STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 10

JUDICIARY

March 15, 1976
Ohio Constitutional Revision Commission
41 S. High Street
Columbus, Ohio 43215

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Ann M. Eriksson, *Director*

The Ohio General Assembly
State House
Columbus

Gentlemen:

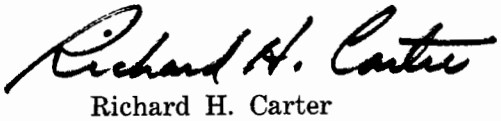
The recommendations contained in this, the tenth report of the Constitutional Revision Commission to the General Assembly, concern the judicial system of the state. This report completes the Commission's work with respect to the constitutional provisions bearing directly on the three branches of state government, the recommendations on the executive and legislative branches having been transmitted on prior occasions.

In a democracy, the judicial system stands as the guardian of the rights and privileges of the People, and the protector of all. Because of its indispensable and central function in the preservation and strengthening of society, its proper functioning is a concern close to the heart of every citizen, who expects, and is entitled to, quick and economical access to it and fair and expeditious disposition of any matter before it. The path to the achievement of this ideal, while well marked, is nevertheless the subject of lively debate in certain respects. This is as it should be with a topic of such fundamental importance as this, and the deliberations of the Commission's Judiciary Committee and of the Commission itself, as well as this report and the minority reports attached to it, bear proud evidence of the free interplay of ideas and opinions which produced these recommendations.

While Ohio's present judicial system is to some extent already the product of needed reform, particularly the 1968 Modern Courts Amendment, the Commission during its study concluded that some areas, chiefly trial court structure, judicial work time, internal organization of courts, and financing of the court system, are in immediate need of further constitutional attention if the system is to cope effectively with the ever-increasing demands which are being placed on it. The changes recommended here are in no sense radical, but they are, indeed, profound. The Commission urges the General Assembly to give them priority attention, so that the People may soon have the opportunity to vote on them, and so that their potential for bringing about the beneficial changes which must be made will soon be fulfilled.

The Commission wishes to express its deep gratitude to the Honorable Robert E. Leach, a former Justice of the Supreme Court of Ohio, who acted as special counsel to the Commission's Judiciary Committee at the committee's invitation. His unparalleled knowledge of the judicial history of Ohio, his wide-ranging grasp of existing court structure and its practical function, and the insights and comments he so unselfishly contributed during committee discussions were of inestimable educational value to the successful conclusion of this endeavor.

Respectfully submitted,



Richard H. Carter
Chairman

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THE OHIO CONSTITUTIONAL REVISION COMMISSION

The 108th General Assembly (1969-70) created the Ohio Constitutional Revision Commission and charged it with these specific duties, as set forth in Section 103.52 of the Revised Code:

A. Studying the Constitution of Ohio;
B. Promoting an exchange of experiences and suggestions respecting desired changes in the Constitution;
C. Considering the problems pertaining to the amendment of the Constitution;
D. Making recommendations from time to time to the General Assembly for the amendment of the Constitution.

The Commission is composed of 32 members, 12 of whom are members of the General Assembly selected (three each) by the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President Pro Tem of the Senate, and the Minority Leader of the Senate. The General Assembly members select 20 members from the general public.

Part 1 of the Commission's recommendations was presented to the General Assembly December 31, 1971. That report dealt with the organization, administration, and procedures of the General Assembly, and included recommendations for improving the legislative process, having the Governor and Lieutenant Governor elected as a team, and repealing obsolete sections of the Constitution. The recommendations in that report were the result of study by a committee appointed to study the Legislative and Executive branches of government, chaired by Mr. John A. Skipton of Findlay.

Part 2 of the Commission's recommendations was presented to the General Assembly as of December 31, 1972 and dealt with State Debt. Included were recommendations respecting all sections in Article VIII and one section in Article XII. These recommendations resulted from the work of the Finance and Taxation Committee, chaired by Mr. Nolan W. Carson of Cincinnati.

Part 3 of the Commission's recommendations dealt with aspects of the constitutional amendment process and affected only one section of the Constitution — Section 1 of Article XVI. It resulted from the work of the committee appointed to study Elections and Suffrage, chaired by Mrs. Katie Sowle, of Athens, and was presented to the General Assembly December 31, 1973.

Part 4 was presented to the General Assembly in November 1974 and covers Article XII, Taxation. Mr. Nolan Carson, of Cincinnati, was chairman of the Commission's Finance and Taxation Committee whose study resulted in the recommendations contained in that report.

Part 5 dealt with the Indirect Debt Limit, Section 11 of Article XII. It resulted from studies of the Finance and Taxation Committee, Mr. Nolan Carson, Chairman, and the Local Government Committee, Mrs. Linda Orfirer, Chairman.

Part 6 of the Commission's report covered the Executive Branch — Article III and several sections of Article XV. It resulted from the study of the Legislative-Executive Committee, chaired by Mr. John A. Skipton of Findlay.

Part 7 covered Elections and Suffrage, and contains recommendations relating to Article V, Article XVII, and several sections in

Articles II and III. Mrs. Katie Sowle, of Athens and Columbus, chaired the committee that studied these portions of the Constitution.

Part 8 covered Local Government. Article X of the Ohio Constitution contains the provisions relating to counties and Article XVIII, those relating to municipal corporations. Mrs. Linda Orfirer of Cleveland chaired the Local Government Committee.

Part 9 dealt with the Initiative and Referendum, found in Article II, Sections 1 through 1g. Mrs. Katie Sowle of Columbus chaired the committee that studied these provisions and recommended changes to the Commission.

This report, Part 10, deals with Article IV, the Judiciary. Mr. Don Montgomery of Celina is the Judiciary Committee chairman.

MEMBERS OF THE OHIO CONSTITUTIONAL REVISION COMMISSION

March 15, 1976

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Appointed by the President Pro Tem of the Senate:
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Senator Charles L. Butts
Senator John T. McCormack

Appointed by the Minority Leader of the Senate:
Senator Paul E. Gillmor
Senator William H. Mussey
Senator Thomas A. Van Meter

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Representative Francine M. Panehal
Representative Marcus A. Roberto

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Special Consultant
Julius J. Nemeth,
Commission Staff

Hon. Sara R. Hunter,
Consultant
Craig E. Evans,
Consultant

Summary of Recommendations

Part 10

THE JUDICIARY

The Commission recommends to the General Assembly the following amendments to Article IV of the Constitution of the State of Ohio:

Section 1	Vesting of judicial power	Amend
Section 2	Supreme Court	No change
Section 3	Courts of appeals	Amend
Section 4	Courts of common pleas	Amend
Section 5	Powers and duties of supreme court; rules	Amend
Section 6	Selection of justices and judges; compensation; retirement; assignment of retired judges	Amend
Section 7	Full-time judiciary; magistrates	Enact
Section 8	Expenses and budget of judicial department	Enact
Section 13	Filling of vacancies	Renumber (10)
Section 15	Changes in number of judges, courts, districts	Repeal
Section 17	Removal of judges by concurrent resolution	Repeal
Section 18	Powers and jurisdiction at chambers	Repeal
Section 19	Courts of conciliation	Repeal
Section 20	Style of process, etc.	Renumber (9)
Section 23	Service of judge in more than one court	Repeal

The recommendations in this report concern provisions governing courts and judges. These recommendations are the outgrowth of the work of the Commission's Judiciary Committee, whose chairman is Mr. Don Montgomery of Celina. Other members of the committee are Mr. Napoleon Bell, Dr. Warren Cunningham, Senator Paul Gillmor, Mr. Richard Guggenheim, Mr. Bruce Mansfield, Representative Richard Maier, Representative Alan Norris, Representative Marcus Roberto, and Mr. John Skipton. The committee began meeting on a regular basis in May 1973, and submitted its report to the Commission in April 1975. Following extensive Commission debate and some amendment of committee proposals, the Commission adopted the recommendations which are contained in this report to the General Assembly.

The recommendations would do the following:

. . . Establish a three-tier court system consisting of the Supreme Court, courts of appeals, and courts of common pleas, and authorize the General Assembly to establish courts with special subject-matter jurisdiction and statewide territorial jurisdiction.

. . . Require the payment of all judicial salaries and the expenses of the court system by the state, under a unified judicial budget.

. . . Authorize the Supreme Court to promulgate rules governing the establishment of subject-matter divisions of the courts of common pleas, other than probate, subject to amendment or rejection by the General Assembly. Election to the probate division would continue and the General Assembly could provide for election to other divisions; otherwise, assignment of judges to divisions would be pursuant to the rules.

. . . Require the Supreme Court to develop criteria to determine the need for changes in the number of judges, except Supreme Court justices, and the need for changes in the number or boundaries of common pleas courts and courts of appeals. The Supreme Court would be required to transmit the criteria, and recommendations based on them, to the General Assembly on a regular basis.

. . . Permit a court of appeals to transfer any case arising in its district to any other court of appeals, pursuant to Supreme Court rule. Each court of appeals would also be authorized to designate one of the counties in its district as its principal seat.

. . . Make the courts of common pleas the only trial courts in the state, with the exception of special subject-matter courts with statewide jurisdiction, such as the Court of Claims.

. . . Give the General Assembly the power to provide, at any time, that common pleas judges be elected specifically to subject-matter divisions.

. . . Require that all judges of a common pleas court be elected by all the voters residing within the territorial jurisdiction of the court.

. . . Establish uniform provisions for selecting the presiding judge of a multi-judge common pleas court or any court of appeals, and designate the judge with the longest period of service on the court as presiding judge in case a selection is not made.

. . . Repeal unnecessary provisions, and make grammatical changes in others.

THE JUDICIARY

Introduction

This Report, Part 10 of the Commission's report to the General Assembly, covers Article IV of the Ohio Constitution, governing the structure, jurisdiction and powers of the courts, and certain matters relating to judges, including the method of their selection, and their terms, duties, salaries, and retirement or removal. The report recommends complete state financing of the courts, the establishment of a full-time judiciary, the creation of a new class of judicial officers within the trial courts, the establishment of a single level of trial courts — the common pleas courts — and the abolition of all other trial courts.

Ohio has three levels of courts created by the Constitution: The Supreme Court, the courts of appeals, and the courts of common pleas. The other courts, namely municipal courts, county courts, and mayors' courts, are created by statute. The most recent major constitutional amendment affecting court structure is the 1968 Modern Courts Amendment, which vested the responsibility for superintending all courts in the Supreme Court, and brought about major changes in the structure of the common pleas courts by making several previously independent courts — notably the probate courts — divisions of the courts of common pleas. This amendment was followed by Issue 3, passed in November 1973, which permits two or more counties to be combined into common pleas court districts served by one or more judges residing in the district. The Modern Courts Amendment was itself an update of several provisions governing courts and judges which resulted from the Constitutional Convention of 1912, the last major effort at a comprehensive review and revision of the Ohio Consititution, including its Judiciary Article. (It was in 1912, for example, that the courts of appeals, as such, were established in place of the former circuit courts, and the courts of appeals were made the courts of last resort in most cases, in furtherance of the "one trial, one appeal" idea. It was also at this time that the entire original jurisdiction of the Supreme Court and the courts of appeals, and nearly their entire appellate jurisdiction, was spelled out in the Constitution. Another amendment provided for the election of one or more common pleas judges per county and imbedded the "one common pleas court per county" concept in the Constitution.) Relevant portions of the history of Ohio's judicial development are discussed in the comments contained in this report and the minority report on judicial selection attached to it.

The Commission regards the recommendations made here as logical extensions of the prior revisions in achieving a rationally structured and fully integrated, or "unified", court system. The recommended changes will strengthen the judicial system internally by simplifying trial court structure, thus eliminating needless duplication of effort and expense; by mandating a judiciary whose entire work time will be devoted to judicial business, thus permitting judges to concentrate exclusively on their duties; and by bringing together in one budget the financial requirements of the entire system, thus for the first time permitting an overview of present needs and planning for the future.

The Commission is keenly aware that the judicial system does not operate in a vacuum. Forces outside the system come into play, and other branches of government have a legitimate interest in what the judicial system does, how it goes about it, and how much it costs. No judicial article can succeed in bringing about the optimum benefits of sound judi-

cial administration unless it recognizes this fact and provides channels for the constructive interaction of these forces. To determine what these channels should be requires an understanding of the various functions of courts and of the relationship of courts to other branches of government, particularly the legislative branch.

There are basically five functions which courts must perform: (1) they must do justice by applying the law to the facts and imposing sanctions where needed; (2) they must protect the individual from the arbitrary use of governmental power; (3) they must provide forums for the resolution of disputes; (4) they must provide formal recognition of legal status (*e.g.*, marriage or minority) and (5) they must *appear* to be able to do justice, by handing down judgments which are as consistent as possible within a given legal framework and by providing an orderly procedure for appeal. The first two of these constitute the "reason for being" of the judicial branch. They are the essence of the judicial function, and as to them it is absolutely essential that judges have and retain "judicial independence" — a neutral and detached posture, free from any interference from another branch of government. On the other end of the spectrum is the function of writing the laws, which is strictly a legislative concern. Between these poles are areas of common concern to all branches, involving such questions as the number of judges, the number of courts, their subject-matter divisions, their staffing, and the source of their financing. In all of these areas, an *interdependence*, particularly of the legislative and the judicial branches, must be recognized. For example, the legislative branch controls fiscal matters. The judicial branch must have money to carry out its judicial function. Yet — except for the historically ineffective "inherent power" doctrine — it has no means to obtain it without legislative cooperation. In the same way, the judicial branch has an obvious interest in how many judges there are, how many courts there are, how courts are staffed, and what their subject-matter organization is. These all affect how *efficiently* the court system can dispose of its work. At the same time, the same considerations affect the *quality* of justice which the courts can deliver. Without in any way implying that courts do or should not concern themselves with this — quite the contrary — it must be recognized that the concern of legislatures as representatives of the People in retaining a voice, and in some instances a veto, in matters of this nature is a legitimate concern. Many court systems have historically either neglected their duty or been reticent about making known their needs and desires concerning internal organization, staffing, facilities, and other business aspects of judicial administration, thus leaving legislatures without any guidelines as to what was needed, and leaving much of what is properly a part of judicial administration to the workings of partisan politics.

