

REFERENCE MANUAL NO. 5

The Judiciary



THE **PENNSYLVANIA**

CONSTITUTIONAL CONVENTION — 1967-1968

The Preparatory Committee for the Constitutional Convention has prepared a series of nine Reference Manuals for the information of the delegates to the Convention. They are intended to give delegates general information on the Convention, to present a brief history of the several constitutions of Pennsylvania, and to provide pertinent information concerning each of the subject areas that the Convention is authorized to consider. The nine Manuals are—

- No. 1 The Convention
- No. 2 Constitutions of Pennsylvania—
Constitution of the United States
- No. 3 A History of Pennsylvania Constitutions
- No. 4 Local Government
- No. 5 The Judiciary
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THE JUDICIARY

The Pennsylvania Constitutional Convention
1967-1968

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REFERENCE MANUAL NO. 5
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Prepared for the Delegates by  
THE PREPARATORY COMMITTEE  
Raymond J. Broderick, Lieutenant Governor, *Chairman*



Commonwealth of Pennsylvania  
**CONSTITUTIONAL CONVENTION**

1967-1968

\* \* \*

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## *Foreword*

Act Number 2, adopted in March, 1967 and ratified by Pennsylvania's voters the following May, authorizes the convening of a Constitutional Convention on December 1, 1967, for a period of three months.

The Act also provides for a Preparatory Committee, to be composed of the Lieutenant Governor and twelve officers of the General Assembly, listed opposite. The Act further stipulates that: "The Committee shall initiate any studies, inquiries, surveys or analyses it may deem relevant through its own personnel or in cooperation with any public or private agencies, including institutes, universities, foundations or research organizations."

Responding to this assignment, the Preparatory Committee appointed a staff under the direction of John W. Ingram, to plan and coordinate its studies. It also appointed four Directors, each commissioned to direct studies in one of the four subject areas within the jurisdiction of the Convention.

In commissioning the studies, the Preparatory Committee directed the staff to trace the historical development of each subject; to analyze judicial interpretations, experience in other states, and national trends; to identify the issues and to compile alternative proposals for constitutional changes to be considered by the Convention. Specific instructions were given the directors to refrain from making any evaluation of alternative proposals cited in the studies, it being the intent of the Preparatory Committee that such evaluations are the proper function of the Convention.

Results of the studies in each area are presented in a series of Reference Manuals, specifically intended to serve as reference sources to which the delegates might turn during their deliberations for information on the many and complex questions which may come before the Convention.

The Preparatory Committee was privileged to have the services of four distinguished and eminently qualified authorities who contributed their time and skills to serve as Directors. Burton R. Laub, Dean of the Dickin-

son School of Law, served as Director for Judicial Administration, Organization, Selection and Tenure, and directed the research and preparation of this Reference Manual on the Judiciary.

The Preparatory Committee is deeply grateful to Judge Laub for his dedicated and competent effort, without which this Manual could not have been completed in the very limited time available. The Committee is indebted also to the Dickinson School of Law for making Judge Laub available to it.

The Committee is pleased to submit this Reference Manual to the Convention delegates, for whose assistance it is intended.

Raymond J. Broderick

*Chairman*

## *Preface*

What must ultimately sustain the courts in public confidence is an efficient judicial system in which the judges are at once competent, of impeccable character and reasonably independent. There is little wonder then that thousands upon thousands of words have been written upon the subject of improving the judiciary, particularly from the standpoint of judicial administration, organization, selection and tenure. In fact, there has been a veritable cascade of glittering ideas poured across the pages of legal literature, all of which tend toward the establishment of an ideal system for the effective administration of justice.

The staff charged with doing the research for the Judiciary Article for the Pennsylvania Constitutional Convention of 1967 was plunged headlong into this cascade when it undertook to prepare this booklet for use by the Delegates to the Convention. From a research standpoint, the problem was not in finding material, but rather culling from a host of treatises, books, articles and pamphlets, those matters which were felt might be helpful to the Delegates in their search for an acceptable system.

Time was our enemy. To the research staff, the summer of 1967 will be remembered as the summer of the threatening deadline. Private and irrevocable commitments made by the staff cut our preparation and writing time down to approximately seven weeks. Thus, with the trumpets of time sounding in our ears, Miss Covey, the assistant director, took work to her cottage in Massachusetts, Mr. Frankston took materials with him to Florida, Mr. Boggs, when he was not sweltering in his office in the Dickinson School of Law, was pouring over the manuscript in New York. For my part, the manuscript in incomplete form was my constant companion wherever and whenever I could get away from my usual occupation. I suspect that the prayers of the staff, like my own, were after the fashion of Shakespeare's "Stand still, you ever moving spheres of heaven, That time may cease, and midnight never come."

Ever mindful of our instructions not to espouse any plan, program or suggestion disclosed by our research, the actual writing of the booklet became somewhat difficult. Being "reasonably reasonable," we had our favorites, of course, but a faithful discharge of our duty required a choice of compromise words not natural to a lawyer's style.

For all of these reasons, we do not regard this as a highly successful literary endeavor, but we have high hopes for its utility. Perhaps men of charity in consideration of the time-frame and difficulties of the task, will forgive us for not licking it into form as a mother cat does to her kittens.

Burton R. Laub

*Director, Judiciary Article*

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## Introduction

At the turn of the century there was more than a normal dissatisfaction with the courts and the administration of justice. People had become distrustful of judges and were convinced that the courts were failing of their purpose. If the Bar was aware of this, it was a knowledge kept well within the legal craft, for not many leaders of the legal profession spoke out for radical reform. However, in 1906 a Nebraska lawyer named Roscoe Pound whose name was to become a legend in legal circles delivered an address to the annual convention of the American Bar Association entitled *The Causes of Popular Dissatisfaction With the Administration of Justice*.<sup>1\*</sup> That speech triggered the imagination of every thoughtful person and centered public attention upon the need for judicial reform in the United States. It also stirred the legal profession out of its lethargy.

The speech indicted our system of courts as being archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdiction, (3) in the waste of judicial manpower. It was Pound's view that a model court system should embrace a single court, complete in itself, embodying all superior courts and jurisdictions, including a single court of final appeal.<sup>2</sup> He also expressed the thought that there was a need to take courts out of politics, pointing out that because judges in many jurisdictions were compelled to become politicians, traditional respect for the Bench had become almost completely destroyed.

It was, perhaps, because judges were the logical persons to be blamed for the trouble that the emphasis at first seemed to be placed on reform in the manner of judicial selection. The states had been juggling judicial selection during various reform movements from the early eighteen hundreds and in Pennsylvania it had been heatedly debated in the constitutional convention of 1873. It seems hardly likely, therefore, that public sentiment had crystallized one way or another at the beginning of the twentieth century.

The election of judges by popular vote was not an incident of the judicial

\*Footnotes will be found at the end of each part.

systems which existed after the Revolutionary War; the appointive system prevailed in all thirteen of the original states. In seven of them judges were chosen by the legislatures: in five, the selection was made by the Governor and Council, and in one state judges were selected by the Governor and the Legislature.<sup>3</sup> In the United States courts, of course, the judges were appointed by the President with the advice and consent of the Senate.<sup>4</sup>

Beginning with Mississippi in 1832, followed by New York in 1846, there was a switch by a number of states to the elective method for choosing judges.<sup>5</sup> Pennsylvania did not follow suit until 1850 when by amendment to Article 5, §2 of the Constitution of 1838, judges were required to be elected by the people. However, there was a minor swing of sentiment away from the elective system near the end of World War I and a search was instituted by thoughtful persons for some solution to the problem of how to insure the selection of qualified judges without subjecting them to partisan political activity but at the same time retaining some measure of control in the people.

About the year 1914, a number of plans began to appear involving the selection of judges by a combination of the appointive and elective methods.<sup>6</sup> The American Judicature Society got interested in these plans and began to foster their development. Eventually, these plans became synthesized in what has become known as "The Missouri Court Plan," — so-called because Missouri was the first state to adopt it in the early 1940s.<sup>7</sup> The basic elements of the plan are these: (1) the nomination of slates of judicial candidates by nonpartisan, lay-professional nominating commissions; (2) the appointment of judges by the Governor from the panels submitted by the nominating commissions, and (3) the review of appointments by the voters in succeeding elections by which judges who have been appointed run unopposed on the sole question of whether their records warrant retention in office.

In Pennsylvania, a number of studies were conducted with respect to judicial reform, including the one reported on March 9, 1959 by the Woodside Commission—a Commission on Constitutional Revision created by the Legislature by Act 1957, July 15, P.L. 927.<sup>8</sup> After a year long study of the Woodside Report and the need for constitutional revision in the Commonwealth, the Pennsylvania Bar Association prepared a draft of a "Revised Constitution for Pennsylvania" which the membership adopted by referendum in March 1963.<sup>9</sup> The text of this proposal was accepted and included in the Report dated January 24, 1964 of the Governor's Commission on Constitutional Revision appointed by Governor William Scranton. While this was going on, the American Bar Association drafted what it called the "Model State Judicial Article" which the Association adopted in 1962.<sup>10</sup>



There has always been considerable disagreement among lawyers and laymen alike concerning the merits of these plans. Arguments of considerable force have been advanced both for and against them, and portions of plans as well as the plans themselves have been debated. In fact, not everyone is in agreement that there is a need for change; some believe that the present judiciary system, if properly manned and implemented by statute, can be made to work satisfactorily.

The urge for judicial reform has not, of course, been confined to Pennsylvania. Between 1956 and 1966 variations of the Missouri Plan were adopted in Alaska, Kansas, Iowa, Colorado and Nebraska; an attempt to have it adopted in North Dakota was defeated. As early as 1941 the Committee on State Government of the National Municipal League prepared a Model State Constitution containing a judiciary article,<sup>11</sup> and more recently, the Task Force on Administration of Justice of the President's Commission on Law Enforcement has recommended many changes in the judicial systems of the United States. New York is concurrently in the process of revising its Constitution.

After the Pennsylvania Bar Association started what it called "Project Constitution" in 1961, pressure began to mount for a constitutional revision in Pennsylvania. At a citizen's conference on the modernization of Pennsylvania's judicial system held in Philadelphia on January 9-10, 1964 under the sponsorship of the Joint Committee on the Effective Administration of Justice and the Pennsylvania Bar Association, the following was adopted as the consensus:

The Pennsylvania judicial system, measured by modern standards, has glaring weaknesses which must be eliminated if it is to respond to the needs of the time and this commonwealth is to maintain its position of leadership among the states.

This judicial system, established in 1874—over 90 years ago—has failed time and again to serve the needs of efficient administration of justice in Pennsylvania. A bewildering patchwork of courts with overlapping jurisdiction, unsupervised operations and, often, ill-trained judicial personnel has created congested dockets and costly delays which deprive the people of prompt, fair and equal justice under law.

Pennsylvania has many dedicated and competent judges in spite of partisan political selection, uncertainty of continued tenure in office, insufficient retirement provisions, and inadequate methods of discipline and removal.

In the areas of court organization, administration and supervision, this Commonwealth has one of the most backward judicial systems of any of the major states in the Union.

In its minor courts, Pennsylvania suffers from an excess—more than 4,000—of justices of the peace, magistrates and aldermen, many of whom are ill-equipped for judicial office. The unsupervised fee system of compensation gives justices of the peace and others a monetary interest in every case that comes before them.

In summary, the present judicial system of Pennsylvania is incapable of providing prompt, economical, fair and equal justice under law in the courts of this Commonwealth.

At this point it is not of moment whether this sweeping indictment of the Pennsylvania judicial system is a valid one. It is cited only to illustrate the beliefs which have spurred the citizenry to action. Statements of this nature convinced a large number of people that Pennsylvania's Constitution is in need of revision and such organizations as the League of Women Voters, A Modern Constitution for Pennsylvania, Inc., local bar associations and others got behind the movement and importuned the Legislature and the people to bring about reformation of the courts.

The Legislature passed the Act of 1967, March 15, No. 2 which authorized a referendum to be held in May, 1967 on the question whether a constitutional convention with limited powers should be called. As certified by the Governor, the electorate authorized such a convention. Among the duties reposed in the convention is the preparation for submission to the electorate of proposals for the revision of a number of articles of the Constitution, including Article V, the main article bearing upon the judiciary. The contents of this booklet are designed to be of assistance to the convention in the exercise of its duties with respect to revisions on judicial administration, organization, selection and tenure.

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### *Notes to Introduction*

1. See Annex No. 1.
2. Pound's ideas on court structure were set forth in greater detail in an article entitled, "Principles and Outlines of a Modern Uniform Court Organization." See Annex No. 2.
3. Temporary State Commission on the Constitutional Convention for the State of New York, Report No. 12, "The Judiciary," p. 19; Winters, "Selection of Judges - An Historical Introduction," 44 Tex. L.R. No. 6, p. 1081.
4. U.S. Constitution, Art. 2, §2.
5. Winters, *supra*, Note 3.
6. The original idea is credited to Professor Albert M. Kales of Northwestern University, but Branning, in her "Pennsylvania Constitutional Development," p. 85, footnote 130 points out that a similar idea was presented to the Pennsylvania constitutional convention in 1875 by a delegate named Barclay.
7. See Annex No. 3.
8. See Annex No. 4.
9. See Annex No. 5.
10. The A.B.A. Model State Judicial Article is set forth in Annex No. 6. The Report of the Governor's Commission of 1964 is recorded in Annex No. 9.
11. The 1941 proposal has since been revised. See Annex No. 7.

## Basic Information

### §1. The Convention—Its Powers, Duties and Limitations

The Pennsylvania Constitutional Convention of 1967 has only the limited powers granted by the people in the referendum held in May 1967. A constitutional convention has no inherent rights—only delegated ones.<sup>1</sup> The question posed to the electorate in May was framed by the Legislature in Section 1 of the Act of 1967, March 15, as follows:

Shall a constitutional convention be called in accordance with, and subject to, the limitations and requirements contained in Act Number 2 of the 1967 Session of the General Assembly, to prepare for submission to the electorate proposals for the revision of the subject matter of any amendment proposed, but not approved, at the May 1967 Primary and for the revision of Sections 16, 17 and 18 of Article II and of Articles V, XIII, XIV, XV and IX (excluding Section 18 and the Uniformity Clause of Section 1 of Article IX as provided in Section 7(b) of this Act)?

The reference to the limitations and requirements contained in Act Number 2 of the 1967 Session of the General Assembly requires a consideration of the pertinent provisions of that statute. With respect to the judiciary, the limitations imposed on the Convention appear in Section 7. Omitting matters not relevant, the provisions of the section are as follows:

*Section 7. Substantive Powers of the Convention; Limitation; Mandatory Duties of the Convention.*—(a) Except as hereinafter provided in subsection (b), the constitutional convention shall have the power by a vote of a majority of the one hundred sixty-three to make recommendations to the electorate on the following subjects only . . . (ii) Judicial Administration, Organization, Selection and Tenure (now covered in part by Article V of the Constitution) . . .

(b) . . .

(c) In dealing with the subject matter as prescribed by this section, the convention may recommend the transfer to another article of any provision contained in those articles, or it may recommend its modification, deletion, repeal, the substitution of an entirely new provision or its continuation without change.

(d) . . .

(e) The convention's recommendation on any of the articles shall not be num-

bered. If approved by the electors these articles shall be numbered by the Governor as provided in Act No. 180 approved the 17th day of August 1965.

From the enabling act, the following appears:

*Manner of Framing Proposals*

the Convention is to make proposals in the form of revisions, amendments or new matter for the electorate to pass upon; the proposals will not become a part of the Constitution until approved by the people as provided in Section 8 and 9 of the enabling act;

for a proposal to be valid, a majority of the one hundred sixty-three delegates is required;

the proposals shall not be numbered; the Governor will number them after adoption by the people as provided by law;

with respect to the judiciary, the Convention is limited to Judicial Administration, Organization, Selection and Tenure (now covered in part by Article V of the Constitution).

*Adjournments and Completion of Convention Work*

Section 6 of the enabling act gives the convention the power to adjourn from time to time and to meet at such appropriate places in the City of Harrisburg as it shall determine. It must, however, conclude its work not later than the 29th of February, 1968.

*General Powers*

The convention as established in Section 5 also has the same powers as the Preparatory Committee. These powers are:

"... to lease or otherwise obtain suitable meeting and office space, to purchase or lease office supplies, equipment, books and other publications and other material necessary for the work of the convention and to hire or engage such secretaries, technical assistants, printers and other employes or consultants as may be deemed necessary for the preparatory work of the convention. The committee shall initiate any studies, inquire, surveys or analyses it may deem relevant through its own personnel or in cooperation with any public or private agencies, including institutes, universities, foundations or research organizations. In so doing, the committee may hold public or private hearings. It may issue subpoenas under the hand and seal of its chairman commanding any person to appear before it and to answer questions touching matters properly being inquired into by the committee and to produce such books, papers, records and documents as the committee deems necessary. . . . Each member of the committee shall have power to administer oaths and affirmations to witnesses appearing before the committee. The committee may request and shall receive from any department, division, board, bureau, commission or agency of the State or any political subdivision thereof such facilities, assistance and data as it deems necessary or desirable to carry out properly its powers and duties. The Committee is hereby authorized and empowered to make and sign any agreements and to do and perform any acts that may be necessary, desirable or proper to carry out the provisions of this act. . . ."

*Manner of Submitting Proposals and Framing Ballot Questions*

In Section 8 of this Act, the Legislature has set forth the manner in which proposals are to be submitted to the electorate as follows:

recommendations shall be submitted to the electorate separately as determined by the convention.

replacements may be in any number of sections which the convention deems suitable.

the convention shall frame the ballot questions which shall bring its recommendations before the electorate.

there shall be no less than one separate question for each of the articles to be recommended by the convention.

the convention's recommendations and the framed questions must be certified by the president and secretary of the convention to the Secretary of the Commonwealth not later than the 7th day of March, 1968.

The Convention is empowered to include in its recommendations those provisions which it deems essential to provide against difficulty in moving from one system to another. The transfer from a prevailing judicial order into a new one is quite likely to involve grave problems of compensation, election, tenure, jurisdiction, the transfer of powers etc., and unless provision is made in advance for the elimination of such problems, confusion, uncertainty and inconvenience may result.

The traditional means for disposing of problems of this nature is a provision or series of provisions called the "Schedule" which makes all necessary adjustments in the movement from one condition to another. The schedule is then adopted along with the new constitutional provisions and has the force and effect of law.<sup>2</sup> The use of a schedule is not mandated and the Convention is free to adopt whatever method it chooses.

## **§2. History of the Present Judiciary Article**

§2.1. *Pennsylvania's Constitutional History in General.* In order to gain an understanding of the background of the present judiciary article, it is necessary to review briefly the Commonwealth's general constitutional history.

It is said that there have been four Constitutions of Pennsylvania, the Constitution of 1776, the Constitution of 1790, the Constitution of 1838 and finally, the present Constitution of 1874. The Constitution of 1838, however, was little more than an amendment to the Constitution of 1790 so that in reality there have been only three basic Pennsylvania Constitutions.

The Constitution of 1776 was framed while the Revolutionary War was still in progress and consisted of three parts: the Preamble or Declaration of Purposes; the Declaration of Rights somewhat similar to the present Bill of Rights, and the Plan or Frame of government. References to the Constitution of 1776 usually designate the Declaration of Rights as Chapter 1 and the Plan or Frame of Government as Chapter 2.

The Constitution of 1776 did not work well and the General Assembly decided that changes should be made. On September 15, 1789 it adopted a

resolution calling for a constitutional convention. The convention met and formulated a new constitution embodying a bicameral legislature. It concentrated executive powers in the Governor with qualified veto powers over legislation and strengthened the Bill of Rights. The convention itself declared the new constitution in effect and adjourned sine die [without day, i.e., without fixing a date for further meeting] on September 2, 1790. Thus, the Constitution of 1790 became the organic law of Pennsylvania without a vote of the people; their only choice in the matter was in the selection of the men who framed it.

Like its predecessor, the Constitution of 1790 was unsatisfactory. Under its provisions the Legislature had made extravagant expenditures and had been promiscuous and ill-advised in the granting of charters to corporations.<sup>3</sup> The question was submitted to the people whether a constitutional convention with limited powers should be called and the people answered in the affirmative. The Legislature then established the details and fixed the date of its first meeting.<sup>4</sup> After a draft of proposed amendments had been prepared, the matter was submitted to the people on October 9, 1838. The draft was approved by a narrow margin of 1200 votes.

Once more the Constitution was unsatisfactory; it seemed to have the same faults as the Constitution of 1790, i.e., it was still possible for the Legislature to enact special legislation. This apparently had become a habit. For example, between 1867 and 1874, only 475 general laws had been passed while during the same period there were 8,755 private laws benefitting individuals and corporations. In consequence, there was pressure for constitutional revision. The result was a constitutional convention which drafted the present Constitution and had it ready for presentation to the people on December 16, 1873. The people voted favorably and the new Constitution became effective January 1, 1874. The fact that the convention was held in 1873 and the Constitution became effective in 1874 has brought about some confusion; some call it the Constitution of 1873; others call it the Constitution of 1874. The latter group seems to be in the majority.

