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ANALYSIS OF NEW JUDICIARY ARTICLE

With Emphasis on Trial Practice

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I. PRELIMINARY STATEMENT

The new Judiciary Article of the Pennsylvania Constitution¹ recently adopted by the Constitutional Convention of 1967-1968 and approved by the citizens of the Commonwealth on April 23, 1968, will become effective with four exceptions² on January 1, 1969.³ This

* This article is based on a recent address by Mr. Comisky before the Philadelphia Bar Association. Mr. Comisky served as General Counsel of the Constitutional Convention of Pennsylvania 1967-1968, and Mr. Krestal served as Assistant to the General Counsel of the Convention.

¹ References to the sections of the Article proper will hereinafter be preceded by the item "Article," references to the sections of the Schedule attached thereto will be preceded by the term "Schedule." References to the old Judiciary Article will be to Pa. Const. Art. V.

² The Commonwealth Court and new justice of the peace courts will not come into existence, however, until January 1, 1970. Schedule, §§3, 13(a). The effective date of the Community Courts, which can be adopted by the citizens of each judicial district as a substitute for the justice of the peace courts, or for the Municipal and Traffic Courts in the case of Philadelphia, will depend upon the timing of the referendum election at which the establishment of that Court is approved. Article, §6. The Judicial Qualifications Commission and the system of merit appointment of state-wide judicial officers will not come into existence unless approved by the voters of the entire Commonwealth at the 1969 Primary Election. Article, §13(d); Schedule, §28.

³ Preamble to Schedule.

Judiciary Article is very detailed and effectuates many substantial changes in our judicial system. I intend today to review the highlights of the Article, pointing out wherever possible what effect the provisions thereof will have on the practice of criminal law in the Pennsylvania Courts.

The Article as adopted by the Convention consists of 18 substantive sections and a Schedule containing 29 sections. The Schedule provides for an orderly transition from the old to the new Judiciary Article and contains provisions implementing the new Article in anticipation of enabling legislation to be adopted by the General Assembly. Schedules are not new to Pennsylvania Constitutional drafting⁴ and this Schedule has been especially designed to be part of the new Judiciary Article.⁵

Basically, the Article and Schedule are divided into two main divisions, one relating to judicial organization and administration⁶ including provisions relating to the

⁴ Schedules were attached to the Pennsylvania Constitutions of 1790, 1838, 1874, as well as to the 1909 amendments.

⁵ Preamble to Schedule: "This schedule is a part of this judiciary article, and it is intended that the provisions contained herein shall have the same force and effect as those contained in the numbered sections of the article."

⁶ Article, §§1-11.

rights of appeal⁷ and of jury trial,⁸ and the second relating to selection and tenure.⁹ I will discuss each of these divisions in turn.

II. JUDICIAL ORGANIZATION AND ADMINISTRATION

A. *Unified Court System—State wide*

The most sweeping innovation instituted by the new Judiciary Article is the establishment of a unified state-wide judicial system, rather than a series of independent courts as now exists. This system will consist of "the Supreme Court, the Superior Court, the Commonwealth Court, Courts of Common Pleas, Community Court, Municipal and Traffic Courts in the city of Philadelphia, such other courts as may be provided by law and justices of the peace."¹⁰

The power granted to the General Assembly to provide for the jurisdiction of the Courts in the unified system and to create new courts¹¹ has been criticized as permitting the legislature to nullify the unified system established by the new Judiciary Article and to upset the balance of powers between the legislative and judicial branches of the Government.¹² This contention is completely without validity. Any action taken by the General Assembly under the new Judiciary

Article in formulating the jurisdiction of the Courts or in establishing new courts must of course be within the framework of the unified judicial system instituted by the new Judiciary Article and certainly cannot take away from the courts their innate power of judicial review over the constitutionality of all acts of the legislature which is the keystone of the balance of power between the two branches. This is made even more clear by Section 2 of the new Judiciary Article which vests in the Supreme Court "the supreme judicial power of the Commonwealth." It might be added that the legislature has always had the authority, even under the old Judiciary Article, to establish statutory courts, witness the Superior Court and County Courts of Philadelphia and Allegheny, and to provide for the jurisdiction of all Courts, whether statutory or constitutional;¹³ and never has such power been considered as giving the legislative branch the authority to destroy the judicial system or its functions in our republican form of government. Ripper legislation will be declared so, I am sure, under this Article as heretofore.¹⁴

Under the unified judicial system, the Supreme Court is authorized to exercise a general supervisory and administrative authority over all of the courts and

⁷ Article, §9.

⁸ Schedule, §25.

⁹ Article, §§12-18.

¹⁰ Article, §1.

¹¹ Article, §8.

¹² Judge Harry A. Kramer, A Vote No on the Proposed Judiciary Article, Supplement Pitts. L. J., 3-29-68.

¹³ Pa. Const. Art. V, §§1, 3 and 6.

¹⁴ See also, Thomas W. Pomeroy, Jr., The New Judiciary Article (A reply to Judge Kramer), Pitts. L. J., 4-10-68.

justices of the peace, including the assignment of judges from one district to another in order to provide for a more efficient disposition of judicial matters.¹⁵ This power, if exercised properly, should expedite the handling of criminal matters throughout the state by permitting the temporary reinforcement of any judicial district in which there is a criminal (or civil) backlog. Although the Court now has the right to assign judges to judicial districts requesting assistance, it can only do so at the request and with the consent of the judge and without consideration of the needs of the system as a whole.¹⁶ In addition, the *Court* is granted the power to prescribe general rules governing practice, procedure and conduct of all court, justices of the peace and all officers, including constables, serving process or enforcing orders of any court; provided that the rules do not affect substantive rights of litigants or affect the right of the General Assembly to determine the jurisdiction of any court. This right to prescribe rules specifically includes "the power to provide for the assignment and re-assignment of classes of cases and appeals among the several courts as the needs of justice shall require."¹⁷ It should be noted that the supervision and rule making authority is conferred upon the *Court as a*

whole and not just its Chief Justice.

To assist the Court in administering and supervising the statewide system, the Court is authorized to appoint a Court Administrator and a staff.¹⁸ The provision for a Court Administrator was criticized by the Chief Justice in advocating defeat of the proposal as requiring an undue expenditure of public funds. It is devoutly anticipated, however, that the Administrator will more than justify the expense of his office by facilitating the speedier disposition of pending litigation, which in the long run is the primary aim of any system of judicial administration.

B. State-Wide Courts

As noted before, the unified judicial system will include a Supreme Court, Superior Court, Commonwealth Court, Courts of Common Pleas, the Municipal and Traffic Courts in Philadelphia, Community Courts, and justices of the peace.¹⁹

The first three courts mentioned can be classified as courts of statewide jurisdiction; the latter as courts of local jurisdiction. Of the state-wide courts, two, the Supreme Court and the Superior Court, are part of our present system, although only the Supreme Court was Constitutional.²⁰ The Commonwealth Court is entirely new

¹⁵ Article, §10(a).

¹⁶ Act of April 27, 1911, P.L. 101, §§1-4, as amended 17 P.S. §§226-29.

¹⁷ Article, §10(c).

¹⁸ Article, §10(b).

¹⁹ Article, §1.

²⁰ Pa. Const. Art. V, §2.

and the Superior Court has now become a Constitutional Court.

1. *Supreme Court*

Section 2 of the Judiciary Article vests the Supreme Court with the supreme judicial power of the Commonwealth. As a consequence, the Court in administering the unified judicial system has been constitutionally invested with the full range of King's Bench powers.²¹

Section 2, in addition, retains the constituency of the Court at seven²² and provides that the Court shall have such jurisdiction as shall be provided by law. In the interim until the General Assembly acts, the Court is required to exercise all jurisdiction now vested in the Supreme Court, including appeals by the accused in all cases of felonious homicide.²³

2. *Superior Court*

The Superior Court, as the Supreme Court, is retained as a seven judge court,²⁴ and its jurisdiction, as well, is to be as provided by law.²⁵ Until the legislature acts, the Court is to exercise all jurisdic-

tion now vested in the present Superior Court.²⁶

3. *Commonwealth Court*

The concept of a Commonwealth Court is an innovation of the new Judiciary Article.²⁷ What we presently call the Commonwealth Court is merely the Court of Common Pleas of Dauphin County exercising jurisdiction over Commonwealth matters. The new Court, which is to come into existence on January 1, 1970,²⁸ a year after the remainder of the new Article is to become effective, will be a separate and distinct court of state-wide jurisdiction and shall exercise such jurisdiction as shall be provided by law. The new Article does not establish any interim jurisdiction for this Court. It is expected, however, that the Court will take over the Commonwealth jurisdiction of the Dauphin County Court, relieving that court of the responsibilities imposed upon it by such jurisdiction. The Court could also be given appellate jurisdiction of a state-wide character, including minor criminal matters, freeing the Supreme Court and Superior Court for consideration of more important matters. Conceivably, this could result in a reshuffling of appellate practice comparable to the Federal system, whereby our Supreme Court will review only upon allowance of a certiorari except in cases involving constitu-

²¹ See *Carpentertown Coal & Coke Co. v. Laird*, 360 Pa. 94 (1948); *Commonwealth v. Onda*, 376 Pa. 405 (1954).

²² Amendments were proposed on the floor of the Convention permitting the legislature to add two extra justices to the Court and two extra judges to the Superior Court upon the prior certification for the necessity thereof by the Supreme Court. These amendments were defeated.

²³ Schedule, §1.

²⁴ See note 22 *supra*.

²⁵ Article, §3.

²⁶ Schedule, §2.

²⁷ Article, §4.

²⁸ Schedule, §3.

tional questions and murder in the first degree, in which appeals may remain.

C. Courts of Local Jurisdiction

1. Courts of Common Pleas

Under the new Judiciary Article, the Courts of Common Pleas continue to be the basic courts of local, county-wide jurisdiction. Even more so. Section 5 provides that there shall be *one* Court of Common Pleas for each judicial district, having such number of judges as shall be provided by law and having unlimited general jurisdiction except as provided by law. This provision by itself is self-executing and is further amplified by the provisions of the Schedule which provide that these courts shall exercise the jurisdiction of the present Courts of Common Pleas, Orphans' Courts, County Court and criminal courts, except in Philadelphia with respect to that jurisdiction vested in the Municipal Court.²⁹

Judicial districts are to remain as heretofore until changed by the legislature and such changes can only be made with the advice and consent of the Supreme Court.³⁰ In multi-county districts, however, there will now be only one court, with each county having its own branch, rather than a separate court of its own.³¹

One of the most important reforms instituted by the new Article is the abolishment of the Orphans'

Courts, criminal courts, County Courts and the ten separate Courts of Common Pleas in Philadelphia and the merger of these courts into one Court of Common Pleas for each judicial district.³² In judicial districts presently having separate Orphans' Courts, including Philadelphia, there will now be a separate orphans' court *division* which will exercise the jurisdiction of the former Orphans' Court.³³ In Philadelphia and Allegheny counties, there will also be a family court division which will exercise jurisdiction over domestic relations,³⁴ juvenile matters,³⁵ adoptions and delayed birth certificates,³⁶ and a trial division which will exercise all other jurisdiction of the court, civil, criminal and equity.³⁷ The legislature may, in its discretion, provide for further divisions of the Courts of Common

²⁹ Schedule, §§4, 16(o), (t), 17(a).