Most state judicial articles — including that of Ohio as presently written — fail to recognize that many matters which have traditionally been labelled matters of judicial or legislative "prerogative" are in reality matters of mutual concern which can not be worked out except through mutual respect and cooperation. Constitutional provisions clearly delineating the responsibility of each branch in regard to a given matter, and providing for means of communication between the branches, can further such cooperation. The recommendations made in this report are made with the conscious aim of providing both the judiciary and the General Assembly more effective constitutional tools to safeguard their respective legitimate interests in the administration of justice, to aid them

to more effectively carry out their respective roles in the process, and to communicate and interact more effectively.

The major recommendations contained in this report must have delayed effective dates to assure a smooth transition. Some questions, such as state financing, will require extensive study by the General Assembly of data which is not presently available and some, like the status of employees of courts which will be abolished, will require decisions on statutory matters which it is not the function of the Commission to make or to suggest. However, the Commission is confident that if its recommendations are implemented in the spirit in which they are proposed, Ohio will have a Judicial Article and a judicial system which will serve her citizens well for a long time to come.

RECOMMENDATIONS

Article IV

Section 1

Present Constitution

Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

Commission Recommendation

Section 1. The judicial power of the state is vested in a judicial department consisting of a supreme court, courts of appeals, courts of common pleas, and such special subject matter courts having statewide jurisdiction, inferior to the supreme court, as may be established by law.

Commission Recommendation

The Commission recommends the amendment of Section 1 as follows:

Section 1. The judicial power of the state is vested in a JUDICIAL DEPARTMENT CONSISTING OF A supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof, and~~ such ~~other~~ SPECIAL SUBJECT MATTER courts HAVING STATEWIDE JURISDICTION, inferior to the supreme court, as may ~~from time to time~~ be established by law.

Comment

In discussing the benefits of the Modern Courts Amendment before the Cincinnati Bar Association on January 5, 1972, the Honorable C. William O'Neill, Chief Justice of the Ohio Supreme Court, added: "The next task in judicial reform which I believe the General Assembly should undertake is the unification of the courts of this state, including such realignment as is necessary to equalize the work burden for all courts. . ."[1] Like so many others who have studied ways to improve court systems, the Commission favors the unification of courts, also, and makes its recommendation for the amendment of Section 1 of Article IV with that objective uppermost in mind.

The term "unification" in the context of court organization has no single definition. Rather, it is a concept which has some definitely identifiable characteristics, including (a) uniform jurisdiction of all courts at the same level (b) simple jurisdictional divisions between courts, especially courts of original jurisdiction and appellate courts (c) uniform standards of justice, implemented through uniform rules of procedure promulgated by a common authority, uniform rules of administration, continuous programs of professional education, consultation between the bench, the bar, and the public on needed improvements in administering justice, and by consistent administration of policy (d) clearly established policy-making authority for the court system as a whole vested either in the Supreme Court or a council of judges, and (e) a clearly established line of administrative authority within the court system. It is obvious that no existing court system is completely unified on the basis of these criteria. It is also obvious that many court systems, including that of Ohio, already exhibit various degrees of unification. The Commission recommendation

made here is for the purpose of furthering the concept by eliminating in Ohio the multi-level trial court system, which lacks cohesive state-wide planning and accountability, and in the Commission's view is inherently wasteful of judicial time, the time of support personnel, available facilities and financial resources.

According to a 1974 Legislative Service Commission study, there were 261 trial courts having separate status in Ohio, excluding the Ottawa Hills Police Court and excluding mayors' courts, whose exact number was undetermined. Of these 261 courts, 88 were common pleas courts — one per county — 106 were municipal courts, and 67 were county courts. The Ottawa Hills Police Court has since been merged into the Toledo Municipal Court. Under present statute, there are 110 municipal courts and 59 areas of jurisdiction in the county courts. There are 296 common pleas court judgeships, 181 municipal court judgeships, and 67 county court judgeships. Twenty additional common pleas court judgeships and one municipal court judgeship are authorized and will be filled by election during the period 1976-1978. During the same period, four county court judgeships (and county court areas of jurisdiction) will be abolished. The above figures illustrate the recent trend of expanding the number or territorial jurisdiction of municipal courts and the contraction of the number of county courts.

Ohio's present system of courts of limited jurisdiction is traced chiefly to the 1951 Uniform Municipal Court Act and the 1957 Uniform County Court Act. The Uniform Municipal Court Act was the first general law applicable to municipal courts. Prior to the Act, municipal courts were created through special laws. However, even under the Uniform Municipal Court Act, there were variations in the civil monetary jurisdiction of the courts until 1974. Generally, the limit was $5,000, but courts of Franklin and Hamilton Counties had $7,500 limits and the municipal courts in Cuyahoga County had a $10,000 limit. A 1974 amendment to the statute, Revised Code Section 1901.17, finally made the monetary jurisdiction uniform at $10,000. However, Section 1901.18 of the Revised Code still confers on the Cleveland Municipal Court certain unique jurisdiction in actions for the sale, foreclosure or recovery of realty and in injunction actions based on violations of ordinances and regulations of the City of Cleveland. In these classes of cases, the Cleveland Municipal Court has concurrent jurisdiction with the Cuyahoga County Common Pleas Court. No other municipal court appears to have a similar grant of jurisdiction.

On the criminal side, all municipal courts have jurisdiction in cases involving municipal ordinances, in misdemeanor cases, and in preliminary hearings in felony cases, in accordance with Section 1901.20 of the Revised Code.

County courts, which replaced justice of the peace courts and have jurisdiction in areas of a county not within the jurisdiction of a municipal court, have a civil monetary limit of $500, in accordance with Section 1909.04 of the Revised Code. Section 1907.012 grants the courts jurisdiction in motor vehicle violations and all other misdemeanors.

Mayors' courts, the exact number of which has never been determined but which the Legislative Service Commission estimated at 500, may function in municipalities that are not the seat of a municipal court. In accordance with Section 1905.01 of the Revised Code, a mayor's court has jurisdiction over violations of municipal ordinances and moving violations occuring on state highways within the boundaries of the municipal corporation.

Since there is no provision for jury trials in mayors' courts, and Sec-

tion 2945.17 of the Revised Code provides that an accused is entitled to a jury trial in any matter in which the potential penalty exceeds $100, this provision effectively limits the jurisdiction of mayors' courts to that amount.

The Ohio Constitution gives the Supreme Court supervisory power over all courts in the state. In the case of common pleas, municipal, and county courts, this power is exercised under specific Rules of Superintendence, which govern aspects of administrative structure and procedure and contain requirements for the reporting of caseloads and certain other information directly to the Supreme Court. Also, all judges must meet the standards set forth in the Code of Judicial Conduct. However, the judges of the various courts of limited jurisdiction in a county conduct the day-to-day business of their respective courts on a largely autonomous basis, free from administrative control by the common pleas court. One exception is the power granted common pleas courts in Section 1907.071 of the Revised Code to divide counties having more than one county court judge into areas of separate jurisdiction, and to designate the area in which each judge has exclusive jurisdiction. The same statute gives the common pleas courts authority to redefine county court areas from time to time, to be equal in population as nearly as possible.

While there is a statutory provision for transferring judges for temporary duty from one area of a county court to another, there is no provision of any kind for assigning municipal court judges to county courts, or county court judges to municipal courts, or judges of county or municipal courts to common pleas courts or vice versa. As a result, some judges in a county where these three types of trial courts exist may not have enough to do while others are overburdened. Likewise, some court facilities may stand idle while others are crowded beyond their capacity and there may be a needless and expensive duplication of supporting personnel as well. In addition, this system of courts is financed under a highly complex, if not bewildering, welter of statutes, from both state and local sources. The fines, fees and forfeitures collected by the trial courts, including common pleas courts, are distributedanderan qually complex maze of statutes to the state, to political subdivisions, or for designated purposes, depending on which court collects them and whether they are collected under state law or local ordinance.[2]

Not every type of court of limited jurisdiction is found in every county. Some counties have county-wide municipal courts. Some counties have county-wide county courts, while other counties have both one or more municipal courts and a county court. The county court, in turn, may function as a single county court district or, in the case of a multi-judge court, may be divided into "areas" by the common pleas court, as previously stated. The entire patchwork has apparently developed on a strictly *ad hoc* basis.

Further, while most municipal court clerks are appointed, municipal courts which serve populations in excess of a statutory minimum may and do have elected clerks; and while the clerk of the court of common pleas is statutorily designated as the clerk of the county court, if one exists in the county, the county court with the concurrence of the board of county commissioners may appoint its own clerk, and some courts have done so.

There is, of course, also a certain amount of overlap of subject-matter jurisdiction, both on the civil and criminal sides, between common pleas and municipal courts. For example, in civil cases in which the amount involved is less than $10,000, suit may be filed in either the common pleas court or the municipal court, since the jurisdiction of the municipal court

is not exclusive; and in a criminal case, since the municipal court's jurisdiction in misdemeanors is not exclusive, either, a prosecutor has at least the theoretical choice of filing such a charge in the common pleas court or in the municipal court. The Commission has been advised that, at least in civil matters, a choice of courts has resulted in a good deal of "forum shopping" for strategic purposes, in those areas where a choice of courts in available, a situation which is not in the best interests of justice.

The Commission considered two alternatives on trial court structure in depth — the possibility of consolidating all courts of limited jurisdiction within a county into one court below the level of the common pleas court, and the possibility of absorbing the jurisdiction of all courts of limited jurisdiction into the common pleas court. The Commission concluded that the latter alternative is preferable.

As noted in one recent study: "The consequences of maintaining two separate trial courts have been generally adverse. These consequences include reduced flexibility in assigning judges and other court personnel in response to shifts in workload; complexity and conflict in processing cases between courts, especially between the preliminary and plenary stages of felony cases; and unnecessary emphasis on hierarchial rank among judges and other court personnel. Perhaps most important, the differentiation of the trial court of limited jurisdiction expresses an implicit differentiation in the quality of justice to be administered. It induces a sense of isolation and inferiority among the judges and court personnel who are called upon to perform one of the judiciary's most difficult and frustrating tasks — individualizing justice in the unending stream of undramatic cases that constitute the bulk of the court system's work."[3]

Idaho,[4] Illinois[5] and Iowa[6] presently have court systems in which there is a single level of trial courts. Hawaii has a two-tier trial court structure[7] but is otherwise highly unified. All of these states also have magistrates or associate judges working within the framework of the trial courts to hear relatively minor matters or matters of a strictly local nature. Parenthetically, in the new Section 7 of Article IV included in this report, the Commission recommends the creation of the office of magistrate, within the common pleas courts, to carry out such duties as are prescribed by law.

Finally, the proposed Section 1 permits the establishment of special subject-matter courts of statewide jurisdiction by law. This provision accommodates such courts as the newly created Court of Claims, and perhaps other special subject-matter courts at a future date. The requirement that any such court have statewide jurisdiction precludes the possibility that the territorial jurisdiction of these courts is split in the haphazard fashion now typical of courts of limited jurisdiction. The General Assembly is free to prescribe which special subject-matter courts are established.

Two further explanations are in order with respect to the proposed Section 1. The first is that the insertion of the reference to a judicial department is for the purpose not of bringing about a substantive change, but to give emphasis to the fact that the courts are parts of a single organizational entity. Precedent for describing a branch of government as a department exists in the Ohio Constitution in Section 1 of Article III, which is the Executive Article. That section begins "The executive department shall consist of . . ."

Also in need of explanation is the removal of references to divisions of the common pleas courts from this section. The Commission is not recommending the abolition of subject-matter divisions in the common pleas

courts. In fact, in proposed Section 4 of this Article, specific provisions are recommended to govern the *creation* of subject-matter divisions in common pleas courts. The reason for recommending the deletion of references to such divisions from Section 1 is strictly for the purpose of removing what the Commission considers to be a redundancy. The phrase "common pleas courts, and divisions thereof" suggests that subject-matter divisions of a court are somehow separate from the court itself while, of course, such divisions are integral parts of the courts within which they are created. For the same reason, the same phrase in other sections of Article IV is similarly modified.

The establishment of a single level of trial courts will, in the view of the Commission, best serve the people and the administration of justice by tending to encourage the most efficient and rational use of judicial time, the time of support personnel, and available facilities and resources, resulting in a more orderly, speedier, and more economical disposition of cases. By cutting down the number of courts, it will undoubtedly minimize "forum shopping" and, more importantly, it will result in the more uniform implementation of standards of justice and of administrative policy decisions within the trial court system as a whole.

A minority report opposing the unified trial court concept is attached as an appendix.

Section 2

Present Constitution

Section 2. (A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Commission Recommendation

The Commission recommends no change in this section.

Comment

The Commission recommends no changes in this section, which was last amended by the Modern Courts Amendment in 1968 and prescribes the membership, organization, and jurisdiction of the Supreme Court.

However, a *caveat* is in order. If special subject-matter courts of statewide jurisdiction, such as could be created under the proposed Section 1 of Article IV are to be established as courts of original jurisdiction — as opposed to being courts of appeals — and it is desired to permit appeals of their orders or judgments directly to the Supreme Court, this section would have to be amended to broaden the appellate jurisdiction of the Supreme Court for this purpose, since this provision presently specifies appellate jurisdiction only in appeals from the courts of appeals, and revisory jurisdiction from orders of administrative officers or agencies.