§2.2. *The Judiciary Prior to the Revolution.* A study of courts in Pennsylvania prior to the Constitution of 1776 would be a project of some magnitude. There was a conglomerate of courts, some of which were inherited from the regime of the Duke of York, some of which were created by William Penn and some of which were established by the Provincial Assembly. From time to time there were attempts to establish an orderly system and to define the powers and jurisdiction of the courts but often the statutes attempting this were nullified in England.

The patent of Charles II to Penn in 1681 gave Penn the "power and authority to appoint and establish any judges and justices, magistrates and officers whatsoever," and in his first proprietary Frame of Government in

1682 he committed himself to the appointment of judges for the term of their "good behaviour."<sup>5</sup> He himself commissioned six justices of a court for the town of New Castle on the Delaware and presided at a session of the court on November 12, 1682. The Provincial Assembly occasionally acted as a court, invading the jurisdiction of the county courts and taking cognizance of appeals from courts of inferior jurisdiction.

The Supreme Court of Pennsylvania was established in the Judiciary Act of 1722, May 22. That statute provided that the court should consist of one chief justice and two associate justices. It was to hold sessions twice a year in Philadelphia and go on circuit for the trial of cases. The 1722 Act was neither approved nor rejected in England but for some reason or other became superseded by the Act of 1727 passed by the Provincial Assembly. In 1767 the number of justices of the Supreme Court was increased to four.<sup>6</sup>

The judiciary under the various Constitutions is considered in subsequent subsections of this section. A summary of the main judiciary provisions appears in Table I.

§2.2a. *The Constitution of 1776.* Most of the early documents dealing with the government and courts of Pennsylvania were legislative in nature, combining criminal and civil laws with charter guarantees without much effort being made to develop a system.<sup>7</sup> The Constitution of 1776 marked the beginning of a new approach, i.e., the statement of a court structure in skeletal form. It required the establishment of courts of Justice in Philadelphia and in each county,<sup>8</sup> and the holding of courts of sessions, common pleas, and orphans courts quarterly in each city and county.<sup>9</sup> The Legislature was given the power to establish other courts as the needs arose.<sup>10</sup>

The Constitution provided for an Executive Council instead of a governor, and the president of this council and at least five members thereof were given the power to appoint and "commissionate" judges and fill vacancies.<sup>11</sup> Judges of the Supreme Court were to be commissioned for seven years by the Council and were eligible for reappointment. They could be removed by the General Assembly for misbehavior.<sup>12</sup>

The Supreme Court and the courts of common pleas were afforded the powers "usually exercised by such courts" and were given certain chancery powers.<sup>13</sup> This indicates that by this time in the history of the Commonwealth, the Supreme Court and the courts of common pleas had become so well established and known that it was not felt necessary to enumerate their powers and duties.

A feature unusual for that time was the provision for the election of justices of the peace. The Constitution provided for their election in each city and county, and gave the right to have two or more persons chosen as justices for each ward, township or district as the law might thereafter direct. Following election, one or more of them were commissioned for seven years,

TABLE I. CONSTITUTIONAL DEVELOPMENT OF THE PENNSYLVANIA JUDICIARY

| <i>Constitution</i> | Court Structure and Jurisdiction                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                  |
|---------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
|                     | <i>Supreme Court</i>                                                                                                                                               | <i>Other Courts</i>                                                                                                                                                                                                                                                                                                                                                                                   | <i>J. P. Courts</i>                                                              |
| 1776                | Powers then existing (trial and appellate) and certain chancery powers.                                                                                            | Philadelphia and County courts of justice with existing powers. Common Pleas and Orphans' Courts.                                                                                                                                                                                                                                                                                                     | Two or more for each ward, township or district.                                 |
|                     |                                                                                                                                                                    | Usual powers, specified chancery powers for common pleas courts.                                                                                                                                                                                                                                                                                                                                      | No specification of powers.                                                      |
| 1790                | Usual powers and certain chancery powers. Care of estates of & persons non compos mentis. Judges ex officio justices of oyer & terminer and general jail delivery. | Judicial circuits established; Common pleas judges ex officio judges of quarter sessions & justices of oyer & terminer and general jail delivery. Register's court established and common pleas judges made judges along with register of wills. Orphans' court with common pleas judges. Common pleas with appellate jurisdiction over J.P. Common pleas judges ex officio J.P. in criminal matters. | J.P. constitutionally established. Appointed. No specification of powers.        |
| 1838                | No change from prior Constitution.                                                                                                                                 | No substantial change in court structure except that circuits were dropped and judicial districts provided for.                                                                                                                                                                                                                                                                                       | No change from prior constitution. Judicial power specifically granted to J.P.s. |



1874

Seven judges provided for. Nisi prius jurisdiction abolished. Limited original jurisdiction conferred. Judges made ex officio justices of oyer & terminer and general jail delivery.

Register's court abolished. Aldermen abolished in Phila. and magistrates' courts substituted. Special provisions for courts of co-ordinate jurisdiction (common pleas) in Phila. and Allegheny Counties. By amendment in 1911 Allegheny common pleas courts reduced to one.

Residence requirements fixed for J.P.s. Number fixed at 2 for each ward, township, district or borough unless approved by electors. Aldermen limited to 1 for each ward or district in cities over 50,000 inhabitants.

#### Judicial Selection

##### *Constitution*

##### *Supreme Court*

##### *Other Courts*

##### *J. P. Courts*

1776

Judges appointed by the president and at least five members of the council (the council had a membership of 12). Commissions expired after seven years. Reappointment permitted.

Judges appointed by the president and at least five members of the council (the council had a membership of 12). Tenure - during good behavior.

Elected by the freeholders of each city and county for a period of 7 years.

1790

Appointed by the Governor.

Appointed by the Governor.

Appointed by the Governor.

1838

Appointed by the Governor by and with the consent of the Senate.

Appointed by the Governor by and with the consent of the Senate.

Elected in the wards, boroughs and townships at the time constables are elected. No more than two to be elected without the consent of the electors.

TABLE 1 (Continued)  
Judicial Selection (Continued)

| <i>Constitution</i> | <i>Supreme Court</i>                                                                                                                                                                                         | <i>Other Courts</i>                                                                                      | <i>J. P. Courts</i>                                                                                                                                                                                                                                                                                                                                                                            |
|---------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1874                | Elected by the people of the State at large. When 2 judges are to be chosen for the same term of service, each voter may vote for one only; when 3 are to be chosen, each voter may vote for no more than 2. | Judges learned in the law to be elected by the electors of the districts over which they are to preside. | Elected in the wards, boroughs and townships as directed by law. No more than two to be elected without the consent of the electors. One year residence required to be qualified. Only one alderman to be elected for each ward or district in cities over 50,000. Magistrates in Philadelphia to be elected; no more than $\frac{2}{3}$ the number to be elected may be voted for by a voter. |

Tenure and Removal

| <i>Constitution</i> | <i>Supreme Court</i>                                                                                                                                | <i>Other Courts</i>                                                                            | <i>J. P. Courts</i>                                                                                                                                               |
|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1776                | Appointed for 7 years with the right to be reappointed.<br><br>Removable for misbehavior by General Assembly.<br><br>Impeachable while in office or | During good behavior.<br><br>Impeachable while in office or afterward by the General Assembly. | Elected by the people. Commissioned by the president in council from among those chosen for seven years.<br><br>Removable for misconduct by the General Assembly. |

|      |                                                                                                                   |                                                                                                                                    |                                                                                                                                 |
|------|-------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
|      | Appointed with tenure during good behavior.                                                                       | Common pleas to have tenure during good behavior.                                                                                  | Appointed and commissioned for a tenure of good behavior.                                                                       |
| 1790 | Removable by the governor on the address of $\frac{2}{3}$ of each house for cause not sufficient for impeachment. | Removable in the same way and for the same causes as judges of the Supreme Court.                                                  | Removable on conviction of misbehavior in office or of any infamous crime, or on the address of both houses of the legislature. |
|      | Impeachment for misbehavior in office. Sole power of impeachment in the House but trial in the Senate.            |                                                                                                                                    |                                                                                                                                 |
|      | (As amended 1850)<br>Elected for a term of 15 years.                                                              | (As amended 1850)<br>All judges learned in the law elected for a term of 10 years. Associates of common pleas a tenure of 5 years. | Elected by the people and commissioned by the governor for 5 years.                                                             |
| 1838 | Removable by the governor for causes not grounds for impeachment on the address of $\frac{2}{3}$ of each house.   | Removable as judges of the Supreme Court are removed.                                                                              | Removable on conviction of misbehavior in office or of any infamous crime.                                                      |
|      | Elected for 21 years without eligibility for re-election.                                                         | All judges learned in the law elected for a term of 10 years.                                                                      | Elected by the people and commissioned by the governor for 6 years.                                                             |
| 1874 | Removable by impeachment or by conviction of misbehavior in office or of any infamous crime.                      | Removable by the governor on the address of $\frac{2}{3}$ of each house for causes not impeachable. Impeachment.                   | Removable by impeachment, address or conviction of misbehavior in office or of any infamous crime.                              |

removable for misconduct by the general assembly. Justices were forbidden to sit in the General Assembly and to take any fees, salary or allowance except such as the Legislature might grant.<sup>14</sup>

§2.2b. *The Constitution of 1790.* The Constitution of 1790 provided for the election of a governor by popular vote instead of the plural executive previously established.<sup>15</sup> It also provided that the Governor should appoint all officers whose offices were established by the Constitution.<sup>16</sup> This is important, for although in the Judicial Article the Constitution gave the Governor the right to remove the judges of the Supreme Court on the address of two-thirds of each branch of the Legislature,<sup>17</sup> it did not otherwise make specific provision for their appointment. There was, however, specific provision for gubernatorial appointment in each county of not fewer than three nor more than four judges to become judges of the courts of common pleas,<sup>18</sup> and of a competent number of justices of the peace as directed by law.<sup>19</sup> These provisions made all judicial offices from justices of the peace to judges of the Supreme Court appointive in nature and eliminated justices of the peace as elective officers as provided in the Constitution of 1776.

It was in the Constitution of 1790 that for the first time a judicial system began to take shape. It provided that the judicial power of the Commonwealth was to be vested in a Supreme Court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, register's court, and a court of the quarter sessions for the peace for each county, in justices of the peace and in such other courts as the Legislature might, from time to time, establish.<sup>20</sup> The judges of the Supreme Court and of the courts of common pleas were given tenure during good behavior,<sup>21</sup> and the judges of the Supreme Court were made ex officio justices of oyer and terminer and general jail delivery in the several counties. The jurisdiction of the court itself extended over the entire state.<sup>22</sup>

A new feature was introduced in the Constitution of 1790 in a provision for dividing the state into judicial circuits composed of from three to six counties. A president was to be appointed for the courts of common pleas in each circuit and he was required to reside therein. Common pleas judges were made ex officio justices of oyer and terminer and general jail delivery but they were not authorized to hold such courts in any county when any of the judges of the Supreme Court were sitting there.<sup>23</sup>

As in the Constitution of 1776,<sup>24</sup> the Supreme Court and the courts of common pleas, in addition to the powers formerly exercised by them, were given specified chancery powers and the duty of care of the persons and estates of persons *non compos mentis*. The Legislature was afforded the power to extend to both courts such powers to grant relief in equity as might be found necessary and to enlarge and diminish those powers, or vest them in other courts as the Legislature might deem proper for the due administration of justice.<sup>25</sup>

The judges of common pleas also became ex officio judges of the quarter sessions courts and orphans' courts and, along with the register of wills, of the register's court of each county.<sup>26</sup> They had the same powers as the judges of the Supreme Court to issue writs of certiorari to the justices of the peace,<sup>27</sup> and were themselves made justices of the peace ex officio in criminal matters.<sup>28</sup>

The following seem to be the salient features of the 1790 Constitution:

- \* the lodgment of judicial power in the several courts
- the absence of a requirement that judges be learned in the law
- the jurisdiction of the courts was only partially touched upon
- the establishment of judicial circuits
- the continued appointment of all judicial officers

§2.2c. *The Constitution of 1838.* The constitutional convention which assembled on May 2, 1837, deliberated for almost seven months. As reported by Rosalind L. Branning,<sup>29</sup> the convention met in an atmosphere of intense political excitement. The chief issues were the governor's powers of appointment, tenure of office, method of choice of judges, the voting franchise, public education, and banking and corporate charters. The most heated debate centered around the tenure of judges and regulations of banks and other corporations.

There were demands for the popular elections of judges by the Democrats in the convention but a coalition of Antimasons and Whigs over the Democrats made it impossible. In consequence, the attack had to be on life tenure. This had some success. As finally adopted, the Constitution provided for the appointment of judges by the Governor by and with the consent of the Senate. The tenure of Supreme Court judges was fixed at fifteen years; the tenure of all other judges required to be learned in the law was fixed at ten years, and the tenure of associate judges was established at five years.<sup>30</sup> The office of justice of the peace was once more made elective and the term was fixed at five years.<sup>31</sup>

The Constitution of 1838 was no sooner adopted than some of the charges which had been laid before the convention were reasserted. The principal complaint was that the broad powers of appointment lodged in the Governor provided him with so much patronage that his political domination of the state was insured. There was also a growth of Jacksonian democracy which contended for a tight rein of government in the hands of the people. This made gubernatorial appointment an anathema to its followers. As a result, Article V, §2 of the Constitution was amended in 1850. The amendment provided for the election of all judges by the electorate, the Supreme Court to be elected at large and all other judges by the voters of the districts of counties in which they were to preside. Except for the scheduling which

provided for the change from one system to another, the terms of office remained as established in the original section.

The circuit courts which were established by the 1790 Constitution were abandoned in 1838 but in almost all other respects the judicial structure remained unchanged. There were eleven sections contained in Article V of the 1838 Constitution and twelve sections in the same article of the Constitution of 1790. A side-by-side view of these discloses the following:

eight of the 12 sections of the Constitution of 1790 were adopted verbatim by the Constitution of 1838.

Section 2 of Article V of the Constitution of 1790 was originally changed in 1838 from life tenure to terms of years, and the selection of judges by the Governor by and with the consent of the Senate was substituted for the appointment of judges solely by the Governor. In 1850 by further amendment this was changed to provide for the election of judges by the people.

The provisions of Art. V, §4 of the Constitution of 1790 were largely merged in the provisions of Sections 2 and 3 of the Constitution of 1838. Circuit courts were dropped but judicial districts are mentioned and there was a proscription against more than five counties in any one district.

Section 10 of Article V of the Constitution of 1790 which provided for the appointment of justices of the peace was changed in Article VI, §7 of the Constitution of 1838 to make justices of the peace elective officers.

§2.2d. *The Constitution of 1874 (The Present Constitution).* The constitutional convention held in 1873 saw the resurrection of some ancient controversies with respect to the judiciary. The committee of delegates on the judiciary was divided on a number of points but there was particular trouble with the manner of selecting judges. The committee recommended to the convention that the judges of the Supreme Court be appointed by the Governor and that local judges be elected by the people, but some members of the committee felt that all judges should be appointed. Those who supported the majority view felt that the election of local judges could be justified on the theory that the voters would know the candidates and could intelligently appraise their capacities; the situation would be different, however, with respect to statewide candidates who would, presumably, be strangers to a large segment of the population.

Another view was that electors are not likely to know much about the qualifications of any judicial candidate, either local or statewide, and that under the elective system no one could win without being a consummate politician. It was also argued that a court should not be treated as a representative body of the people and the judges thereof should not be elected for courts should not "represent any interest, any party or any combination whatever."<sup>32</sup>

But the election of judges had been settled by the 1850 amendment to Article V, §2 of the Constitution of 1838 and the delegates were not dis-

posed to disturb it after only twenty-three years of experience. In consequence, the new Constitution required the election of all judges. In the case of the Supreme Court there was an interesting provision: in order to make it probable that there would be minority party representation on the court, it was provided in Article V, §16, that whenever two judges of the Supreme Court are to be chosen for the same term of service, each voter may vote for only one candidate, and when three are to be chosen, he shall vote for no more than two. The candidates highest in vote are to be declared elected.

The Constitution of 1874 increased the number of judges of the Supreme Court to seven<sup>33</sup> and established the term of office as twenty-one years without eligibility for re-election.<sup>34</sup> In 1873, as in 1967, there was a hue and cry about the backlog of cases which obtained in the courts. In truth, there was a backlog in 1873 but it existed in the Supreme Court and not in the inferior ones. Although there were some who claimed that the Supreme Court was not industrious and engaged in practices which were not desirable, the probable reason for the pile-up of cases was that the Supreme Court was then exercising *nisi pruis* [trial] jurisdiction as well as appellate jurisdiction. As a result, Article V, §21 of the Constitution specifically abolished the Supreme Court's *nisi prius* jurisdiction. In Section 3 of Article V, the court was given a limited original jurisdiction for the purpose of issuing certain writs<sup>35</sup> and to all intents and purposes the Supreme Court was turned into a court having almost no original jurisdiction. There was one exception. The Constitution made the Supreme Court judges *ex officio* justices of oyer and terminer and general jail delivery in the several counties. This meant that the court could assign one of its members to sit as trial judge in oyer and terminer court if the court saw fit. This power, although rarely exercised, has sometimes been used by the Supreme Court in unusual situations.<sup>36</sup>

The Register's court which had been established by Article V, §1 of the 1790 Constitution was abolished in 1874.<sup>37</sup> The magistrates' courts in Philadelphia were substituted in place of Alderman's courts<sup>38</sup> and although this provision was subjected to a minor amendment in 1909, the magistrates' courts remained and the abolition of the aldermanic courts was reiterated.

The new Constitution took all of the jurisdiction and powers formerly vested in the district courts and courts of common pleas in Philadelphia and Allegheny Counties and vested them in four common pleas courts of co-ordinate jurisdiction in Philadelphia having three judges each, and two common pleas courts of co-ordinate jurisdiction in Allegheny County also having three judges each.<sup>39</sup> However, by amendment in 1911, the number of common pleas courts in Philadelphia was increased to five and in Allegheny County the number was reduced to a single common pleas court. The Constitution provided that the number of courts in Philadelphia could be enlarged from time to time and that the number of judges in Allegheny County

could be increased as the need arose. By Act of Assembly in 1965<sup>40</sup> the number of courts in Philadelphia was increased to ten and by the addition of other judges in Allegheny County in August 1963,<sup>41</sup> the number of judges in that jurisdiction was increased to nineteen.

The Constitution provides that whenever a county has a population of forty thousand inhabitants it shall constitute a separate judicial district<sup>42</sup> and it limits the number of counties which may be included in a single district to four.<sup>43</sup> The Constitution of 1838 had fixed the maximum number of counties in one district at five. The new charter also provided that counties not having sufficient population to constitute separate districts could be formed into single districts or, if necessary, attached to contiguous districts as provided by the Legislature. The office of associate judge not learned in the law was abolished in counties forming separate districts. It was held shortly after the adoption of the Constitution that associate judges were still to be elected in counties without a sufficient population to form separate districts.<sup>44</sup>

### **§3. Article V of the Present Constitution.**

As noted in §1. *supra*, the attention of the Convention with respect to judicial administration, organization, selection and tenure is centered upon Article V of the present Constitution. Set forth below are the provisions of said Article, including amendments thereto, together with a reference to corresponding provisions in earlier constitutions.<sup>45</sup>

## **ARTICLE V**

### **THE JUDICIARY**

Sec. 1. *Judicial Power.* The judicial power of this Commonwealth shall be vested in a Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish.

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 26.

Constitution of 1790, Art. V, Sec. 1.

Constitution of 1838, Art. V, Sec. 1.

Sec. 2. *Supreme Court.* The Supreme Court shall consist of seven judges who shall be elected by the qualified electors of the State at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall in turn be chief justice.

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 23.



Constitution of 1790, Art. V, Sec. 2.

Constitution of 1838, Art. V, Sec. 2.

Sec. 3. *Jurisdiction of Supreme Court.* The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 3.

Constitution of 1838, Art. V, Sec. 4.

Sec. 4. *Common Pleas Courts.* Until otherwise directed by law, the courts of common pleas shall continue as at present established, except as herein changed; not more than four counties shall, at any time, be included in one judicial district organized for said courts.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 4.

Constitution of 1838, Art. V, Sec. 3.

Sec. 5. *Judicial Districts. Associate Judges.* Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges, as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts, or if necessary, may be attached to contiguous districts as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts, but the several associate judges in office when this Constitution shall be adopted shall serve for their unexpired terms.

Sec. 6. *Court of Common Pleas of Philadelphia and Allegheny Counties.* In the county of Philadelphia all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this Constitution or by law, shall be in Philadelphia vested in five distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each. The said courts in Philadelphia shall be designated respectively as the court of common pleas number one, number two, number three, number four, and number five, but the number of said courts may be by law increased, from time to time, and shall be in like man-

ner designated by successive numbers. The number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased, from time to time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of the said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court, to which any suit shall be thus assigned, shall have exclusive jurisdiction thereof, subject to change of venue, as shall be provided by law.