³⁰ Schedule, §§4, 16(a). (o), (p), 17(a).

³¹ Including "desertion or nonsupport of wives, children and indigent parents, including children born out of wedlock; proceedings for custody of children; divorce and annulment and property matters relating thereto," Schedule, §16(q) (i), 17(b) (i).

³² Including, in the case of Philadelphia: "dependent, delinquent and neglected children and children under eighteen years of age, suffering from epilepsy, nervous or mental defects, incorrigible, runaway and disorderly minors eighteen to twenty years of age and preliminary hearings in criminal cases where the victim is a juvenile," Schedule, §16(q) (ii), and in the case of Allegheny County: "all matters now within the jurisdiction of the juvenile court," Schedule, §17(b) (ii).

³³ Schedule, §16(q) (iii), 17(b) (iii).

³⁴ Schedule, §16(a), (o), 17(a).

²⁹ Schedule, §§4, 16(o); 17(a).

³⁰ Article, §11; Schedule, §27.

³¹ Schedule, §6.

Pleas, as for instance division of the trial division into civil, criminal and equity.³⁸

These divisions and the assignment of judges thereto will not be as inflexible as the present system of separate courts. The president judges of the Philadelphia³⁹ and Allegheny⁴⁰ Courts are empowered "to assign judges from each division to each other division of the Court when required to expedite the business of the Court." For the same purpose, the President Judge of the Philadelphia Court will have the further power to assign lawyer members of the Philadelphia Municipal Court temporarily to the higher court.⁴¹ This, too, will help expedite the disposition of the criminal backlog in these Counties by permitting crash programs of criminal listings to which a large number of judges⁴² can be assigned.

The Schedule contains many detailed provisions with respect to the merger and organization of the new Courts of Common Pleas of

Philadelphia⁴³ and Allegheny Counties.⁴⁴ Basically, the present judges of the Courts of Common Pleas and Allegheny County Courts will become judges of the trial division; the present judges of the Philadelphia County Court and Allegheny Juvenile Court will constitute the family court division and the present judges of the Orphans' Court will become judges of the orphans' court division, all without effect upon their present tenure.⁴⁵

2. *Municipal Court and Traffic Court*

The Magistrate Courts in Philadelphia are abolished by the new Article⁴⁶ and replaced by two new courts; a Municipal Court (eventually to consist of lawyer judges)⁴⁷ and a Traffic Court which will serve as the base of the judicial system in Philadelphia.⁴⁸ The number of judges⁴⁹ and juris-

³⁸ Schedule, §16.

³⁹ Schedule, §§17-20.

⁴⁰ Schedule, §§16(b)-(d), 18.

⁴¹ Schedule, §16(u).

⁴² Article, §12(a).

⁴³ Article, §6(c).

⁴⁴ At the beginning, the Municipal Court will consist of twenty-two of the present magistrates as designated by the Governor. The remaining six magistrates will be assigned to the Traffic Court. Schedule, §16(e). Those judges appointed to the Municipal Court who are not members of the bar will be eligible to complete their present term of six years and to be elected to serve one additional term. Schedule, §16(v). The magistrates appointed to the Traffic Court will be permitted to complete their present terms, Schedule, §16(e), but will be eligible to be elected for additional terms thereafter only if they meet the qualifications for the office; that is, they must be members of the bar.

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³⁸ Article, §8.

³⁹ Schedule, §16(g).

⁴⁰ Schedule, §20.

⁴¹ Schedule, §16(h).

⁴² In Philadelphia, there will be an immediate potential of 59 judges; 30 from the present Courts of Common Pleas, 6 from the present Orphan's Court, 20 from the present County Court, and 3 present lawyer magistrates who could be appointed to the Municipal Court. In Allegheny, there will be an immediate potential of 31 judges; 19 from the present Court of Common Pleas, 4 from the present Orphan's Court, 6 from the present County Court and 2 from the present Juvenile Court.

diction of these courts shall be as provided by law. In the interim, the Municipal Court will have jurisdiction over certain minor matters, principally of a criminal nature,⁵⁰ and the Traffic Court will have jurisdiction over all summary offenses under the motor vehicle laws.⁵¹

Although there will be no right to trial by jury in criminal or civil

or have completed a course of training and passed an examination, Article, §12(b). There is no specific provision in the Schedule, as there is with respect to the justices of the peace in the other counties, Schedule, §12(b), excusing the present magistrates in Philadelphia from taking the training course before they can be re-elected to the Traffic Court. This, of course, is subject to judicial interpretation.

⁵⁰ Schedule, §16(r) :

"The Municipal Court shall have jurisdiction in the following matters:

"(I) Committing magistrates' jurisdiction in all criminal matters.

"(II) All summary offenses, except those under the motor vehicle laws.

"(III) All criminal offenses for which no prison term may be imposed or which are punishable by a term of imprisonment of not more than ten years, and indictable offenses under the motor vehicle laws for which no prison term may be imposed or punishable by a term of imprisonment of not more than three years. . . .

"(IV) Matters arising under the Landlord and Tenant Act of 1951.

"(V) All civil claims involving less than five hundred dollars. . . .

"(VI) As commissioners to preside at arraignments, fix and accept bail, issue warrants and perform duties of a similar nature."

During the changeover period only the judges who are members of the bar will be permitted to dispose of civil or criminal matters other than summary offenses.

⁵¹ Schedule, §16(s).

matters, there will be a right of appeal to the trial division of the Court of Common Pleas, where there is a right to a trial by jury.⁵² Moreover, there will be concurrent jurisdiction in the said trial division over the civil⁵³ and temporarily over the criminal matters⁵⁴ assigned to the Municipal Court.

3. *Justices of the Peace*

Although the Magistrate Courts in Philadelphia have been abolished, the justice of the peace system has been retained for the balance of the state,⁵⁵ albeit with substantial reforms. Briefly, the justices of the peace will now be compensated by salary⁵⁶ and not by the collection of fines,⁵⁷ will be greatly reduced in number⁵⁸ and will be subject to the supervision of the courts.⁵⁹ In addition, if they are not members of the bar, or have not completed one full term as a justice of the peace by January 1, 1970, they will be required to take a course of training and pass an examination as prescribed by law.⁶⁰ These reforms, as distinguished from the rest of the Judicial Article will become effective

⁵² Schedule, §16(r) (iii), (v).

⁵³ Schedule, §16(r) (v).

⁵⁴ Schedule, §16(r) (iii).

⁵⁵ Article, §7(a).

⁵⁶ Article, §7(b).

⁵⁷ Schedule, §13(a).

⁵⁸ There can now only be one justice of the peace for each magisterial district, Article, §7(a), and no magisterial district will be formed with a population less than 4,000, Schedule, §13(b).

⁵⁹ Article, §10(a).

⁶⁰ Article, §12(b); Schedule, §12(b).

tive January 1, 1970,⁶¹ although the present justices of the peace will be permitted to complete their present terms of six years under the old system, including the retention of fees as compensation.⁶² If the reorganization is accomplished as prescribed by January 1, 1970, many justices of the peace may have little activity and little compensation while "serving out" their terms.

The number of justices of the peace and the boundaries of the magisterial district of each justice of the peace are to be established by the courts under the supervision of the Supreme Court.⁶³ On the other hand, the jurisdiction, salary and training of the justices of the peace are to be established by the General Assembly.⁶⁴

4. Community Courts

As an alternative to the Municipal and Traffic Courts in Philadelphia and justices of the peace in the balance of the State, the citizens of each judicial district may, by referendum, approve the establishment of a Community Court consisting of judges learned in the law

which shall have such jurisdiction as shall be provided by law.⁶⁵ Conversely, any judicial district, including Philadelphia, adopting a Community Court may elect to discontinue the court and revert to the justice of the peace system or the Municipal-Traffic Court system, as the case may be.⁶⁶

Unlike the provision for the Judicial Qualifications Commission which will be voted on in the 1969 Primary by the very provisions of the Article,⁶⁷ the Community Court question can be placed on the ballot in a judicial district only upon the filing of a petition signed by the number of electors equal to 5 per cent of the total votes cast for all candidates for the office occupied by a single official for which the highest number of votes was cast at the last preceding November election in conformance with the general election laws of the Commonwealth.⁶⁸ A question to this effect cannot be placed on the ballot in a judicial district more than once in any five year period.

5. Presiding Judges

The Chief Justice of the Supreme Court and President Judges

⁶¹ Schedule, §13(a).

⁶² Schedule, §12(a).

⁶³ Article, §7(b). This must initially be determined by January 1, 1969 so that the new justices of the peace can be elected at the municipal election of 1969. Schedule, §13(a).

⁶⁴ Article, §7(a)(b). In order to make these provisions self-executing, the Schedule does adopt an initial salary basis, Schedule, §13(c), and directs the Department of Public Instruction to devise a training program Schedule, §13(d).

⁶⁵ Article, §6(a). This alternative provision was originally applicable only to the counties other than Philadelphia. The amendment to include Philadelphia was submitted by delegate David Shapiro and was hotly debated, until delegate William Devlin expressed his trust in the citizens of Philadelphia on being able to choose which was the best system for them; the amendment was then adopted almost unanimously (119-1).

⁶⁶ Article, §§6(a), (c), 7(a).

⁶⁷ Article, §13(d); Schedule, §28.

⁶⁸ Article, §6(b).

of all other Courts with seven or less judges is to be the justice or judge longest in continuous service on these respective courts. This procedure of seniority in designating the presiding judge is to be distinguished from the method of *selection* of the presiding judge by all of the members of the Court, which will apply to all Courts with over seven judges, both state-wide and local, except the Philadelphia Traffic Court where an appointment will be made by the Governor.⁶⁹ With the exception of the Philadelphia Court, the terms of the present presiding judges have been preserved and the provisions for the selection of president judges will not go into effect until the expiration thereof.⁷⁰ President Judges and administrative judges will have to be selected, elected or appointed for the Philadelphia

⁶⁹ Article, §10(d). The procedures of seniority and selection are further to be distinguished from the "election" of administrative judges of each of the three divisions of the Philadelphia Court of Common Pleas by the majority vote of the judges of that division; Schedule, §16(g), and the temporary appointment of the President Judge of the Philadelphia Municipal Court by the President Judge of the Philadelphia Court of Common Pleas, Schedule, §16(h).

⁷⁰ Schedule, §§11, 19. However, since the present President Judge of the Court of Common Pleas of Allegheny County is to become the President Judge of the consolidated Court there would have to be an immediate election of a President Judge of the trial court division of that court.