Section 3

Present Constitution

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of

Commission Recommendation

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of a minimum of three judges. Unless the parties agree to have a case heard by two judges, three judges shall participate in the hearing and disposition of each case. The judges of each court of appeals shall select one of their number, by majority vote, to act as presiding judge, to serve at their pleasure. Until the judges make such selection, the judge having the longest total service on such court shall serve as presiding judge. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court. A court of appeals may select one of the counties in its district as its principal seat. The court shall hold sessions in each county of the district as the necessity arises. Each county shall provide a proper and convenient place for the court of appeals to hold court, as provided by law.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and in cases transferred from another court of appeals pursuant to supreme court rule, and shall have such appellate jurisdiction as may

Present Constitution — Continued

the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Commission Recommendation — Continued

be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of A MINIMUM OF three judges. ~~Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges~~ UNLESS THE PARTIES AGREE TO HAVE A CASE HEARD BY TWO JUDGES, three judges shall participate in the hearing and disposition of each case. THE JUDGES OF EACH COURT OF APPEALS SHALL SELECT ONE OF THEIR NUMBER, BY MAJORITY VOTE, TO ACT AS PRESIDING JUDGE, TO SERVE AT THEIR PLEASURE. UNTIL THE JUDGES MAKE SUCH SELECTION, THE JUDGE HAVING THE LONGEST TOTAL SERVICE ON SUCH COURT SHALL SERVE AS PRESIDING JUDGE. THE PRESIDING JUDGE SHALL HAVE SUCH DUTIES AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY RULE OF THE SUPREME COURT. A COURT OF APPEALS MAY SELECT ONE OF THE COUNTIES IN ITS DISTRICT AS ITS PRINCIPAL SEAT. The court shall hold sessions in each county of the district as the necessity arises. ~~The county commissioners of each~~ EACH county shall provide a proper and convenient place for the court of appeals to hold court, AS PROVIDED BY LAW.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district AND IN CASES TRANSFERRED FROM ANOTHER COURT OF APPEALS PURSUANT TO SUPREME COURT RULE, and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all ~~three~~ judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Comment

The changes recommended in Section 3 are mainly procedural, affecting the internal workings of the courts of appeals. The substantive jurisdiction of these courts is unchanged.

Division (A) is amended, first, to provide that each court of appeals shall consist of a *minimum* of three judges; the second sentence, concerning the passage of laws increasing the number of judges, is struck because the first sentence as amended would make clear that the number of judges could be increased beyond three, and the matter of the standard to be applied ("volume of business") would be covered by a new provision (in Section 5) giving the Supreme Court the duty to establish criteria, and to make recommendations to the General Assembly, concerning the need for change in the number of judges. The foregoing language changes in Section 2 are not intended to be substantive or to be construed as limiting the power of the General Assembly to determine the number of courts of appeals judges.

The second change is the inclusion of a provision specifying that parties may agree to the submission of a case to two judges, giving formal recognition to a practice which the Commission understands is not uncommon in Ohio today. In order to make most effective use of the working time of appellate judges, some commentators suggest a reduction in the number of judges sitting on multi-judge panels,[8] and while the Commission recognizes that on occasion it may be necessary to rehear an appeal if the two judges hearing it cannot agree on a decision, the Commission also believes that this will not present an insurmountable obstacle. The option to submit a case to a two-judge panel is, at any rate, one which can be

exercised only by agreement of the parties, and unless they agree, three judges will decide a case, as at present.

The third and principal change in division (A) is the insertion of a provision prescribing the method of selecting the presiding judge of a court of appeals. The recommended method parallels the method presently prescribed in the Constitution for the election of the presiding judge of a court of common pleas, namely by a vote of the judges of the court. This is a more logical alternative than is now prescribed, by law, for the courts of appeals. Section 2501.06 of the Revised Code bestows the post automatically on the elected judge with the shortest time left to serve in his term, without regard to his administrative ability, his willingness to serve, or his acceptability to other judges on the court.

The last sentence in division (A), concerning the prescription of the duties of the presiding judge of a court of appeals also parallels language presently found in the Constitution with regard to common pleas courts. Strictly speaking, this sentence may not be necessary, since the Supreme Court could prescribe the duties of a presiding judge of a court of appeals under the general power of superintendence, although it has not promulgated rules of superintendence for the courts of appeals as of this writing.

The following changes should also be noted: Granting permission to select one county as a principal seat confirms a practice now permitted by Section 2501.181 of the Revised Code and followed by at least one multi-county court in the state. Wider implementation of the practice may, in the view of the Commission, increase administrative efficiency and cut costs of operation, two factors which are of particular importance in view of the Commission's recommendation, made elsewhere in this report, that the state assume the payment of all judicial salaries and the expenses of the judicial department. The amendment of the last sentence of division (A) is for the purposes of emphasizing that providing space for holding court is a county responsibility, to be carried out as provided by law, and not the responsibility of the county's executive or legislative body, which may change at some future date, as for example, if county charters were adopted. And finally, the expansion of the jurisdiction of the courts of appeals in division (B) (2), to include cases transferred from another court of appeals complements the recommendation, also made in this report, that the Supreme Court be empowered to make rules governing the transfer of cases between such courts. The purpose of the recommendation is to provide an alternate method to the assignment of judges outside their districts to help in the disposition of court of appeals cases, as needed. This, too, is intended to result in a saving, both of judicial time and of travel expenses.

Section 4

Present Constitution

Section 4. (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically

Commission Recommendation

Section 4. (A) There shall be a court of common pleas, with such divisions thereof as may be established, serving each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into compact districts having one or more judges resident in the district and serving all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In courts of common pleas having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. Until the judges make such selection, the judge having the longest total service on such court of common pleas shall serve as presiding judge. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas. Judges shall be elected specifically to such probate division. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(D) There shall be such divi-

Present Constitution — Continued

to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

Commission Recommendation — Continued

sions of the courts of common pleas, in addition to probate, as may be established pursuant to supreme court rules subject to amendment by concurrent resolution of the general assembly. The general assembly may, by law, at any time provide for the election of judges specifically to such other divisions. Rules governing the establishment of such other divisions, and the assignment of judges thereto if judges are not specifically elected thereto, shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof. Such rules shall take effect on the following first day of July, unless prior to such day, the general assembly adopts a concurrent resolution of disapproval. Except as provided in this section, all laws in conflict with such rules shall have no further force and effect after such rules have taken effect.

This section shall not be construed to limit the power of the supreme court to assign judges for temporary duty pursuant to division (A) (3) of section 5 of this article.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 4. (A) There shall be a court of common pleas, ~~and~~ WITH such divisions thereof as may be established ~~by law~~, serving each county of the state. Any judge of a court of common pleas ~~or a division thereof~~ may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into COMPACT districts having one or more judges resident in the district and serving ~~the common pleas courts of~~ all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In ~~counties or districts~~ COURTS OF COMMON PLEAS having more than one judge ~~of the court of common pleas~~, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. ~~If~~ UNTIL the judges ~~are unable because of equal division of the vote to~~ make such selection, the judge having the longest total service on ~~the~~ SUCH court of common pleas shall

serve as presiding judge ~~until selection is made by vote~~. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas ~~and divisions thereof~~ shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division ~~and such other divisions~~ of the courts of common pleas ~~as may be provided by law~~. Judges shall be elected specifically to such probate division ~~and to such other divisions~~. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(D) THERE SHALL BE SUCH DIVISIONS OF THE COURTS OF COMMON PLEAS, IN ADDITION TO PROBATE, AS MAY BE ESTABLISHED PURSUANT TO SUPREME COURT RULES SUBJECT TO AMENDMENT BY CONCURRENT RESOLUTION OF THE GENERAL ASSEMBLY. THE GENERAL ASSEMBLY MAY, BY LAW, AT ANY TIME PROVIDE FOR THE ELECTION OF JUDGES SPECIFICALLY TO SUCH OTHER DIVISIONS. RULES GOVERNING THE ESTABLISHMENT OF SUCH OTHER DIVISIONS, AND THE ASSIGNMENT OF JUDGES THERETO IF JUDGES ARE NOT SPECIFICALLY ELECTED THERETO, SHALL BE FILED BY THE COURT, NOT LATER THAN THE FIFTEENTH DAY OF JANUARY, WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY DURING A REGULAR SESSION THEREOF. SUCH RULES SHALL TAKE EFFECT ON THE FOLLOWING FIRST DAY OF JULY, UNLESS PRIOR TO SUCH DAY, THE GENERAL ASSEMBLY ADOPTS A CONCURRENT RESOLUTION OF DISAPPROVAL. EXCEPT AS PROVIDED IN THIS SECTION, ALL LAWS IN CONFLICT WITH SUCH RULES SHALL HAVE NO FURTHER FORCE AND EFFECT AFTER SUCH RULES HAVE TAKEN EFFECT.

THIS SECTION SHALL NOT BE CONSTRUED TO LIMIT THE POWER OF THE SUPREME COURT TO ASSIGN JUDGES FOR TEMPORARY DUTY PURSUANT TO DIVISION (A) (3) OF SECTION 5 OF THIS ARTICLE.

Comment

While there are a number of proposed changes in this section, most of them are grammatical only and recommended for the purpose of removing ambiguities which may lead to confusion in the interpretation of existing language. The principal substantive change, that of giving the Supreme Court rule-making power with respect to the creation of subject-matter divisions of common pleas courts subject to legislative amendment or rejection, is found in proposed division (D), which has no counterpart in the present Article IV.

One example of an ambiguity which would be eliminated by Commission recommendations is previously discussed in the comment to proposed Section 1. It results from use of the phrase "common pleas court *or a division thereof*", or a variation of this phrase, in this section (emphasis added). The recommended deletion of references to divisions at the places indicated is solely to dispel the possibility of an interpretation that subject-matter divisions of courts of common pleas are separate entities from the courts themselves, which interpretation would not be consonant with the concept of a unified trial court. The recommendation is not intended to bring about the abolition of subject-matter divisions. Indeed,

the Commission makes specific recommendations with respect to the *creation* of subject-matter divisions in this section.

A second ambiguity in the present language is corrected by another proposed amendment to division (A). This provision now reads in part that "two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas *courts* of all counties in the district. Judges serving a district shall sit in each county in the district as the business of the *court* requires" (emphasis added). The use of the plural of "court" here suggests that there can be more than one court in a district, which is inconsistent with the full sentence quoted above, and with other present references to "court" in division (A), which are all in the singular. Changing the above-quoted phrase to read "two or more counties may be combined into compact districts having one or more judges resident in the district and serving all counties in the district" removes any possible doubt as to proper interpretation. The Commission wishes to assure to the extent possible that common pleas court districts, where created, shall be of convenient and manageable size, and for that reason recommends the insertion of the word "compact", a word presently used to describe appellate districts, at the place indicated in the above-quoted sentence.

The change from "[i]n counties or districts having more than one judge" to "[i]n common pleas courts having more than one judge" is grammatical only, and is not intended to be substantive. However, the changes in the sentence referring to the selection of the presiding judge are substantive. Deleting the reference to equal division of the vote recognizes that there may be reasons other than equal division of the vote which may prevent the judges of a multi-judge court from selecting a presiding judge. Also, changing the language to provide that *until* the judges make such selection, the judge with the longest total service on the court shall serve as presiding judge, assures that every multi-judge court will at all times have a presiding judge. The present language could lead to the interpretation that the position of presiding judge does not devolve upon the judge with the longest total service until the judges have met, voted, and been unable to make a selection. This could in certain circumstances leave a court without a presiding judge until such time as that event had occurred. In the view of the Commission, this result would be harmful to the proper administration of the court, and it will be avoided if the recommended change is adopted.

The reasons for deleting the phrase "and divisions thereof" with reference to courts of common pleas from division (B) are the same as those previously discussed with reference to this phrase in the comment to division (A).

The proposed amendments to division (C) and the new division (D) of this section, both of which refer to the creation of subject-matter divisions in the courts of common pleas, should be viewed together. Presently, division (C) establishes the probate division and grants certain powers to probate judges. The General Assembly is authorized to create other subject-matter divisions, and the language requires that judges be elected specifically to divisions. The Commission recommends the deletion of references to subject-matter divisions other than probate from division (C). Probate judges would continue to be elected specifically to the probate division so long as such division continued to exist, as provided by law. No change is recommended with respect to the probate division because testimony before the Commission indicated that the function of a probate judge is a highly specialized one, and should be kept separate from the

rest of the court's work in order that the necessary expertise can be developed and maintained.

However, the Commission recommends that other subject-matter divisions of the courts of common pleas be created, as needed, pursuant to Supreme Court rule subject to amendment or rejection by the General Assembly. Election to divisions other than probate would no longer be required by the Constitution, although the General Assembly could at any time impose a requirement for specific election by law. In the absence of law, assignment to divisions other than probate would be governed by Supreme Court rule. It should be noted that any such rule could be overriden by law even after the rule had gone into effect.

The last sentence of division (D) would make clear that nothing in that division is to be construed as limiting the authority of the Supreme Court to assign a judge for temporary duty on any court as presently provided in the Constitution.

The Commission does not expect its recommendations with regard to subject-matter divisions, if adopted, to result in any immediate or drastic changes in presently existing divisions of common pleas courts, nor in the requirement that judges be elected specifically to them. What the Commission intends is that the Constitution become more flexible with respect to common pleas court structure in order to accommodate possibly desired changes in the future. There are a number of subject-matter areas of the law for which it may be thought appropriate to create subject-matter divisions. Some of these divisions may need to be established only on a temporary basis; some of them may perhaps deal with subjects unusually repetitious or routine in nature or involving especially taxing work to which a judge should not be, or may not wish to be, limited for his entire term. A requirement of specific election to every division also undoubtedly introduces an element of rigidity into the organization of courts which, as a matter of constitutional principle, should be kept to a minimum. The Commission believes that this recommendation accomplishes that objective without disrupting any existing organizational arrangements. Furthermore, by granting the Supreme Court the authority to promulgate rules pursuant to which divisions other than probate are created and judges assigned, the recommendation shifts the burden of initiating changes in this area to the Supreme Court which, because of its unique position at the apex of the court system is, and should be, in the best position to ascertain where changes are needed. However, in the final analysis, the recommendation leaves to the General Assembly the ultimate decision on what changes should be implemented, in recognition of the Assembly's unique capacity to receive, and to react to, concerns expressed at the local level, especially by those who are not associated with the court system, and in recognition of the fact that — perhaps by default — prescription of court structure has traditionally been the prerogative of legislatures in Ohio and elsewhere.