In the county of Allegheny all the jurisdiction and powers now vested in the several numbered courts of common pleas shall be vested in one court of common pleas, composed of all the judges in commission in said courts. Such jurisdiction and powers shall extend to all proceedings at law and in equity which shall have been instituted in the several numbered courts, and shall be subject to such changes as may be made by law, and subject to change of venue as provided by law.

The president judge of said court shall be selected as provided by law. The number of judges in said court may be by law increased from time to time. This amendment shall take effect on the first day of January succeeding its adoption. (Amendment of November 7, 1911.)

Section six of article five of this Constitution originally read as follows:

Sec. 6. In the counties of Philadelphia and Allegheny all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this Constitution or by law, shall be in Philadelphia vested in four, and in Allegheny in two, distinct and separate courts of equal and coordinate jurisdiction, composed of three judges each: the said courts in Philadelphia shall be designated respectively as the court of common pleas number one, number two, number three and number four, and in Allegheny as the court of common pleas number one and number two, but the number of said courts may be by law increased, from time to time, and shall be in like manner designated by successive numbers: the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time, and whenever such increase shall amount in the whole to three such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court, to which any suit shall be thus assigned, shall have exclusive jurisdiction thereof, subject to change of venue as shall be provided by law. In Allegheny each court shall have exclusive jurisdiction of all proceedings at law and in equity, commenced therein, subject to change of venue as may be provided by law.

Sec. 7. *Prothonotary of Philadelphia. Salaries. Fees. Dockets.* For Philadelphia there shall be one prothonotary's office, and one prothonotary fo

all said courts to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said courts; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county; all fees collected in said office, except such as may be by law due to the Commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket which shall contain the judgments and liens of all the said courts, as is or may be directed by law.

Sec. 8. *Criminal Courts in Philadelphia and Allegheny Counties.* The said courts in the counties of Philadelphia and Allegheny, respectively, shall, from time to time, in turn detail one or more of their judges to hold the courts of oyer and terminer and the courts of the quarter sessions of the peace of said counties, in such manner as may be directed by law.

Sec. 9. *Powers of Judges of Common Pleas Courts.* Judges of the courts of common pleas learned in the law shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' Court, and within their respective districts shall be justices of the peace as to criminal matters.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 5.

Constitution of 1838, Art. V, Secs. 5, 7, 9.

Sec. 10. *Certiorari to Courts not of Record.* The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of certiorari to justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice to be done.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 8.

Constitution of 1838, Art. V, Sec. 8.

Sec. 11. *Justices of the Peace. Aldermen. Term. Residence. Number.* Except as otherwise provided in this Constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs or townships, by the qualified electors thereof, at the municipal election, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of six years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than

one alderman shall be elected in each ward or district. (Amendment of November 2, 1909).

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 30.

Constitution of 1790, Art. V, Sec. 10.

Constitution of 1838, Art. VI, Sec. 7.

Section eleven of article five of this Constitution originally read as follows:

Sec. 11. Except as otherwise provided in this Constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and township at the time of the election of constables by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of five years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district.

Sec. 12. *Magistrates' Courts in Philadelphia. Election. Term. Salaries. Jurisdiction.* In Philadelphia there shall be established, for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be six years, and they shall be elected on general ticket at the municipal election, by the qualified voters at large; and in the election of the said magistrates no voter shall vote for more than two thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county; and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of aldermen is abolished. (Amendment of November 2, 1909).

Section twelve of article five of this Constitution originally read as follows:

Sec. 12. In Philadelphia there shall be established, for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be five years, and they shall be elected on general ticket by the qualified voters at large; and in the election of the said magistrates no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished.

Sec. 13. *Disposition of Fees, Fines, etc.* All fees, fines and penalties in said courts shall be paid into the county treasury.

Sec. 14. *Appeal from Summary Conviction.* 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.

Sec. 15. *Election of Judges. Term. Removal. Temporary Assignment of Former Judges.* All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of General Assembly.

The Chief Justice of the Supreme Court may designate and assign former judges, learned in the law, who are willing so to do, who have served at least one term and who have not been defeated for reelection, to the office of judge of any court of record, to temporarily sit in the courts of any judicial district for the disposal of business under such circumstances and subject to such qualifications and conditions as the General Assembly may prescribe. (Amendment of November 2, 1965).

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 20.

Constitution of 1790, Art. V, Secs. 2,4.

Constitution of 1838, Art. V, Sec. 2, (Amendment of 1850).

Section 15 of article five of this Constitution originally read as follows:

Sec. 15. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of the General Assembly.

Sec. 16. *Voting for Supreme Court Judges.* Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two; candidates highest in vote shall be declared elected.

Sec. 17. *Priority of Commission.* Should any two or more judges of the Supreme Court, or any two or more judges of the court of common pleas for the same district, be elected at the same time, they shall, as soon after the election as convenient, cast lots for priority of commission, and certify

the result to the Governor, who shall issue their commissions in accordance therewith.

Corresponding provisions of prior Constitutions:

Constitution of 1838, Art. V, Sec. 2, (And amendment of 1850)

Sec. 18. *Compensation of Judges.* The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their service an adequate compensation, which shall be fixed by law, and paid by the State. They shall receive no other compensation, fees or perquisites of office for their services from any source, nor hold any other office of profit under the United States, this State or any other State.

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 23.

Constitution of 1790, Art. V, Sec. 2.

Constitution of 1838, Art. V, Sec. 2, (Amendment of 1850).

Sec. 19. *Residence of Judges.* The judges of the Supreme Court, during their continuance in office, shall reside within this Commonwealth; and the other judges, during their continuance in office, shall reside within the district for which they shall be respectively elected.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 4.

Constitution of 1838, Art. V, Sec. 2, (Amendment of 1850).

Sec. 20. *Chancery Powers.* The several courts of common pleas, besides the powers herein conferred, shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas of this Commonwealth, or as may hereafter be conferred upon them by law.

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 24.

Constitution of 1790, Art. V, Sec. 6.

Constitution of 1838, Art. V, Sec. 6.

Sec. 21. *Duties of Judges. Nisi Prius Courts. Supreme Court Judges.* No duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided. The court of nisi prius is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the Supreme Court shall be established.

Sec. 22. *Orphans' Courts. Registers' Courts Abolished.* In every county wherein the population shall exceed one hundred and fifty thousand, the General Assembly shall, and in any other county may, establish a separate

orphans' court, to consist of one or more judges who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in or which may hereafter be conferred upon the orphans' courts, and thereupon the jurisdiction of the judges of the court of common pleas within such county, in orphans' court proceedings, shall cease and determine. In any county in which a separate orphans' court shall be established, the register of wills shall be clerk of such court and subject to its directions, in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said court. All accounts filed with him as register or as clerk of the said separate orphans' court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor whom the court may, in its discretion, appoint. In every county orphans' courts shall possess all the powers and jurisdiction of a registers' court, and separate registers' courts are hereby abolished.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 7.

Constitution of 1838, Art. V, Sec. 7.

Sec. 23. *Style of Process. Indictments.* The style of all process shall be "The Commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same."

Corresponding provisions of prior Constitutions:

Constitution of 1776, Sec. 27.

Constitution of 1790, Art. V, Sec. 12, (Verbatim).

Constitution of 1838, Art. V, Sec. 11, (Verbatim).

Sec. 24. *Appeal to Supreme Court in Criminal Cases.* In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused after conviction and sentence, may remove the indictment, record, and all proceedings to the Supreme Court for review.

Corresponding provisions of prior Constitutions:

Constitution of 1790, Art. V, Sec. 5.

Constitution of 1838, Art. V, Sec. 5.

Sec. 25. *Vacancies in Courts of Record.* Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy.

Corresponding provisions of prior Constitutions:

Constitution of 1838, Art. II, Sec. 8.

Constitution of 1838, Art. V, Sec. 2, (Amendment of 1850).

Sec. 26. *Uniform Laws for Courts. Certain Courts Prohibited.* All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this Constitution in the judges of the courts of common pleas and orphans' courts.

Sec. 27. *Litigants may Dispense with Jury Trial.* The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

Sec. 28. *Justices of the Peace and Aldermen. Course of Education and Training.* The General Assembly may, by general law, provide that a course of training and education be completed by justices of the peace and aldermen hereafter selected who have not been admitted to practice law in this Commonwealth. The required course of training and education shall not exceed three months' duration, one month of which shall be taken after their election and prior to their assuming office. The remaining two months of training and education shall be taken immediately after assuming office. Their jurisdiction shall extend to summary offenses only prior to completion of the required course. Persons who have served as justices of the peace or aldermen prior to the adoption of this amendment shall not be required to take this course. The required course shall be at the cost of the Commonwealth. (Adopted November 8, 1966).

#### **§4. Constitutional Provisions Other than Article V Which Bear Upon the Judiciary**

Not all provisions of the Constitution of 1874 which bear upon the judiciary are contained in Article V. It is perhaps this circumstance which prompted the Legislature, in Section 7(a) of Act Number 2 of the 1967 Regular Session of the General Assembly, to authorize the Convention to make recommendations on Judicial Administration, Organization, Selection and Tenure "(now covered in part by Article V of the Constitution)." [Emphasis supplied]. Apart from the fact that the courts are required to protect, defend and enforce every provision of the Constitutions of both Pennsylvania and the United States there are two types of provisions which have some particular relation to the judiciary: those which indirectly impose some duty or limitation on the courts, and those which directly affect them. The Convention may wish to have these in mind when deliberating upon matters within the framework of its duties.



§4.1. *Provisions Indirectly Bearing upon the Judiciary.* Many of the provisions of the Bill of Rights contained in Article 1 control the powers and duties of the courts. The declaration of the natural rights of mankind set forth in Section 1, for example, imposes upon the courts the protection of the right to defend life and property and the right to possess and protect property and reputation. In Section 3, the courts are indirectly prohibited from interfering with freedom of worship and the rights of conscience, and in Section 6 they are enjoined to preserve inviolate the right to trial by jury. Section 7 preserves freedom of speech and of the press and defines the rights of the accused in libel prosecutions. Section 8 guarantees freedom from unreasonable searches and seizures and lays down guidelines for the issuance of search and body warrants; in Section 9 the rights of any accused person in all criminal prosecutions are defined. These are the right to:

- be heard by himself and his counsel.
- demand the nature and cause of the accusation against him.
- meet witnesses face to face.
- have compulsory process for obtaining witnesses in his favor.
- have a speedy public trial.
- trial by an impartial jury of the vicinage.
- be free of compulsion to give evidence against himself.
- be free of a deprivation of his life, liberty or property, unless by the judgment of his peers or the law of the land.

In Section 10 the right to indictment as a form of criminal accusation is preserved and a proscription is imposed against an accused being placed twice in jeopardy of life or limb. In the field of eminent domain, this section forbids the taking or application of private property for public use without authority of law and without just compensation being first made or secured. In Section 13 the courts are forbidden to demand excessive bail, to exact excessive fines or inflict cruel punishments. In Section 14 the courts are told that all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great, and in the same section the right to the writ of habeas corpus may not be suspended unless there is a rebellion, an invasion or the public safety may require it. Section 15 forbids the issuance of a commission of oyer and terminer or jail delivery—a proscription designed to prevent the creation of a special tribunal to try individuals or classes of cases, to serve a temporary purpose, and end with its accomplishment.<sup>46</sup>

Section 16 forbids the continuance in prison of debtors unless there is a strong presumption of fraud when the debtor delivers up his estate for the benefit of his creditors.

§4.2. *Provisions Directly Bearing upon the Judiciary.* In preparing recommendations for constitutional provisions dealing with judicial administration, organization, selection and tenure the Convention should have in mind those provisions of the present Constitution which have a direct bearing upon the judiciary or one of its branches. For example, in considering any changes affecting the minor judiciary and courts not of record, it should be remembered that under Article 15, §4 the general assembly is authorized to provide for the consolidation of the county, poor districts, city borough and townships of Allegheny County and to provide a charter for its government. In said charter the Legislature may provide for the "organization of all courts, other than those of record, in the consolidated city and for the appointment and/or election of the judges and officers thereof and for the procedure thereof, including the right to provide that said courts be courts of record, which courts may exercise the jurisdiction, powers and rights of the magistrates, aldermen and justices of the peace, and such other jurisdiction and powers as may be conferred by law."

Article V, §25 of the present Constitution provides that the Governor shall fill by appointment any vacancy happening by death, resignation or otherwise in any court of record, such appointment to continue till the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of such vacancy. While this provision is within the purview of the Convention's competence, before proposing any change in the manner of filling vacancies in judicial office, the Convention should bear in mind the provisions of Article IV, §8. That section, *inter alia*, provides that the Governor shall have the power to fill all vacancies that may happen in offices to which he may appoint during the recess of the Senate, by granting commissions which shall expire at the end of their next session; he shall have the power to fill any vacancy that may occur in such recess "... in a judicial office." If the vacancy occurs during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of the Constitution, unless the vacancy occurs within two calendar months immediately preceding such election day, in which case the election for said office must be held on the second succeeding election day appropriate to such office.

Article VIII, §3 makes provision for the election of judges at Municipal Elections, and this section also should be considered if the Convention proposes any change in the manner of judicial selection.

Other constitutional provisions mention either the judges or the courts in the body thereof. Article VI "dealing with impeachment and removal from office, for example, provides that judges of the courts of record may not be

removed at the pleasure of the power by which they shall have been appointed and they may not be removed by the Governor for reasonable cause on the address of two-thirds of the Senate as is the case with some other officers. In any event, if the Convention considers any suggested changes in impeachment and removal of judges, Article VI should be given full consideration.

Other provisions of less importance to proposals for revision appear throughout the Constitution. Article III, §23 vests the power to change the venue [place of trial] in civil and criminal actions in the courts; Article I, §11 requires that all courts shall be open; that every man for an injury done him in his lands, goods, person or reputation shall have a remedy by due course of law, and justice must be administered without sale, denial or delay. This section also provides that suit may be brought against the Commonwealth in such manner and in such courts and in such cases as the Legislature may by law direct. Article VIII, §17 provides that the trial of contested elections must be by courts of law, or by one or more of the law judges thereof, and Article IV, §17 requires the Chief Justice to preside at the trial of contested elections of Governor or Lieutenant Governor and shall decide questions of the admissibility of evidence and give his opinion upon questions of law involved in the trial. Article VIII, §15 disqualifies office holders from being election officers but specifically exempts justices of the peace and aldermen from this proscription. Finally, Article VI, §3, prescribes the form of oath to be taken by all judicial officers [The oath was formerly contained in Article VII, §1].

#### **§5. Pennsylvania's Court Structure.**

Several thousands of years ago, Jethro, the father-in-law of Moses, devised a theory for the establishment of a court system. As related in Exodus,<sup>48</sup> Jethro became absorbed in watching Moses sit in judgment on the people and became concerned over the heavy case load his son-in-law was carrying. Noting that this was not healthy nor efficient, Jethro gave Moses some common sense advice. He suggested that Moses first give the people a basic education in law and the essentials of congregate living, and then to appoint able men, "... such as fear God, men of truth, hating covetousness; and place such over them to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens." These men, according to the scheme, were to judge the people in small matters, saving the more important ones to be decided by Moses himself.

Practically every modern court system has followed the Jethro device for the division of labor among courts. The general practice is to establish inferior courts for relatively small matters, intermediate courts for more important affairs, and a high court to decide broad policies, to correct the errors of the courts below and to make final interpretations of the law. Al-

though Pennsylvania, in general, follows this pattern, because of our industrial and commercial development, our court system has grown to become highly complex. A substantial number of courts have been created, each having separate jurisdictional authority, and the great body of the law has itself been separated into components and allocated to particular tribunals for the more efficient disposition of business.

The Constitution of 1874 specifically vests the judicial power of the Commonwealth in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and such other courts as the General Assembly may from time to time establish.<sup>49</sup> This section differs from the corresponding sections of the Constitutions of 1790 and 1838 in that it does not specifically vest the judicial power in justices of the peace. However, an equivalent status was conferred by the present Constitution in vesting judicial power in "Magistrates" courts, and in such other courts as the General Assembly may from time to time establish."

The words "court" and "judge" are so frequently used interchangeably that persons unlearned in the law are apt to confuse the two. The difference has been explained by the Supreme Court in this language: <sup>50</sup>

By "court" is to be understood a tribunal officially assembled under authority of law at the appropriate time and place for the administration of justice. By "judge" is to be understood simply an officer or member of such tribunal. Whether an act is to be performed by one or the other is generally determined by the character of the act, but whenever it is a statutory power or duty conferred or prescribed upon the court it can only be discharged by the assembled tribunal, however composed, whether of one judge or several.

It is important, therefore, in gaining an insight to the court structure of any state, to discover the nature of each court, its jurisdiction and how it is judicially manned.

In general terms, there are several broad classifications of courts; those of record and those not of record; those that are superior and those that are inferior; those that have criminal jurisdiction and those that have civil jurisdiction, and in the latter category, those that have equity powers.

Courts of record are those whose acts and judicial proceedings are recorded and which have the power to fine or imprison for contempt. They are organized tribunals having attributes and exercising functions independently of the persons designated to hold them.<sup>51</sup> Historically, courts of record were those high courts created by the King's prerogative whose records could not, by reason of Royal infallibility, be impeached or attacked. Now, as in ancient England, the distinction is not between courts which keep records and those which do not. Courts not of record keep records, of course, but generally there is a merging of the office of the presiding officer and the court itself so as to render the two almost indistinguishable at times. As

Blackstone explained it<sup>52</sup> in his *Commentaries on the Laws of England*, a court not of record "is the court of a private man in England, as courts baron, incident to every manor." The counterparts of these in Pennsylvania are courts generally having the incidents and powers of justices of the peace.

An inferior court is one whose judgments and decrees can be reviewed on appeal or writ of certiorari [a writ directing a court to send up its records for review] by a tribunal having the authority to do so. A superior court is, of course, a court which has the power to review the judgments or decrees of a lower court, or which has control over a lower court.

Courts which exercise criminal jurisdiction are courts charged with administering the penal laws and the imposition of sanctions against persons who commit wrongs against the public. Such criminal jurisdiction can extend from hearing accusations against a prisoner charged with simple assault to the trial of an accused for murder. Offenses less than misdemeanors or felonies, such as violations of the game laws or the speeding provisions of the Vehicle Code are not usually classified as criminal cases although they may be so considered. These are usually, though not always, made punishable by a trial before a judicial officer without jury, in which case they are called "summary offenses." Justices of the peace, aldermen and magistrates usually have summary jurisdiction in minor criminal matters and act as committing officers in criminal cases, i.e., they hold hearings to determine whether it is probable that a crime has been committed and if so, whether the accused is probably the one who committed it. If both of these affirmatively appear, the justice, alderman or magistrate as the case may be holds the accused to answer to a tribunal which has jurisdiction to try him.

A court exercising civil jurisdiction disposes of issues between individuals or between individuals and legal entities. At times, civil jurisdiction extends to non-criminal issues between individuals and the Commonwealth. Civil courts are concerned with the ascertainment, enforcement and redress of private rights. A branch of the civil jurisdiction exercised by some courts is called equity, i.e., the court administers justice according to principles of justice and equity when there is no adequate remedy at law. The powers thus exercised are often called chancery powers. Justices of the peace and magistrates are generally afforded jurisdiction in civil matters.

While the powers and duties of the various judges throughout Pennsylvania can be derived from a study of the jurisdiction of the courts in which they preside, it is difficult to define the powers and duties of associate judges unlearned in the law. They have existed since the very foundation of the Commonwealth and it was not until the Constitution of 1838<sup>53</sup> that there was a reference to judges "learned in the law," thus recognizing the existence of judges who were not learned in the law. In the Constitution of 1874<sup>54</sup> the existence of lay judges was acknowledged in the abolition in counties

forming separate judicial districts of the office of associate judge not learned in the law.

Under the provisions of Article V, §5 of the Constitution and Schedule No. 1, §16, as interpreted by the Supreme Court, associate judges are to be elected in counties without sufficient population to form separate judicial districts. Such judges are, to all intents and purposes, judges of the court of record in their respective counties although their powers are limited.<sup>55</sup> When a county unqualified for separate existence as a judicial district is attached by the Legislature to one which is qualified, the qualified county retains all of the rights of a separate judicial district, i.e., it is entitled to a resident law judge; lay judges are not elected for such county. On the other hand, the unqualified county is entitled to elect its own lay judges and has the right to the services in court of the law judge from the qualified county to which it is attached.<sup>56</sup> Both counties, however, participate in the election of the law judge.<sup>57</sup> Apparently, since the Constitution has abolished lay judges only in counties forming separate districts, if two unqualified counties are joined together into a single district, each may elect associate judges even though only one law judge may be provided for the consolidated district.