Court under the new Article effective January 1, 1969.⁷¹

D. *Right of Appeal*

The new Article expressly provides for a right of appeal from a court not of record to a court of record, and from a court of record or administrative agency to a court of record or to an appellate court.⁷² This provision is much broader than that contained in the old Article,⁷³ which pertained solely to summary convictions and penalties adjudged by courts not of record. There is now a constitutional right to an appeal from the decision of all courts of original jurisdiction in all types of matters and from the decisions of administrative agencies where appeals were previously prohibited or limited by statute. In addition, the Courts of Common Pleas retain the power which they had under the old Article⁷⁴ to issue writs of certiorari to inferior courts to review the proceedings in those courts.^{74(a)}

⁷¹ The President Judges of the abolished courts in Philadelphia and the Chief Magistrate, although not retained in office, will continue to receive the additional compensation to which they are entitled. Schedule, §16(x).

⁷² Article, §9.

⁷³ Pa. Const., Article V, §14:

"In all cases of summary conviction in this Commonwealth or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof upon cause shown."

⁷⁴ Pa. Const. Article V, §10.

^{74(a)} Schedule, §26.

Although these provisions for appeal are self-executing, it would be helpful if the legislature expressly provided the court or courts to which appeals shall be made. This should receive attention and should be tied in with the creation, powers and duties of the Commonwealth Court.

E. Jury Trial

The basic right to a jury trial guaranteed by Article I, § 6 of the Constitution has been retained. Indeed, as I advised the delegates on several occasions, the Convention had no jurisdiction to affect this right.⁷⁵

Section 7 of Act No. 2 of 1967, which provided for the convening of the Constitutional Convention, authorized the Convention to consider only those subjects expressly enumerated therein, including inter alia, "Judicial Administration, Organization, Selection and Tenure." It was our opinion that the Convention's jurisdiction with respect to the judicial field was restricted to those aspects thereof designated in the Act and did not include the power to affect, revise or change in any way the provisions dealing with the procedure and conduct of jury trials as recited and as guaranteed in the Bill of Rights provisions of Article I of the Constitution.

The Convention did however retain in the Judiciary Article, almost

verbatim, a provision in the old Article⁷⁶ granting to the parties the right to waive trial by jury "by agreement filed with the Court," adding thereto only the prefatory language "until otherwise provided by law."⁷⁷ This provision was retained to avoid confusion since there is authority that without such a Constitutional permission, the right to jury trial would be inviolate and no waiver would be allowed even by agreement. The prefatory language was added only to permit the legislature to enact laws regulating the procedure of how to waive jury trial, as distinguished from the right to jury trial itself.

Nonetheless, critics of the new Article have expressed concern that by the addition of this language, the legislature is now empowered to nullify the right to trial by jury. Nothing can be further from the truth! Not only did the Convention not have jurisdiction to so empower the legislature; it did not even intend to do so. On the contrary, throughout the proceedings, the delegates displayed great concern for the preservation of this right. This is particularly evidenced by the redundant language used in those provisions of the Schedule granting litigants the "right of appeal for *trial de novo*" including the right to *trial by jury*" to the Court of Common Pleas of

⁷⁶ Pa. Const. Article V, §27.

⁷⁷ Schedule, §25.

⁷⁵ Counsel Opinion Nos. 19 and 20.

Philadelphia from decisions of the Municipal Court in the minor civil and criminal cases over which the latter Court was conferred jurisdiction.

At the other extreme, it has been stated that the use of the phrase "by agreement filed with the court" will nullify the present rules⁷⁸ of court permitting waiver by endorsements on pleadings and will make the waiver of jury trials impractical. As stated before, the language is copied verbatim from the present Constitutional provision under which the rules have been instituted and the rules have never been challenged as contrary thereto. As a matter of fact the separate waivers filed by the attorneys by endorsement can be said properly to constitute "an agreement filed with the court."

III. JUDICIAL SELECTION AND TENURE

A. Qualification

All justices and judges, except judges of the Philadelphia Traffic Court, will be required to be members of the bar of the Supreme Court. Moreover, all judicial officers must be citizens of the Commonwealth and must reside in the Commonwealth, in the case of state-wide judges, and in their judicial district, in the case of local judges and justices of the peace,

for a period of one year *preceding* election or appointment and during their continuance in office. There is an exception to the residency requirement, however, for judge assigned temporarily to another judicial district or retired judge who are considered on temporary assignment.⁷⁹ As stated before justices of the peace and Philadelphia Traffic Court judges, if not admitted to the bar, will be required to complete a course of training and pass an examination.⁸⁰

B. Election, Appointment and Tenure

The regular term of all justices and judges of courts of record or appeal elected under the new Judiciary Article, including Community Court judges, will be ten years; terms of the judges of the Philadelphia Municipal and Traffic Courts and justices of the peace will be six years.⁸¹ This means a reduction in the initial terms of the justices of the Supreme Court which is presently twenty-one years,⁸² although a Supreme Court justice will now be eligible for reelection which is not the case under the old Article. The terms of the justices now in office, however, will not be affected.

All judicial offices, including state-wide justices and judges, are to be elected at *municipal* elec-

⁷⁸ Article, §12(a).

⁷⁹ Article, §12(b).

⁸¹ Article, §15(a).

⁸² Pa. Const. Article V, §2.

⁷⁸ Phila. Rule 909, adopted under Act of June 25, 1937, P.L. 2090, 12 P.S. §695.

tions;⁸³ that is in the November election in odd-numbered years. Vacancies occurring in a judicial office prior to the expiration of the incumbent's term of office will be filled by appointment of the Governor.⁸⁴ If the *vacancy* occurs during a session of the General Assembly the appointment must be with the advice and consent of two-thirds of the members elected to the Senate. This will apply even if the General Assembly is in adjournment at the time of the appointment. The key point of time is the date of the vacancy. The appointee will serve until the first Monday of January following the next municipal election more than ten months after the occurrence of the vacancy. The Governor's appointment power will not apply whenever the vacancy occurs at the expiration of a term of a judge who does not seek retention.⁸⁵ In that situation, there will be a regular *contested* election for the position at the municipal election preceding the expiration of the incumbent's term.

Justices and judges previously elected under the new Article at the expiration of any term may file a

declaration of candidacy for a retention election in which he will not be required to run on a party label or against an opponent.⁸⁶ The electorate will merely vote on whether he should be retained in office or not. This procedure will apply to both state-wide and local judges and to judges selected on the merit system as discussed below. Since this declaration must be filed by the first Monday of January of the year preceding the expiration of the judge's term, special provision has been made for present judges eligible for retention election at the 1969 Municipal Election.⁸⁷

At the 1969 primary election, the citizens of the Commonwealth will have an opportunity to determine whether to retain the system of initial political election of state-wide judges, or to substitute in its place a system of merit selection and appointment by the Governor.⁸⁸ If the merit system is approved at the election, any vacancy occurring in a state-wide judicial office would be filled by the Governor by appointment from a list of "not fewer than ten nor more than twenty" names, submitted to him by a Judicial Qualifications Commission without the necessity of the consent of the Senate. Each justice or judge so appointed by the Governor would hold office for an initial term ending at the beginning of the year

⁸³ Article, §13(a). Since formerly state-wide judges and justices were elected at either the November municipal or general elections, Pa. Const. Article VII, §3, special provision has been made for the continuation of the terms of the Superior Court judges whose terms would otherwise expire on the first Monday of January of odd numbered years. Schedule, §2.

⁸⁴ Article, §13(b).

⁸⁵ Article, §13(c).

⁸⁶ Article, §15(b).

⁸⁷ Schedule, §10.

⁸⁸ Article, §13(d).

immediately following the municipal election more than twenty-four months after appointment, at which he would stand for a non-political retention election.⁸⁹ In no event will this merit system apply to local judges.

The Judicial Qualifications Commission, if approved, will consist of four non-lawyers appointed by the Governor and three non-judge lawyers appointed by the Supreme Court.⁹⁰ No more than four members of the Commission are to be members of the same political party and no person holding public office for compensation or political office will be eligible to serve on this Commission. The term of the members of the Commission will be seven years with one member being appointed each year.

C. Retirement

All judicial officers, including justices of the peace, are required under the new Article to retire at seventy years of age and will receive such compensation thereafter as shall be provided by law.⁹¹ Former or retired judges, if they consent, may be assigned by the Supreme Court to temporary judicial service, in very much the same fashion as now exists in the federal courts.⁹² As noted before, such assignment need not take into consideration the residency requirements of judicial qualifications.⁹³

D. Suspension, Removal and Discipline

The new Article requires all judges to devote full time to their judicial duties and specifically prohibits judges and justices of the peace from engaging in certain unethical, illegal or non-judicial activities, including the receipt of any compensation for their services other than the salary and expenses provided by law.⁹⁴ Although the justices and judges of the Supreme and Superior Courts are exempted from the legislative imposition of non-judicial duties and powers of appointment except as provided in the Constitution,⁹⁵ the same exemption is not applicable to the other judicial officers who will continue to be subject to these duties.

The Supreme Court has been granted the power to suspend, remove or discipline judges for engaging in any prohibited activity or other misconduct or neglect in office and to order the compulsory retirement of disabled judges as an alternative to the present procedures of impeachment and address.⁹⁶ This power is to be exercised, at least with respect to justices and judges,⁹⁷ upon the recommendation of a Judicial Inquiry

⁸⁹ Article, §17.

⁹⁰ Article, §17(d).

⁹¹ Article, §18.

⁹² The procedure for removal, suspension, discipline or compulsory retirement of justices and judges is spelled out in detail in Section 18 of the Article. The procedure with respect to justices of the peace has been left to rules to be prescribed by the Supreme Court. Article, §18(k).

⁸⁹ Article, §13(e).

⁹⁰ Article, §14; Schedule, §23.

⁹¹ Article, §16(b).

⁹² Article, §16(c).

⁹³ Article, §12(a).

and Review Board established under Section 18 of the Article.

This Board will consist of nine members, three common pleas judges from different districts, two Superior Court judges, appointed by the Supreme Court and two non-judge lawyers and two non-lawyers appointed by the Governor, all for a term of four years. After the initial appointment the terms will be staggered so that not all members will be appointed in the same year.⁹⁸ As is the case with the Judicial Qualifications Commission, no person holding office in a political party will be eligible to serve on the Board. Since the majority of the Board is composed of judges, there is no validity to the objections raised to the adoption of the Article that discipline will be invoked for unpopular decisions.

In addition to the above, the Article retains the former provision automatically forfeiting the office of any justice, judge or justice of the peace convicted of misbehavior in office and adds a further forfeiture provision for judges filing for nomination or election for any public office other than a judicial office.⁹⁹

IV. CONCLUSION

On balance, we believe that the new Judiciary Article as adopted by the Constitutional Convention and approved by the citizens of the Commonwealth is an excellent one

and is far superior to the previous Article which had become outdated and cumbersome. True, there were compromises made and many fine proposals omitted because of political expediency. But this is how our democratic form of government works, and the end result still represents a substantial improvement over the old.

The new Article is for the most part self-executing. The attached schedule indicates those sections which are self-executing and those which will require implementation.

SCHEDULE OF ARTICLE SECTIONS AS TO SELF-EXECUTION

Section 1. Unified Judicial System—self-executing.