Section 5

Present Constitution

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in

Commission Recommendation

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) (1) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right, and may prescribe rules governing the transfer of cases from one court of appeals to another. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be filed not later

Present Constitution — Continued

that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Commission Recommendation — Continued

than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(2) Courts may adopt additional rules concerning local practice and procedure in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(3) The supreme court shall establish uniform criteria for determining the need for increasing or decreasing the number of judges, except supreme court justices, and for increasing or decreasing the number of magistrates, and for altering the number or the boundaries of common pleas and appellate districts. Before each regular session of the general assembly, the court shall file with the clerk of each house its criteria, findings, and any recommendations, for increasing or decreasing the number of judges or magistrates or changing the number or the boundaries of common pleas or appellate districts. The general assembly shall consider such criteria, findings, and recommendations at the next regular session. No decrease in the number of judges shall vacate the office of any judge before the end of his term.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of

Commission Recommendation — Continued

any judge of the courts of appeals or courts of common pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas ~~or a division thereof~~ temporarily to sit or hold court on any other court of common pleas ~~or division thereof~~ or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas ~~or division thereof~~ and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) (1) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right, AND MAY PRESCRIBE RULES GOVERNING THE TRANSFER OF CASES FROM ONE COURT OF APPEALS TO ANOTHER. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July,unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(2) Courts may adopt additional rules concerning local practice AND PROCEDURE in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(3) THE SUPREME COURT SHALL ESTABLISH UNIFORM CRITERIA FOR DETERMINING THE NEED FOR INCREASING OR DECREASING THE NUMBER OF JUDGES, EXCEPT SUPREME COURT JUSTICES, AND FOR INCREASING OR DECREASING THE NUMBER OF MAGISTRATES, AND FOR ALTERING THE NUMBER OR THE BOUNDARIES OF COMMON PLEAS AND APPELLATE DISTRICTS. BEFORE EACH REGULAR SESSION OF THE GENERAL ASSEMBLY, THE COURT SHALL FILE WITH THE CLERK OF

EACH HOUSE ITS CRITERIA, FINDINGS, AND ANY RECOMMENDATIONS, FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES OR CHANGING THE NUMBER OR THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS. THE GENERAL ASSEMBLY SHALL CONSIDER SUCH CRITERIA, FINDINGS, AND RECOMMENDATIONS AT THE NEXT REGULAR SESSION. NO DECREASE IN THE NUMBER OF JUDGES SHALL VACATE THE OFFICE OF ANY JUDGE BEFORE THE END OF HIS TERM.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas ~~or division thereof~~. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Comment

Divisions (A) and (C) of this section are amended only by the deletion of unnecessary references to divisions of the common pleas courts, in line with the Commission's position expressed in the comment to Section 1.

Division (B) contains two minor amendments and one major one. One minor amendment authorizes the Supreme Court to adopt rules governing the transfer of cases from one court of appeals to another. This recommendation complements the one made in Section 3 that courts of appeals be permitted to transfer cases among themselves pursuant to Supreme Court rules. As stated, the purpose of this procedure would be to provide a more expeditious and less expensive alternative to the assignment of judges outside their districts to hear and dispose of cases. Another minor amendment is the addition of rules of procedure to rules of practice as those which local courts are authorized to adopt, as long as they are not inconsistent with Supreme Court rules. This amendment is not intended to be substantive, and merely parallels the language now in the Constitution describing the power of the Supreme Court in this area.

The major recommendation in this section concerns the question of determining the number of judges and magistrates, and the question of altering the number or the boundaries of common pleas or appellate courts. While the proposal put forth in this recommendation leaves the ultimate question of what changes are enacted into law up to the General Assembly alone, it does place responsibility on the Supreme Court to develop criteria to be used as the basis for suggestions, and to make suggestions and recommendations to the General Assembly in this subject area.

Traditionally, this subject has been considered to be within the exclusive province of legislatures. The legislatures, however, have had little or no guidance or standards on which to base their determinations. As a result, the number of judges on a particular court was, more often than not, determined by local political pressure. To alleviate such pressure, some states have enacted statutes which tie the number of judges to population, thus making a change in the number of judges automatic and dependent on a contingency outside the immediate political arena. For example, in Ohio the number of county judges is determined in accordance with a statutory formula, set forth in Revised Code Section 1901.041, which prescribes basically one judge per 30,000 population, and Revised Code Section 1901.05, which sets forth a formula for determining the number of municipal court judges and calls for one judge for the first 100,000 of population, and an additional judge for each additional 70,000 or fraction thereof. This general provision, however, is overridden by the

specific provisions of Section 1901.08, which prescribes the number of judges to be elected to a specific court at a designated time. *State ex rel. Leis v. Board of Elections*, 28 Ohio St. 2d 7 (1971). Either by providing for a specific exception to Section 1901.05 (as in the case of the Cleveland and Youngstown Municipal Courts) or by providing for the election of a smaller or larger number of judges than is called for by the formula contained in Section 1901.05 (as in the case of the Hamilton County and Portage County Municipal Courts), the General Assembly has on a number of occasions sidestepped the formula for determining the number of municipal judges. And the number of common pleas judges is determined strictly on an *ad hoc* basis.

In recent years, several states have adopted constitutional provisions giving their respective supreme courts some recognized duty in regard to the question of determining the number of judges and the boundaries of judicial districts. For example, Section 3 of Article V of the South Dakota Constitution provides in part that "the circuit courts consist of such number of circuits and judges as the Supreme Court determines by rule"; and the 1968 Amendment of the Pennsylvania Constitution, in Section 11 of Article 5, provides in part that "the number and boundaries of judicial districts shall be changed by the General Assembly only with the advice and consent of the Supreme Court."

The Commission wishes to emphasize that its recommendation would not give the Ohio Supreme Court the power to decree changes by rule, nor require its assent before any change could be made. The role given the Court would be one of advising the General Assembly on the basis of criteria developed by the Court, which criteria themselves would have to be filed with the Assembly, thus giving the Assembly full access to the basis for the Court's recommendations.

At the present time, the Supreme Court collects and analyzes statistics primarily in terms of filings and dispositions and caseloads, per court or per judge, per period. This aids the Court in carrying out its duties in superintending the existing court structure of the state. Such statistics might also be the basis for recommending changes in that structure, especially when filings, dispositions, and caseloads are considered along with other factors, such as the time lag between filing and disposition; shifts in the types of cases pending; shifts in population; effects of tourism; and judge-to-population ratios.

In some states, such as California and Florida, the cases themselves are subjected to minute analysis in terms of categories and in terms of the likelihood of any procedural step (*e.g.*, motion to dismiss; jury trial) occurring in a case as it moves through the court system, as well as the amount of judicial time required for each step. This method of analysis results in "judge-years", each judge-year justifying a recommendation for the election of an additional judge to a court.

The systematic analysis of the need for judicial manpower on a basis other than population is of relatively recent origin and is an evolving science. While opinions differ as to the most meaningful and reliable factors to be taken into account and the method of analysis to which such factors should be subjected — as to which the Commission expresses no position — it is clear that there is a fundamental need to continually monitor the performance of the state's judicial system in order to make rational suggestions for change where needed. The Commission believes that the Supreme Court, which is charged with the superintendence of the courts, is in the best position to make such suggestions, and for that reason recommends the adoption of the proposed new division (B) (3) of

Section 5. Parenthetically, the last sentence of this division, which would prevent the cutting short of the term of an incumbent judge by any change, is intended to carry forward the protection afforded by the corresponding part of present Section 15 of Article IV, the repeal of which is recommended in this report. This change is not intended to be substantive, and would bring together related matter in one section of the Constitution.

Section 6

Present Constitution

Section 6. (A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any

Commission Recommendation

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties or districts in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside during his term of office in the county or district from which he is elected.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas and all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. The compensation of all judges of the courts of common pleas shall be the same. Judges shall receive no fees or perquisites, except such perquisites as may be provided by law, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge for any elective office, except a judicial office, shall be void.

Present Constitution — Continued

other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Commission Recommendation — Continued

(C) No person shall be elected or appointed to any judicial office if on or before the day when he assumes the office and enters upon the discharge of its duties, he has attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Commission Recommendation

The Commission recommends the amendment of this section to read as follows:

Section 6. (A) (1) The chief justice and justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties~~,~~ OR districts~~, or, as may be provided by law, other subdivisions,~~ in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas ~~or division thereof~~ shall reside during his term of office in the county~~,~~ OR district~~, or subdivision~~ FROM WHICH HE IS ELECTED ~~in which his court is located~~.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas and ~~divisions thereof, and~~ of all courts of record established by law, shall, at stated times, receive~~,~~ for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. THE COMPENSATION OF

ALL JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE THE SAME. ~~Common pleas judges and judges of divisions thereof and judges of all courts of record established by law shall receive such compensation as may be provided by law.~~ Judges shall receive no fees or perquisites, EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge~~,~~ for any elective office, except a judicial office, ~~under the authority of this state, given by the general assembly, or the people~~ shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he ~~shall assume~~ ASSUMES the office and ~~enter~~ ENTERS upon the discharge of its duties, he ~~shall have~~ HAS attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Comment

The only changes in division (A) occur in the third paragraph. In line with the Commission recommendation discussed earlier in this report to eliminate unnecessary references to subject-matter divisions of common pleas courts from the Constitution, such references are struck from this provision. Also deleted are references to election of common pleas judges from "subdivisions". This word was introduced into Section 6 in a constitutional amendment adopted in November 1973. It is not defined for purposes of this section, and it is unclear whether it is intended to refer to a political subdivision as presently defined in Ohio law (*e.g.*, a municipal corporation or county) or whether it is intended to refer to some other territorial unit which is smaller than the entire territory served by a court. In either event, election from a political subdivision or such a territorial unit would be contrary to the Commission's view that the judges serving on a court ought to be elected by all the people resident within the territorial jurisdiction of the court, on the basis of elemental fairness.

The change from requiring a judge to reside during his term in "the county, district, or subdivision in which his court is located" to "the county or district from which he is elected" is intended to clear up another potential ambiguity. The present language of this provision could be interpreted to require that any judge of any court is required to reside in the political subdivision in which his court is physically located or headquartered, regardless of the court's territorial jurisdiction. Such a strict residence requirement is unwarranted, and would be even more restrictive than the residence requirement now imposed on municipal judges by statute. Substitution of the requirement that a judge must reside within "the county or district from which he is elected" is intended to eliminate the potential for such interpretation. Under this language, it is clear that if a judge is elected to a court whose territorial jurisdiction encompasses only one county, he must reside within that county, but if he is elected to a court whose territorial jurisdiction encompasses a district of two or more counties, he may reside in any county in that district, regardless of the physical location or headquarters of the court.

The major changes in division (B) are that it would make the salaries of all common pleas judges equal and that it would permit the General

Assembly to provide judges with some perquisites by law. The first of these recommended changes is based on the assumption that the workload inequities which may be found to exist under Ohio's present common pleas court structure will be corrected legislatively, to the extent that this is reasonably possible. At present, the salaries of common pleas judges come from two sources: first, a uniform and fixed amount paid by the state under Section 141.04 of the Revised Code; second, an amount determined according to a population formula and paid by the counties under Section 141.05 of the Revised Code. Effective November 1973, the state paid $20,000 of the salary of each judge, and the counties an amount equal to eighteen cents per capita, but not less than $3500 nor more than $14-,000. This resulted in the possibility of a $10,500 salary gap between the lowest paid and the highest paid common pleas judges in the state. As workloads are equalized, the rationale for any salary differential will cease to exist. The second substantive amendment of this division permits the receipt of such perquisites as are authorized by law. The Commission does not view perquisites (such as a car for official use, where needed) as necessarily inappropriate, but believes that it is more honest to recognize and sanction them in the Constitution. The last sentence of this division, which refers to votes cast for a judge, is broadened to state that votes cast for any judge for any elective office except a judicial office shall be void. The present section voids such votes only if cast for an office "under the authority of this state". The proposed amendment thus applies the rule to any elective office other than a judicial office, whether local, state or national. The sentence makes a simple statement concerning the evil it is intended to prevent, namely the election of a judge to a partisan political office while he is still a judge — a statement fully in accord with the Canons of Judicial Ethics, which even forbid a judge to become a candidate for non-judicial office.

The Commission does not recommend a change in the method of selecting judges, although the Commission's Judiciary Committee did make a proposal to change the method in its report to the Commission. The committee devoted a substantial amount of time to the study of the alternate methods of selecting judges, and heard a number of nationally recognized authorities on the subject, including Glenn R. Winters, then the Executive Director of the American Judicature Society. At the conclusion of its study, the committee proposed a constitutional provision making the appointive-elective system of selection mandatory for Supreme Court and courts of appeals judges and optional, through the vote of the citizens affected, for each common pleas court. This proposal did not receive a sufficient number of votes from Commission members to constitute a Commission recommendation.

A minority report favoring the adoption of an appointive-elective method of judicial selection, mandatory for Supreme Court and courts of appeals judges and optional for common pleas judges, is attached to this Commission report as an appendix.

Section 7

Present Constitution

Vacant. Former Section 7 repealed effective May 8, 1968.

Commission Recommendation

Section 7. Judges shall devote their full time to the performance of judicial duties. The general assembly may, by law, provide for magistrates of the courts of common pleas, who shall be attorneys licensed to practice in this state and who need not devote their full time to the performance of judicial duties. Such magistrates shall be appointed by the courts of common pleas they are to serve, and shall serve at the pleasure of the respective courts. Laws shall be enacted to prescribe the times and mode of their appointment, their powers and duties, and their compensation.

Commission Recommendation

The Commission recommends the enactment of a new Section 7, to read as follows:

Section 7. JUDGES SHALL DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES. THE GENERAL ASSEMBLY MAY, BY LAW, PROVIDE FOR MAGISTRATES OF THE COURTS OF COMMON PLEAS, WHO SHALL BE ATTORNEYS LICENSED TO PRACTICE IN THIS STATE AND WHO NEED NOT DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES. SUCH MAGISTRATES SHALL BE APPOINTED BY THE COURTS OF COMMON PLEAS THEY ARE TO SERVE, AND SHALL SERVE AT THE PLEASURE OF THE RESPECTIVE COURTS. LAWS SHALL BE ENACTED TO PRESCRIBE THE TIMES AND MODE OF THEIR APPOINTMENT, THEIR POWERS AND DUTIES, AND THEIR COMPENSATION.

Comment

The Commission considers the recommendation to create a single level of trial courts in Ohio as one of the two most significant ones in this report, equalled only by the recommendation for complete state financing. A full-time judiciary, required by this proposed section, is an integral part of the entire concept. As of January 1, 1976 there were 296 common pleas court judgeships in Ohio, 181 municipal court judgeships, and 67 county court judgeships. All common pleas judges were full-time, approximately 30 of the 181 municipal judges were part-time, and all of the county judges were part-time.