In the early days of the Commonwealth when travel was difficult and distances a barrier, lay judges were of material help in the administration of justice. Their greatest use was found in their local knowledge. Their presence in the counties when the law judge was absent enabled them to fix bail, approve sureties, appoint viewers, appraisers, guardians, committees and do other matters required to be done in the Quarter Sessions and Orphans' Courts.<sup>58</sup> They sat with the law judge and assisted him in the trial of cases in Oyer and Terminer Court and if there was a conviction, they consulted with him as to penalty.<sup>59</sup> Occasionally they took the bit in their teeth and overruled the law judge with the result that appeals were taken to the appellate courts and some confusion resulted as to their powers.<sup>60</sup> The matter seemed finally to have become settled in *Commonwealth v. Lenhart*, 241 Pa. 129 (1913) where the lay judges overruled the decision of a law judge. There the Supreme Court said (p. 136): "They were elected as judges unlearned in the law, and, if men of ordinary intelligence, ought to have known that it was never contemplated by the Constitution that they should ever set up their judgment against that of the head of the court on a matter of law."

After studying the cases respecting the powers and duties of associate judges unlearned in the law, one learned writer said this: <sup>61</sup>

The rule now seems well established that on questions of law the associate judges may not overrule the judgment of the president judge but that on questions of fact, and in the exercise of discretion by the court, the judgment of the majority of the court governs.

§5.1 *Pennsylvania's Judiciary.* In order to understand fully the complexity of Pennsylvania's court system, it is wise to begin with the men who man the benches of the various courts. These fall into seven categories: (1) trial judges, (2) appellate court judges,<sup>62</sup> (3) orphans' court judges, (4) juvenile court judges, (5) County court judges, (6) Associate judges unlearned in law, and (7) justices of the peace, magistrates, aldermen and mayors of boroughs and cities. Many of these wear two judicial hats, as for example, the judges of the courts of common pleas who in some jurisdictions are also judges of the juvenile court and the orphans' court. They are also appellate judges in appeals from certain administrative tribunals and justices' courts, and are themselves justices of the peace in criminal matters. They are, of course, trial judges in both civil and criminal courts. The Supreme Court, although an appellate court, has jurisdiction to assign one of its members to try cases in oyer and terminer court.

The current magnitude of the judicial manpower of the Commonwealth can be seen in the following table which gives the number of judges in each category:

| JUDGES                                     | NUMBER OF |
|--------------------------------------------|-----------|
| Associate judges unlearned in the law..... | 28        |
| Common pleas.....                          | 163       |
| County Court of Allegheny County.....      | 6         |
| County Court of Philadelphia County.....   | 20        |
| Juvenile Court of Allegheny County.....    | 2         |
| Orphans' Court (separate).....             | 28        |
| Superior Court.....                        | 7         |
| Supreme Court.....                         | 7         |
| Total.....                                 | 261       |

The above table does not, however, reveal the entire picture. In addition to the judges who man the courts of record, there is a host of officers who exercise the powers of justices of the peace either in whole or in part. These are the courts "not of record."

It is difficult to determine how many justices of the peace and aldermen there are in Pennsylvania at any given moment. The Constitution<sup>63</sup> provides that not more than two may be elected for each ward, district, borough or township without the consent of the electorate thereof and in cities containing over 50,000 inhabitants, not more than one alderman may be elected in each ward or district. The number of justices fluctuates almost from day to day. Elected justices sometimes fail to qualify, sometimes no one runs to fill a vacancy, occasionally elected and qualified justices leave the jurisdiction to follow another pursuit without resigning the office and no one bothers to have a vacancy declared. As C. Brewster Rhodes said in an address to a citizen's conference on the modernization of Pennsylvania's judicial system in 1964, "It would be well nigh impossible to determine the actual number of

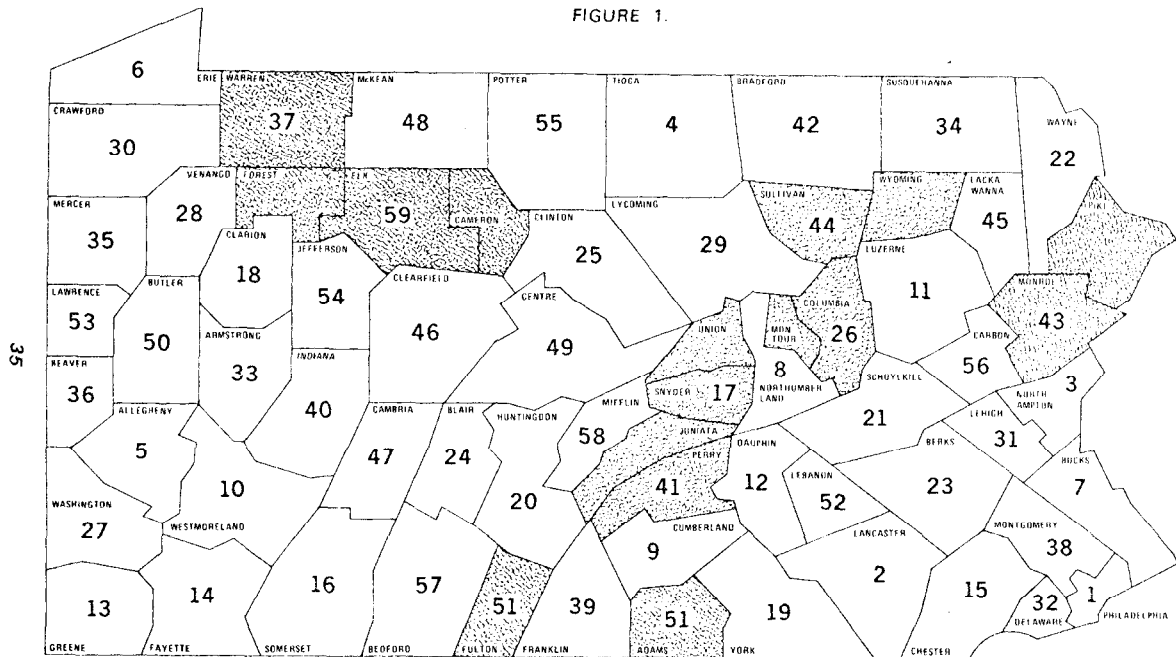
justices of the peace actually serving in the State at this moment. It is supposed that there are outstanding approximately 4,500 commissions to justices of the peace, although the number of commissions authorized over 5,000."

Aldermen are provided for in cities of the second class, cities of the second class A and cities of the third class and these exercise the powers of justices of the peace. The office has been abolished in Philadelphia but instead, there are 28 magistrates. Police magistrates are also authorized in second class cities and these have some of the powers of justices of the peace.<sup>64</sup> However, the story is not complete with an enumeration of the number of justices of the peace, aldermen and magistrates in existence. It must be remembered that under the Borough Code<sup>65</sup> borough mayors have the power to exercise the jurisdiction of justices of the peace in the enforcement of borough ordinances and the collection of fines and penalties imposed thereunder; to sentence any person violating such ordinance to detention in the lockup, county jail or workhouse "as hereinafter provided. The same section of the Act gives mayors the powers of justices of the peace within the borough for the suppression of riots, tumults, and disorderly meetings, and in all criminal cases for the punishment of vagrants and disorderly persons. In addition to this, the Vehicle Code<sup>66</sup> defines "Magistrate" as "A mayor, burgess, alderman, justice of the peace or other officer having the powers of a committing magistrate." Thus, wherever the term magistrate is used in the vehicle code, a mayor or burgess is included. Considering the additional facts that there are 955 boroughs in the Commonwealth<sup>67</sup> and that both the Third Class City Code<sup>68</sup> and the act pertaining to second class cities<sup>69</sup> confer limited powers of justices of the peace on city mayors, it can be seen that persons exercising the powers of justices of the peace are overwhelming in number.

§5.2. *Judicial Districts.* The Constitution provides that whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges as the business of said districts may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts or, if necessary, may be attached to contiguous districts as the General Assembly may provide.<sup>70</sup> The same constitutional provision abolishes the office of associate judge not learned in the law in counties forming separate districts. Schedule No. 1, §14 of the Constitution reads: "The General Assembly shall, at the next succeeding session after each decennial census and not oftener, designate the several judicial districts as required by this Constitution." It is, therefore, important to learn what the Legislature has done with respect to judicial apportionment.



FIGURE 1.



JUDICIAL DISTRICTS

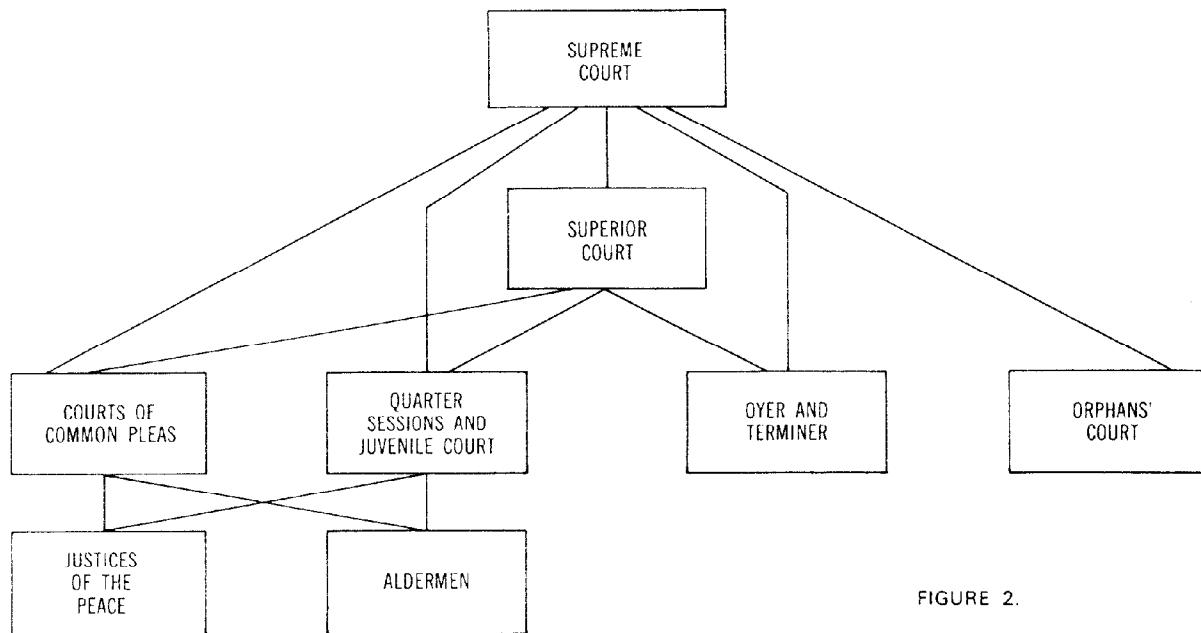


FIGURE 2.

PENNSYLVANIA'S COURT STRUCTURE  
(EXCLUDING PHILADELPHIA AND ALLEGHENY COUNTIES)  
INDICATING THE CHANNELS OF APPEAL

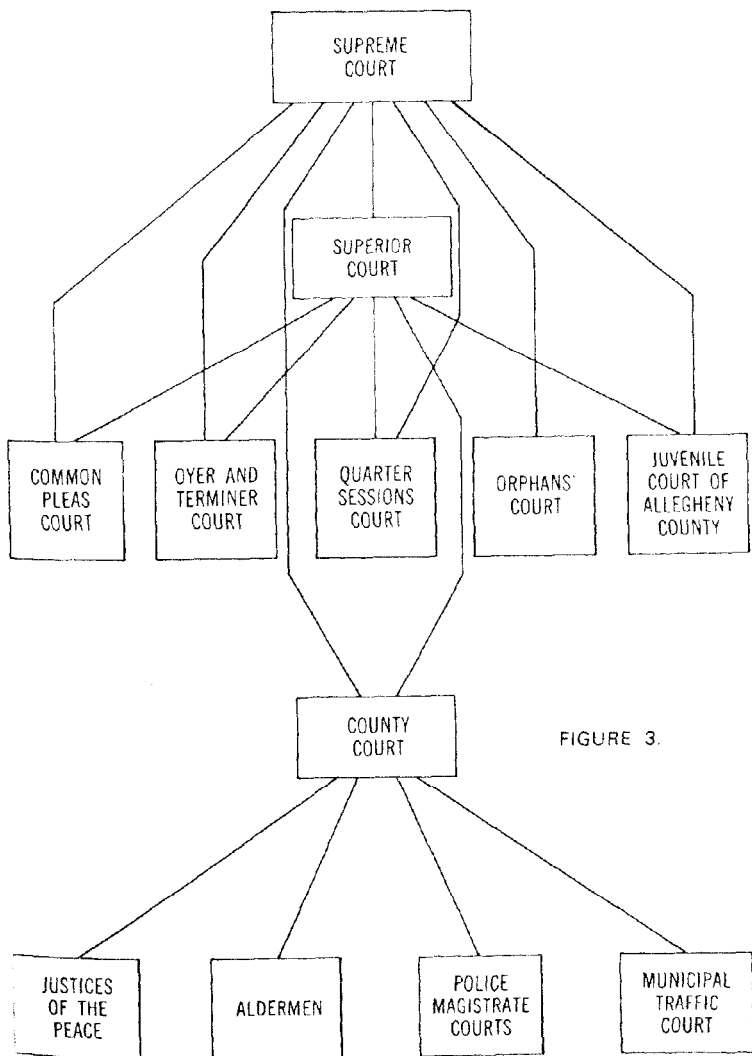


FIGURE 3.

ALLEGHENY COUNTY COURTS  
(INDICATING THE CHANNELS OF APPEAL)

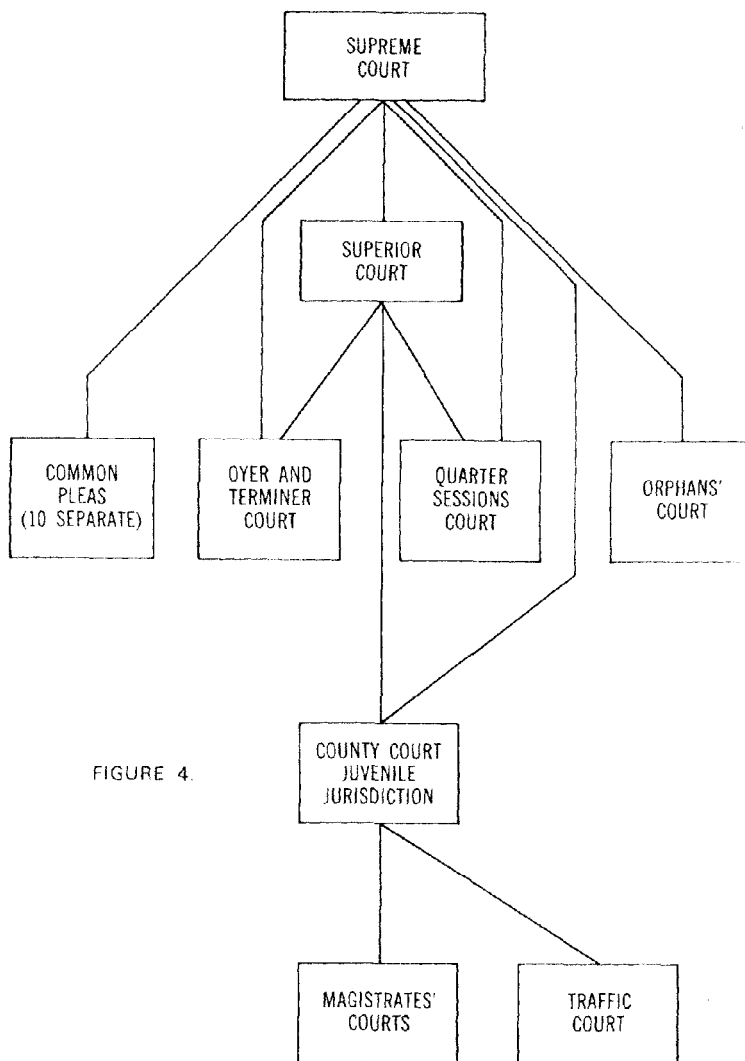


FIGURE 4.

PHILADELPHIA COUNTY COURTS  
(INDICATING THE CHANNELS OF APPEAL)

The Act of 1952, January 8, P.L. (1951) 1844, No. 494, §1, 17 PS §784 divided the Commonwealth into fifty-nine judicial districts. In six situations, the Legislature has created judicial districts comprising two counties; in two situations it has attached one county to a contiguous district, i.e., Montour County is attached to the twenty-sixth district of Columbia County and Forest County is attached to the thirty-seventh district of the County of Warren. Union and Snyder Counties comprise the seventeenth district; Juniata and Perry Counties comprise the forty-first district; Monroe and Pike Counties comprise the forty-third district; Wyoming and Sullivan Counties comprise the forty-fourth district; Adams and Fulton Counties (which are separated by Franklin County) comprise the fifty-first district and Cameron and Elk Counties comprise the fifty-ninth district. In all other instances each judicial district comprises a single county. Figure 1 depicts the judicial apportionment effected by the Act of 1951. Figures 2, 3, and 4 diagram the Pennsylvania Courts and show the channels of appeal which are now open. The next succeeding subsections describe the composition and jurisdictions of the individual courts.

### §5.3. *Composition and Jurisdiction of Pennsylvania Courts*

§5.3.1. *The Supreme Court.* The Supreme Court is the highest Court of the Commonwealth. It is the oracle of Pennsylvania law and the court of last resort.

As provided in the Constitution (Art. V, §2), the Supreme Court consists of seven judges elected at large by the people of the State. The established term of office is twenty-one years and no judge is eligible for re-election. The chief justice is the one whose commission will expire first and his successors are chosen in the same manner.

Under Article 5, Section 3 of the Constitution, Supreme Court jurisdiction extends throughout the Commonwealth and the judges of the court are, by virtue of office, justices of oyer and terminer and general jail delivery in the several counties. The court has the same appellate jurisdiction by appeal, certiorari or writ of error that existed at the time the Constitution was adopted and as may, from time to time be provided by law. It has original jurisdiction in cases of injunction where the defendant is a corporation, of habeas corpus, or mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State. No other original jurisdiction may be exercised by it.

By statute,<sup>71</sup> the following cases go directly to the Supreme Court on appeal: Felonious homicide; the right to public office; appeals from the orphans' courts; equity matters; civil actions under the Banking Code, the Building and Loan Code and the Department of Banking Code; appeals from common pleas and quarter sessions in zoning matters; direct criminal contempt in lower courts and other contempts relating to matters appealable

directly to the Supreme Court; disbarment and suspension from the practice of law; and the supercession of a district attorney by the attorney general or a court.

## JUDICIAL DISTRICTS

Judicial districting as established by the Act of 1952, January 8, P.L. (1951) 1844, No. 494, §1, 17 PS § 784. Stippled areas indicate judicial districts comprising two counties or districts having an attached county.

In the twenty-sixth district Montour County is attached to Columbia County and in the thirty-seventh district Forest County is attached to Warren County.

Judicial districting is authorized by Article V, §5 of the Constitution and mandated to be done at the next succeeding session of the General Assembly after each decennial census and not oftener by Schedule 1, §14.

§5.3.2. *The Superior Court.* The Superior Court is a statutory court of intermediate appeal. It is composed of seven judges learned in the law, elected at large by the people. Its jurisdiction extends throughout the Commonwealth, but it has no original jurisdiction, except in actions of mandamus and prohibition to courts of inferior jurisdiction where such actions are ancillary to proceedings within its appellate jurisdiction, and except that it, or any judge thereof, has the power to issue writs of habeas corpus under like conditions. Where authorized by statute, it has exclusive and final appellate jurisdiction of all appeals by or in the nature of appeal, certiorari or writ of error.<sup>72</sup>

The Superior Court has appellate jurisdiction in all proceedings of any kind originating in quarter sessions and oyer and terminer, except cases involving the right to public office and felonious homicide. It also has appellate jurisdiction in all actions and proceedings at law in the courts of common pleas and in the county courts of Allegheny and Philadelphia Counties and all similar courts, whether originating therein or reaching that court by appeal or certiorari from some other court or tribunal, if the subject of the controversy is either money, chattels, real or personal, or the possession of or title to real property, and if also the amount or value thereof in controversy is not greater than ten thousand dollars, exclusive of costs.<sup>73</sup>

Appeals may be taken from the Superior to the Supreme Court if (a) the jurisdiction of the Superior Court is in issue, (b) the matter involved a construction of the Constitution of the United States or of Pennsylvania, (c) the Superior Court allows a special appeal, or (d) the appeal is allowed by the Supreme Court or one of its justices.<sup>74</sup>

§5.3.3. *Common Pleas Courts.* The Constitution provides "Until otherwise directed by law, the courts of common pleas shall continue as at present established, except as herein changed; not more than four counties shall, at

any time, be included in one judicial district organized for said courts." <sup>75</sup> It also provides that whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district. When a county does not have a population large enough to constitute a separate judicial district, it may be formed into a convenient single district with similar counties, or may be attached to a contiguous district as the General Assembly sees fit. <sup>76</sup>

Thus, although the territorial jurisdiction of a common pleas court is limited to a single county, <sup>77</sup> for purposes of administration, several courts may be joined together to form a judicial district. At present, there are fifty-nine such districts in the Commonwealth, some having but a single court, others having more than one court. On the other hand, Philadelphia, which comprises the first judicial district, has ten common pleas courts of its own. Allegheny County, despite its size, has a single court. <sup>78</sup>

By statute, every county of the Commonwealth must have a court of record known as "the court of common pleas of the (respective) county." <sup>79</sup> The jurisdiction of such courts, is to "hear and determine all pleas, actions and suits, and causes, civil, personal, real and mixed, according to the Constitution and laws of this commonwealth; and the said courts shall have power to grant, under their judicial seals, all lawful writs and process necessary for the exercise of such jurisdiction . . ." <sup>80</sup> As provided in the Constitution, <sup>81</sup> common pleas courts possess all of the chancery powers which they possessed when the Constitution was adopted. Such powers are, however, subject to legislative change.