Section 2. Supreme Court—enabling legislation necessary to provide jurisdiction, which is temporarily created in Schedule, §1.

Section 3. Superior Court—same as above except the jurisdiction temporarily created in Schedule, §2.

Section 4. Commonwealth Court—requires legislation organizing court—and establishing jurisdiction.

Section 5. Courts of Common Pleas—self-executing as to jurisdiction, but legislature can change.

Section 6. Community Courts and Philadelphia Municipal and Traffic Courts—requires enabling legislation establishing organization and jurisdiction of courts and compensation of judges. Petition also required for referendum.

⁹⁸ Schedule, §24.

⁹⁹ Article, §18(1), (m).

Section 7. Justice of the Peace—legislation required for jurisdiction and compensation of justices of the peace, and court action required to establish magisterial districts. Interim salary classification schedule and training course as provided in Schedule can be revised.

Section 8. Other Courts—obviously not self-executing.

Section 9. Right of Appeal—self-executing as to right but requires legislative authorization as to court to which appeal can be taken.

Section 10. Judicial Administration—requires court rules and appointment of administrator and legislative appropriations of funds.

Section 11. Judicial Districts—requires legislative and Supreme Court implementation if districts are to be changed.

Section 12. Qualification of Judges—self-executing except as to training course for justices of the peace. Interim provision in Schedule can be changed.

Section 13. Election of Judges—self-executing, even as to referendum for Judicial Qualifications Commission.

Section 14. Judicial Qualifications Commission—self-executing except for judicial and executive appointment and legislative appropriation of funds.

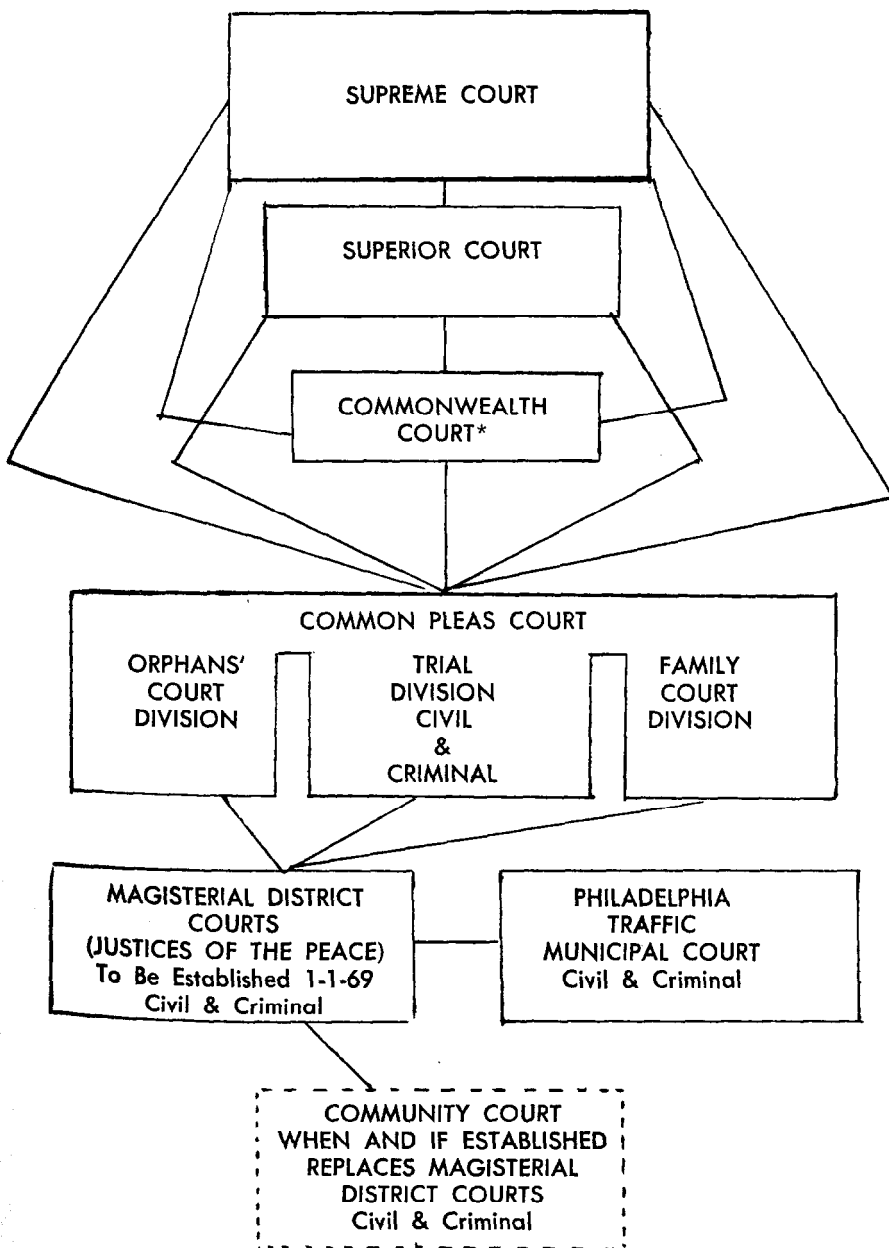
Section 15. Tenure—self-executing.

Section 16. Compensation and Retirement—requires legislative determination as to compensation of judges not previously provided for by law and for services of retired judges serving on temporary assignment.

Section 17. Prohibited Activities—self-executing, except as to judicial formulation of Canons and rules of ethics to be followed by judges and justices of the peace.

Section 18. Suspension, Removal, Discipline—judicial and executive action necessary to appoint Board and approve compensation of members and to formulate rules of procedures.

NEW UNIFIED COURT SYSTEM



* The specific jurisdiction of this court remains to be determined by statute.

THE FIFTH AMENDMENT: THE CASE FOR A CONSTITUTIONAL CHANGE*

BY THE HONORABLE HENRY J. FRIENDLY

Judge, U. S. Court of Appeals, Second Circuit

The title of these lectures has been suggested by the small but influential book, "The Fifth Amendment Today." This contains three addresses delivered in 1954 by Dean Erwin N. Griswold of the Harvard Law School, my friend of more than 40 years, whom the United States is fortunate to have as its Solicitor General.

My purpose, however, is quite different from his. It is different because the needs of the times are

* Judge Friendly delivered his well known series of lectures on the Fifth Amendment as the Robert S. Marx Annual Lectures at the University of Cincinnati Law School in 1968.

The full text of Judge Friendly's lectures on this subject together with extensive citations of authorities are available from the University of Cincinnati *Law Review*, where they were published in 37 *U. Cinn. L. Rev.* 671-726. (University of Cincinnati *Law Review*, Taft Hall, University of Cincinnati, Cincinnati, Ohio 45221.)

Previous comment in other publications concerning Judge Friendly's lectures on the Fifth Amendment has been generally limited to his proposed amendment. These proposals cannot be adequately understood without the reasons underlying them—thus this article. Judge Friendly does not advocate that the Fifth Amendment be repealed—only that it be changed in the respects outlined in this article which was published originally in the *Philadelphia Inquirer* of January 12, 1969, Section 7, pp. 1-2. It is reproduced with the consent of the editors of the *Philadelphia Inquirer*.

different. In the mid-1950s it was necessary to vindicate the privilege against self-incrimination, which I too will sometimes call simply "the Fifth Amendment," against the opprobrium that Sen. Joseph McCarthy and others sought to heap on many who properly invoked it, particularly before legislative committees, and Dean Griswold earned the nation's gratitude by speaking out as he did.

At the end of the 1960s it is necessary to vindicate the rights of society against what in my view has become a kind of obsession with the privilege, which has stretched it far beyond not only its language and history but any justification in policy.

The time has come, I believe, when the nation should face up to the hard task of considering an amendment to the self-incrimination clause that will preserve all the framers said and some of the Court's extensions, modify others, expunge some altogether, and guard against accretions seemed to be in the making.

It should scarcely be necessary to defend the propriety of such consideration, which has already been proposed by seven members of the President's Commission on Law

Enforcement and the Administration of Justice.

True it is, as these members said, "One approaches the thought of the most limited amendment with reticence and a full awareness both of the political obstacles and the inherent delicacy of drafting changes which preserve all relevant values." But, as they continue, "it must be remembered that the Constitution contemplates amendment, and no part of it should be so sacred that it remains beyond review."

INTERPRETING THE CLAUSE

The self-incrimination clause of the Fifth Amendment appears in all conscience to be limited enough; it says, quite simply, that no person "shall be compelled in any criminal case to be a witness against himself."

The picture immediately conveyed is of a defendant on trial for crime being dragged, kicking and screaming, to the stand, or more realistically, being imprisoned for refusal to testify.

It also covers well enough a person hauled before a grand jury who is already the subject of a complaint or is believed by the prosecutor to be a likely subject for indictment. No stretching is required to take the words back one step further to the preliminary hearing before a magistrate of a person against whom a complaint has been filed. On a strictly literal basis the clause can be read as applying also to any *witness* in criminal proceedings.

(After noting that the amendment had been read to cover the witness at a legislative investigation or in a civil trial, Judge Friendly continued:)

My quarrel is not with any of these decisions but with the latitudinarian attitude toward the language of the Amendment apparently emanating from them. Once "in any criminal case" has been read out of the Amendment, it has been all too tempting to take equal liberties with "shall be compelled" and "to be a witness against himself."

A good way to start dissipating the lyricism now generally accompanying any reference to the privilege is to note how exceptional it is in the general setting of jurisprudence and morality. While it carries the burden of impeding ascertainment of the truth that is common to all testimonial privileges, it has uncommon burdens as well.

Most other privileges—for communications between husband and wife, attorney and client, doctor and patient, priest and penitent—promote and preserve relationships possessing social value. Yet the law has rather steadfastly resisted their expansion, even to a profession having such strong claims as accountancy. In contrast the Fifth Amendment privilege extends, by hypothesis, only to persons who have been breakers of the criminal law or reasonably believe they may be charged as such.

NOTIONS OF CONDUCT DEFIED

Again while the other privileges accord with notions of decent conduct generally accepted in life outside the courtroom, the privilege against self-incrimination defies them. No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers and teachers. Those who are questioned consider they are morally bound to respond, and the questioners believe it proper to take action if they don't.

Finally, the privilege, at least in its pre-trial application, seriously impedes the state in the most basic of all tasks, "to provide for the security of the individual and his property," not only as against the individual asserting the privilege but as to others whom it has reason to think were associated with him.

It not merely stands in the way of convictions but often prevents restitution to the victim—of goods, of money, even of a kidnaped child. In contrast to the rare case where it may protect an innocent person, it often may do the contrary. A man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit; if he is brought to trial, the best he can do is call the latter as a witness and hope the jury will draw the infer-

ence from the witness' assertion of the privilege which it would not be allowed to do with respect to his own.