In the Commission's view, a full-time judiciary, free from the distractions and pressures of having to maintain a private practice, free from even the appearance of a possible conflict of interest, and at all times available to meet the demands of judicial business, best serves the interests of the administration of justice. Full-time judges, equal in rank and pay, have a tendency to raise the morale of the court on which they serve.

At the same time, the Commission recognizes the potential need for judicial officers other than judges within the framework of a single level trial court. Other states which have recently adopted single level trial court systems, including Idaho, Iowa, and Illinois also provide for magistrates (or associate judges) within their trial courts. The range of functions they perform, and the types of cases they may hear and decide, varies. For example, Article VI, Section 8 of the Illinois Constitution of 1970 permits the Supreme Court of Illinois to designate the types of cases which may be heard by associate judges (who were, or replaced, judges of courts inferior to the circuit courts). Under this authority, the Supreme Court has promulgated Rule 295, pursuant to which the presiding judge of the circuit may assign an associate judge to hear and decide any case other than a felony. More typical is the prescription of the function of magistrates, and the types of cases they may hear, by statute. Magistrates generally may perform marriages, grant bail in non-capital offenses, issue search warrants, hear traffic cases and at least a limited class of other misdemeanor cases. These functions, of course, were historically performed by justices of the peace, some of whom were not trained in law. The latter would not be the case in Ohio where, in fact, it may be that at least a large percentage of the magistrates initially appointed would be former part-time judges of municipal or county courts. While the Commission believes that designating the functions of magistrates and the types of cases they hear is a matter for the General Assembly, and its recommendation recognizes this fact, the Commission also expresses the hope that the statutes enacted to implement this recommendation will recognize the fact that magistrates functioning within the framework of the trial court of general jurisdiction can, and should be permitted to, perform a range of functions beyond those ordinarily associated with justices of the peace, or even with judges of courts of limited jurisdiction which function autonomously of the trial courts of general jurisdiction. As stated in the comment to Standard 1.12 (b) of the American Bar Association's *Standards Relating to Court Organization*: "There is a wide range of functions that judicial officers can perform. These include conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as a referee or master, hearing short causes and motions, and sitting in lieu of judges by stipulation or in emergency. These functions can be classified into two general types. The first is the hearing of parts or stages of larger proceedings that are before regular judges in their main aspects. The other is presiding over the trial of smaller civil and criminal matters, under the general authority and supervision of regular judges. In the latter capacity, the judicial officer would perform the functions now performed in many instances by judges of courts of limited jurisdiction. This arrangement economizes the time of the regular judges and recognizes the fact that smaller civil and criminal cases ordinarily do require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases. At the same time, it brings the trial of smaller cases within the ambit of the principal trial court and makes them subject to the supervision of its judiciary. It can serve also as a training ground for judicial advancement."

The feature that such judicial officers, who would be called magistrates under the Commission recommendation, would work within the common pleas court framework and be responsible directly to the court which appointed them distinguishes such officers from the former justices of the

peace, who functioned in a largely autonomous manner. In addition, as previously indicated, the range of judicial functions magistrates perform could be much broader, limited only by the discretion of the General Assembly as expressed in statute.

The Commission recognizes that the combined effect of recommending a three-tier court system staffed by full-time judges could, if implemented without adequate preparation and a transition period, disrupt the functioning of the courts as well as the careers of judges and support personnel who hold office in, or are employed in, the existing court structure. The establishment of a single level of trial courts necessarily means the abolition of municipal courts, county courts, and mayors' courts. Such a changeover involves, in addition to consideration of the financial impact on the units of government, the consideration of how the caseloads of the courts to be abolished are to be absorbed by the common pleas courts, and the distribution of, and adjustments in the number of, judges and support personnel. This will require extensive study. Also, there may be judges or court employees who do not wish to be a part of the reorganized court system and therefore may wish to find other pursuits. For all of these reasons, the Commission strongly recommends to the General Assembly that a changeover to single level trial courts, staffed by full-time judges and both full-time and part-time magistrates, not be put into effect until sufficient time has elapsed for adequate study and the enactment of necessary and well-considered legislation.

Section 8

Present Constitution

Vacant. Former Section 8 repealed effective May 7, 1968.

Commission Recommendation

Section 8. The salaries of all judges and expenses of the judicial department shall be paid from the state general fund as provided by law. There shall be a unified judicial budget as provided by law.

Commission Recommendation

The Commission recommends the adoption of a new Section 8, to read as follows:

Section 8. THE SALARIES OF ALL JUDGES AND EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID FROM THE STATE GENERAL FUND AS PROVIDED BY LAW. THERE SHALL BE A UNIFIED JUDICIAL BUDGET AS PROVIDED BY LAW.

Comment

This recommendation contains two elements: state financing of the courts and the establishment of a unified budget. The Commission regards both of these as indispensable to making Ohio's courts, particularly the trial courts, more effective instruments for the administration of justice. This conviction is shared by many who have commented on the subject in recent times. As an example, the U. S. Advisory Commission on Intergovernmental Relations in a comprehensive examination of state-local relations in the criminal justice system devoted several sections of its 1972 report on this subject to a discussion of the responsibility for financing state and local courts. Noting great variations in the degree to which state and local governments share the costs of operating the judicial branch of government, this report acknowledges rising interest in transferring judicial costs to state government.

As to the relationship of state financing of the courts to court unification, the writers assert:

> "Full state assumption of court expenses is a logical concomitant of a unified and simplified state-local judicial system. Such a system is designed to achieve greater uniformity in the administration of justice through simplified structure and state prescription and policing of standards of performance. Included in the latter are the vesting in the highest court of responsibility for promulgation of rules of practice and procedure, exercise of administrative oversight through an administrative office, and assignment and reassignment of judges to meet fluctuations in workloads. These objectives of unification and simplification are more likely to be achieved if the state supplies the necessary funds instead of relying on county or city governments to provide any substantial portion."[9]

It is further observed:

> "A state constitutional provision for a unified court system administered by the chief justice of the supreme court permits the judges to control the system of justice. But when the courts must go hat in hand to various local departments of government for the wherewithal

to support their needs, the judgment of the financier may be substituted for that of the judge. Conflicts between courts and branches of local government respecting personnel often arise."[10]

Regrettably, such conflicts between local government units and judges are not uncommon in Ohio. In one two-week period in early 1976, two items on the subject appeared in a central Ohio newspaper. On January 22, it was reported that a Ross County Common Pleas Court judge had filed an action in mandamus against the Ross County Commissioners "over their refusal to grant the amount of money sought by the courts for 1976 operations", the judge holding the view that the certification of funds made by the commissioners was incorrect.[11] On February 6, it was reported that the Madison County Commissioners had retained legal counsel to resist a request for appropriations made by a Madison County Common Pleas Court judge, which request was in the form of a court order, and which request had been cut by $22,000 from the original $112,500. "We only have so much money to appropriate. If it is decided we have to come up with the money, then cuts will have to be made in other offices" said a Madison County Commissioner, according to the report.[12] These two instances illustrate two cardinal arguments in favor of state financing of the courts. The first is that the inherent power doctrine, as a method for securing the financing of the courts, has severe limitations and, at times, negative consequences; and the second is that in arrangements in which the burden of financing trial courts falls heavily on local units of government, such courts are, and are treated as, competitors for funds which would otherwise be expended on local services. Courts are, in fact, primarily representatives of the judicial power of the state and, especially since many standards under which they operate emanate from state law or policy, in the Commission's view they should be financed by the state.

Furthermore, the present system, under which a large share of the cost of operating the courts is borne locally and much of the revenue generated by the courts is retained locally and treated as part of the general fund, presents all too much temptation for law enforcement officers to use the threatened nonenforcement of laws as a bargaining tool to gain economic ends.[13] The Commission regards this as no more appropriate than fee-supported justice of the peace courts, in which the enforcement of laws is tied on an economic incentive. There is also some evidence that because the distribution of moneys collected for prosecutions under state statutes varies from that collected under local ordinances — the latter being retained locally — there have been policy decisions to prosecute relatively more often under local ordinances than under state statutes, sometimes under local ordinances which are for all practical purposes identical to such statutes. At best, this situation has resulted in an unnecessary proliferation of criminal or regulatory law; at worst, it may involve considerations of denial of equal protection of the law. State financing of the court system would, in the Commission's view, tend to minimize citizen apprehension concerning the enforcement of law for any other reason than the demands of justice.

In 1969, state financing existed in at least seven states: (1) Alaska (93%); (2) Colorado (100%); (3) Connecticut (99%); (4) Hawaii (99%); (5) North Carolina (91%); (6) Rhode Island (99%); and (7) Vermont (100%).[14] The movement toward state financing stems primarily from the realization that (1) if the state sets the standards by which its courts operate, it should provide the fiscal support to implement them and (2) that the present local-state methods of sharing the cost of court systems produce

situations where the true cost of the court systems can not be determined at all.

The Institute of Judicial Administration conducted a study of state and local financing of the courts and in 1969 published a tentative report based in large part upon responses to questionnaires submitted to state supreme courts and court administrators. The writers make the point at the outset that the study was undertaken to obtain information about states and local financing that is virtually impossible to obtain through ordinary research methods. In fact, complete and accurate information about the financing of courts other than federal courts is unobtainable. The introduction to the IJA report states:

> "Even an intelligent guess as to the total amount of state funds expended on the judiciary within a state is almost impossible, except in the relatively few states where the entire, or almost the entire, judiciary is supported exclusively by state funds."[15]

The introduction further notes the difficulty in attempting to pinpoint a "typical" court:

> "The entire cost of one or more courts will be borne by the state government. Other courts will obtain funds from both state government and local government units. Still other courts are completely financed by local government units, sometimes by both county and municipal governments. This means that in order to determine total appropriations for the judiciary within a single state, it is necessary to consult numerous county and municipal budgets and supplemental appropriations measures. Inconsistent inclusions on and exclusions from the local judicial budgets make an intelligent estimate of the actual total expenditures for the support of the judiciary within the state exceedingly difficult."[16]

Many of the criticisms voiced in the 1969 IJA report concerning the lack of adequate information on court budgets and costs of operation are equally applicable to this state. It is impossible to give an exact figure of the cost of Ohio's trial court system, for example, or even to estimate it with any degree of assurance, because the true cost is hidden in so many local budgets — some of which are not judicial budgets — and there is no requirement that items be shown in a uniform manner in these budgets or that amounts budgeted for the court system be reported, as such, to a central point in state government.

In 1974 a Legislative Service Commission study was conducted to try to determine the income and expenses of these courts — common pleas, municipal, county and mayors' courts. The study was based on an examination of the reports required to be filed by county auditors with the Auditor of State for calendar 1972 and on questionnaires prepared and distributed for this purpose. Mayors' courts, as an example, showed no expenses for that year, while showing a total income of several million dollars. This appears to indicate that the expenses of mayors' courts (the *pro rata* share of a mayor's salary and the salary of a deputy or secretary, the cost of overhead, etc.) were simply not attributed to court expense. In this study, too, it proved impossible to determine the state's share of the income of common pleas courts from such sources as fines collected for violation of state statutes, because these amounts, which are deposited in the state general fund, are not shown as separate items in the local reports, and neither the State Auditor nor the State Treasurer keeps a

separate account of them. It appears proper to conclude from this study, however, that the total expenses of common pleas courts, taken as a whole, exceeded the income of such courts by some amount while the income of the courts of limited jurisdiction, taken as a whole, exceeded their expenses by several millions of dollars in 1972. The practical impossibility of determining the exact cost of the trial court system for that year — or any other — in the Commission's view underscores the evident need for uniform accounting and financial reporting in the judicial department and the desirability of a unified judicial budget. If the state is to assume the cost of the court system — which the Commission strongly urges — a unified budget is indispensable. Such a budget would also form the basis for long-range planning for the court system as a whole, something which is presently completely lacking, and permit the allocation of its human and material resources more equitably and rationally than is possible today.

However, the Commission is well aware that a changeover from the present method of financing, which includes a highly complex maze of laws under which fines, forfeitures and court costs paid into court are a source of revenue for local government — in effect a substitute for tax revenue — can not be implemented without a thorough investigation and evaluation of the fiscal impact of the proposal, both on the state and its political subdivisions, and of the statutory changes needed to avoid unfairness or hardship. Such an investigation, and the decisions on what statutory changes should be made, are in the Commission's view properly in the domain of the General Assembly. The Commission, therefore, recommends that the effective date of its recommendations for a new Section 8 be delayed until a time sufficiently in the future to enable the General Assembly to complete the study and to enact appropriate implementing legislation.

Section 9

Present Constitution

Vacant. Former Section 9 repealed effective September 3, 1912.

Commission Recommendation

Amend and transfer present Section 20.

Commission Recommendation

The Commission recommends that present Section 20 be retained, and amended by being renumbered Section 9.

Comment

See comment following present Section 20.

Section 10

Present Constitution

Vacant. Former Section 10 repealed effective May 7, 1968.

Commission Recommendation

Amend and transfer Section 13.

Commission Recommendation

The Commission recommends that present Section 13 be retained, and amended by being renumbered Section 10.

Comment

See comment following present Section 13.

Section 13

Present Constitution

Section 13. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

Section 10. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

The Commission recommends that this section be amended by being renumbered Section 10, to read as follows:

Section ~~13~~ **10.** In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Comment

The Commission makes no recommendation for change in the manner in which judges are chosen, nor in the manner in which vacancies are filled. However, the Commission does recommend that Section 13 be renumbered Section 10. It will be the last section of Article IV as revised pursuant to the recommendations contained in this report.

Although the Commission makes no recommendation for change, a minority report advocating the appointive-elective method of judicial selction (including the filling of vacancies) is attached as an appendix, as previously noted.

Section 15

Present Constitution

Section 15. Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The repeal of this section was previously recommended to the General Assembly by the Commission in Part 1 of its report, relating to the administration, organization, and procedures of the General Assembly, on the basis that the two-thirds vote requirement contained in it was "an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting courts specifically named in the Constitution or as may be established by law." (Part 1, page 64) If the recommendations on the Judicial Article contained in this report are adopted, there will be even less justification for imposing a special majority requirement on the General Assembly when it votes on a change in courts or judges, because the recommendations for such change by the Supreme Court will be a matter of public record and will be based on criteria which themselves will be public, thus eliminating any element of "log-rolling" from the decision process. An additional reason for repeal is the fact that the last sentence of proposed Section 5 (B) of Article IV states as follows: "No decrease in the number of judges shall vacate the office of any judge before the end of his term." That portion of Section 15 which would save the office of any judge would therefore be superfluous, as would that portion which states that any existing court heretofore created by law shall continue in existence until otherwise provided by law, since such courts, except for those specifically authorized in proposed Section 1, would cease to exist as of the effective date of proposed Section 1.