From the constitutional and statutory provisions noted above, it seems safe to characterize common pleas courts as trial courts of original, and virtually unlimited jurisdiction in civil and equitable matters. In a few minor instances, the functions of common pleas have been transferred to other courts and to administrative agencies, so that it would not be accurate to say that its power to act is entirely unlimited.

The judges of common pleas also have criminal jurisdiction. As provided by the Constitution, <sup>82</sup> "Judges of the courts of common pleas learned in the law shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court and within their respective districts shall be justices of the peace as to criminal matters." Quarter sessions and oyer and terminer courts are the principal criminal courts of the Commonwealth.

There are a number of statutes giving common pleas appellate powers over the decisions of inferior courts and administrative agencies, and under the Constitution, common pleas is given authority to issue certiorari to inferior courts. <sup>83</sup>

§5.3.4. *Oyer and Terminer Court.* The judges of common pleas court are *ex officio* judges of oyer and terminer court and, by statute, are required to hold terms of oyer and terminer four times annually at the times set apart

for holding quarter sessions court.<sup>84</sup> Since Article 5, Section 3 of the Constitution makes the judges of the Supreme Court *ex officio* justices of the several courts of oyer and terminer throughout the state, and since at common law all local courts were suspended when the King's Bench was sitting in a county, the statute provides that common pleas judges may not sit when oyer and terminer is being held within the county by the Supreme Court or some of its members. This is of historic interest, for it is based upon the concept of the Supreme Court as wielding the powers of the King's Bench.

Oyer and terminer jurisdiction is spelled out in the Act of 1860, Mar. 3 P.L. 427, §31, 17 PS §391. In essence, oyer and terminer has jurisdiction to try the following: Murder, manslaughter or other homicide, and accessories to such crimes; treason against the Commonwealth; sodomy, buggery, rape or robbery, and the counsellors, aiders and abettors of such crimes; voluntary and malicious burning of a building or thing made punishable in the same manner as arson; mayhem, cutting off the tongue, putting out the eye, slitting the nose, cutting off the nose, lip, or limb or member by lying in wait or with malice aforethought, with intent to maim and disfigure, and the aiders, abettors and counsellors of such crimes; burglary, concealment by a woman of the death of her bastard child so that it may not be known whether it was born dead or alive, or whether it was murdered or not; the second or subsequent offense of receiving, harboring or concealing an robber, burglar, felon or thief, or of the crime of knowingly receiving stolen goods. In addition thereto, oyer and terminer has been given jurisdiction to try cases of kidnapping with intent to extort a thing of value for the return of the person and the aiding, assisting, and abetting such kidnapping.

§5.3.5. *Quarter Sessions Court.* As in the case of oyer and terminer, common pleas judges are *ex officio* judges of quarter session courts.<sup>87</sup> Quarter sessions courts are required by law to be held four times a year.<sup>88</sup> In essence, quarter sessions courts are authorized to hear and determine all such crimes, misdemeanors and offense not triable exclusively in oyer and terminer, and are given statutory power to do the incidental things necessary to the exercise of their duties.<sup>89</sup> With the exception of Philadelphia and Allegheny counties, quarter session judges sit in juvenile court.<sup>90</sup>

Primarily, the difference between quarter sessions and oyer and terminer is one of degree; oyer and terminer disposes of serious criminal matters while quarter sessions disposes of relatively minor offenses. Although this was the schematic approach, legislative action has, at times, breached the pattern in the manner of stating the type of crime involved in certain instances.

§5.3.6. *Orphans' Courts.* Among the courts accorded the judicial power of the Commonwealth in Article 5, §1, of the Constitution are orphans' courts. These are courts possessing the general powers exercised in other jurisdictions by courts of surrogate, ordinary, register and probate. Except



where a separate orphans' court has been established, judges of the common pleas courts are *ex officio* judges of the orphans' courts of the various counties.<sup>91</sup> By constitutional mandate, however, in every county where the population exceeds one hundred and fifty thousand, the General Assembly must establish a separate orphans' court. It may if it wishes, establish such a court in any other county in the Commonwealth, and when a separate orphans' court is so established, the jurisdiction of the common pleas judges terminates as to Orphans' Court matters.<sup>92</sup>

The jurisdiction of the orphans' court, whether separate or otherwise, embraces many things established by statute, including adoptions, guardianships of minors, decedent's estates, testamentary trust estates, appeals from the orders or decrees of the registers of wills, the control and settlement of accounts of trustees of trusts *inter vivos*, and similar matters. Enumerating the subjects of orphans' court jurisdiction would be voluminous. A list of the subjects over which it has exclusive jurisdiction is set forth in §301 of the Orphans' Court Act of 1951, August 10, P.L. 1163, as amended 20 PS §2080.301, and the same statute, in §302 (20 PS §2080.302), lists the items over which it has concurrent jurisdiction.

In general, the orphans' court exercises its statutory jurisdiction according to rules and principles of equity and is correctly termed a court of equity.<sup>93</sup> But, being a separate court, it has no general equity powers other than as conferred by statute or which are incidental to its general powers.<sup>94</sup>

§5.3.7. *County Courts.* Confusion often exists among laymen with respect to the difference between common pleas courts and county courts. In places outside of Philadelphia and Allegheny counties, it is customary among laymen to refer to common pleas as a county court. This is probably due to the location of the common pleas court in the county courthouse and the fact that it is the only local court having county-wide jurisdiction. Actually, there are only two county courts in the Commonwealth, the County Court of Philadelphia and the County Court of Allegheny County. Both of these are statutory courts while common pleas is a constitutional court.

§5.3.7a. *The County Court of Philadelphia* was originally known as the Municipal Court of Philadelphia,<sup>95</sup> but it was so often confused with a magistrates' court or a court of lesser importance that the legislature felt constrained to change its name. In 1961, by statute, the court was changed to the County Court of Philadelphia and all of the powers formerly exercised by the Municipal Court were transferred to it.<sup>96</sup>

The County Court of Philadelphia is a court of record and consists of a president judge and nineteen associate judges, all learned in the law. It has jurisdiction in all civil actions at law and equity where the value of the matter or thing in controversy, exclusive of costs and interest, does not exceed

five thousand dollars. It has the power, with the consent of common pleas, upon the application of the plaintiff, to transfer suits wrongfully brought in the County Court in excess of its jurisdiction, and upon application of the defendant, to transfer all suits brought before it within its jurisdiction where the defendant sets up as a defense a counterclaim or set-off in excess of the court's jurisdiction.<sup>97</sup>

The County Court of Philadelphia has exclusive jurisdiction in the county of adoptions and birth records,<sup>98</sup> desertion and nonsupport, juvenile court proceedings, and criminal cases (including suits for penalties) except cases of murder, voluntary manslaughter, treason, or misprision of treason, or for violation or conspiracy to violate the election or registration laws of the Commonwealth, or for embezzlement by any public officer, or any offense involving breach of official duties by a public officer.<sup>99</sup> The court also hears appeals from and certiorari to magistrates,<sup>100</sup> and the judges thereof are *ex officio* justices of the peace.<sup>1</sup>

§5.3.7b *The Allegheny County Court* is a court of record having six judges learned in the law.<sup>2</sup> It has jurisdiction in all civil actions wherein only a money judgment is sought to be recovered, and in all actions of replevin in which the sum demanded or the value of the property replevied does not exceed five thousand dollars, except in cases where the title to realty may come into question. It has jurisdiction in nonsupport proceedings, appeals from summary convictions, civil suits and judgment in suits for a penalty before a magistrate or court not of record as provided by law, appeals from the suspension of operators' licenses or privileges under the Vehicle Code, certain tax assessment appeals, appeals from the Pennsylvania Labor Relations Board, zoning appeals, mercantile license tax appeals, and appeals from the Civil Service Board or Commission of a municipality where such appeals are provided for by law.<sup>3</sup>

The court also has criminal jurisdiction in all criminal suits, indictments and actions except the trial of indictments for arson, burglary, murder, voluntary manslaughter, treason, or misprision of treason, or for violation or conspiracy to violate the election or registration laws of the Commonwealth, or for embezzlement by any public officer, or any offense involving breach of official duties by a public officer. The judges of the court are also *ex officio* justices of the peace.<sup>4</sup>

§5.3.8 *Juvenile Court.* Juvenile court jurisdiction is exercised by the judges of the court of quarter sessions in every county except Philadelphia and Allegheny Counties.<sup>5</sup> In Philadelphia, it is exercised by the judges of the County Court of Philadelphia,<sup>6</sup> and in Allegheny County it is exercised by a specially created court of record known as the Juvenile Court of Allegheny County.<sup>7</sup>

In a general way, juvenile courts have jurisdiction over all dependent,

delinquent, incorrigible or neglected children under the age of eighteen years, including truants, habitually disobedient children, and children who violate a statute or ordinance. Hearings are conducted by the judge without jury.

§5.3.9. *Justices of the Peace, Aldermen, Magistrates and Mayors of Cities and Boroughs.* Article 5, §11 of the Constitution provides for the election of aldermen and justices of the peace in the several wards, districts, boroughs or townships of the Commonwealth to be commissioned by the Governor for a term of six years. Not more than two such officers may be elected for each such district without the consent of the majority of the electors thereof and in cities containing over 50,000 inhabitants, not more than one alderman may be elected in each ward or district. In Philadelphia, the office of alderman has been abolished and magistrates courts (one for each 30,000 of inhabitants) are substituted therefor. Magistrates hold office for a term of six years and have civil jurisdiction not exceeding one hundred dollars and such other civil and criminal jurisdiction as may be conferred by law or as formerly exercised by aldermen.<sup>8</sup> As noted in §5.1, supra, the mayors of cities of the second class, second class A and third class, as well as mayors of boroughs exercise some of the powers of justices of the peace.

There have been a number of statutes affecting the civil jurisdiction of justices of the peace, aldermen and magistrates. A collection of these would constitute a volume in itself.

Justices of the peace, aldermen and magistrates have criminal jurisdiction in summary conviction cases and act as committing magistrates with respect to crimes triable in quarter sessions or oyer and terminer.

Under the present judicial system in Pennsylvania, justices of the peace, aldermen and magistrates are important officers: often they are the citizen's first contact with the processes of law. The office is a judicial one and neither the courts of common pleas nor quarter sessions can directly supervise a magistrate in the exercise of his powers.<sup>9</sup> Justices and magistrates are not required to report to anyone but they must, of course account for any fees or costs due the county or state.

§5.3.10 *Police Magistrates and Traffic Courts.* A Police Magistrate's Court is established in Pittsburgh by statute.<sup>10</sup> It consists of the Mayor and not less than five nor more than eight magistrates as designated by ordinance. They are appointed by the Mayor subject to the approval of the elect council and hold office during good behavior, during the Mayor's term of office and until a successor is appointed. Their powers are listed in the statute as those existing prior to the statute's approval, which means that they have limited criminal jurisdiction over offenses committed within the corporate limits of Pittsburgh and no civil jurisdiction whatever. A

concomitant of the Pittsburgh police magistrate's court is the Municipal Traffic Court—a court consisting of such police magistrates as the Mayor might assign to that duty.<sup>11</sup> It has criminal jurisdiction in summary offenses arising under the Motor Vehicle Code, or any ordinance enacted pursuant thereto, committed within city limits and has jurisdiction over preliminary proceedings in indictable offenses arising in the same manner.

Philadelphia also has a court known as the Traffic Court of Philadelphia which was established by statute.<sup>12</sup> It is manned by magistrates appointed to that service by the chief magistrate and has substantially the same jurisdiction in Philadelphia as the Municipal Traffic Court has in Pittsburgh.

#### § 6. Broad Topical Subjects Usually Considered in Framing a Judicial Article

In his work on *Justice as the Foundation of Society and Challenge of Civilization*, Ruby Vale said, in 1948, "The human mind will never cease its search for . . . the determinants and aspirations of man for justice."<sup>13</sup> Almost a quarter of a century before, another author said, ". . . in all social deeds and human institutions is concealed a feeling and a longing for justice."<sup>14</sup> Daniel Webster summed it up in the Fall of 1845 thus: "Justice, sir, is the great interest of man on earth."<sup>15</sup>

These statements are cognate to the establishment of a judicial system, for the relationship between the courts and justice—or truth—is a firm and inflexible one. Justice is an important word in our vocabulary. The Declaration of Independence gave the obstruction of justice by the King as a sufficient cause for revolt. Justice, as stated in its Preamble, was one of the aims of the United States Constitution, and in the fourteenth Declaration of Rights of the Pennsylvania Constitution of 1776 there is a call for a "firm adherence to justice." "The administration of justice," said a great Pennsylvanian, "is the most important function of government."<sup>16</sup> Another said, "The two greatest ideals of America are the attainment of world peace and the administration of justice . . ."<sup>17</sup>

The courts have universally been treated as "the machinery of justice"<sup>18</sup> and justice and the courts seem to have been woven together into a single strand in human thought. Throughout the United States in every major constitutional revision of the past ten years, much of the accent has been on revision of existing judiciary provisions. It is probably excusable, therefore, to generalize thus:

the honest, fair and effective administration of justice is of utmost importance in the world today.

the organization of the courts into engines of justice operating under modern conditions is a public aspiration.

the competence and quality of judges and the means for insulating society from the adverse effects of incompetent or unqualified judges are central in determining the nature of justice and the efficiency of the courts.

In achieving desired judiciary reform, it is necessary to give consideration to the major suggestions which have been advanced from time to time by interested persons. Some of these have been noted below in succeeding subsections of this section; others are treated in greater detail in other parts of this booklet.

§6.1. *The Simplification of Constitutional Provisions Relating to the Judiciary.* Those charged with making proposals for constitutional amendment are normally faced with a major policy decision at the outset. The initial problem is whether the proposals are to consist of a detailed outline of all important aspects of judicial administration, organization, selection and tenure, or whether they should be skeletal in nature, leaving implementing details to the Legislature or some other branch or arm of the government. Subsidiary to this is the problem of who should do the implementation if a detailed proposal is not to be made.

Modern writers and advocates of constitutional change seem imbued with the idea that a judiciary article ought to be simple. Frequently they use the words "simple" and "unified" in juxtaposition but the terms, of course, are not synonymous. The Task Force on Administration of Justice of the President's Commission on Law Enforcement and Administration of Justice advocates the creation of a "unified, simplified court structure" for improvement of the criminal courts."<sup>19</sup> Even before the first meeting of the 1967 constitutional convention for the State of New York, the question of unification and simplification was raised.<sup>20</sup> When the Illinois Judicial Article was adopted in 1964, one of its proponents said, "The most significant feature of the new article is a unified court system so simple and streamlined as to be truly classic in concept."<sup>21</sup> In an address to a Citizen's Conference on the Modernization of Pennsylvania's judicial system in 1964, Glenn R. Winters, Executive Director of the American Judicature Society, praised the judiciary articles of Puerto Rico, Alaska and Hawaii for their "simplified, unified court organization," and at the same gathering, Thomas F. McCoy, State Administrator of the New York Judicial Conference, posed the following question and then gave his own answer as follows: "What kind of court structure is desirable? A short answer can be given: the simpler the better."

In a separate minority statement following the Report of the Commission on Constitutional Revision in 1959, two members of the Commission felt that the majority recommendations contained too much detail. They concluded that, "Life is so interdependent and change so rapid that we need great flexibility. To us this bespeaks a constitutional pattern, which leaves a maximum area of policy decision-making and power devolution to the legislative representatives of the people. In short, we should minimize the making of more or less specific policy decisions at the constitutional level and maximize such decision-making at the legislative level."<sup>22</sup>

Hon. Robert E. Woodside, Chairman of the Commission on Constitutional Revision in 1959 thought that the Commission had blown both hot and cold on the matter of simplification. His separate statement in point is as follows:<sup>23</sup>

I deeply regret what I consider to be a basic inconsistency in the Commission's recommendations. Many students of government believe that our present Constitution is too long, made so primarily because it contains provisions which are legislative in nature. It was contended that these provisions should be removed and the Legislature entrusted with the responsibility of dealing with them as it sees fit. The Constitution, it was argued, should be limited to those provisions necessary to establish the basic structure of government.

Following this concept, the Commission recommended the removal from the Constitution of numerous provisions it deemed legislative in nature. Unfortunately, the Commission abandoned this concept when considering suggested changes in government which it deemed desirable. The concepts of "trusting the legislature" and shortening the Constitution were ignored, as recommendations were adopted which added thousands of words to the Constitution and dealt with procedures in the minutest detail.

There can be, of course, strong arguments presented both ways. It is certainly true that a simple court structure can be created and operated without chaos or disaster. We have seen the United States courts operate for almost two hundred years under the simplest possible form of judiciary article. Article III of the United States Constitution simply vests the judicial power of the United States "in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish," and it extends the judicial power thus conferred "to all cases, in Law and Equity, arising under the Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." Along with conferring jurisdiction in the courts to certain other classes of cases and controversies, the article defines the original jurisdiction of the Supreme Court. It fixes the tenure of judges as "during good behaviour" and forbids Congress to diminish judicial salaries during the judges' continuance in office.

However, the simplicity of the structure of the Federal Court System does not make for all sweetness and light. Federal courts, like many state courts have tremendous backlogs at the trial level and there have been complaints about the judges.<sup>24</sup> It is claimed that life tenure makes despots of judges and they move the law about to suit themselves without regard to public aspirations. These are some of the complaints leveled against Federal courts and judges by those who dislike the present trend toward reform of the criminal law. At least one United States Senator thinks the manner of judicial selection needs improving.<sup>25</sup>

The simpler the constitutional structure, the more reliance must be had on implementation by the Legislature or some other arm of government. In the Federal system it is Congress which does the job. It must establish inferior courts as the needs arise and must confer jurisdictional pow-

ers upon them. In Pennsylvania, which has what has been termed "a bewildering patchwork of courts with overlapping jurisdiction, unsupervised operations and, often ill-trained judicial personnel,"<sup>26</sup> the job of implementing the Constitution rests with the Legislature. It has been abreast of the Federal Congress in conferring rulemaking powers upon the Courts,<sup>27</sup> and the Pennsylvania Legislature seems to have done well in the establishment of new courts and the creation of new judgeships.<sup>28</sup>

The removal of legislative specifications from the Constitution and the insertion of a skeletal framework for the other provisions of the Judiciary Article would transform it into a definition of fundamentals and little else. Some other arm, department or branch of government would then have to supply the details and the argument here is among those who have faith in the legislative processes and those who do not.<sup>29</sup> Either view can be supported and documented.

Sidney Schulman, a Philadelphia lawyer who is interested in Constitutional revision and wrote a book about it seems to take a middle ground. While endorsing in principle the concept of simplicity and stating that the problem is not what should be taken out of the present judiciary article but how much detail to put in, he says this:

"The Legislature of Pennsylvania has certainly not acted towards court-reorganization in the past in a manner to instill confidence that problems of judicial administration can safely be left entirely in its hands."<sup>30</sup>

Some of the ideas pro and con on simplicity seem to be as follows:

#### *Pro.*

under the doctrine of separation of powers it is wise to keep legislative matters within the Legislature and judicial matters within the Judiciary. Neither should overstep. While it might be wise to allow the Judiciary to have considerable say in the organization, management and operation of the courts, the Legislature must have some check. The tail must not wag the dog. Detailed constitutional provisions are almost always invasions of the Legislature's prerogative and this is not in keeping with our concept of government.

details of organization contained in a Constitution make for inflexibility; an efficient court organization must be able to exercise footwork in accommodating itself to changing conditions. This calls for flexibility.

It is not difficult to frame a simple judiciary article which adequately protects the independence of the courts. Besides, public faith in the legislature is manifested elsewhere; why not in judicial matters?

as a practical matter, too much detail in a proposal by a constitutional convention might stimulate controversy over a minor detail and bring about the defeat of an overall good plan.