One would suppose that such a collection of detriments would have led the Supreme Court to expound the basis for the privilege thoughtfully and carefully before asking the country to accept extensions in no way required by the Fifth Amendment's words or history. It thus is strange how rarely one encounters in the Court's opinions on the privilege the careful weighing of PROS and CONS, the objective investigation of how rules of law actually work, above all the consideration whether a less extreme position might not adequately meet the needs of the accused without jeopardizing other important interests, which ought to characterize constitutional adjudication when the Court goes beyond the words.

Instead the privilege is treated with almost adulation, of which Mr. Justice Douglas' footnote reference to the Halakhah which "discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclination," is a striking recent example.

INITIAL ENCOUNTER

Obsession with the Fifth Amendment is not a novelty introduced by the Warren Court, although that Court has pressed Amendment far beyond anything that went before. Rather it has been characteristic from the Supreme Court's

initial serious encounter with the privilege some 80 years ago. This was in *Boyd vs. United States*, where the Court held for the first time that the constitutional privilege protected against the compulsory production of incriminating papers. The Court declared it was "unable to perceive" how requiring a man to produce such a document was "substantially different from compelling him to be a witness against himself."

(After carefully analyzing the traditional arguments for the privilege and finding many to be wanting in force, Judge Friendly suggests two others:)

One point is what Prof. McNaughton ungenerously and unfortunately called "the First Amendment albatross." In using that phrase, he could not have failed to recognize that one of the greatest values of the privilege, on both sides of the Atlantic, has been to afford a shelter against governmental snooping and oppression concerning political and religious beliefs. That, indeed, is what gave it birth.

This is the privilege we love. Here eloquence on privacy rings true, as it does not in the case of the murderer, the rapist or the bagman. Here also is the area to which Dean Griswold meant to pay his tribute and now would limit it.

The trouble in this area is not that the privilege is too broad but that it is not broad enough. Why should resistance to governmental prying into a man's ideological views require him to make a claim,

often far-fetched and possibly beyond what he can conscientiously do, that an answer would tend to incriminate him? Why not hold that a person's political and religious beliefs and associations and lawful acts to advance them are none of the government's business save in the rare case where these are truly relevant to an issue before a judicial or administrative tribunal? What McNaughton meant was that if this be so, there is no need to deal with such cases through the Fifth Amendment; the First is the appropriate vehicle.

I have little doubt that the Supreme Court will and should interpret the First Amendment to give this protection. Such a development seemed to be in the making in 1958, when the Court unanimously struck down Alabama's requirement that the NAACP disclose the names of its local members. Although later decisions by sharply divided courts failed to make good on this indication, I would place a considerable bet that the views of the dissenters in those cases will prevail. If my prophecy should prove wrong, any contraction of the privilege now afforded under the Fifth Amendment would indeed have to be limited so as not to affect the area here under discussion. But I am rather confident we can leave all this in the hands of the Supreme Court.

EQUAL PROTECTION BASIS

There is no similarly simple method for dealing with what I believe an important reason for the

Court's recent expansion of the privilege, particularly as regards police interrogation and the requirements of warnings. So far as I know, it has never been expressly put forward as such, although there are rather loud echoes of it in Chief Justice Warren's opinion in *Miranda*.

One might call it the equal protection basis. It runs as follows: The wealthy and the professional criminal are well aware that they cannot be made to speak; by and large they will say nothing until counsel arrives and then only if he achieves an understanding with the prosecutor making it worth their while to talk. The poor and the ignorant are unaware they need say nothing, and are peculiarly likely to succumb to the blandishments described in the police manuals catalogued in *Miranda*. The only way to achieve the equality between rich and poor on which the Court has insisted as to other aspects of criminal law and enforcement is thus to require the police to give warnings designed to lead the indigent and the ignorant to behave as do the wealthy and the knowledgeable. One cannot, I think, deny force in this argument.

(After considering the problems existing before a grand jury and at trial, Judge Friendly goes on as follows:)

Critics of the privilege who will regard what I have just said as a milk-and-water approach have not long to wait; lovers of the privilege should brace themselves for a shock. I favor an amendment that

would abolish the privilege with respect to chattels, notably including documents, in the possession of defendant which are sought to be obtained by reasonable subpoena or other legal process.

Most of us are used to turning over books and records without slightest cavil when the government asks questions whether, through oversight or honest difference of opinion, we have failed to pay the income tax claimed to be justly due. It is standing common notions of decency on their head to say that if a person has failed to pay his taxes, not for innocent reasons of this sort, but from evil design, a curtain must fall on the investigation.

RELIABLE EVIDENCE

We can here dismiss "our distrust of self-deprecatory statements." Chattels and documents are not self-deprecatory; on the contrary they are the most reliable evidence that can exist. We can also dismiss "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses"; we are talking about the process of a court.

An amendment overruling the doctrine that an order requiring the production of incriminating chattels compels testimony in violation of the Fifth Amendment should also place beyond doubt that the privilege does not protect an accused from having to submit himself to identification and reasonable examination of his body, furnishing specimens of its fluids,

providing samples of his handwriting, and exercising his voice. I am not dealing here with the degree of force that may be used to obtain such cooperation, as to which the due process clause sets limits, but solely with the question of self-incrimination.

(At this point Judge Friendly disagrees with recent decisions limiting the interrogation of public officials and members of licensed professions. He then continues:)

I come now to the liveliest topic of all today—interrogation by the police before the formal criminal process has begun.

Until a few years ago it was widely believed that the self-incrimination clause did not apply at this stage. The privilege, it was said, protects against compelled testimony and the police have no legal power to compel. Prof. Levy has written that long after the privilege was established in England, the principle "was restricted narrowly to prohibition of the oath and to the right of the suspect to refuse to answer"; in contrast the purpose of the preliminary examination before the justice of the peace was to wring out of the suspect "a confession of his guilt, unsworn, or enough damaging testimony to put him on trial for the crime. Secret examinations characterized by bullying and incriminating interrogation were common practice." Not until 1848 was the examining magistrate required to inform the suspect that he need not say anything and that anything he said might be

used in evidence against him at his trial.

"INDISSOLUBLE NEXUS"

Abuses of this sort called for a remedy; the courts provided one in the rule forbidding the admission of involuntary confessions. I shall not add to the quantity of ink that has been spilled in attempts to define with precision the relationship between the two rules. Prof. Levy says there was an "indissoluble nexus." If he means only that both were designed to protect those charged with crime against government abuse, I agree; if he means more than that, I do not.

Where the privilege applies, government can do nothing. In contrast the involuntary confession rule reflected a belief that there was an area where government might legitimately inquire before the criminal process began; only when its agents overpassed the boundaries of decent conduct must the answers or their fruits be excluded.

Despite a contrary dictum in an opinion of 1897, the Supreme Court, although constantly expanding the notion of what was involuntary, generally kept the two principles apart until its much discussed decisions of 1964 in *Malloy v. Hogan* and *Escobedo v. Illinois* and its even more discussed decision of 1966 in *Miranda v. Arizona*, which swept the involuntary confession rule within the Fifth Amendment.

That this was a doctrinal innovation should not obscure the gravity of the problem with which the

Court was confronted. The *Miranda* decision was an effort to end, once and for all, the anomaly of what has been called "a queer set of doctrines, which bar interrogation in an orderly inquiry but permit it where the danger of physical abuse and unfair pressure is greater."

The Court had determined long ago to stamp out the "third degree"—an affront to human dignity and a source of unreliable confessions. But it was dissatisfied with the results achieved by its long crusade, even though it had gone far beyond physical violence and deprivations of food and rest and had also insisted on more effective procedures for determining a claim of involuntariness. Its disenchantment, I think, rested on a number of grounds: for one thing, it justifiably believed that too many inferior courts were too slow in getting its message.

ESTABLISHING EQUALITY

It may be a source of regret that the Supreme Court lost confidence in the lower courts just when so much was being done, however belatedly, to set matters right. There may be regret also that the Court abandoned hope as to policing the police at the very time when advances in photography and sound recording would make possible a rather faithful reproduction of events in the police station—not to speak of improvements in police practices.

These considerations, however, were irrelevant to what I have called the equal protection argu-

ment, a ground bass that resounded throughout the *Miranda* opinion. The involuntary confession rule afforded no benefit to the poor and ignorant who confessed without having been subjected to unfair tactics, whereas the rich and the knowledgeable remained silent.

Equality could be established only by advancing the point at which the privilege became applicable and surrounding the poor man with safeguards in the way of warnings and counsel that would put him more nearly on a par with the rich man and the professional criminal.

It can be fairly argued that this is too great a concession to egalitarianism. Equality, it can be forcefully contended, does not demand cessation of proper police practices that are valuable, perhaps essential, to the investigation and punishment of crime, simply because some segments of the population don't know they are not obliged to cooperate whereas others do. Such, apparently, is the view of Congress, expressed in a statute on whose constitutionality the Supreme Court will have to pass.

If no other solution were available, I might agree at least in cases where interrogation is needed to produce important results other than conviction of the suspect. I refer to such matters as restitution to a victim, prevention of the spread of a crime, or apprehension of other participants. However, the situation with which the Court was confronted in *Miranda* was sufficiently disturbing that those of us who fear that the Court's answer

will unduly hamper proper police interrogation ought to search hard for alternatives rather than take the easy course of returning simply to the rule that statements to the police are admissible unless "involuntary."

STATION-HOUSE FACTOR

In the matter of station-house questioning, I indorse Justice Walter V. Schaefer's proposal of judicially supervised interrogation by the police. The only sanction, under the proposal, is permission to comment at the trial on the suspect's refusal to answer; he is to be warned by the magistrate that he need not answer but that if he is subsequently charged, his refusal will be disclosed at the trial. While Justice Schaefer does not say whether counsel must be present, I assume his answer would be in the affirmative, except perhaps in cases where time will not permit. A similar proposal has been made by a distinguished group of English lawyers.

One of the merits of the proposal is its tendency to promote the speedy production of the suspect before a magistrate. Another is that it meets the equal protection argument; the rich man and the professional criminal could no longer clam up without adverse consequences.

Assuming that the Schaefer proposal affords a reasonably satisfactory solution for station-house questioning, what shall we do about the still earlier stage? A declaration that the privilege does not apply to

questioning before the arrival at the station obviously would not do; the route from the place of apprehension would too often rival that supposedly taken by the driver with a gullible foreigner in his car. A partial solution would be a more charitable judicial view as to the point in time when an arrest occurs; the fact that a suspect *may be* restrained if he should refuse to answer or attempt to flee does not mean he is already under arrest when a question is put to him. But that alone will not be effective if the Court is going to require warnings even before custody is taken.

Another topic demanding consideration is the application of the privilege to a quite different situation—statutes requiring that certain records be kept and made available, and registration or reports of a variety of activities.

Until three years ago no attack on such statutes under the Fifth Amendment had succeeded.

The first breach in the dike was wrought by *Albertson v. Subversive Activities Control Board*, invalidating, as a violation of the self-incrimination clause, a provision of the Subversive Activities Control Act requiring members of the Communist Party to register.