Section 17

Present Constitution

Section 17. Judges may be removed from office, by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which, shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

There are at present five methods for removing a judge from office in Ohio, two of them prescribed in the Constitution, one prescribed by law, one prescribed by law and implemented through Rule VI of the Supreme Court's Rules for the Government of the Bar of Ohio, and one prescribed by Rule IV of these rules.

The older of the constitutional methods is impeachment, which was found in Article I, Section 23 of the Constitution of 1802, and was carried over with minor changes as Article II, Section 23 of the Constitution of 1851. This section is thus part of the Legislative Article, and reads as follows:

> "The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the Senators, when sitting for that purpose, shall be upon oath of affirmation to do justice according to law and evidence. No person shall be convicted, without the concurrence of two-thirds of the Senators."

The grounds for impeachment are set forth in Article II, Section 24, which states:

> "The Governor, Judges, and all State officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law."

There have been few impeachments of judges in the history of Ohio, and none have occurred in this century. Two of the earliest such impeachments occurred when the state was not yet a decade old. In the culmination of a power struggle between the judicial and legislative branches of the state government, Supreme Court Judges Tod and Pease

were impeached as the result of their decisions, in separate cases, that aspects of a statute defining the powers and jurisdiction of justices of the peace were unconstitutional. Early in 1809, Tod and Pease were tried separately before the Senate. When the votes were taken, the two-thirds majority necessary for conviction was missed by a single vote in each case, and the judges were acquitted.

As with the federal counterpart of this provision,[17] there are open questions as to what constitutes a "misdemeanor" in office, although there appears to be agreement that the word "misdemeanor" as used in this context has a broader meaning than a misdemeanor as defined by statute. There is also a question as to whether the judgment of the Senate is subject to judicial review. Some have called impeachemnt a "cumbersome, unmanageable, impractical process."[18] That it may be, but it is also a powerful and historic tool for maintaining public confidence in the judiciary as well as other state officers, and the Commission believes it should continue to remain available.

The second constitutional method for the removal of judges is by concurrent resolution of the General Assembly under Section 17 of Article IV, whose repeal the Commission hereby recommends. This section had no equivalent in the Constitution of 1802. It is an original part of the Constitution of 1851 and, unlike the impeachment provision, it applies only to judges. Judicial removal under Section 17 may be classified for comparison with other state constitutions as a form of address. Traditionally, an address is a nonobiligatory request made by the legislative branch to the executive branch that an officer of the government be removed from his position. It usually applies to the removal of judges only, as does Section 17, but some constitutions make nonjudicial officers subject to address as well. Address procedures or proceedings in the nature of address are available in approximately one-half of the states.

The Ohio provision differs from the classical concept of address in that the executive takes no part in the removal process. Section 17 requires only the concurrent decision by both houses of the General Assembly that a judge be removed from office. The section provides that no judge may be so removed without the posting of the legislative complaint, notice to the judge, and the opportunity for the judge to be heard. Unlike impeachment, there is no requirement that a trial be held, but only that the responding judge be allowed to present his position. However, in one sense Section 17 establishes a procedure which is more difficult to apply successfully than impeachment: whether the judicial removal be by impeachment or under Section 17, a two-thirds vote of the entire Senate is required; but while articles of impeachment may be founded upon a simple majority in the House, a Section 17 removal demands the approval of a two-thirds majority of both the House and the Senate.

Section 17 is like the provisions in most state constitutions which allow proceedings in the nature of address in that a two-thirds vote is set as the standard, and in that no specification of cause for removal, such as the commission of a "misdemeanor" in the case of impeachment, is made. While no delineation of what constitutes sufficient cause for removing a judge exists in Section 17, the requirement that the substance of the complaint against the judge be included in the legislative journal does imply that some despicable act must have been committed or an otherwise unacceptable situation must have been created by the judge in question. Still, no appeal normally exists for one removed from office by address or proceedings in the nature of address, and one can infer from this that the legislature may have the power to remove a judge arbitrarily, so

long as the procedure of enrolling the complaint, providing notice, and allowing the judge a hearing is followed.

The inclusion of Section 17 in the Constitution of 1851 received only passing debate on the floor of the Convention. The first report of the Convention's Standing Committee on the Judicial Department included a suggestion that removal of judges be allowed upon a mere concurrent vote of two-thirds of both houses of the General Assembly. Subsequently, the proposal was amended to provide for journalizing the complaint and giving notice and an opportunity to be heard. There was recognition that a constitutional method of removal other than impeachment did not exist as to nonjudicial officers and the argument was made that judges should not be exposed to a greater liability of removal. The delegates who presented this argument reasoned that the judiciary was chartered as a separate branch of government and should not be subject to a threat of legislative control.

The history of Ohio shows that whether the address-like proceeding provided for in Section 17 is or is not more expeditious than impeachment as a method of judicial removal, and whether or not it presents a threat of potential legislative control over the judicial branch, it, like impeachment, has not been favored as an approach to dealing with unfit judges. As with impeachment, the address-like method of removal has not been used during the twentieth century. In fact, it has never been used.

The two statutory methods of removal can also be traced to a constitutional provision, namely Article II, Section 38, adopted as part of the 1912 revision of the Constitution. This section is in the nature of a mandatory direction to the General Assembly to provide statutory methods of removal for state officers, judges, and members of the General Assembly. The provision reads:

> "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

The thrust of Section 38 is that judges and other officers should be subject to removal from office for moral turpitude and other statutorily stated causes, and that such removal need not be accomplished by impeachment or, in the case of judges, by the address-like proceeding of Article IV, Section 17. The provision singles out "misconduct involving moral turpitude" as cause for statutory removal, but does not limit the General Assembly in denominating other types of misconduct as causes for removal. Section 38, while in part the result of dissatisfaction with the removal procedure under Article IV, Section 17, includes the procedural safeguard of that earlier provision by requiring that any removal made possible by statute shall be "upon complaint and hearing".

One statutory method is set forth in Sections 3.07 to 3.10 of the Revised Code. These sections specifically refer to Article II, Section 38 in establishing a procedure for removal of public officers which is initiated directly by the public and to which judges are subject. These statutes require the removal of an officer upon a judicial finding that he is guilty of "misconduct in office."

The first sentence of Revised Code Section 3.07 not only sets the framework for removal under this method and refers directly to Article

II, Section 38, but also defines the "misconduct in office" which, when found, creates a vacancy in the office. The sentence reads:

> "Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office."

The procedure for removal based upon a finding of "misconduct in office" is codified in Revised Code Section 3.08. The proceedings are instituted by the filing of a complaint which delineates the charge and which is signed by a designated number of electors of the state or of the political subdivision whose officer it is sought to remove. The statute also prescribes the court in which the complaint is to be filed, requires notice to the officer who is the subject of the complaint, a prompt hearing, and that the hearing be a matter of public record. The Supreme Court has ruled that a judge may not be found guilty of misconduct in office and removed except upon clear and convincing evidence.

The decision of a court in a removal case under these statutes has been held to be a judicial rather than a political decision and subject to appellate review. Revised Code Section 3.09 allows a single appeal, whether the first hearing be in a common pleas court or a court of appeals. Statistics on the frequency with which judicial removal under Revised Code Sections 3.07 to 3.10 has occurred are unavailable, although reported decisions show at least three instances which have arisen under these sections and analogous provisions of the predecessor General Code.

The second statutory method the General Assembly has authorized for the removal of judges is found in Revised Code Sections 2701.11 and 2701.12. This method applies exclusively to judges, and these statutes are expressly subject to the rules of the Supreme Court and outline the procedure more fully implemented by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio. Briefly stated, Revised Code Section 2701.11, which also concerns the retirement and suspension of judges who are physically or mentally disabled, provides for a proceeding before a commission of five judges, appointed by the Supreme Court, who may cause the removal of a complained-of judge when cause, as defined in Revised Code Section 2701.12, exists. As required by Article II, Section 38 and prescribed in Rule VI, these sections provide for a complaint and a hearing. Revised Code Section 2701.12 states in pertinent part:

> "(A) Cause for removal or suspension of a judge from office . . . exists when he has, since first elected or appointed to judicial office:
> (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of pulic respect for the office;
> (2) Been convicted of a crime involving moral turpitude; or
> (3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment."

The statute clearly indicates that the cause for removal must arise

after the judge assumes his office. But, in applying this rule care should be taken to note just what event constitutes the cause. For example, under (A) (2) the conviction is the pivotal event which must occur while the judge is in office, although the commission of the crime involving moral turpitude might be before taking office, and (A) (3) recognizes disbarment or suspension *while in office* for misconduct *prior to taking office* as cause for removal.

Rule VI, entitled "Removal of Judges", was adopted by the Supreme Court in 1972. (This rule was originally enacted as Supreme Court Rule XXI in 1969.) Not only does Rule VI deal with judges who are accused of some act or omission which makes them unfit to hold the office, but it also provides for removal of those judges who are physically or mentally disabled. It is explicit that this rule was adopted pursuant to the authority granted by the General Assembly in Revised Code Sections 2701.11 and 2701.12. The rule reiterates many of the aspects of judicial removal set forth in these statutes, but is primarily directed to supplying needed definitions and details of procedure.

The full range of procedural details prescribed in Rule VI can best be seen in a direct comparison of Revised Code Section 2701.11 and 2701.12 to the Rule, but only the major steps of the procedure, which are contained in both the statutes and the rules, are outlined here. First, the grievance committee of a regularly organized bar association investigates a suspicion or charge of judicial misconduct. If it is believed that a full hearing should be held, a complaint is filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The seventeen member board then investigates the complaint, and if twelve or more members find substantial credible evidence in support of the complaint, the investigation is certified to the Supreme Court. The Court then appoints a commission of five judges to determine by a majority the question of removal. This commission is composed of judges of courts of record located in any five appellate districts other than that in which the complained-of judge resides. If the commission orders removal, the judge so removed may appeal directly to the Supreme Court.

Rule VI adds several noteworthy elements to the statutes. For example, the Rule affirmatively states that a judge is disqualified from performing his duties while awaiting the disposition of any indictment or information charging him with the commission of a felony. The current practice under this part of the Rule is for the Supreme Court to issue an order suspending the subject judge as soon as the indictment or information becomes a matter of public record. The theory behind this practice is to remove from the bench judges who might be unable to rule impartially, given concerns over their personal futures, or whose very presence on the bench might incite public distrust in the judiciary, regardless of the presumption of innocence.

Rule VI also expands the causes for which a judge may be removed as set forth in Revised Code Section 2701.12 by adding "if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute. . ."

Rule IV of the Rules For the Government of the Bar, entitled "Professional Responsibility and Judicial Ethics", provides an alternate rule-based approach to the removal of judges. Rule IV binds all attorneys to the Code of Professional Responsibility and all judges to the Canons of Judicial Ethics. New standards of judicial behavior became effective in December 1973, when the Code of Judicial Conduct was adopted. This

Code is designed to replace the Canons of Judicial Ethics and binds all person not in a judicial office on the effective date of the Code when they take a judicial office and all incumbent judges upon the beginning of their next term in office. The procedure for imposing discipline under these sets of standards is set out in Rule V. By prescribing suspension from the practice of law and disbarment for willful breaches of these tenets of behavior, Rule IV establishes the basis for another approach to removing an unfit judge.

The statute[19] and the Rules [20] clearly state that a judge's loss of the privilege to practice law constitutes cause for his removal from office, but the fact that judges must be attorneys and that attorney-judges have an obligation to follow the Codes and Canons has been interpreted by the Supreme Court to mean that an indefinite suspension or a disbarment works a forfeiture of judicial office and is in itself grounds for removal.[21] The Court has further held that an action in *quo warranto* lies to enforce the vacating of the office.[22]

The situation results that the disbarment of a judge can give rise to his direct removal under the forefeiture of office concept or it can constitute cause for a proceeding under the statute or rule which exposes him to the liability of removal. It must be borne in mind here that a judge may also be disbarred or suspended for a willful violation of the Code of Professional Responsibility, which establishes generally more inclusive standards of behavior than are in the Canons of Judicial Ethics or the Code of Judicial Conduct and which violation might conceivably not be a violation of the ethical rules which apply only to judges.

The authority of the courts to consider the professional discipline of an attorney who is serving as a judge and to remove that judge from the bench if he is deemed unfit as an attorney has been challenged unsuccessfully on several occasions. Challenges usually assert the exclusivity of constitutional and statutory methods of removal. The Supreme Court has ruled that it, "through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member."[23]

While the states are divided on whether a judge may be disciplined while in office for his actions as an attorney before taking office, Ohio holds that elevation to the bench does not cut off an attorney's liability to discipline for his previous professional misconduct.

The supervision of judicial fitness and the removal of judges by a combined use of Revised Code Sections 2701.11 and 2701.12 and the Supreme Court Rules has been successful. Several judges have been removed from office in recent years by the use of these approaches.

The Commission concludes that there are adequate means, other than a concurrent resolution of the General Assembly under Section 17 of Article IV, to remove unfit judges from office in Ohio, and the Constitution as presently written is flexible enough on this point to allow the General Assembly or the Supreme Court to prescribe new, and perhaps even more effective, means in the future. Both existing constitutional methods have in the past been criticized as being too cumbersome to be of effective use. The total lack of use of either the impeachment method or the concurrent resolution method in this century would seem to bear out that judgment. The Commission is advised that, in fact, most resignations of judges for reasons other than age, health or other legitimate cause have in recent years been accomplished without formal proceedings

under threat of Supreme Court action. It may well be argued that there is a practical need for a procedure not dependent on the judgment of the Supreme Court, to hear and determine possible cases involving one or more members of the Court itself. If that is so, then the impeachment approach, the basis for which is set forth in the Constitution, however imprecisely, as "any misdemeanor in office", and which specifically requires a trial, is preferable to the concurrent resolution approach, the basis for which is not set forth in the Constitution and which, while it requires a hearing, does not require a trial. Thus, the very presence of the latter method in the Constitution poses a threat of possible confrontation between the legislative and judicial branches of government for reasons other than judicial fitness — a situation which should be avoided if at all possible. For this reason, and the conviction that the remaining methods are adequate now and capable of improvement or change in the future, the Commission recommends the repeal of Section 17 of Article IV.