#### *Con.*

absent constitutional protection, a governor dissatisfied with the courts or their decisions and with the aid of a friendly legislature might work havoc with the ad-

ministration of justice by packing courts, reducing judicial salaries, abolishing courts, or altering judicial districts. The Executive and the Legislature must be curtailed so that encroachment on the Judiciary is impossible. This calls for some protective detail in the provisions of the Constitution.

the absence of important details in a constitution may cause legislative delays in implementing a good judicial system at a time when speed and changes are imperative. One product of simplicity is apt to be vagueness; vagueness would create confusion in the legislative mind.

a good judiciary article must necessarily be detailed in order to set forth its aims and objectives; mere skeletal provisions without more could lead to an unexpected result. Simplicity does not necessarily mean the absence of essential elements. The Pennsylvania Bar Association proposal, for example, is detailed. In order to dispel any difficulty as to its meaning, it was necessary to employ 17 sections, only three of which are single paragraphs. All other sections have two or more paragraphs and one of them [§7] has eight lengthy paragraphs marked by letters. Although containing fewer sections than the present judiciary article, it is more voluminous.

§6.2. *Judicial Framework and The Organization of Courts.* All students of state constitution-making acknowledge that there is no such thing as an ideal constitution for all the states, whose basic laws must necessarily provide for differing needs and situations.<sup>31</sup> This means, of course, that what is good for State A is not necessarily good for State B. Thus, a body convened for the purpose of framing a constitution for a particular state must build upon the peculiarities of that state, drawing whatever useful material it can from the knowledge, studies and experience of others as well as the lessons to be learned from its history.

It is not only unfortunate that no two states are exactly alike so that workable provisions may be directly borrowed from this constitution or that, it is also unfortunate that very few of our sister states have constitutions geared to our volatile age. Of the constitutions of the 50 states in existence three years ago, thirty-five were the products of the 19th century and three went back to the 18th century. Thus, only twelve belonged to this century and five of these were the original constitutions of states formed since 1900. The average age of all of the state constitutions was approximately eighty-three years and currently we in Pennsylvania are in the midst of the ninety-third year of our Constitution's life.

Where there have been new judiciary provisions in state constitutions or new proposals have been made dealing with the judiciary the trends seem to have been toward:

- a so-called unified judicial system having several levels of courts with a central authority.

- a grant of legislative power for the creation of additional courts.

- a means for selecting judges leaning toward the nominative-appointive elective system called the "Missouri Plan."



a means for disciplining, controlling and removing judges.

a provision for administrative direction of the courts by a supreme court or chief justice.<sup>32</sup>

a provision allowing the supreme court to make rules governing practice, procedure and judicial administration.

a provision giving the legislature power to establish civil and criminal jurisdiction in the courts.

Of the above trends, the first, that is, the creation of a "unified" judicial system poses a problem for the Convention. The questions which arise are:

what is a unified system?

what alternative systems are there?

what system is best adapted for use in Pennsylvania?

§6.2.1 *A Unified Court System* The basic concept of a unified court system is explained in some detail in Annex 2. In essence, this is what the term includes:

(a). *A single court in which all judicial power is concentrated.* The name given to such a court is unimportant, Dean Pound suggested the name Court of Justice; the Pennsylvania Bar Association proposal uses these words: "The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of a Supreme Court, a Superior Court, District Courts, Estates Courts, and Community Courts" The Bar Association proposal, therefore, does not give the judicial power to a court—it gives it to a "unified judicial system." The advantages of this seem apparent. Where the judicial power is vested in a court, it would imply that each judge has identical powers with all others—that is, an inferior court judge would have the same powers as a judge of the Supreme Court; the distinction between "powers" and "jurisdiction" is not always apparent.

The structure of a single court system is similar to an industrial, commercial or military organization—the whole organization is devoted to a single purpose but branches or phases of the enterprise are manned by specialists. The unified court concept is not of specialized courts but specialized judges.

(b). *A division of the unified court into categories.* In place of a group of separate courts each having its own name, organization and manpower, a unified court is stratified into levels or plateaus of action and judges are provided to man the courts at all levels. The top level consists of the highest court which supervises the operation of the entire system and constitutes the ultimate court of appeal. The next lower group consists of courts of the first instance for all cases civil and criminal above the grade of minor civil causes and petty offenses. On the ground floor are the minor courts designed to deal with petty offenses and causes such as violations of municipal ordinances, summary conviction cases and civil suits for small claims etc.

A three-storied structure is not prerequisite to a unified court system. Between the top and bottom levels there may be as many plateaus as the needs indicate. For example, there may be an intermediate court of appeal, there may be a plateau of trial courts between the minor courts and the courts trying more serious matters etc. The distinguishing feature of a unified court system is not the number of judges, courts and court levels but uniform jurisdiction and centralized control and responsibility.

(c). *A centralization of power in the high court to assign judges to work in needed areas.* One of the most valuable aspects of a unified court plan is the ability to utilize the resources of the system to the fullest extent. Below the appellate level, all judges are, in theory, judges of the whole court no matter to what branch or division they may have been chosen originally. They are mobile and not fixed; the administrative head may assign them to where the work awaits. Where there are relatively autonomous courts with fixed territorial and substantive jurisdictions, there is a tremendous waste of manpower. Court A may be swamped with a heavy case load while in the jurisdiction next door judges are relatively unoccupied. Under a unified system the administrative head may move the troops to fight whatever backlog or caseload problem may arise in any given place.

(d). *A system in which all judges are learned in the law.* In theory the amount of money involved in a civil case or the relative impact of a violation of the criminal law on society may have a relation to the expense of suit or prosecution and therefore have a bearing upon which court the case should be tried in, but these factors should have no bearing upon the quality of justice to be derived from a system. The amount of money involved in a case or the importance or unimportance to society of a criminal action do not determine the difficulty of a case. Small cases often generate great legal problems and a law-trained judge is often of importance in settling such matters justly and effectively and without the injustice of repeated new trials for error.

For these reasons, a unified court plan usually calls for the abolition of lay judges or justices of the peace. It is possible, however, to have a unified system with judges not learned in the law if adequate means of control are provided.

(e). *A delegation of the rulemaking power to the high court for all courts at all levels.* It is believed that the power of a high court to make rules governing practice and procedure for all courts at all levels in both civil and criminal cases is essential to the effective operation of any court system. Early in the century the American Bar Association fought to have this power conferred upon the Federal Courts and when its efforts were rewarded with success, it is claimed that the Federal courts became much more effective. As noted in §6.1, Supra, footnote 27, Pennsylvania gave this power to the Supreme Court in 1937 and 1957.

In early America, the courts were hamstrung by legislation prescribing procedural details and setting forth item by item steps in their operation. It was once said of the New York code of civil procedure that there was a rule for every action of the judge from the time he entered the courthouse, except to prescribe the exact peg on which he should hang his hat.<sup>33</sup> The proponents of the idea of inserting the rulemaking function as a court power in a constitution, point out that although the legislatures have been conferring such powers on the court by statute, what is given in the first instance may be taken away in the second. To paraphrase Job, "What the Legislature giveth, the Legislature sometimes taketh away." This, it is claimed, is wrong. The courts should not be constrained, in the development of the substantive law, to follow restrictive measures over which they have no control. The establishment of an enlightened procedure belongs to the courts which know and deal with the problems.

§6.2.2. *Alternative Systems to a unified court.* A unified court system is not, of course, the only system available. There are as many possibilities as there are people to form ideas about them. The principle concepts seem to be as follows:

(a) *A congeries of courts—the prevailing system in Pennsylvania.* Pennsylvania courts have, as we have seen (Part I, §2.2, *supra*), been developed and refined from early courts established in the Province in pre-Revolutionary days. These courts reflected the influence of the English, Dutch and Swedish settlers and present-day courts are rooted in and reflect the experience of history.

The word "congeries" means "that which is brought together; a collection of things or parts in one mass or aggregate; a heap; a pile."<sup>34</sup> Because our court system is not really a system at all but is a collection of individual courts which have been made to fit together into a somewhat cumbersome whole, it is sometimes referred to as a congeries of courts. The term is perhaps an apt one for relatively autonomous courts have been constructed down through the years and connected only tenuously by avenues of appeal or through the indulgence of the "King's Bench" theory which gives the Supreme Court some measure of control over lesser courts.<sup>35</sup>

There are those who see no wrong in perpetuating the Pennsylvania courts in their present posture and others who think the court structure is good but that there should be some refinement—such as a change in the method of judicial selection and tenure. The statement of Hon. Edwin W. Tompkins, dissenting from the majority in the Woodside Commission Report indicates his belief that the Constitution as presently constituted has proved its ability to cope with changing time. Apropos of this he said:<sup>36</sup>

Such terms as "antiquated" and "outmoded" have been and are being used to describe the Constitution of 1874. With such expressions I cannot agree. Although

history assigns many and varied reasons for the adoption of some of the proposals contained in the 1874 Constitution, we still cannot and should not consign to oblivion the wisdom of its authors which has successfully piloted us across time, years and circumstances from an agrarian age and society through the industrial, machine, electronic, air and into the atomic and space age; and through several world upheavals to our present position, still intact as a free and independent people. It has preserved our precious liberties which I certainly hope are not considered "antiquated" and "outmoded."

Hon. Horace Stern, former Chief Justice of the Supreme Court of Pennsylvania, apparently believes our judicial system is not unsound but advocates change in the method of judicial selection. With respect to the courts he has said: "The two greatest ideals of America are the attainment of world peace and the administration of justice, and as far as the latter is concerned it has always been our proud boast that our judicial system is our shining glory."<sup>37</sup>

A fair summary of the contentions of those who oppose radical change in the prevailing judicial structure seems to be:

the courts worked well under the present Constitution.

a departure from the established order would require an adjustment to a new order and result in unnecessary confusion, uncertainty and inconvenience.

there is no assurance that a different order would be an improvement on the old; there is a chance that it might be worse.

(b). *A layer system of courts.* One possible modification of the unified system of courts involves several layers of courts, each layer being administered separately and horizontally but with channels of appeal from lower layers to the upper ones. The principle departure from the unified system is the relative autonomy of each layer with respect to the assignment of judges, the creation of departments and the assortment of cases. Arguments in favor of this system may be crystallized thus:<sup>38</sup>

judges at the appellate level are not close enough to the problems of courts at lower levels to make valid judgments respecting administration. Policy-making decisions belong at the level where the policies are executed. The responsible authority at each level should only have to account to the top administrative officer for general failures of the system.

a unified court system creates a huge and unmanageable bureaucracy of judges and court officers. The breaking up of a system into levels centers responsibility for failures in a concentrated area and divides manpower into reasonable and manageable segments.

a layer system maintains a hierarchial organization, keeping the prospect of advancement from one court to another as a spur to excellence in performance.

a consolidation of present courts into levels would avoid a total departure from established traditions which is not called for at this time.

The editor of the Journal of the American Judicature Society favors a unified court but believes in restricting such a court to two levels only. He has editorially disagreed with those plans which establish lower-level judges of a lower-level court and urges an appellate division and a trial division as the only desirable stratification of a unified system.<sup>39</sup> He would, of course, be in disagreement with a layer system having hierarchial aspects.

(c). *Specialized courts.* The present Pennsylvania system comprises a number of specialized courts, i.e., they are courts designed to handle certain types of cases only. This, of course, differs from the concept of a unified system consisting of specialized judges and not specialized courts. However, as noted in paragraph (a) *supra*, these courts are not organized into a system but rather into a collection of courts rather haphazardly put together as the needs have arisen over the years.

One concept of a judicial system embraces specialized courts vertically responsible to the highest court both as to management and control and with appeal channels running in the same direction. It visualizes no horizontal interchange of personnel, leaving the judges of each specialized court frozen to one type of work and not assignable to other courts. In its application this would mean that all trial courts having criminal jurisdiction would be in one vertical line and all trial courts having civil jurisdiction would be in another. Orphans' courts or Estates courts would be a third line etc.

The hoped for advantage of this system is that while control centers in the top court of the state, the judges who man the lower courts are kept in positions in which they have had experience and skill or in which such assets would eventually develop. It would be argued that a judge who has developed skills and talents in a specialized field (which he himself has chosen by seeking his office) should not be forced into the handling of cases not to his liking or in which he has little training. It could also be advanced that this is the highest fulfillment of the concept of specialized judges even though such judges might operate in specialized courts.<sup>40</sup>

While not advocating a system of specialized courts, the Montgomery Bar Association advocates the retention of the Orphans' Courts of Pennsylvania, stating: "In an age where specialization has become inevitable and essential to administer justice efficiently, the wisdom of providing separate courts to deal with estates has been proven, and they are current with their business."<sup>41</sup> Others have suggested a system of separate and integrated family courts to handle the specialized business of domestic and family relations, including divorce. There are many ideas concerning the retention of justices of the peace courts either as a specialized court in its own right or as a specialized adjunct of common pleas, and there are those who would have a separate juvenile court in every judicial district manned by trained judges having no other duties.

§6.3. *Manning the Courts.* The importance of high-quality judges has been manifested in our literature for centuries. It is expressed in the charge of Moses to his judges to, "Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him,"<sup>42</sup> and it appears in the words of the Magna Charta, "We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it."<sup>43</sup>

A great Italian teacher and doctor of the laws once said that the state feels the importance of selecting the right kind of judges, "for it knows that it is entrusting to them the dangerous power which, when abused, makes injustice just, forces the majesty of the law to serve evil, and indelibly marks white-robed innocence with a bloody brand which makes her indistinguishable from guilt."<sup>44</sup>

It does not appear, however, that the selection of judges in the United States has been of the best. A writer in *Reader's Digest* in 1966 said: "Indeed, in state after state there is growing alarm over judges who are sick or senile, corrupt, guilty of unconscionable gold-bricking, habitually intoxicated or otherwise unfit to serve on the bench."<sup>45</sup> and in our own state in 1964 the consensus of a citizen's conference on modernization of Pennsylvania's judicial system concluded that, "A bewildering patchwork of courts with overlapping jurisdiction, unsupervised operations and, often, ill-trained judicial personnel has created congested dockets and costly delays which deprive the people of prompt, fair and equal justice under law."<sup>46</sup>

Judicial selection, as illustrated by the debates during the constitutional conventions of 1838 and 1874, has been a recurring problem in our efforts to establish good government. Since the advent of the Missouri Plan for the selection of judges there has been a host of articles, speeches and conferences on the subject, particularly since the inception of the Pennsylvania Bar Association's "Project Constitution." The discussions have been vigorous, at times, for there are those who would abandon the elective system and those who would retain it, and the advocates of each side have strong supporting arguments.

The problems confronting the convention are not solely confined to the best method of selecting judges; there are other considerations as well. The convention must decide, for example, whether it will recommend inclusion in the Constitution of such things as age limits or residence and citizenship requirements, or whether it will supply minimal constitutional qualifications and leave the rest to the Legislature.

The present Constitution requires separate Orphans' Court Judges to be learned in the law;<sup>47</sup> and elsewhere it refers to judges "learned in the law"<sup>48</sup> but does not otherwise fix such condition as a prerequisite for the holding of judicial office. It does require that members of the Supreme Court are to be qualified Electors of the Commonwealth<sup>49</sup> and it does require judges of

the Supreme Court to reside in the state and all other judges to reside in the districts for which elected,<sup>51</sup> but other than this, it leaves the establishment of judicial qualifications up to the Legislature. As a legal proposition there is no danger in this. The general principle of interpretation applicable to a state, as distinguished from the Federal, constitution, is that powers not expressly withheld from the Legislature inhere in it, especially when the constitutional provisions involved are not self-executing. Therefore, if the Constitution does not speak out on qualifications, the Legislature has the power to establish them.<sup>51</sup> This the Pennsylvania Legislature has done. In general it requires that judges of the Supreme, Superior and all other courts of record be learned in the law and be qualified electors.<sup>52</sup> The latter provision fairly well takes care of the problems of age, residence and citizenship. However, if special qualifications as to age or residence are intended which do not meet the voting prerequisites, such special qualifications must be spelled out. The principal argument in favor of such specification rests upon an inherent distrust that the Legislature might, for example, establish an age limit which is so extreme in either direction as to render the office available only to juvenile ineptitude or senile incompetence. However, if the qualifications established by the Legislature so limit the field of choice as to prevent the filling of the office or if they bear no rational relationship to the functions of the office to be filled, such qualifications would be arbitrary, capricious and illegal.<sup>53</sup>

A provision similar to Section 6 (a) of the proposed Judiciary Article of the Pennsylvania Bar Association would dispose of the matter of judges learned in the law. The final sentence of that provision is, "All justices and judges shall be members of the bar of the Supreme Court." However, it is an open question whether associate judges unlearned in the law should be discontinued in the rural areas where they now exist or whether all presiding officers of the minor judiciary should be learned in the law. These are policy questions which the Convention must resolve.

Another problem involved in manning the courts is how much should be constitutionally prescribed with respect to court officers. In Article V, §7 of the present Constitution, for example, there is a specific provision establishing a prothonotary's office [civil clerk's office] for Philadelphia. This was necessary in that instrument because there are multiple courts in Philadelphia and if each is to have its own prothonotary's office, there would be ten such offices at the present moment. Similarly, Article V, §22 of the Constitution provides for a clerk of the court in districts having separate Orphans' Courts. Sections 14 and 15 of the Pennsylvania Bar Association's proposed judiciary article deals with administration offices and clerks of court but neither the American Bar Association Model Judiciary Article nor the Model Judiciary Article proposed by the National Municipal League have comparable provisions.

A more detailed discussion of the problems of judicial selection appears in Part II, *infra*.

§6.4. *Removal and Retirement of Judges.* Getting good judges on the bench is a difficult thing but getting rid of bad ones, or disabled ones, or senile ones, or those addicted to alcohol or drugs is even more difficult. In the past, when the problem of getting rid of bad judges was considered and removal procedures were being framed, the evils sought to be remedied were corruption and venality; little thought was given to the removal of judges who were not evil but who, by reason of some unfortunate circumstance such as mental illness or senility were often a more serious threat to justice than the corrupt ones. As a result, there have been many situations where unfit judges have continued to act and the public has been powerless to take corrective steps.<sup>54</sup>

In Pennsylvania there are two methods of removing judges by legislative action; there is another method which amounts to automatic removal on conviction for misbehavior in office or of any infamous crime.<sup>55</sup> The legislative methods are impeachment and address; the other is a direct self-executing recall by the people of criminally unfaithful public servants who, sworn to obey and enforce the law, themselves violate it. All three methods are Constitutionally established.

*Impeachment and Address.* Impeachment and removal on address are provided for in Article VI, §§4-7 of the Constitution. Any judge of any court guilty of misdemeanor in office, misbehavior in office or of any infamous crime is subject to impeachment even though there has been no prior criminal prosecution. Impeachment proceedings are initiated by the House of Representatives by a specification of causes. The causes are then tried before the Senate which cannot convict without the concurrence of two-thirds of the members present. Removal by address applies to all judges except the judges of the Supreme Court. As provided in Article V, §15 of the Constitution, a judge may be removed for any reasonable cause not sufficient ground for impeachment, by the address of two-thirds of each House of the General Assembly to the Governor.

Removal by impeachment differs from removal by address to the Governor in that in the former there is a specification of charges voted by the lower House and trial by the Senate, whereas in the latter there is merely a concurrent resolution passed by two-thirds of each house directing the Governor to remove the judge. There is no trial in removal by address and there is no provision for the entry of a defense although the Legislature may allow such defense if it sees fit.<sup>56</sup>

Impeachment is specifically provided for in cases of "misbehavior in office."<sup>57</sup> or a conviction of "any infamous crime."<sup>58</sup> Although a conviction in a criminal court of either of these two offenses would automatically



result in a sentence of removal,<sup>59</sup> the lack of a conviction in criminal court would be no bar to impeachment proceedings.

