. I am writing, therefore, to urge the court to consider making appropriate changes in these two instances before certifying its final revision to the Secretary of State as provided under Proposal 11. I write on the assumption that Proposal 11 will be approved; if it is not, all that follows is academic.

I want to recognize at the outset that the court may feel constrained not to make any changes in the "proposed revision" it issued in response to the legislature's request under Joint Resolution 38. My own view on this matter, which I elaborate upon below, is that the court is not so constrained. In any event, I think the court ought to approach the question by first asking what ought to be done were there no constraints, and then asking whether in fact the supposed constraints keep it from doing what ought to be done. That in any event is the approach I will follow here.

Problem #1: Substituting "In Person" for "By Himself" in Article 10 of Chapter I

Article 10 of Chapter I deals with the rights of persons accused of crime. The opening clause of that Article currently reads: "That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and counsel" (emphasis supplied). Under the court's proposed revision, the clause would read: "That in all prosecutions for criminal offenses, a person hath a right to be heard in person and by counsel" (emphasis supplied). The court substituted "in person" to avoid the use of

the masculine pronoun "himself" in the current provision. The problem is that by making this substitution, the court may have inadvertently altered the "sense, meaning or effect" of this provision.

The problem arises because the substitute language, "in person," supports the argument, in a way that the original language did not, that the right to be heard is a right to be bodily or physically present. It does not necessarily have that connotation. "In person" in this context might be construed to mean simply a right to be heard without an intermediary; indeed, that may have been the court's understanding in proposing this substitution. But in ordinary discourse, we normally use "in person" to indicate "bodily presence." Thus, if I say, "I would rather not discuss this with you over the phone; I would prefer to discuss it with you in person," I mean I would prefer to discuss it when we are both physically present. That is the normal meaning of the term; it is also the meaning found in the dictionary.

The phrase "by himself" does not carry with it that same innuendo. Arguably, the clause providing that "a person hath a right to be heard by himself and counsel" could be interpreted to mean a right on the part of the accused to be physically present; but it could equally be interpreted to mean simply a right to be heard on one's own behalf without an intermediary. Indeed, for many people, the second interpretation would probably be the preferred one in this context.

At stake is how this particular clause in Article 10 is to be interpreted. The problem is that the clause as it currently reads is open to both interpretations: the right to be heard established there can mean a right to be heard on one's own behalf or it can mean a right to be physically or bodily present. While both the currently existing and the court's proposed substitute formulations can be interpreted either way, the court's proposed substitute - "in person" - is biased in favor of the "bodily present" interpretation in a way that the existing phrase - "by himself" - is not.

The fact that it is biased need not change the legal "meaning" of this provision, because the court, in an appropriate case, could always say "in person" in this context means the same as "by himself" and then go on to say that "by himself" simply means "without an intermediary." Indeed, the first part of this would be required by Proposal 11. But there is no getting around the fact that the substitute term does change the "sense" of this provision. It shifts the balance in favor of the "right to be bodily present" interpretation. And that, in my view, is a shift in "sense" prohibited by Proposal 11.

This is not just a matter of academic concern. If there is any doubt about it, one need only canvass the views of public defenders and prosecutors on the acceptability of the court's proposed substitute formulation. Without exception, the public defenders would favor the "in person" formulation, and the prosecutors would oppose it. They would do so, it is important

to see, because they know the bias exists, and they either want to take advantage of it or resist it.

Even if the substituted phrase in this case does not ultimately result in a change in legal "outcome," that fact is in the meantime it will have a change in "effect." The court, of course, can always ignore or dismiss arguments of counsel, but there is no way it can effectively bar counsel from arguing that "in person" means "bodily or physically present" according to both normal usage and dictionary definition. This impact upon argument by itself, in my view, constitutes an impermissible change in "effect" within the meaning of Proposal 11.

It would be one thing if there was no alternative that would allow getting around the problem, but in this case there is an easily available alternative. In place of "by himself" the court could simply substitute "by himself or herself."[1] Such a substitution would avoid both the problem of inadvertent bias and the problem of unnecessary distracting argument. Generally, in its proposed revisions, the court avoided the repetitive use of "he or she" and "his or her," in my view wisely. But in this one instance, the use of "by himself or herself" would avoid the problem of including in its final revisions a change in language that would alter "the sense, meaning, or effect" of Article 10. I urge the court to make this minor but important change before certifying its final revisions.