OTHER WALLS TUMBLE

With *Albertson Unlimited* on the books, other walls were sure to tumble. Early in 1968, with only the Chief Justice in dissent, the Court struck down the registration provision of the Federal wagering tax and, more seriously, the wager-

ing excise tax when the defendant asserted that the filing of the required return would violate the privilege, and also a section of the National Firearms Act penalizing illegal possession of unregistered firearms, the Court somewhat unnecessarily construing this as requiring the possessor to register.

Although the opinions, by Mr. Justice Harlan, were rather narrowly written, the list of possibles in Chief Justice Warren's dissent, the grant of certiorari in a case involving the validity of the marijuana tax and registration provisions, and the Court's addiction in Bill of Rights cases to "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation" are sufficiently portentous that we cannot dismiss this subject on the comfortable basis that no great harm has yet been done.

Moreover, the Chief Justice's extensive catalog, limited to Federal statutes, is only the top of the iceberg. High on the vulnerable lists are statutes, doubtless existing in almost every state, requiring the reporting of automobile or other accidents and of compliance with factory and building regulations and other safety and sanitary standards.

An interesting proposal is Prof. Mansfield's—to sustain the registration or reporting requirement but prohibit use of the statement in a prosecution for any offense disclosed. The interest of the government deserving protection is in

getting information required to fill its responsibilities in today's complex society. If it gets that, it does not also have to be able to use the information as evidence in the prosecution of crime.

Admittedly this still makes the filing of some types of registration or reports an exceedingly serious piece of business for a person who has committed a crime. But the government has an interest in registration and reporting requirements far greater than in the usual case of compulsory self-incrimination, and this is the best compromise of which I know.

When I began working on these lectures two years ago, I wondered what I would do when I reached the ultimate question, "Have you a specific amendment to propose?" For a long time I thought I would take the lazy course and duck.

But I concluded that to refrain from making a concrete proposal would be cowardly and irresponsible. If a constitutional amendment is undraftable, it is inexcusable to waste time in talking about it. And there was, after all, the comforting assurance that however bad the draftsmanship of an amendment to the Amendment might be, it could hardly be worse than that of the Fifth Amendment itself.

Here it is:

The clause of the Fifth Amendment to the Constitution of the United States, "nor shall be compelled in any criminal case to be a witness against himself," shall not be construed to prohibit:

(1) *Interrogating any person or requesting him to furnish goods or chattels, including books, papers and other writings, without warning that he is not obliged to comply, unless such person*

has been taken into custody because of, or has been charged with, a crime to which the interrogation or request relates;

(2) Comment by the judge at any criminal trial on previous refusal by the defendant to answer inquiries relevant to the crime before a grand jury or similar investigating body, or before a judicial officer charged with the duty of presiding over his interrogation, provided that he shall have had the assistance of counsel when being so questioned and shall have then been warned that he need not answer; that if he does answer, his answer may be used against him in court; and that if he does not answer, the judge may comment on his refusal.

(3) Compulsory production, in response to reasonable subpoena or similar process, of any goods or chattels, including books, papers and other writings.

(4) Dismissal, suspension or other discipline of any officer or employee of the United States, a state, or any agency or subdivision thereof, or any person licensed by any of them, for refusal, after warning of the consequences, to answer a relevant question concerning his official or professional conduct in an investigation relating thereto, or the introduction in evidence of any answer given to any such question, provided that such person shall have had the assistance of counsel.

(5) Requiring a person lawfully arrested for or charged with crime to identify himself and make himself available for visual and auditory investigation and for reasonable scientific and medical tests, provided the assistance of counsel has been furnished except when urgency otherwise requires.

(6) Requiring registration or reporting reasonably necessary for a proper governmental purpose, provided that no registration or report so compelled shall be admissible as evidence of any crime revealed therein.

The six proposals are not interdependent. The package need not be taken as a whole, and, apart from correcting the draftsmanship, I reserve the right to change my mind about some or all of it. There

might be great merit, for example, in making the text that I have suggested the first section of an amendment and adding, as a second section, something as follows:

Nothing in the foregoing shall apply to interrogation, registration, reporting, or the production of writings with respect to religious, political or social beliefs or associations.

But for the moment the text with this elaboration, if thought to be required, represents my idea of what the Fifth Amendment should be tomorrow if we are to have a reasonable reconciliation of the values the self-incrimination clause seeks to protect and the great objectives of the Constitution to "establish Justice" and "insure domestic Tranquility."

Let me emphasize that in submitting for public consideration these proposals to amend the Fifth Amendment, I intend no reflection on the Supreme Court or any of its members, for whom I entertain profound respect. The self-incrimination clause is not "specific," no matter how loudly it is proclaimed to be, and reasonable men will thus differ as to its proper scope. All of us must venerate its purpose—to protect the lone individual against the all powerful state.

Yet here, as always with the great guarantees of the Constitution, we must avoid absolutes. The protection of one citizen should not be pushed, beyond his reasonable needs, in such manner as to impair the state's ability to perform its duty to protect all citizens against criminal acts and to punish those who commit them.

My respectful submission is that decisions have pushed the scales too far.

Let me attempt to clarify also that my proposal is a long way from seeking to repeal everything the Court has been doing in this area—although I have little doubt that critics will claim it to be precisely that. Indeed, I fully expect I will be said to have advocated the repeal of the self-incrimination clause, although my remarks should make it evident that if our only choices were repeal or what we now have, I would unhesitatingly choose the latter. On the most heated subject, police interrogation, I accept many premises of the *Miranda* decision; my proposal—really Justice Schaefer's proposal—is to effect a reasonable accommodation of these with the need of the police to get information from the man best able to furnish it.

TOO MANY WORDS?

The most pointed expression I have heard of this is that if it is wrong to read the Bill of Rights as a Code of Criminal Procedure, as I contended in a conspicuously uninfluential lecture some years ago, it is worse to *write* it that way.

What the argument does not tell us is how, if the Court insists on reading the Fifth Amendment as a detailed code—for example, taking as many words in the *Miranda* opinion to spell out the Amendment's requirements on police interrogation as I have done to deal with all topics covered here—and the nation does not like the Court's

reading, it can effectively respond in any other way so long as the views of the Court remain unchanged.

The contention that if an amendment of the sort here suggested were adopted, there would be a drive for similarly detailed amendments of other sections of the Bill of Rights, importantly the First, manifests a lack of faith in the good sense of the people that I do not share.

Still, I heartily agree, for a variety of reasons, that it would be far better if any needed adjustment could be accomplished through judicial action rather than constitutional amendment. A great deal—if, perhaps not all—could be done in that manner if the Court were so disposed. My discussion of the issues must have been intolerably obscure if it failed to make that clear. Indeed, two of my proposals require, with an exception of small practical importance, only a holding of the line; they are included solely because that law was drawn by uncomfortably narrow majorities over vigorous dissents.

The trouble with these attractive prospects, however, is that the tendency of the Court, particularly over the past four years, has been to an ever greater expansion of the Fifth Amendment and that the slim majority that successfully resisted still further adventures is no longer there. It thus remains worthwhile to discuss an amendment to the Constitution until there is evidence of a change in judicial attitude.

PENNSYLVANIA'S NEW JUDICIARY ARTICLE:

An Analysis with Emphasis on Implementation

BY MARVIN COMISKY AND H. LYNN EDWARDS, *Philadelphia*

Members of the Pennsylvania Bar

PENNSYLVANIA'S NEW JUDICIARY ARTICLE

This past New Year's Eve marked the exodus of a judicial system which Pennsylvania has had since 1874, and the genesis of a new system embodied in the new Judiciary Article, passed by Pennsylvania's electorate in 1968 as the voters' stamp of approval on the work of the Constitutional Convention.

Like any newborn babe, its parents have great aspirations for it; its many friends and relatives are happy and hopeful.

But, sad to state, this new "heir apparent" to Pennsylvania's judicial domain is not without its doubting Thomases, its mavericks, and even its enemies.

To cite a few examples:

A. An action was brought in the Commonwealth Court of Dauphin County seeking a preliminary injunction which would have stayed the vote on the Constitutional Amendments in 1968. The Pennsylvania Supreme Court affirmed the denial of the injunction.¹

Thereafter an action was begun on the merits, seeking to have the Ju-

diciary Article declared unconstitutional as violating the "separation of powers" doctrine; the Dauphin County Court rejected the suit November 26, 1968.² The case was again brought before the Pennsylvania Supreme Court, which affirmed the lower court in an opinion dated February 7, 1969.³

B. Another action, not jugular, however, was the legislation sponsored under pressure of local judges in Allegheny County, which made inroads into the "unified court" concept of the Judiciary Article, and resulted in enlarging the Court of Common Pleas of that county to include an additional division, namely, a Criminal Division.⁴

C. Also, there remains the controversy over the magisterial districts throughout the state. The *Evening Bulletin* of January 16, 1969 carried two important headlines:

1. "25 Districts Suggested Montgomery Judges Propose Reducing

¹ *The Philadelphia Inquirer*, November 29, 1968, p. 4.

² *The Legal Intelligencer*, February 11, 1969, p. 1.

³ Act No. 357, Senate Bill No. 1763, signed December 2, 1968.

⁴ *Siander v. Kelley*, 432 Pa. 1 (1968).

JP's from 157 to 33; 40 JP Plan Rejected by Penna. Supreme Court."

and

2. *"Bucks Battle of JP's Expected as Court Cuts Districts to 17-99 Justices Forced to Vie for New Jobs."*

Happily, this latter issue has since been resolved by the Pennsylvania Supreme Court, which has completed its orders regarding magisterial districts in all judicial districts of the Commonwealth, and it appears that slightly less than 600 new magisterial districts will come into existence and operation in January, 1970.⁵

Like the ideal situation after a hard fought political campaign is over, the thing for all men of good will is to close ranks and dedicate ourselves to implementing the new provisions; and if those efforts prove unfruitful, then to utilize existing machinery, "according to the rule of law," designed to effectuate whatever changes such experience will indicate are necessary and desirable.

It is precisely in this spirit that I appear before you as nominee for Vice-President of the Pennsylvania Bar Association, charged with responsibility of providing leadership to the organized Bar of the great Commonwealth of Pennsylvania. My personal position is that the new Judiciary Article represents a giant

step forward in judicial strengthening and renewal for Pennsylvania, holding great potential for the future of this Commonwealth.

It would be pleasant to be able to state that the Judiciary Article, as approved by the electorate, constituted a complete, self-implementing package which went into effect January 1, 1969, already having built into it all of the implementation needed for accomplishing the strengthening and renewal of our judicial branch. But the contrary is more to the situation.

SCHEDULE OF IMPLEMENTATION

The Judiciary Article as approved by the electorate April 23, 1968, was accompanied by a Schedule containing 29 Sections. This Schedule was designed by the Convention to provide for an orderly transition from the old to the new Judiciary Article in anticipation of enabling legislation to be adopted by the General Assembly. This device of a Schedule is not new to Pennsylvania Constitutional drafting, and the Schedule may be considered a part of the new Judiciary Article.⁶

In the 1968 session of the General Assembly, nine specific Bills were passed and subsequently signed, which implement numerous provisions of the Judiciary Article.⁷

⁶ Comisky and Krestal, "Analysis of New Judiciary Article," *Pennsylvania Bar Association QUARTERLY*, Vol. 40, No. 1, October, 1968, p. 68.