The common law crimes of misbehavior in office, variously called "misconduct in office," or "misfeasance or misdemeanor in office" means either the breach of a positive statutory duty or the performance by a public officer of a discretionary act with an improper or corrupt motive.<sup>60</sup> But a judge who fails to perform promptly the duties of his position, unless prevented by substantial illness or other circumstances over which he has no control may be subject to either impeachment or removal by address even though a criminal act is not necessarily involved. The words of the Constitution (Art. VI, §7), "All officers shall hold their offices on the condition that they behave themselves well while in office" means that regardless of the nature of the breach of duty, a breach of a serious nature may result in legislative removal. The sale, denial or delay of justice destroys or prejudices a suitor's rights and this is one of the most grave breaches of that fidelity which every official owes to the sovereignty he is chosen to serve. Such a breach may result in either impeachment or removal by address.<sup>61</sup>

*Conviction of Misbehavior in Office or of any Infamous Crime.* Article VI, §7 of the Constitution provides for the removal of an officer on conviction of misbehavior in office or of any infamous crime. As noted above, misbehavior in office means either the breach of a positive statutory duty or the performance by a public officer of a discretionary act with an improper or corrupt motive; the conviction of an infamous crime has not been discussed and, therefore, this phrase must be examined. As a general proposition in law, an infamous crime is one which renders the perpetrator incompetent as a witness or which involves great moral turpitude [shameful wickedness].<sup>62</sup> but as used in the Constitution the expression has a deeper meaning. In construing the expression in its constitutional sense, the Supreme Court long ago concluded that it means treason, felony, and "every species of *crimen falsi* [the crime of falsifying]—such as forgery, perjury, subornation of perjury [procuring or inducing perjury], attain of false verdict [giving a false verdict from improper motives], and other offenses of like description, which involve the charge of falsehood, and *affect the public administration of justice.*"<sup>63</sup>

The words of Article VI, §7 are mandatory, that is, when a public officer is convicted of misbehavior in office or of any infamous crime, he must be removed from office. The sentence should include an order of removal and when the judgment of conviction becomes final, the officer has been recalled by public mandate.<sup>64</sup>

*Experience in Impeachment, Address and Removal.* There are approximately 9000 judges in the United States and since judges are human, perfection is not attainable. One would expect, therefore, that the impeachment

or removal of judges for misbehavior while not common would not be exactly a rarity either. The truth is, however, that impeachment and removal proceedings are so cumbersome, expensive and difficult that they have not been much of a factor in clearing the bench of dishonest judges. There have been a few cases where removal has been attempted, but these were situations where the judge engaged in conduct of such a shocking nature that the normal processes of criminal prosecution would probably have sufficed. The crux of the situation is epitomized in a question posed by one author: "Is there anyone familiar with this topic who will argue that the traditional Anglo-American legislative procedures of address and impeachment are anything but hopeless except for grievous wrongdoing?"<sup>65</sup>

In all of Pennsylvania's long history there have been but three instances of legislative impeachment since Judge Francis Hopkinson was impeached in 1780. Hopkinson's impeachment was followed by the impeachment of Alexander Addison in 1803, three members of the Supreme Court in 1805, and finally the impeachment of Thomas Cooper in 1811.<sup>66</sup> There has not been a single judicial impeachment in Pennsylvania for over one hundred and fifty-six years and, according to one author, up until 1962 at least, there have been no reported Pennsylvania cases involving the removal of judges for "conviction of an infamous crime."<sup>67</sup>

The principal objections to impeachment or address as a means of removing judges seem to be these:

either method is cumbersome. The Legislature must be in session or called into session and the legislators are taken from their normal duties for long periods of time.

either method is expensive. The impeachment of a judge in Oklahoma in recent years cost more than \$50,000 in expense in addition to the cost of investigation. In Florida a short while ago there were two impeachment trials which cost an estimated \$250,000.

either method is essentially political in nature. Widespread publicity and editorial comment as well as pressure from other sources might put the legislators under a dishonest influence to vote the sentiment of their constituents rather than their own.

if there is a miscarriage of justice, there is no appeal.

either method must necessarily be attended by an enormous amount of publicity which would be damaging to the entire judicial system and undermine public confidence in the judiciary.<sup>68</sup>

But what seems to be of equal, if not greater importance, is the objection that impeachment and address do not cover situations involving the disability of a judge through physical or mental infirmity, senility, drug or alcohol addiction or just plain inattention to business. There is, for example, a vacant seat in one of the courts of Philadelphia due to the unfortunate and extended incapacity of a judge. In a community which has been fighting court

backlogs with vigor, the loss of a single judge is a serious setback; it would be better to retire the incumbent at full pay and substitute an active judge in his place than to let the business of the court suffer. But the effect on the public is even worse when an ill or senile judge continues to act: his work product is apt to have a tremendously adverse effect upon justice. One author has cited an instance of a federal district judge who refused to resign even though a stroke had reduced his maximum attention span to one hour a day. He mentions, as the cause of a proposal to amend the Maryland Constitution, the refusal of a Baltimore judge to resign in the face of a claim by five of his fellow judges that he lacked capacity to deal with the responsibilities of his office. The same author cited an article in a leading Western newspaper to the effect that a trial judge was under the care of a psychoanalyst due to his inability to decide cases—a situation so notorious that the legal community had been aware of it for years.<sup>69</sup> In 1943 and for several years prior thereto, the Supreme Court of Pennsylvania had been troubled by a judge who shamefully neglected his duties on a claim of illness. The Chief Justice wrote to this judge several times but received no reply. The Supreme Court sent another judge into the district to dispose of cases which the allegedly ill judge had neglected and despite the fact that the substitute judge had done a good job, the backlog continued to grow. Finally, the Attorney General had to start an action in mandamus against the judge to compel him to do his work. The Supreme Court, after noting that the judge's illness was of a "self-inflicted nature", ordered him to do his duty. This finally proved to be somewhat effective.<sup>70</sup> In Erie County in the early 1940s the president judge of the common pleas courts became mentally disturbed but continued to act in his judicial capacity. His conduct was so shocking that a number of judges and lawyers petitioned the Supreme Court for relief. The matter terminated when the judge, through his counsel, agreed not to sit. He stayed off the bench until his term ended.<sup>71</sup>

*Recall of Judges.* Pennsylvania does not have any provision for the recall of judges. Recall is a procedure found in some state constitutions allowing for the removal of public officials by means of a special recall election. The election is called after a certain number of voters or a certain percentage of voters have signed a petition asking that the question of recall be put to the voters at an ensuing election. Recalls, like impeachments, have been relatively rare. In California, for example, which has a recall provision in its constitution,<sup>72</sup> there has not been a recall vote since 1932.<sup>73</sup> The reasons why recall is not more widely used appear to be:

recall is likely to be advantageous only in cases of flagrant misconduct—a type of conduct not likely to be engaged in by judges except under extraordinary conditions. There is usually no provision made for the investigation of charges and this involves considerable expense and trouble.

the gathering of signatures on a recall petition can be quite troublesome and expensive. The California Constitution, for example, provides that a recall

petition must contain the signature of 20% of the number of voters who cast votes for the office in question in the previous general election. Thus the recall of a judge elected county-wise in Los Angeles County might require a petition containing more than 100,000 signatures.

for a recall petition to be effective, it must be supported strongly by persons most likely to be hurt by the judge whose recall is sought. This means that practicing lawyers and public-minded citizens of substance who are often litigants would have to get behind the movement without any assurance of success.<sup>74</sup>

*Alternatives to Impeachment, Address and Recall.* There are a number of alternatives to impeachment, address and recall, only one of which, the California Plan, seems to have gained material support in recent years. There is, for example, the Missouri system. This consists in a Judicial Retirement Committee empowered by supreme court rule to investigate complaints and make recommendations for action against judges found to be too old or infirm to serve effectively. The Committee, which is chosen by the State Bar Board of Governors, receives complaints from whatever source and investigates them. If the committee finds that a complaint is justified, a delegation is sent to the judge to suggest that he retire. Experience has shown that this suggestion is not usually followed. The Committee, before seeing the judge again, advises the judge's friends, relatives and physician of the committee's findings and they are urged to talk to him about retiring. If persuasion fails, the Committee recommends that the Attorney General commence proceedings before a special tribunal set up by the Constitution.

Approximately 20 judges have retired under Committee pressure since its inception and in only two cases were formal complaints made. Only once did the Attorney General begin proceedings for removal and in that case the judge retired fifteen minutes before the hearing was to begin.

The Missouri solution is not considered a happy one by the bar. The Committee has met with opposition and some of its members do not like the "dirty work" entailed. The Committee has been nicknamed the "S.O.B. Committee" which is far from being acceptable to the members. Missouri has a low pension plan which explains judicial reluctance to retire. The plan has also been criticized because it does not have the power to act in cases of misbehavior of judges who are not disabled by age or illness. There is a positive reaction in Missouri to a system similar to California's where the predominant role is in the hands of judges rather than attorneys.

In Wisconsin, the rules of the integrated bar impose the duty on local committees to receive complaints of judicial misconduct and pass their findings along to the Board of Governors of the State Bar. The plan has never been used.<sup>75</sup>

The Section of Judicial Administration of the American Bar Association has taken the view that enforcement authority should reside in the highest

appellate court of the state, except where a justice of that court is involved. The high court, it believes, should have the power of censure and removal. The argument in favor of this is that a high court is better qualified to determine questions of misconduct than is the legislature. The Section believes that impeachment should not be utilized except for the removal of justices of the high court. Impeachment as a general procedure for removing judges is not recommended because it is cumbersome and because there is a more urgent need for methods to deal with judicial conduct of a nature not warranting removal from office.<sup>76</sup> This thinking is reflected in the American Bar Association Model State Judicial Article, §6, ¶4 (See Annex No. 6). What the proposal amounts to is a modification of the New York system which, under its Constitution, has a specially convened court, the Court on the Judiciary, which has the power to remove judges of the major courts. Other states which have adopted this system or variations thereof are Alabama, Texas, Louisiana, New Jersey, Illinois and Alaska. <sup>77</sup>

One plan which has gained considerable momentum in recent years is the so-called California Plan. By amendment to its constitution in 1960, California added a body called "The Commission on Judicial Qualifications,"<sup>78</sup> a nine-member commission of judges, lawyers and laymen which has jurisdiction over every judge in the state with respect to willful misconduct in office, willful and persistent failure to perform duties, habitual intemperance, and disability seriously interfering with a judge's duties, which is or is likely to be permanent in character.<sup>79</sup>

The California Commission has a full-time executive secretary and staff for the receipt and investigation of complaints. The body has regular meetings at which it reviews those complaints which the executive secretary has found to have merit. It recommends, when necessary, appropriate disciplinary action to the Supreme Court; the Supreme Court alone has the removal power.

The following are the claimed advantages of the California Plan:

- it is a full-time, permanent, state-wide agency with a competent investigative staff. Other plans seem to lack this merit.

- it operates confidentially and makes its conclusions public only if it finds that a judge is *unsuitable to hold office* and when informal methods of solution have failed. Secrecy during the early stages of an investigation is important. Unfounded and malicious charges would, if made public, bring the judiciary into disrepute.

- it can only recommend removal to the Supreme Court; it cannot do the job itself. This is a form of appeal which is desirable to correct errors in the Commission's findings or conclusions.

Not every one likes the California plan. It has its critics who claim:

- that it gives disciplinary powers over judges to a commission in which senior appellate judges are in a minority and in which nearly half of the members

are not judges. The job of disciplining judges belongs to people who know what a judge should or should not do.

that giving investigative and disciplinary powers to a body having lay representation interferes with judicial independence. Judges should be free of interference by outsiders and responsible only to the craft itself.

that because the Commission is permanent it will develop an incentive to produce results. An idle commission, with not much to do, is likely to feel it necessary to justify its existence by taking action in doubtful cases. This could cause the Commission to put pressure on judges to resign for reasons which would not, in fact, justify removal or involuntary retirement.

The Pennsylvania Bar Association, at its July 1967 meeting in Bedford Springs, voted to substitute for Section 12 of Article V of its original proposed Judiciary Article, a new Section 12 which is an adaptation of the California Plan, to the rest of the Association's proposed judicial organization. The new Section is recorded in the annexes. See Annex No. 5B.

The problems of removal, suspension and discipline of judges are discussed more fully in Part V, *infra*.

Kindred considerations with respect to the removal, suspension and discipline of judges are (1) the proscription of incompatible activities by judges, (2) the retirement of judges other than for senility or disability. These topics have been considered at length in Parts IV and VI, *infra*.

§6.5. *Insuring the Independence of the Judiciary.* Under the doctrine of separation of powers it is necessary that there be constitutional restraints against intrusion of the judiciary by the executive and legislative branches of government. The literature on the subject of governmental powers is replete with statements assuming that the judiciary should be independent of the other branches,<sup>80</sup> and this is in keeping with the logical view that the dispensers of justice must not be distracted in the search for truth. In fact, this was the thought behind that specification of oppression against the King of Great Britain in the Declaration of Independence.—“He has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Alexander Hamilton once wrote: “Next to permanency in office nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's substance amounts to a power over his will and we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on occasional grants of the latter.”<sup>81</sup> In borrowing a phrase from this utterance, one judge wrote:

If it should be held for a moment that the legislature, after fixing the salary of a judge, had power to reduce it, we would be obliged to hold that they would have the power to reduce the salaries of all judges; as, in fact, such laws must be general

and, therefore, if they passed any such laws, they would be obliged to reduce the salaries of judges. If they can pass a law reducing the salaries of judges, then they can pass a law practically sweeping away the salaries entirely, and if they can practically sweep away the salaries—the power over a man's subsistence amounting to a power over his will—they can crush and destroy the whole judicial department of the government. If this is possible, then the legislature by an act could destroy the government itself, for the judiciary is a co-ordinate branch of the government, without which the whole fabric would be bound to fall to pieces.<sup>82</sup>

The present constitutional provision respecting the salaries of judges is contained in Article V, §18. It merely prescribes that all judges learned in the law must receive a fixed, adequate compensation. It does not contain the protective language contained in the corresponding section of the Constitution of 1790 (Art. V, §2) that compensation of judges "shall not be diminished during their continuance in office." This, however, does not alter the established principle that with respect to the judiciary the Legislature may be prohibited by necessary implication from doing things not expressly prohibited in the Constitution. Upon this basis it has been held by our Supreme Court that the Legislature may not reduce the salary of a judge either directly or by reapportioning districts so as to bring him in a district paying a lower salary.<sup>83</sup> The Legislature may, however, under the mandate of the Constitution to fix "adequate compensation", increase the salaries of judicial officers.<sup>84</sup>

But there are other possible methods whereby the legislative branch might interfere with judicial independence. For example, if it were possible for the Legislature to completely eliminate a judicial office during its prescribed period of life, it could easily command the obedience of existing judges under pain of losing their offices. This, however, is not possible under the present Constitution. Various provisions of Article V establish the tenures of the judges of the courts from justices of the peace to judges of the Supreme Court and apart from impeachment and address these provisions limit the right of the legislative branch to eliminate a judicial officer once elected to an established court. In holding that this is the law, the Supreme Court succinctly expressed the inherent dangers thus:

What could be more destructive to all independence of action of a judge, than the momentary liability, during the recurring sessions of the legislature, to be dismissed from the exercise of the functions of his office by the repeal or abolition of his judicial district? If all the while he must be conscious that he exercises the powers and authority conferred by his commission only by the forbearance of the legislature, although it might be possible that independence of action might still exist, it would be an exception; as a rule it would be a myth.<sup>85</sup>

Article V of the Constitution vests the judicial power of the Commonwealth in the Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail deliver, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the Gen-

eral Assembly may from time to time establish. In Section 26 of the same article, it is prescribed that all laws relating to courts shall be general and of uniform operation, and the General Assembly is prohibited from creating other courts to exercise powers vested by the Constitution in the judges of common pleas and orphans' courts.

These provisions are obviously aimed at protecting the courts and judges from legislative invasion. They mean that the Legislature cannot give itself judicial powers not otherwise constitutionally granted. It cannot, for example, direct the courts to perform a judicial function in a particular way,<sup>86</sup> command the courts to adopt for the future a particular construction of a previously enacted statute,<sup>88</sup> or direct a court to grant a new trial.<sup>87</sup> Under Section 26, it could not give itself or another tribunal powers vested in the common pleas and orphans' courts, and under the provisions of Section 3, which describes the jurisdiction of the Supreme Court, it cannot give itself appellate jurisdiction: it can, of course, in some instances destroy the effect of a judicial decision based upon the substantive law by changing that law, but it cannot change the effect of judgments or decrees previously rendered.<sup>89</sup>

There is one way in which the Legislature can exercise some form of pressure upon the lower court judges and that is by imposing nonjudicial duties upon them. The Constitution (Article V, §21) prohibits the imposition of nonjudicial duties upon the Supreme Court or its judges, but this does not apply to lower courts.<sup>90</sup> Schulman, in his work "Toward Judicial Reform in Pennsylvania" <sup>91</sup> lists a host of legislative enactments imposing nonjudicial duties or duties marginally judicial upon Pennsylvania judges. This poses the question to the Convention whether there ought to be some curtailment of legislative power to exact nonjudicial work from its lower court judges. This is not an easy problem, for in many situations the courts have historically exercised a sort of judicial supervision over or participation in the work of elected officials at the county and municipal level and the results have been satisfactory. On the other hand, when a judge is engaged in such nonjudicial work he is mixing in politics, is distracted from his judicial duties and becomes a target for criticism which lowers public esteem in the judiciary.

Boiled down to basics, the major problems of the Convention in this regard seem to be:

should the Constitution return to the salary provisions of the Constitution of 1790, prohibiting a reduction of judicial salaries during the continuance of the judges in office? Under the case law, this appears unnecessary; it may be desirable.

concomitant to the first problem, should the Constitution specifically authorize the increase of judicial compensation during a judges's tenure? Under case law, salaries can be increased without direct constitutional authority. Perhaps this should be spelled out.



should the tenure provisions of the Constitution have added thereto a provision prohibiting the other branches of government from eliminating a judge during his tenure by statute or decree? This would be difficult to spell out without disturbing other provisions of the Constitution and may be unnecessary in view of case law.

should the grant of judicial power to whatever courts are to be established have added thereto a provision that no judicial power shall be exercised by either the legislative or executive branches except as provided elsewhere in the Constitution? This would merely express the principle of separation of powers as enunciated by the courts.

should the prohibition of Article V, §21 against the imposition of nonjudicial duties on the Supreme Court be extended to the lower courts? if extended, should the prohibition be entire or partial only? If partial, to what extend should the prohibition apply? This is a policy decision not easily resolved.

In connection with these problems it is interesting to note how some of them are disposed of in the various proposals of representative bodies. The proposal of the Pennsylvania Bar Association (Art. V, §11), the proposal of the American Bar Association (Section 7, ¶3) and the Model Judiciary Article of the National Municipal League (Article VI, Alternative §6.04 (f)) all suggest the use of language similar to that used in the Constitution of 1790, namely, language which forbids the diminution of judges' salaries during their terms of office. (See Annexes Nos. 5, 6, 7). There is this exception: evidently in anticipation of a period of economic stress, the Pennsylvania Bar Association proposal allows a reduction of judicial salaries if all compensation of salaried officers of the Commonwealth are diminished. This might have some objectional features since the proposal does not require a proportional diminution of all salaries. Thus, the proposal, if adopted, might support a nominal lessening of salaries generally but a substantial diminution of judicial salaries at some levels, thereby exhibiting the vice which the present case law seeks to eliminate.

The American Bar Association proposal (§7, ¶1) has the interesting suggestion that the salary of justices and judges have, as the top limit, the salary paid to the highest executive officer other than governor. This might be objectionable on the ground that it endangers the principle of adequate compensation of judges. Who is the next highest executive to the governor might be hard to determine and even if determined, the amount of his compensation might be relatively low because his duties are not arduous. Thus, the suggested standard might be unfair to judges who have extremely difficult tasks and heavy case loads.

The proposal of the Pennsylvania Bar Association (Art. V, §13) extends the prohibition against imposing nonjudicial duties on judges so as to include all justices and judges. This, in fact, goes beyond the present Constitution (Art. V, §21) which protects only the Supreme Court against the imposition of such duties.

Finally, the Pennsylvania Bar Association Proposal (Art. V, §1) prohibits the Legislature from establishing courts other than those specified in the Constitution unless the necessity therefor is certified to by the Supreme Court. This would, of course, act to prevent the Legislature without Supreme Court permission from weakening a court by creating another with concurrent jurisdiction or appellate jurisdiction over it. The current Constitution (Art. V, §1) gives the General Assembly the power to establish courts other than those therein mentioned, but it may not establish a court of original jurisdiction to be presided over by the judges of the Supreme Court (Art. V, §21), nor may it establish a court to exercise the powers vested in the Constitution in the judges of the common pleas and orphans' courts (Art. V, §26).

§6.6. *The Business of the Courts.* No matter how well organized or how well manned a court may be, the benefits of such virtues may be lost in the manner in which the court's business is handled. If there are long delays; if counsel fees mount because of repeated useless appearances, justice may be effectively denied. Judicial business is big business, not only in the volume of cases and the value of the interests litigated therein, but in the number of persons employed and the extent of the property used in the judicial processes.

In Pennsylvania alone there are thousands of people engaged in pursuits which either directly or indirectly bear upon the business of the courts. Apart from the judges on the bench, there are court criers, bailiffs, tipstiffs, interpreters, court stenographers, secretaries, minute clerks, copyists, typists, probation officers, librarians, research assistants, jury commissioners, bail commissioners, appraisers and a host of others whose occupations touch upon the administration of justice and who must be compensated for their services.

In the course of daily court business, thousands of square feet of public property are occupied, heat, light and power are consumed, great masses of supplies are used up, records are meticulously posted and copied, writs, papers and documents of all sorts are issued and thousands of man hours of labor are poured into the hopper of justice.