Section 18

Present Constitution

Section 18. The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The Commission views this provision as unnecessary. This section became part of the Constitution in 1912, and the exact reason for its addition is uncertain, although its aim appeared to be the prevention of the issuance of *ex parte* orders in chambers. However, since the powers of any court are derived either from the Constitution, the statutes, or to a more limited extent, are inherent, this provision is in one sense unduly limiting and in another sense simply surplusage. It should, therefore, be removed from the Constitution.

Section 19

Present Constitution

Section 19. The General Assembly may establish courts of Conciliation, and prescribe their powers and duties; but such courts shall not render final judgment, in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

This provision also became part of the Constitution in 1912. The Debates of the Convention shed little light on its intended purpose, although the general tenor of the discussion which is recorded there indicates a desire to provide a forum in which parties could settle legal differences by means short of a formal trial. It is interesting to note that the statutory references following this section in Page's Ohio Revised Code are to Revised Code Section 2711.01 *et seq.*, which govern arbitration clauses in written contracts generally, and to Revised Code Section 4129.02 *et seq.*, which govern the powers and duties of the Industrial Commission and procedures before that body. The Commission believes that the validity of the foregoing statutes would not be affected by a repeal of Section 19. And, although courts of conciliation as such never have been established in Ohio, there is no reason to believe that a subject-matter division serving the same function — that is, the settlement of disputes in a less formal atmosphere and with simplified rules and procedures — could not be established within the structural framework for common pleas courts which the Commission recommends in this report.

Section 20

Present Constitution

Section 20. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the State of Ohio."

Commission Recommendation

Section 9. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude "against the peace and dignity of the State of Ohio."

Commission Recommendation

The Commission recommends that this section be amended by being renumbered Section 9, to read as follows:

Section ~~20~~ 9. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the State of Ohio."

Comment

This section prescribes certain formalities to be followed in relation to the style of process and the form of indictments, and states that all prosecutions shall be carried on in the name and by the authority of the State of Ohio. It states sound constitutional principles, and its parameters are well known and understood. The Commission believes that the section should be retained, but, because Section 9 is presently vacant, this section should be renumbered Section 9. No substantive change is intended.

Section 22

Present Constitution

Section 22. A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General As-

Commission Recommendation

Repeal.

Present Constitution — Continued

sembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

Commission Recommendation

The Commission again recommends that this section be repealed.

Comment

This section was adopted in 1875. It authorized the creation of a Supreme Court Commission to serve for three years beginning in 1876, and it further authorized the General Assembly, by a two-thirds vote, to establish such commissions by law, if requested to do so by the Supreme Court, not oftener than once in ten years nor for terms of more than two years. The purpose of the provision was to alleviate extraordinary circumstances in the workload of the Supreme Court. Pursuant to this provision, one other Supreme Court Commission was established, also in the last century. The section has not been used since that time.

In Part I of its report, relating to the administration, organization and procedures of the General Assembly, the Constitutional Revision Commission has once before recommended the repeal of this section as obsolete. This recommendation was accepted by the General Assembly and placed on the May 1973 ballot. At that time it was defeated, apparently as the result of inadequate voter information. However, the Commission concludes that the reasons given in support of the original recommendation to repeal this section are valid, and for that reason renews the recommendation here.

Section 23

Present Constitution

Section 23. Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten percent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such county the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.

Elections may be had in the same manner to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends that this section be repealed.

Comment

The overall concept of the Commission's recommendations for a revised Article IV is the establishment of a three-tier court structure in which there is only one level of trial courts of general subject-matter jurisdiction, namely the courts of common pleas. It is contemplated that existing county and municipal courts will be absorbed into the common pleas courts, and mayors' courts will be abolished. The creation of subject-matter divisions except probate, and the assignment of judges to such other divisions, would be governed by Supreme Court rule subject to amendment or rejection by the General Assembly, unless the General Assembly by law required special election to a division. Section 23 is inconsistent with this concept, and for that reason the Commission recom-

mends its repeal. However, the effective date of the repeal of this section should be delayed to coincide with the effective date of proposed Section 1, so that consolidation under Section 23 can take place until proposed Section 1 becomes operative.

Footnotes

1. Remark reprinted in *Ohio Briefs, No. 20* (Columbus: League Women Voters of Ohio, September 1972), p. 2.
2. For examples of the disposition of fines in state cases, see *Minor Courts in Ohio* (Columbus: Legislative Service Commission, Staff Research Report No. 35, 1959), Appendix D.
3. American Bar Association, *Standards Relating to Court Organization* (1974), Commentary on Section 1.11 (b), pp. 9-10.
4. Idaho Constitution, Article 5, Section 20.
5. Illinois Constitution, Article 6, Section 1.
6. Iowa Code, Section 602.1.
7. Hawaii Revised Statutes, Section 601-1 *et seq.*
8. Glenn R. Winters, "New Approaches to Appellate Court Problems", *Louisiana Bar Journal*, June 1970, p. 29.
9. U. S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (1971), p. 207.
10. *Ibid.*
11. "Judge is Assigned for Ross County Budget Hearing", *Columbus Dispatch*, Thursday, January 22, 1976, p. B-1.
12. "Judge Questions His Court Budget", *Columbus Dispatch*, Thursday, February 5, 1976, p. D-5.
13. "Police Slowdown May Reduce Jobs", *Columbus Dispatch*, Thursday, January 22, 1976, p. A-1.
14. See U. S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System*, "State-Local Sharing of Court Expenditures, 1968-1969", p. 108.
15. Institute of Judicial Administration, *State and Local Financing of the Courts* (Tentative Report, April 1969), p. 4.
16. *Ibid.*
17. Constitution of the United States, Article II, Section 4.
18. *State of Ohio, Debates and Proceedings, Constitutional Convention, 1850*, p. 240 (May 30, 1850).
19. Revised Code Section 2701.12 (A) (3).
20. Rule VI, Section 1 (c) of the Rules for the Government of the Bar of Ohio.
21. *State ex rel. Saxbe v. Franko*, 168 Ohio St. 338 (1958).
22. *Ibid.*
23. *Mahoning County Bar Association v. Franko*, 168 Ohio St. 17 (1958).

APPENDIX A
Minority Report

Appointive-Elective Method of Judicial Selection

Introduction

The Commission's Judiciary Committee submitted its report in April 1975 after nearly two years of study of the questions relating to judicial administration, including extensive research and discussion of the methods of judicial selection. Based on its study, the committee decided to propose an extensive revision of Section 6 of Article IV providing for the appointive-elective method of selection, mandatory for the Supreme Court and the courts of appeals and optional, by vote of the electorate affected, for courts of common pleas. This proposal was contained in the April 1975 committee report. It was debated at the June and July, 1975 Commission meetings, during the course of which debate it was amended in a few relatively minor respects. Subsequently, it was submitted to a vote of the Commission, and received 15 votes. Twenty-two votes are needed under Commission rules for a proposal to be adopted as a Commission recommendation.

The proposal, as amended, is attached to this minority report. We, the undersigned, support the proposal, as amended, and hereby offer our reasons for this support.

Methods of Judicial Selection Currently in Use Among the States

There are five methods of judicial selection currently in use in the United States. These are:

1. Gubernatorial appointment. In this method, the governor makes the original appointment, usually with the approval of the legislature or a house thereof, or of a body especially established for this purpose.

2. Legislative election. In this method, the selection is made by a vote of the legislature.

3. Nonpartisan election. In this method, judicial candidates are formally excluded from identification with a political party on the election ballot, although they may be chosen at partisan primaries.

4. Partisan election. Here, judges may be identified on the election ballot with a political party and are nominated in partisan primaries.

5. Appointive-elective method. This method, which has come to be known popularly as the merit plan or Missouri plan, has three essential elements: first, slates of candidates are chosen by a nonpartisan nominating commission usually composed of some designated members of the judiciary, several lawyers appointed or elected by bar associations, and several lay persons appointed by the governor; second, the governor selects a judge from the list of names submitted by the commission; finally voters review the appointment by means of a referendum in which the judge runs unopposed on his record.[1]

History of Judicial Selection in the United States

During colonial times, judges were appointed by the Crown. After the Declaration of Independence, six of the new states vested the responsibil-

ity for judicial appointments in the governor, subject, however, to the approval of a group of citizens or to the state legislature. In Pennsylvania and Delaware, the approving authority was the state legislature. In Massachusetts, New Hampshire and Maryland it was the Governor's Council, consisting of various state officers, and in New York it was a special "Council of Appointment", consisting of four state senators as well as the governor. In contrast, seven of the original states entrusted the election of judges to their legislatures, as an indication of distrust for the executive. These were Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, South Carolina and Georgia. In 1789 no state obtained its judges by popular election. Georgia was the first to do so, in 1793.

Several reasons have been advanced for the rising demand for popular control of the judiciary. First, there was the impact of *Marbury v. Madison*, 1 Cranch 137 (1803), in which the Supreme Court unequivocally asserted the power of the judicial branch to pass on the constitutionality of legislation. This declaration generated a great deal of controversy over the possible dire consequences of unchecked judicial power, and in fact led to an attempt to impeach several members of the Court. Thomas Jefferson, who before he became President advocated the appointment of judges to serve during good behavior, suggested after the *Marbury* decision that the popular election of judges might, indeed, be desirable. Second, judges of American courts were called upon to play a more active role in the *creation* of law than their English counterparts, because many English common-law precedents simply did not fit the circumstances and needs of a frontier society. The vacuum thus caused forced American judges to create new law for the resolution of particular legal conflicts, but many citizens regarded this as the usurpation of what they saw as a properly legislative function. Third, following the American Revolution there began a period of distrust for the legal profession as a whole, resulting from the fact that many prominent attorneys had been Loyalists during the war, and that, following the war, attorneys had participated extensively in debt collection and in the foreclosure of mortgages. Finally came the impact of Jacksonian Democracy, which was firmly premised on the belief that all men are created equal, and that, as a consequence, all men are equally capable of assuming any public office. In his first inaugural address, Jackson proceeded from the premise that all men are in fact equal to the conclusion that judges "were as fungible in public office as potatoes."[2]

The prevalent method of election during the nineteenth century was by means of partisan primaries and elections. The excesses and evils of this approach were most starkly exemplified by the workings of the Tweed political machine in New York City from 1866 to 1871. While the Tweed Era probably represented the bleakest picture of the consequences of the partisan election of judges, the fact was that many citizens recognized the need for some reform in this area. The most notable of these reforms was the emergence of the nonpartisan judicial ballot, which was a product of the turn-of-the-century Progressive Movement and which, in theory at least, was supposed to eliminate the worst feature of the election of judges — *de facto* domination of judicial selection by partisan political bosses and organizations.

However, no fundamentally new approach to judicial selection was put forward until 1913, when Professor Albert M. Kales of Northwestern University Law School proposed a plan which in his view combined the advantages of the appointive and elective methods and eliminated the faults of both. The original Kales proposal was that an elected officer (he

suggested an elected chief justice) do the appointing to fill judicial vacancies from a list of names submitted by an impartial, nonpartisan nominating body (he suggested a judicial council), the appointees to go before the voters at stated intervals thereafter on the sole question of their retention in office. The rejection of a judge by the voters was to create a vacancy to be filled again by appointment. This concept was from its beginning championed by the American Judicature Society and in 1937 the American Bar Association also formally declared its support for it.

For reasons apparently grounded in a widely shared desire for reform sparked by bitter partisanship and scandal in the state's judiciary over a period of several decades, Missouri in 1940 became the first state to adopt the Kales-ABA principles in a constitution. The ABA's support for the appointive-elective method or plan was reaffirmed when its principles were incorporated in that organization's Model Judicial Article, published in 1962. Today, the states of Alaska, California, Colorado, Indiana, Idaho, Kansas, Missouri, Nebraska, Oklahoma, Utah and Vermont select at least their supreme court and court of appeals judges by this method.[3] About a half dozen states use aspects of merit selection on a more limited basis, and some states have established nominating commissions for the filling of vacancies by executive order even though they still employ the elective method. Significantly, no state has changed an existing method of judicial selection to anything but the appointive-elective method during the post World War II period.

History of Judicial Selection in Ohio

Under the Constitution of 1803, Ohio joined the Union with a judiciary appointed by the General Assembly. The Ohio Constitution of 1851, written near the height of Jacksonian Democracy, put Ohio into the ranks of those states which elected their judges. As one commentator remarked:

> "Most of Ohio's 'founding fathers' had gone to their rewards by the time of the Ohio Constitutional Convention of 1850, and the Jacksonian version of what came to be called 'populism' was sweeping the country, bringing with it the spoils system, and a belief that no special talents were needed for public office. The populists buried under an 'elitist' label anyone who cautioned that, at least in the case of those offices which required some professional or technical competence, popular election would cost more in mediocre government than it would ever gain from the largely theoretical increase in citizen involvement."[4]

By 1850, many Ohioans had concluded that courts staffed by the legislature had become "undemocratic", because party service had become an indispensable qualification for a judgeship. So, the new Constitution provided for the nomination of judges by party convention and election on a partisan ballot. This, presumably, at least gave the voters a choice of candidates. By the end of the century, however, political thought had evolved to the position that judicial selection would be made "more democratic" by the elimination of partisan politics from the selection process altogether. Progressive forces were thereafter instrumental in securing the passage of the Nonpartisan Judiciary Act of 1911, which required nonpartisan ballots for the election of judges, and the rotation of judges' names on the ballot. In 1912, the Progressives at the convention held that year succeeded in incorporating into the Constitution a provision for the direct primary nomination of all state officers including judges, except for

those nominated by petition, and the election of judges on a nonpartisan ballot. The new structure for judicial selection, like its predecessors, soon came under severe criticism, including that "the ability to get publicity rather than judicial fitness" had become the pathway to judicial office in Ohio.[5] However, despite such criticsm, several attempts to substitute the appointive-elective method for the present method have failed. In 1938, Ohio voters rejected a proposed constitutional amendment to adopt a plan similar to the one adopted two years later in Missouri, and none of several subsequent proposals has reached the ballot in Ohio since that time.