⁷ *Act No. 351*, "An Act implementing the provisions of Section 9 of Article V of the Constitution of the Commonwealth of Pennsylvania by providing for a right of appeal in all cases from courts of record not otherwise provided for."

(Continued on opposite page)

⁵ Pennsylvania Bar Association, Report of Committee on Implementation of the Judiciary Article, sub-committee on "Magisterial Districts and the Training and Jurisdiction of Justices of the Peace," Raymond Pearlstine, Chairman.

These Bills cover such things as filling gaps in the right of appeal, establishing magisterial districts, salaries, offices and disposition of costs for district justices of the peace, increasing monetary arbitration ceilings, and adjusting the judicial structure of Allegheny County.

IMPLEMENTATION IN PHILADELPHIA

The Legislature adjourned without passing Bills to set up Philadelphia's

Municipal and Traffic Courts. (Article V, sec. 6 (c).) However, the Schedule (section 16) provided for interim implementation under the supervisory and administrative control of the Supreme Court.⁸ Thus, by January 1, 1969, Philadelphia's hitherto heterogeneous court structure became theoretically unified; its 56 judges, theretofore consisting of 30 in the Court of Common Pleas, 20 in the County Court, and 6 in the

(Continued from opposite page)

Act No. 352, "An Act implementing the provisions of sub-section (b) of Section 7 of Article V of the Constitution of Pennsylvania authorizing the General Assembly to establish classes of magisterial districts and salaries of district justices of the peace and providing for their offices and the disposition of costs."

Act No. 353, "An Act implementing the provisions of Section 9 of Article V of the Commonwealth of Pennsylvania by providing for a right of appeal in all cases from adjudications of administrative agencies of political subdivisions; and providing for the practice and procedure before said agencies."

Act No. 354, "An Act amending the Act of June 4 1945 (P.L. 1388) entitled "An Act relating to the practice, procedure, regulations and adjudications of departments, departmental administrative boards and commissions, independent administrative board and commissions, officers and other administrative agencies of this Commonwealth, and judicial review thereof; and preserving equitable jurisdiction in certain cases," implementing the provisions of Section 9 of Article V of the Constitution of the Commonwealth of Pennsylvania by providing for a right of appeal in all cases from adjudications of administrative agencies of the Commonwealth; repealing CERTAIN PROVISIONS which RESTRICT the applicability of the act to enumerated agencies; and repealing certain other acts and parts of acts."

Act No. 355, "An Act implementing the provisions of Section 9 of Article V of the Constitution of the Commonwealth of

Pennsylvania by providing for a right of appeal in all cases from decisions of the minor judiciary; and providing the procedure therefor."

Act No. 356, "An Act amending the act of June 16, 1836 (P.L. 715) entitled "An act relating to Reference and Arbitration," IMPLEMENTING ARTICLE V OF THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA AND increasing the amount of arbitration by the COURTS of Common Pleas in Allegheny AND PHILADELPHIA COUNTIES."

Act No. 357, "An Act establishing the Court of Common Pleas of Allegheny County and the divisions thereof conformably to the Constitution as amended in 1968; providing for the judges and president judges of the said court and the divisions thereof and defining the effect of this act on certain liens heretofore entered."

Act No. 358, "An Act to provide for the office of public defender, authorizing assistants and other personnel, and to provide adequate representation for persons who have been charged with an indictable offense or with being a juvenile delinquent, who for lack of sufficient funds are unable to obtain legal counsel."

Act No. 359, "An Act implementing the provision of subsection (b) of Section 7 of Article V of the Constitution of Pennsylvania authorizing the General Assembly to establish classes of magisterial districts and salaries of district justices of the peace for counties of the second class."

⁸ Schedule to Judiciary Article, Section 16.

Orphans' Court—all with their respective Administrative or President Judge—henceforth would become the Court of Common Pleas, with three divisions: trial, orphans', and family. Also, the 28 magistrates, constituting the minor judiciary, not required to be "learned in the law," would be divided by gubernatorial designation into 22 judges of the Municipal Court and 6 Judges of the Traffic Court.

Overall coordination was built in by providing for one judge of Common Pleas Court to be selected for a five-year term by the other judges to serve as President Judge over all except the Municipal and Traffic Courts. The Supreme Court authorized the President Judge of Common Pleas to name the President Judge of the Municipal Court until all its judges should become "learned with law"; and the President Judge of the Traffic Court would be appointed by the Governor.¹⁰ The three divisions of the Common Pleas would each be headed by an Administrative Judge, elected by their respective division, and all to be accountable to the President Judge.¹¹

The Supreme Court, by Order of its Chief Justice December 24, 1968, delegated to Philadelphia's Court of Common Pleas authority to promulgate Rules of Criminal Procedure for the new Municipal Court. These were adopted December 30, 1968, and on the same day President Judge Vincent A. Carroll issued an Order

making them effective January 1, 1969.

These Rules implement the Judiciary Article's Municipal Court jurisdiction which expands the pre-existing magistrates' jurisdiction in criminal offenses punishable by imprisonment of two years or less; and in indictable motor vehicle offenses punishable by three years or less. Significantly, the judges "learned in the law" in this court can determine guilt or innocence and impose sentence in such cases; also, they may be temporarily assigned to the Court of Common Pleas "when required to expedite the business of the court."¹² These two changes wrought by the new Judiciary Article should have great potential for substantially reducing the backlog of criminal matters in Philadelphia.¹³

I think Philadelphia's record of progress to date in implementing its portion of the Judiciary Article is a tribute to the leadership, the perennially "young at heart" progressive

¹² Schedule to Judiciary Article, Section 16 (h), (r) (iii).

¹³ According to Common Pleas Court Administrator Edward J. Blake, "Judge Carroll has stated that the first order of priority for the new court is a criminal court system which will insure that all defendants accused of crime are brought to trial within six months with a significantly shorter period provided for individuals incarcerated or accused of crimes of violence"; also, according to Mr. Blake, "The expanded criminal jurisdiction of the new Municipal Court presents a potential for the early disposition of approximately 50 per cent of the existing criminal caseload." However, both added that adequate judicial manpower and courtroom facilities will be essential to achieve these goals. (See Philadelphia Bar Association, *The Shingle*, Vol. 31, No. 9, Nov., 1968, pp. 244, 245.)

⁹ *Id.*, Section 16.

¹⁰ *Id.*, Section 10.

¹¹ Schedule to Judiciary Article, Section 10.

spirit, and the talents of President Judge Vincent A. Carroll, and the excellent capabilities of his Court Administrator, Edward J. Blake.

I know both of those men heartily endorse my giving heavy credit to the sustained help received from other groups. These include: (1) the Philadelphia Bar Association's Ad Hoc Committee for Implementation of the New Judiciary Article in Philadelphia, headed by Chancellor Louis J. Goffman; (2) the Pennsylvania Bar Association's Committee on Implementation of the Judiciary Article, headed by Judge Abraham H. Lipez (25th Judicial District, Lock Haven, Pennsylvania); with co-Vice-Chairmen Gilbert Nurick, Past President of the Pennsylvania Bar Association, and Thomas W. Pomeroy, Jr., also a Past President of the Pennsylvania Bar Association and now a Justice of the Pennsylvania Supreme Court; and (3) the Joint State Government Commission.

We will want to keep our eyes on the new Municipal Court. The increase in civil jurisdiction to \$500 given this court, and the significant grant of criminal jurisdiction to the "learned in the law" judges, not to mention the availability of the latter to help out in Common Pleas—all of these should make considerable impact on case backlogs and help speed justice.

One of the truly exciting expectations from the Municipal Court is the potential presented for erasing the stigma of the magistrate courts, which were abolished, and substituting a fresh, wholesome, dignified image of judicial administration at

the "man on the street" level where it is sorely needed.

Under the direction of President Judge Carroll, we have already seen some tangible signs which document an apparent effort to bring about this new and improved image for the "people's court." For example, he has decreed that judges will wear robes in Municipal Court. Also, the Municipal Court judges will sit at City Hall on night small claims cases, designed specifically to make the court available to parties to small civil claims who are reluctant to lose a day's wages to fight the suit. Additionally, plans are to have the court centrally located and controlled, a decision which was predicated upon carefully weighing the pros and cons, which resulted in the conclusion that "centralized" justice is better than the previous practice of "store-front" magistrates' offices.¹⁴

COMMONWEALTH AND COMMUNITY COURTS

Additionally two new courts are provided for in the Constitution, one mandated and the other discretionary.

A. Commonwealth Court:

This Court is mandated. The Judiciary Article established a new State-wide court, called the Commonwealth Court, with a judicial complement and jurisdiction to be "provided by law." The Schedule (Section 3) calls for this court to come into existence January 1, 1970.

¹⁴The *Sunday Bulletin*, December 15, 1968, p. 11.

Implementation will require legislation, and the Pennsylvania Bar Association's Implementation Committee has submitted a proposed bill and it is presently under consideration by the Legislature.¹⁵

In this connection, I wish to remind you of the specific, practical reasons behind the establishment of the Commonwealth Court, especially those which pertained to lessening the workload of appeals in the Superior and Supreme Courts. The journals of the Constitutional Convention fully document this.

Accordingly, I strongly urge the members of the Bar actively to exert their leadership and sustain an informed concern to insure that the Legislature takes maximum advantage of this mandated opportunity.

B. Community Court:

This Court is discretionary. As a brand new type of court among those listed in the Judiciary Article as part of the "unified judicial system," Section 1 mentions "community courts."

In order to thoroughly understand the electorate's potential power in this referendum, it is necessary to realize what the new Judiciary Article *does* and what it *does not* do with respect to the minor judiciary magistrates, aldermen, justices of the peace.

What it *does do* is lump them into the "unified judicial system."¹⁶ As such, they are subject to considerable supervisory and administrative con-

trol of the Supreme Court.¹⁷ Their territorial jurisdiction is hereafter subject to tight restrictions. The fee system will be replaced by a fixed and equitable schedule of salaries based on classes of magisterial districts.¹⁸

The big improvement which the Judiciary Article *does not* bring about is the eventual definite demise of the non-lawyer minor judiciary. This is the great promise of the "Community Court" referendum. For, if the electorate in a judicial district establish a community court, this results *ipso facto* in the abolishment of the office of justice of the peace after completion of his term, and in its place is substituted a court of judges who must be members of the Bar.

This burning and multi-faceted issue concerning the retention or abolishment of the non-lawyer minor judiciary was exhaustively considered during the Constitutional Convention. It is no cut and dried affair. I would be most unfair, and even presumptuous, dogmatically to tell you there is only one side to the question.

But, I do contend that the Convention, in its jury-like wisdom, has given the electorate the "last word." The Convention has, in effect, said that there is no blanket policy which should cover the entire Commonwealth. Localities differ. Personalities differ. Conditions differ.