Problem #2: Elimination of the Phrase "of the Freemen" without Substitute Language in Section 18 of Chapter II

Section 18 of Chapter II deals with the qualifications and basis of representation for Senators in the state legislature. The first sentence in Section 18 currently reads: "The Senate shall be composed of thirty Senators to be of the freemen of the senatorial district from which they are elected" (emphasis supplied). In the court's proposed revision, the same sentence reads: "The Senate shall be composed of thirty Senators to be of the senatorial district from which they are elected" (emphasis supplied). In its proposed revision, the court simply dropped the phrase "of the freemen" in the apparent belief that it was redundant or unnecessary. While that is true of some other

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[1]The court might find it interesting, by way of comparison, to see how the State of Maine handled the same problem in the inclusive language revision of its constitution in 1989. The parallel provision in the Maine constitution is Section 6 of Article I, which originally provided in the opening sentence: "In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election." In the 1989 revision, this was changed to read: "In all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused."

provisions where the court eliminated the reference to "freemen," it is not so here. In this one instance, the elimination of the phrase "of the freemen" without providing any substitute language actually changes the meaning of the provision. Under the current provision, to be eligible to be elected as Senator from a district, one has to be a registered voter ("of the freemen") in that district. Under the court's proposed revision, one need simply be from the district. While it seems highly unlikely that anyone who is not a registered voter would ever in fact be elected, the proposed revision nonetheless changes the substantive requirement in a way that seems to me to violate the prohibition against changes that alter the "sense, meaning or effect" of the sections that are changed.

In this instance, fortunately, the problem can also be easily cured by simply substituting the term "voters" for "freemen" in the current version. I urge the court to make this minor adjustment as well before certifying its final revisions to the Secretary of State.

Is the Court Constrained from Making Final Adjustments Deemed Necessary to Bring Its Final Revision into Compliance with Proposal 11?

My own conclusion is that these changes should be made in these two provisions before the court certifies its final revision to the Secretary of State. The question then is whether the court is legally prohibited from making such changes either by the terms of Joint Resolution 38 or by some more general obligation of restraint imposed by representations implicit in the circulation of its "proposed revisions" prior to the public vote on Proposal 11. There are a number of considerations that bear on the court's decision on this question, which I can deal with only briefly here. Let me say first that I agree the court ought to feel generally bound by the proposed revision it certified under the terms of Joint Resolution 38, if not legally, then at least ethically and politically, and that it should not make changes unless those changes are felt necessary or important. But that does not mean that the court is precluded from making minor adjustments or corrections in its final revision if such adjustments or corrections are felt necessary to bring the final revision into compliance with Proposal 11 or to eliminate unnecessary complications down the road. I can find nothing in Joint Resolution 38 itself that prohibits the court from making such minor but necessary "fine-tuning" adjustments before certifying its final revision. Indeed, it is difficult to believe the legislature would have wanted the court to be so bound. What the legislature wanted was a draft of "proposed" revisions that the court would generally agree to be bound by, so that the people of the state would know generally the sorts of changes that would be made. But even if Joint Resolution 38 squarely prohibited the court from making final adjustments on the basis of problems discovered after the proposed revisions had

been certified, indeed, even if it were not just a joint resolution but regularly enacted legislation that purported to so bind the court, the court's obligation under the amendment itself [new Section 76 of Chapter II] would be paramount. And that obligation is to certify a revision that does not alter "the sense, meaning or effect" of the constitutional provisions that have been revised sections. It is the amendment itself, after all, and not the Joint Resolution, that the people of the state will have voted to approve. It is the language of the amendment, therefore, that should govern.

I can understand why it might seem attractive to deal with the problems identified above, not through making adjustments in the text itself, but through the device of a clarifying memo or "reporter's note." Were what was involved here ordinary legislation, I think there might be advantages to approaching "correction" or "clarification" this way. But we are dealing with a constitution - with a text that will be around for a long time. Because of that, the better course would be to make these adjustments in the text itself before the final revision is certified. In the long term, it is the cleaner, less complicated, less problem-generating approach. I strongly urge the court to take that approach in the two instances discussed above.

Finally, before certifying its final revisions to the Secretary of State, I urge the court to make those revisions upon an officially certified version of the currently existing constitution. Published versions of the existing constitution do not necessarily reflect accurately the official historical document. There are a number of minor discrepancies, for the most part typographical, but important nonetheless. The certification of a revised text provides an opportunity to eliminate perpetuation of the minor discrepancies that have crept into the text in the course of successive publications.