Why an Appointive-Elective System?

We believe that the present method of selecting judges in Ohio is not in the best interests of the people. Any elective method involves essentially a choice of judges by political party officials who are primarily concerned with political factors such as a candidate's support within a party organization, prior service to the party, and political charisma. In our view, the only acceptable basis for selecting a judge is a thorough knowledge and evaluation of his personal conduct and integrity, and his professional competence. The appointive-elective method of selection, in which the superior screening process of the nominating commission is the central feature, is much more likely to establish the facts necessary for a decision as to fitness for judicial office than an election campaign. Particularly in metropolitan areas in which a large number of judges may be elected at once, the average voter faces a hopeless task in trying to educate himself sufficiently to make a truly informed choice. All too often, he ends up relying on the familiarity of a name, which may depend on incumbency or ethnic origin, both of which are basically irrelevant factors. There is another facet to the "name game" in Ohio judicial races.[6] It has on occasion resulted in the loss of judicial office by individuals who, by every test we can apply, deserved to remain in office on the basis of their records. And we wonder how many other qualified persons have not offered themselves as candidates for judicial office for fear of one day facing defeat because they did not have the "right" name or because it was not "the right year" for their party.

Supporters of the elective system argue that election assures that judges who share the policy views of a majority of the electorate hold such office. Even if we concede that judges should be policy makers — and we are not prepared to do so unequivocally — there are two factors which strongly mitigate against an elected judge's accurately reflecting the policy viewpoint of the citizens he serves. The first of these is the now well-documented "voter dropoff" phenomenon in judicial races, which may result from the fact that judicial opinions seldom arouse much public fanfare, so that policy decisions which *are* made public may well go unnoticed. Whatever the reason for it, studies show that the phenomenon tends to operate in favor of well-educated middle and upper class voters, who are in a better position to acquire the necessary information than the less educated, and who thereby are in a better position to assure the election of judges who more closely reflect their own political orientation.[7] The second factor is the essentially cloistered nature of judicial work itself, which makes it difficult to determine its quality. As one observer states:

> "Once we have named a man as a judge, the quality of his performance as a judge passes almost completely outside our effective surveillance and control, unless his performance is extremely bad ... Any notion that the public or the bar may have any genuine control

over the quality of judicial performance by judges already on the bench is simply not realistic."[8]

Again, we are compelled to recognize the importance of the selection process, and again we emphasize the inherent suitability of a nominating commission for the purpose. Such a commission will by its very nature either contain elements of those segments of society which have a constant interest in the high quality of courts and judges or receive input from them, and over time it will develop an expertise in detecting and cataloging qualities which make a good judge, something which the average voter has no way to do under the present, elective system. The public interest sparked by the operation of a commission will of itself serve an educational function, and the voter will retain ultimate control over who occupies judicial office through the retention election. Thus, the ultimate result of an appointive-elective system will be a better screened and qualified judiciary, accountable to a more informed electorate.

Richard A. Watson and Rondal G. Downing point out in their in-depth study of the Missouri experience, *The Politics of the Bench and the Bar*, that "[w]hether the plan eliminates politics in judicial selection is a false issue. Instead, the key issue is whether the particular kind of politics that evolved under the plan adequately represents the legal, judicial, public and political perspective thought to be important in determining who shall sit on the bench."[9] In those courts of Missouri in which the appointive-elective method is in effect, both the public and the legal profession, in the main, agree that it has produced a more respectable judicial climate than existed in the state before the method was adopted, and while no empirical proof is available that the method produces "better" judges in terms of there being fewer reversals of their decisions by higher courts, there has been a positive psychological impact on both the public and the bar as the result of its adoption in that state. Watson and Downing conclude that the method has had a tendency to eliminate highly incompetent judges from the bench, and has placed on the bench persons with qualities Missouri lawyers — and presumably also Missouri citizens — rate most highly in a "good" judge: (1) knowledge of the law; (2) open-mindedness; (3) common sense; (4) courtesy to lawyers and witnesses; and (5) diligence.[10]

Data from states which have more recently adopted the appointive-elective system have not yet been as thoroughly analyzed as those of Missouri, but judging from the trend toward the adoption of the method which began in the 1950's and is continuing at the present time, it appears that a majority of the citizens who are concerned with the improvement of the courts and the quality of their judges, and who have had an opportunity to voice their beliefs at the ballot box have concluded that the appointive-elective method is more likely to produce the results they desire than any other method of judicial selection now available. We join in that conclusion and strongly endorse the adoption of an appointive-elective method of judicial selection for Ohio.

Respectfully submitted,

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Richard H. Carter	William H. Mussey
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Footnotes, Appendix A

1. Henry R. Glick and Kenneth N. Vines, *State Court Systems* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973), p. 39.
2. Roger J. Traynor, "Who Can Best Judge the Judges", *Selected Readings – Judicial Selection and Tenure*, ed. Glenn R. Winters (Chicago: American Judicature Society, 1967), p. 141.
3. *Montana Constitutional Convention Studies*, Report No. 14, "The Judiciary", (Helena: Montana Constitutional Convention Commission, n.d.), Table 14, p. 145.
4. Bruce I. Petrie, "The 122-Year Cop-out", *Cincinnati Bar Association Journal* (Fall, 1973), p. 12.
5. Francis R. Auman, "The Selection, Tenure, Retirement and Compensation of Judges in Ohio", 5 U. Cin. L. Rev. 408 at 414 (1931).
6. See editorial, "In this Ohio Name Game, the Real Loser is You", *Akron Beacon Journal*, Sunday, September 1, 1974, p. E-2.
7. Kathleen L. Barber, "Ohio Judicial Elections — Nonpartisan Premises with Partisan Results", 32 Ohio State L. J. 762 at 788 (1971).
8. Robert A. Leflar, "The Quality of Judges", 35 Ind. L. J. 289 at 299 (1960).
9. Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar* (New York: John Wiley and Sons, Inc., 1969), pp. 331-332.
10. Watson and Downing, *op. cit.*, p. 345.

Attachment to Minority Report on Judicial Selection

Article IV

Section 6

Section 6. (A) (1) ~~The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.~~ THE FULL TERMS OF THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT, OF THE JUDGES OF THE COURTS OF APPEALS, AND OF THE JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE SIX YEARS.

(2) (a) ~~The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.~~ WHENEVER A VACANCY OCCURS IN THE OFFICE OF CHIEF JUSTICE, OR OF ANY JUSTICE OF THE SUPREME COURT, OR OF ANY JUDGE OF A COURT OF APPEALS, OR WHEN ANY ADDITIONAL JUDGESHIP ON THE SUPREME COURT OR A COURT OF APPEALS IS ESTABLISHED BY LAW, THE GOVERNOR SHALL FILL THE SAME BY APPOINTMENT UNDER AN APPOINTIVE-ELECTIVE SYSTEM, FROM A LIST OF NOT FEWER THAN THREE QUALIFIED PERSONS, WHOSE NAMES SHALL BE SUMBITTED BY A JUDICIAL NOMINATING COMMISSION.

(b) THE NUMBER OF JUDICIAL NOMINATING COMMISSIONS AND THEIR ORGANIZATION, THE NUMBER, METHOD OF SELECTION, COMPENSATION AND EXPENSES, QUALIFICATIONS, AND TERMS OF OFFICE OF MEMBERS OF EACH COMMISSION, AND PROVISIONS FOR FILLING OF VACANCIES, SHALL BE ESTABLISHED BY LAW; PROVIDED, THAT NOT MORE THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE FROM THE SAME POLITICAL PARTY, AND THAT LESS THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE MEMBERS OF THE BAR OF OHIO; AND PROVIDED THAT THE TERMS OF OFFICE OF SUCH MEMBERS SHALL BE STAGGERED. HOLDERS OF PUBLIC OFFICE EXCEPT MEMBERS OF THE GENERAL ASSEMBLY MAY SERVE ON A JUDICIAL NOMINATING COMMISSION.

(c) ANY JUSTICE OR JUDGE OF THE SUPREME COURT OR A COURT OF APPEALS WHO IS APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM ESTABLISHED PURSUANT TO THIS CONSTITUTION SHALL SERVE AN INITIAL TERM OF TWO YEARS FROM THE DATE OF HIS APPOINTMENT AND UNTIL FEBRUARY FIFTEENTH FOLLOWING THE NEXT GENERAL ELECTION OCCURRING IN AN EVEN-NUMBERED YEAR. AT SUCH TIME AS PROVIDED BY LAW, ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION AS PROVIDED BY LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE "YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY VOTING ON THE QUESTION VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE ON THE FIFTEENTH DAY OF FEBRUARY FOLLOWING THE ELECTION, WHICH VACANCY

SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

(d) THE CHIEF JUSTICE, ANY JUSTICE OF THE SUPREME COURT, OR ANY JUDGE OF A COURT OF APPEALS SERVING ON THE EFFECTIVE DATE OF THIS AMENDMENT IS ENTITLED, UNLESS REMOVED FOR CAUSE, TO REMAIN IN OFFICE. AT SUCH TIME AS PROVIDED BY LAW, PRIOR TO THE ELECTION PRECEDING THE END OF THE TERM TO WHICH HE WAS ELECTED OR APPOINTED ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM TO BEGIN ON THE DAY PROVIDED BY LAW UNDER WHICH HE WAS ELECTED OR APPOINTED, SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION, AS PROVIDED BY LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE"YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY OF THOSE VOTING ON THE QUESTION AS TO ANY JUSTICE OR JUDGE VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE AT THE END OF THE TERM, WHICH SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

(3) (a) The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties~~,~~ OR districts~~, or, as may be provided by law, other subdivisions,~~ in which their respective courts are located, ~~for terms of not less than six years,~~ and each judge of a court of common pleas ~~or division thereof~~ shall reside during his term of office in the county~~,~~ OR district~~, or subdivision~~ FROM WHICH HE IS ELECTED ~~in which his court is located~~. IN CASE THE OFFICE OF ANY JUDGE OF A COURT OF COMMON PLEAS BECOMES VACANT BEFORE THE EXPIRATION OF THE TERM FOR WHICH HE WAS ELECTED, THE VACANCY SHALL BE FILLED BY THE GOVERNOR, UNTIL A SUCCESSOR IS ELECTED AND HAS QUALIFIED, AND SUCH SUCCESSOR SHALL BE ELECTED FOR THE UNEXPIRED TERM AT THE FIRST GENERAL ELECTION THAT OCCURS MORE THAN FORTY DAYS AFTER THE VACANCY OCCURS, EXCEPT THAT WHEN THE UNEXPIRED TERM ENDS WITHIN ONE YEAR IMMEDIATELY FOLLOWING THE DATE OF SUCH GENERAL ELECTION, AN ELECTION TO FILL SUCH UNEXPIRED TERM SHALL NOT BE HELD AND THE APPOINTMENT SHALL BE FOR SUCH UNEXPIRED TERM.

(b) (1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, JUDGES OF ANY COURT OF COMMON PLEAS MAY BE APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM, UPON THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION WITHIN THE TERRITORIAL JURISDICTION OF THE COURT. ELECTIONS MAY BE HELD IN THE SAME MANNER TO DISCONTINUE THE PRACTICE OF APPOINTING SUCH JUDGES. THE METHOD OF SUBMISSION OF EITHER QUESTION SHALL BE PROVIDED BY LAW.

(2) THE PROVISIONS OF DIVISION (A) GOVERNING AN APPOINTIVE-ELECTIVE SYSTEM FOR THE CHIEF JUSTICE, JUSTICES OF THE SUPREME COURT, AND JUDGES OF THE COURTS OF APPEALS APPLY TO JUDGES OF ANY COURT OF COMMON PLEAS MADE SUBJECT TO SUCH A SYSTEM BY THE ELECTORS, EXCEPT THAT THE LIST SUBMITTED BY THE JUDICIAL NOMINATING COMMISSION SHALL CONTAIN NOT FEWER THAN TWO NAMES,

AND THE DATE OF COMMENCEMENT AND EXPIRATION OF THE TERM OF EACH COMMON PLEAS JUDGE SHALL BE PROVIDED BY LAW.

~~(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.~~

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof, and~~ of all courts of record established by law, shall, at stated times, receive~~,~~ for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. THE COMPENSATION OF ALL JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE THE SAME. ~~Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law.~~ Judges shall receive no fees or perquisites, EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, ~~under the authority of this state, given by the general assembly, or the people~~ shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he ~~shall assume~~ ASSUMES the office and ~~enter~~ ENTERS upon the discharge of its duties he ~~shall have~~ HAS attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

APPENDIX B

Minority Report

Opposing the Unified Trial Court Concept

The majority in this report recommends eliminating the existing mayors' courts, county courts, and municipal courts in Ohio and merging all such trial courts into the common pleas courts, thus retaining the common pleas courts as the only trial courts in the state. We wish to be recorded as opposing the single trial court.

The courts sought to be eliminated by the recommendation of the majority are the so-called "statutory courts" of Ohio, that is, those which the Constitution authorizes the General Assembly to create by statute, but which it does not require to be established. While we subscribe to the theory that court structure and procedure should be simple so that cases can be decided fairly, inexpensively, and quickly, we do not believe that this recommendation will necessarily lead to that result. "Bigger" does not always "make better". Futhermore, Ohio's statutory courts have a particularly local character, dealing as they often do with matters involving local ordinances, local disputes, traffic violations, and other relatively minor degrees of criminal offenses. It is in these courts that most citizens come in contact with the judicial system, if they come in contact with it at all during the everyday course of their lives. So they regard such local courts as "their" courts, as institutions in whose maintenance and continuation they have a particularly personal stake. While it is conceivable that "unification" of trial courts might bring about some operating efficiencies which can not be realized under the present system, we do not believe these are worth the cost in terms of the loss of personal identification with an institution of government — an identification which is a positive force in our society.

Finally, since the courts which it is proposed to abolish by this recommendation were created by law, they can be altered or abolished by law, without any need for constitutional amendment. Should the General Assembly at some future time decide that a change in the structure of statutory courts is warranted, that will be soon enough to make the changes. They should not come about by constitutional fiat.

Respectfully submitted,

Richard F. Maier
Donna Pope


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