Accordingly, each district is given the "green light" to explore the

¹⁵ Article V, Section 10.

¹⁶ Senate Bill 261.

¹⁷ Article V, Section 1.

¹⁸ Article V, Section 7, Schedule, Section 13.

facts, and to initiate corrective action if the findings seem to warrant such.

But with such a prerogative, I feel that there must be an accompanying program of education and enlightenment to insure that the electorate will realize the grave issue facing them. Here is where the members of the Bar, in league with an informed and concerned lay citizenry, can perform a meritorious service. There is no pressing deadline bearing down on you. Yet, time is of the essence. So, you are urged to find out what the facts are in your community regarding the minor judiciary; evaluate those facts, and act accordingly!

JUDICIAL ADMINISTRATION BY THE SUPREME COURT

Closely related to the provision of the Judiciary Article which establishes the unified court system, and constituting some of the real "teeth" which will enable its spirit and letter to be carried out, is that portion of the Judiciary Article which gives the Supreme Court a mandate to "exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court district to another as it deems appropriate."¹⁹

To accomplish this task, the Judiciary Article further mandates the Supreme Court to appoint a Court Administrator and gives it latitude to appoint necessary subordinate administrators and staff. In December, 1968, the Supreme Court announced

the appointment of the Court Administrator at a salary of \$35,000 per year.²⁰

The new Court Administrator began January 1, 1969, to assemble a staff. The real work of this newly established office lies mostly ahead. Until there is opportunity to observe what directions it will take, and how intensive are its efforts, it will be difficult or impossible to gauge the true value of this part of the Judiciary Article. At most, I can only suggest some measure of the potential involved. For this, I rely upon suggestions and recommendations made to the Supreme Court by the Pennsylvania Bar Association's Committee on Implementation of the Judiciary Article.

This Committee underscored the importance of the Supreme Court's administrative role by prefacing its recommendations as follows:

"... While the (Judiciary) Article speaks with a muffled voice on a number of important questions, one fundamental theme is absolutely clear: *responsibility for the entire business of the efficient administration of justice is now squarely up to the Supreme Court of Pennsylvania.* The Pennsylvania electorate has challenged the Court to unify the judicial system and to make it work more effectively . . ."

And further, the Committee states:

"Simply stated, the new Constitution says to the Supreme Court: We will have a

²⁰ Chief Justice John C. Bell named A. Evans Kephart, Esquire. He was born December 21, 1905 in Ebensburg, Cambria County, Pa.; graduated from Harvard Law School; served as an Assistant City Solicitor in Philadelphia from 1930-37; Pennsylvania State Senator from 1940-54 from Philadelphia's 2nd Dist., and is partner in Philadelphia law firm of Stassen & Kephart; see *Philadelphia Inquirer*, Dec. 13, 1968, p. 12; also *The Legal Intelligence*, Jan. 13, 1969, p. 19.

¹⁹ Article V, Section 10 (a) and (c).

unified judicial system; you make it work, and the tool you should use will be an adequate staff, headed by a Court Administrator."

JUDICIAL INQUIRY AND REVIEW BOARD

The new Judiciary Article mandated the creation of this Board, to consist of five judicial members appointed by the Supreme Court, two non-judge members of the Bar and two non-lawyers to be appointed by the Governor.²¹

The Judicial Inquiry and Review Board has already been appointed. The five judicial members named by Chief Justice Bell are: Superior Court Judges M. Montgomery, of Pittsburgh, and Theodore O. Spaulding, of Philadelphia; Common Pleas Judges James B. Dwyer, of Erie, Otto P. Robinson, of Scranton, and William W. Lipsett, of Harrisburg. (*The Evening Bulletin*, Dec. 8, 1968, p. 20.)

The four named by the Governor are: Richard E. McDevitt, Esq., Philadelphia; Judd N. Poffinberger, Jr., Esq., Pittsburgh; Robert S. Bates, Meadville, Layman; J. Ralph Rackley, Provost of Penn State University. (Per contact with Governor's office.)

It is also understood that the drafting of rules of procedure is now under way.

Time and experience will tell best how effective this powerful sanction will prove as a tool for preventing, curing, and eliminating weaknesses in the judicial body. Here also is a

challenge, to the Bar as well as to laymen, to assist in this most important policing role. We should be able henceforth to state with honest conviction that Pennsylvania is truly getting the quality of judicial conduct which it has demonstrated it wants.

JUDICIAL SELECTION

I have placed this item last in sequence—not as indicative of its least importance—rather, because I hope to persuade you that, for the next several months, this subject should loom first in priority.

From our review of the new Judiciary Article up to this point, I think it is clear that there was a sincere effort to make the courts *stronger*, not just *bigger and fatter*. Too, the thrust was to impart to the judiciary a healthy degree of essential independence, yet still preserve a counterbalancing system of supervision and control.

But the history of mankind is still very much man. As one commentator recently put it, "We have a new look in the courts, but no system can be better than the man who operates it."²²

What does Pennsylvania's new Judiciary Article provide, and what need we do concerning judicial selection?

The President's Commission on Law Enforcement and the Administration of Justice charged that the elective process has been ineffective

²¹ Article V, Section 18.

²² "The New Courts," Editorial No. 528, KYW, KYW-Television, Philadelphia, Pennsylvania.

in producing well-qualified judges free from political and similar pressures. The caliber of judges can be improved only through tight screening procedures, retention in office on the judge's own record, and rescreening each time the judge's term is up.²³

Prior to the present Judiciary Article, Pennsylvania basically utilized popular elections to select its judges. Exceptions existed in several instances where judicial positions could be filled by appointments.²⁴

The new Judiciary Article provides that *all judicial officers* includ-

ing State-wide justices and judges, *are to be elected at Municipal Elections.*²⁵

It should be apparent that the new Judiciary Article really made no changes in judicial selection from the pre-existing situation. However, Section 13 (d) of the new Article contains this most important provision:

"At the Primary Election in 1969, the electors of the Commonwealth *may elect* to have the justices and judges of the Supreme, Superior, Commonwealth, and all other *State-wide* courts appointed by the Governor *from a list of persons qualified for the offices submitted to him by the Judicial Qualifications Commission*. Such appointment shall not require the consent of the Senate." (Underscoring supplied.)

In brief, the foregoing means that Pennsylvania voters in the 1969 Primary Election will have a one-time opportunity to convert the judicial selection of *State-wide judges* to a merit selection system.²⁶ This is why I stress the "short-term priority" of the judicial selection provisions of the Article.

It is my firm conviction that the quality of our justice is directly proportional to the quality of our judges; and, at least in the case of State-wide judges, some method of merit selection would seem indispensable to our assurance of getting more consistent quality—certainly superior to partisan political election.

²³ Article V, Section 13 (a).

²⁴ President's Commission on Law Enforcement and the Administration of Justice, pp. 146-147.

²⁵ (1) By the Governor to fill a new judicial position or judicial vacancy resulting from death, resignation, removal or incapacity of a judge before the expiration of his term of office; (2) Temporary assignments by the Chief Justice of the Supreme Court, to any court of record, of former judges learned in the law, who served at least one term and had not been defeated for re-election, and were willing to accept such temporary assignments; such judges sit temporarily in any judicial district for the disposal of business under such circumstances and subject to any qualifications and conditions prescribed by the General Assembly; (3) In Pittsburgh, appointments are made by its Mayor to the position of Police Magistrate; (4) In the event of enemy attack, appointments of special emergency judges can be made by the Chief Justice of the Supreme Court in consultation with the other members of the Supreme Court and the State or County Chairman of the political party involved; the judge so appointed must be of the same political party as his predecessor; and he remains in office only until the regular judge returns or the office can be filled in accordance with the Constitution and statutes of the Commonwealth. "The Pennsylvania Constitutional Convention 1967-68," Reference Manual No. 5, "The Judiciary," p. 86.

²⁶ The 1969 primary election is scheduled for May 19, 1969, prior to the publication of this article. By the time this article is published, the voters will have exercised their option and the outcome will be known.

Furthermore, the new Judiciary Article provides that a judge selected under this merit system need not run for retention on a partisan basis. To the contrary, he will be entitled to have his name submitted to the electors for re-election on a non-partisan ballot, leaving it to the electorate to determine whether his record merits retention in office.²⁷

GOALS

The following programs, I think, merit study:

1. We must extend the judicial merit selection program to all the courts at all levels.

2. We must institute a departmental intermediate appellate court, with the right of review therefrom only by certiorari to our Pennsylvania Supreme Court, following the federal pattern presently in existence from the Courts of Appeals to the United States Supreme Court.

3. We must re-examine, in the light of the experience to be undertaken, the broad "right of appeal."

4. We must make a critical re-examination and re-evaluation of the phrase "as heretofore" contained in the Bill of Rights—referring to the right to trial by jury as heretofore. In this connection, it may also be appropriate for some fresh thinking in connection with our trial procedural rules. It is now over thirty years since our fact pleading system was instituted. Perhaps new procedures are merited in the light of the present volume of litigation.

Certainly changes must be made in the present use of the cumbersome and costly reproduction of records on appeal. The reproduction of the trial record not only involves the heavy burden of wasteful cost but is the single most important factor in delaying appellate argument.

5. Since judges now may be assigned from county to county throughout the state without their consent, and since they must all now retire at 70 years of age, it may well be appropriate to provide a single salary scale despite the area in which they are elected, and provide a meaningful and level retirement plan.²⁸

And finally,

6. We must continually review the magisterial districts to see if both in number and in quality, unless they are replaced by Community Courts, they are serving the needs of the public.

²⁸ By Act of Jan. 26, 1966, P.L. (1965), No. 565; 17 P.S., Sec. 830.23 et seq., the salaries were established as follows:

Population of 150,000 and over in the Judicial District	Population of 100,000 to 149,000
\$30,000	\$27,500
Population of less than 100,000	Dauphin County Judges
\$26,500	\$32,500

NOTES:

(1) The President Judges of the Courts of Common Pleas and the Dauphin County Court receive an additional \$500 per year (17 P.S. Sec. 830.31a).

(2) The judges of the former special courts, i.e., County Court of Philadelphia, County Court of Allegheny, and the Juvenile Court of Allegheny County formerly received \$27,500 per year. (17 P.S. Sec. 830.29-830.31).

²⁷Article V, Section 15 (b).

CONCLUSION

I began this paper on the implementation of the new Judiciary Article by likening it to a newborn babe. I think it would be appropriate to end on the same note. As in the case of any newborn baby, those interested in it are at times prone to manifest a certain degree of impatience for the baby's progress and accomplishments, in such things as learning to walk, to talk, to read, to write. Similarly, we like to imagine the highest hopes for the baby in such realms as marriage, profes-

sional achievement, and social status. However, no one can deny that each of these steps requires a careful blending of nature's processes—tender, loving care, planned guidance and experienced direction, and to the extent to which those entrusted with these responsibilities measure up to or fall short of their trust, to that same extent will the "high hopes" be realized.

So it is with this new Judiciary Article. We, the people of this Commonwealth, will get out of it only what we ourselves put into it.