The cost of this vast operation is born partly by the Commonwealth; partly by the counties. As mandated by the Constitution,<sup>92</sup> the State pays the salaries of the judges who are required to be learned in the law, but apart from bearing the expenses of the Supreme and Superior Courts, it shifts the vast bulk of the costs to the counties. This has resulted in some conflicts between the courts and county fiscal officers, for the latter have considerable control over the number and salaries of appointed court officers. In the County Code, the Legislature set up salary boards which have jurisdiction over the number and compensation of all court criers, tipstaves and other court employees, and of all officers, clerks, stenographers and em-

ployees appointed by the judges who are paid by the county treasury.<sup>93</sup> The president judge of the court sits as a member of each county board when the number and salaries of court appointed officers are considered but he can easily be outvoted.

With the exception of the prothonotary of the courts of common pleas of Philadelphia County who is appointed by the judges,<sup>94</sup> the clerks of court, registers of wills and prothonotaries of the counties are elected by the people.<sup>95</sup> These individuals, their deputies, clerks and employees keep the records and work closely with the courts yet the judges have only a nominal control over them and virtually no say in the choice of office personnel. Although this would seem to be the setting for a potential cold war between the judges and the officers who keep court records and issue court writs, it has rarely resulted in difficulty of any sort. No serious difficulty could arise anyway, for the court is master of its own records and has the inherent power to enforce reasonable rules to see that its records are protected.

Nor has there been much difficulty between the courts and the fiscal officers of the counties with respect to judicial appointive officers. There has been unhappiness, of course, whenever the Salary Board refuses to go along with the judges on the number and salaries of their appointees, but the judges have learned to live with this as a fact of public life. Of course, if the Salary Board gets unreasonable in its attitude, the judges are not without remedy. If county fiscal officers neglect or refuse to furnish funds, or sufficient funds, for reasonable judicial functions, and in consequence the efficient administration of the judicial branch of the government is thereby impaired or destroyed, the courts possess the inherent power to require such necessities to be furnished and to direct payment therefor out of the public treasury.<sup>96</sup>

The judicial power of the Commonwealth is vested in the courts named in Article V, §1 of the Constitution but the fiscal power is vested in the Legislature by Article IX. These are coordinate powers which in the past have not conflicted to any great degree but those who have strong views on judicial administration sometimes press for changes which might create some difficulty. It is urged, for example, that a modern judicial article should have two paramount items: (1) the designation of the chief justice of the highest court as the responsible administrative head of the system, having the right to supervise and control employees of the court system, to transfer and reassign judges, and to develop administrative and other procedures for handling the nonjudicial business of the courts efficiently and effectively. (2) an administrative officer and staff to prepare materials, gather information, create a budget for the over-all system, collect statistics, develop personnel standards and the like.<sup>97</sup>

Complete judicial supervision and control of all court personnel would, of course, involve the elimination of some elected court officers, such as

prothonotaries, clerks of court, registers of wills etc., and would transfer the appointment of these and their deputies, clerks and assistants to the court. The suggested system would also involve a huge budget and the approval thereof would undoubtedly create some problems with the Legislature. It is argued that without an entire revision of the Constitution, it is doubtful that complete implementation of these proposals could be achieved.

Most proposals for court administration are in outline only, using the provisions of the New Jersey Constitution of 1947 as a starting point or model. The New Jersey Constitution (Article VI, §VII.¶¶ 1-3) provides that the Chief Justice shall be the administrative head of all the courts in the State who appoints an Administrative Director to serve at his pleasure. The Chief Justice makes all assignments to the Divisions and Parts of the Superior Court and has the transfer or reassignment power. The Clerk of the Supreme Court and the Clerk of the Superior Court are appointed by the Supreme Court.<sup>98</sup>

The American Bar Association proposal (§8, ¶2), the Pennsylvania Bar Association proposal (Article V, §14(a)), and the Model State Constitution proposed by the National Municipal League (§6.06 (a)) all make the chief justice or judge the head of the court system with the right to assign judges to do the work. The American Bar proposal directs the chief judge to appoint an administrator to prepare a budget for submission to the legislature; in the Model State Article the chief judge submits a consolidated budget for the entire unified system and requires that the total cost thereof be paid by the State with the right of the legislature to require reimbursement from political subdivisions. The Pennsylvania Bar proposal says nothing about budgets but requires the legislature (Article V, §17) to implement the provisions of the article as needed.

There are some who do not think that all administrative power should be solely in the chief judge, and it is pointed out that the record in states where administrative authority is so concentrated has not been uniformly successful. On the other hand it is argued that each state differs from the others and that an unsuccessful record elsewhere should not be binding. The proponents of concentration believe that the stature and ability of the chief judge is needed to afford effective leadership and command respect, and if he needs help, he can consult with others without undermining his own powers.<sup>99</sup>

1938 saw the beginnings of the various systems of judicial administration now in the process of development throughout the country. In that year the Section on Judicial Administration of the American Bar Association made four simple recommendations:

that practice and procedure in the courts should be regulated by rules of court; and that to this end the courts should be given the rulemaking power.

that provision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

that judicial councils should be strengthened with representation accorded to the Bar and the Judiciary Committees of the Legislative Department.

that quarterly statistics should be required.<sup>100</sup>

Of these four suggestions, one has been adopted in toto in Pennsylvania and one has been used in modified form for many years. The rulemaking power was long ago given to the Supreme Court by the legislature<sup>1</sup> and ever since 1911 it has been possible for willing judges, not behind in their work, to be assigned to other districts in the Commonwealth to assist in the disposition of cases.<sup>2</sup> The latter system has worked out very well. It has enabled judges of the smaller districts to receive valuable experience in the more populated areas and has been an excellent medium for the exchange of ideas among judges. Its principal faults seem to be that judges cannot be assigned against their will and assignments cannot be made to any district unless that district requests help.<sup>3</sup> More recently, by amendment to the Constitution,<sup>4</sup> it has become possible for the Chief Justice to assign former judges learned in the law, who are willing so to do, who have served at least one term and who have not been defeated for reelection, to temporarily sit in the courts of any judicial district under such conditions as the Legislature may prescribe. The Legislature, by statute, has provided that such retired judges as desire to serve, may file their names with the prothonotary of the Supreme Court together with a statement of the ensuing weeks or months during which they will be available for assignment. When the president judge of a court of record needs an assigned judge to help with the work of his court, he requests the Chief Justice to make an assignment from the retired judges' pool, etc.<sup>5</sup> It is perhaps too early to appraise the effect of this amendment and its implementing statute but the general feeling among judges is that the system is working well.

There is one more aspect of court business which needs consideration. While considerable thought has been given elsewhere to the handling of the business of trial judges, not much has been said of the work of appellate courts. There has been an undoubted increase in the amount of work which has been dumped on appellate courts since the law explosion, particularly in the criminal field where radical developments of constitutional law have brought a flood of post-conviction relief applications. The work output of the appellate courts seems to have slowed slightly but they keep relatively abreast of the flood. However, in anticipation of the growth of possible backlogs and in the interests of expedition as well as in improving the quality of appellate work, a number of suggestions for improvement have been

made. Among these is the suggestion that the number of appellate judges be increased. The proposal of the Pennsylvania Bar Association (Article V §3(a)) suggests an enlargement of the Superior Court from seven to nine judges, with the power in the Supreme Court to temporarily add judges thereto from the ranks of the lower courts as the needs arise. Coupled with this is a provision allowing the court to act in panels of three or more.

First, with respect to the enlargement of the court only: the proponents urge that the more judges there are the less individual work there is for each judge. This, it is claimed, not only increases the court's work capacity, it also enhances the quality of such work. The critics have this to say about it however: "

increasing the number of judges does not lessen the work of each judge, necessary for the study of records and briefs, legal research and examination of opinions which the other members write. A judge must do all of these things in order to decide whether to agree with the opinion writer or dissent.

enlarging the court does not decrease the time required for listening to oral arguments; in fact, oral arguments may take a longer time because the more judges there are the more questions there are likely to be asked.

the more the judges, the longer the post-argument discussions, conferences and consultations.

the more judges there are, the greater the chance for disagreement in the manner in which an opinion is to be presented. This results in a lot of telephoning, correspondence, duplication of opinions, revamping, etc., before an opinion is ready to be handed down in final form.

It would, however, be unfair to consider the proposals in this way, for a piecemeal consideration only gives part of the picture. The proposals of the Pennsylvania Bar Association and others have coupled with them, the power of the court to act in panels of three or more, and the arguments in favor of this departmentalization appear to be:

the number of opinions each judge must write is reduced.

the number of cases which can be ready for disposition is materially increased.

there can be less formality and less deliberation by the court with respect to minor features of an opinion.

dividing a court frees the entire court for more careful consideration of important questions of law or policy. (A case originally thought to be minor in nature and set down for argument before a division can be rescheduled for the full bench if it develops into an important case.)

The Colorado Constitution (Article VI, §5) has authorized the departmental system for most cases in the Supreme Court since 1904,<sup>7</sup> and in Missouri, the Constitution (Article V, §7) has authorized both the Supreme Court and the courts of appeals to sit in divisions of not less than three judges since 1891. William E. Doyle, associate justice of the Colorado su-

preme court reported in 1961 that "The number of cases which can be ready for disposition is doubled by use of the department method." Writing of the Missouri experience in 1939, supreme court justice Laurance M. Hyde of the Missouri Supreme Court (then a commissioner of the court) said: "The divisional system has unquestionably enabled the court to hear and determine almost double the number of cases that it could have disposed of if all cases had to be heard by the court en banc [the full court]."<sup>9</sup>

Criticisms of the departmental or divisional system seem to be:

it tends to increase the number of applications for rehearings. A decision by less than a majority of the court encourages the hope that a responsive ear might be reached among so many remaining judges.

it presents the possibility of conflicting decisions by the different divisions and results in a multiple Supreme or Superior Court instead of the single one established.

if the divisions are permanent in nature, lawyers are afforded an opportunity to select a court which they believe would be favorable to their causes.

if a matter is of sufficient importance to justify an appeal to a court of the stature of the Supreme or Superior Court, this calls for more than the decision of a few of the judges thereof.

§6.7. *The Retention, Modification or Elimination of the Minor Judiciary System [Justices of the Peace, Aldermen and Magistrates]*. Of recent years, many individuals, reform groups and organizations have been advocating either the abolition of the minor judiciary entirely or a complete renovation thereof.<sup>10</sup> Others are willing to admit that the system has some defects but are not willing to concede that it should be completely discarded. They believe that the core of the system can be maintained without material alteration; that the deficiencies which others have complained about can be corrected without much difficulty.<sup>11</sup> Among this latter group is the Pennsylvania Magistrates Association which, among other things, maintains substantially as follows:<sup>12</sup>

(a). Pennsylvania should retain the centuries old tradition of a people's court distilled by the day to day practical experience of those who man the benches thereof.

(b). A system of people's courts manned by local residents provides a strong, liberal and flexible administration of justice.

(c). Justices of the Peace keep courts of record from being overcrowded.

(d). Justices' courts provide a forum for quick, simple and inexpensive justice.

(e). A Justice knows his neighbors and is able to evaluate the activity and character of the people before him better than anyone else.

(f). The local justice of the peace is a stabilizing influence on the community, settling disputes before they gain out-of-proportion impetus and magnitude.

There seems to be little doubt that of recent years there has been a decided trend toward eliminating justices of the peace throughout the United States. In his statement to the Preparatory Committee on behalf of the Pennsylvania Bar Association (Part VIII, *infra*, Submission No. 5), Bernard G. Segal, Esquire, of Philadelphia, stated that the minor judiciary has been eliminated in every State bordering on Pennsylvania except Delaware, and even there, the system was completely overhauled in 1965, the justices of the peace being placed under the control of the Chief Justice of the Supreme Court and required to be governed by Supreme Court rules.\*

Mr. Segal further asserts that the minor judiciary has been eliminated in Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Virginia, Washington and Wisconsin. The elimination of an institution of such historical nature in twenty-four of the fifty States is some indication that there is a growing belief that the time has come for a change. Whether this is true in Pennsylvania remains for the Constitutional Convention to decide. Since the matter has been raised in so many jurisdictions, and since it has been made a distinct issue before the Preparatory Committee, there is every likelihood that it will be raised before the Convention. As a constitutional issue, the following problems will arise:

should the present minor judiciary system be eliminated?

if eliminated, what system should replace it? There are a number of suggestions which might be adopted in this regard, or the Convention may create its own system.

if the system is not eliminated, what should be done to correct whatever evils are present? This will require a study of the objections which have been raised.

should the matter of constables be considered and if so, what constitutional provisions should there be with respect to constables?

There are roughly two classes of objectors to the minor judiciary system: those who find it unacceptable on broad general principles, and those who point to specific aspects of the existing system which they find objectionable. The first group seems to feel that the minor judiciary system provides only a form of second-class justice. They not only object to the entire scheme of justices who keep poor records and are not responsible to any central authority, and who work part-time and are not learned in the law, but to the basic concept of a court designed to handle so-called "minor" causes. They believe that the amount involved in a civil case, or the relative impact of a

\*Mr. Segal may have made an error in his conclusion that all states bordering on Pennsylvania except Delaware have eliminated justices of the peace. Martindale-Hubbell Law Directory, Law Digests, Vol. IV, p. 3553 (1967), lists justices of the peace courts as still part of the West Virginia court system. West Virginia, of course, borders on Pennsylvania.



violation of the criminal law on society may have a relation to the expense of suit or prosecution, and, therefore, have a bearing upon which court a case should be tried in, but not upon the quality of justice to be derived from a system. The amount of money involved in a case or the importance or unimportance to society of a criminal action or a summary conviction case do not determine the legal difficulties which may be involved; small cases often generate great legal problems and a full-time experienced court manned by a legally trained judge is important in settling them justly and effectively. It is unjust to compel a litigant to have recourse to an appeal to secure a right denied him by a justice's court which may or may not have acted ignorantly or innocently. Further, an adverse judgment in a small suit against an impecunious defendant may have an impact upon him as great or greater than a substantially larger verdict might have on an affluent defendant, yet in the one case the matter is decided informally and in the other there is a full-dress trial with a highly qualified judge on the bench.

Some of the contentions of those who find specific phases of the minor judiciary unacceptable and the replies thereto appear to be as follows:

minor courts are staffed with persons ignorant of the law. Often a justice is unlettered generally and unable to grasp the significance of a statute or a provision thereof.

*Reply.* Not all justices are uneducated; many are highly educated. Further, provision has now been made by constitutional amendment (Amendment to Article V, §28, adopted No. 8, 1966) for the training of justices of the peace. The business of the minor judiciary is not so complicated that a few months of intensive training at the State's expense cannot equip the average person for the job.

Under the present system, if lawyers want to run for office of justice of the peace there is nothing to stop them; in fact, a number of justices are law-trained men who have not been admitted to the bar.

There is no assurance anyway that lawyers would necessarily make good justices of the peace. Many lawyers never see the inside of a courtroom and wouldn't know how to act if they got there. A justice of the peace needs more humanity, common sense and experience than a legal training; the small cases he handles do not require expert legal knowledge. This has been demonstrated by centuries of acceptable work.

There is a current shortage of lawyers which seems to be getting worse. Where will the justices of the peace come from if they must be lawyers? In some of the thinly populated counties there are only a handful of lawyers and they are too busy to be interested in becoming justices of the peace.

Justices of the peace operate out of makeshift offices either in their own homes or in adjacent outbuildings. This semi-official atmosphere and the lack of formality makes a bad impression upon citizens whose first contact with the law is in a justice's court. Respect for law in all of its phases is highly important, particularly in this lawless time.

*Reply.* There are two answers to this objection. (1). The fact that a justice's office is in his home may be an asset. Its proximity to the homes of litigants obviates the necessity for many miles of travel to a central location. It is convenient to the police who make arrests nearby; they do not have to use up valuable time driving miles to secure warrants or to attend hearings. Further, the "nearest available magistrate" provisions

*of the Vehicle Code have proved a convenience to motorists arrested in transit and have operated to prevent collusion between justices and police. (2). The place where hearings are held is not an indictment against either the justices or the system—it is an indictment against society for having failed to supply hearing rooms or offices. The State or County could easily supply more formal quarters and thus remove this objection.*

justices of the peace operate on a fee basis. Justice should not be measured by the source of the judge's income. Because of the fee system, justices of the peace have historically favored plaintiffs over defendants—so much so that the initials "J.P." are derisively referred to as "Judgment for the plaintiff."

*Reply. Those who make use of a justice's office should pay for the service if they are the ones at fault. There are justices who decide cases on the merits and not upon the possibility of collecting fees and it is unfair to condemn a system because a person in it may not operate properly. However, it is agreed that the fee system is not good. There is an easy remedy. If the Constitution required payment of an adequate salary, this objection would disappear.*

justices of the peace are not responsible to anyone, including the court of common pleas. Established higher courts exercise control only upon appeal or certiorari in specific cases. Most students of government believe in a unified, centralized court where responsibility is lodged in a single court or individual. In this way faults can be pinpointed and corrections made. As matters now stand, the very court which needs the most supervision is completely without it.

*Reply. Justices of the peace have done an acceptable job for centuries without court interference. However, it might be wise if there was some supervision by a higher court; it is not essential.*

justices do not devote their full time to their official duties. The public is entitled to dedicated full-time justices.

*Reply. Whether or not justices put in a full eight-hour day in their offices is an open question. Many do work at outside jobs in order to survive but this objection overlooks the fact that more than any other elected officials, justices of the peace are called upon at all hours of the day or night. Most justices would be happy to quit their jobs and work full time if there was a living wage for their services. Here again the objection is directed not at the justices but at society which has neglected the matter of compensation. If the Constitution required the payment of an adequate salary to justices, this objection would disappear.*

there are too many justices. It is impossible to determine how many justices there are at any given time or to keep track of their activities. Because there are so many of them, there is competition for business in some areas which leads justices to court the favors of the police. This has adversely affected the public image of the justices and has injected the profit-making aspect of business into the administration of justice.

*Reply. There are too many justices. The number should be reduced by constitutional changes which provide adequate services for each community without overcrowding.*

justices are too transient, unpredictable, and poor record keepers. They are not concerned with judicial ethics and are inefficient and sloppy in their operations. In many places there is such a low regard for the office that candidates cannot be persuaded to run for the office; in still others, those who are

elected do not qualify. Sometimes an elected and qualified justice pulls up stakes and moves away without notice or resignation, leaving the community without the services of an acting justice while in neighboring communities there is a surplus.

*Reply.* As an abstract proposition there is some validity to this objection but only with respect to specific instances which could be pointed to; the objection does not apply to the vast majority of dedicated justices throughout the State. If the fee system was abolished and the Legislature given the authority to provide adequate salaries; if reasonable controls were established under the Constitution, these objections would vanish. Once the office of Justice of the Peace is returned to its high standing, there will always be men of character to seek and hold it.

Complicating the problem of what to do with the minor judiciary is the circumstance that many people who have no quarrel with it in rural communities, find the magistrate system in Philadelphia objectionable. Because of recent evidences of corruption, venality, inefficiency and indifference in the Philadelphia Magistrates' courts, there are those who would abolish such courts without touching the rest of the system. Arlen Specter, District Attorney of Philadelphia advocates abolition of the system but says nothing about the justices of the peace;<sup>14</sup> the AFL-CIO, however, believes that uniform standards should be constitutionally established on statewide basis.<sup>15</sup> It objects to the idea of treating the magistrates and the justices as separate entities and believes that controls should be in the Constitution and not legislatively created.

### CONSTABLES

Constables are not judicial officers, and yet no discussion of the minor judiciary in Pennsylvania would be complete without some mention of their functions. They are neither county, borough or constitutional officers<sup>16</sup> yet they are as much a part of the American scene as the traditional apple pie. In fact, they have existed among the English-speaking peoples since the reign of Edward III,<sup>17</sup> who ascended the throne of England in 1327.

It is difficult to see how a justice of the peace could perform the functions of his office in civil matters without a constable to serve his writs and levy on his executions. While local police might be willing to serve his criminal warrants, there is no assurance that they would do so in all cases.

The present judiciary article of the Constitution (Art. V.) makes no mention of the duties and functions of constables although in Article III, §7, the General Assembly is forbidden to pass any local or special law regulating their fees or extending their powers and duties. The Legislature has, however, enacted a host of general laws governing the election, qualifications and functions of constables. The effect of these is to establish constables in roughly the same position with respect to justices of the peace as sheriffs are to the courts of common pleas, but constables are free agents and not subject to the control of the justices. In fact, although many of them

operate out of the offices of the justices, they do not share in the expense thereof. This is a matter of comity between the two.

As a problem to the Constitutional Convention, the question is whether the election, qualifications, functions and relationship of constables to the minor judiciary should be constitutionally established.

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### *Notes to Part I*

1. Woods's Appeal, 75 Pa. 59,69.
2. The transition from the Constitution of 1838 to the present Constitution was through use of a schedule. A schedule was also used when the amendments of November 2, 1964 were made to the Constitution of 1874. Other states, (as for example, New Jersey) have used the same device. The Report of the Governor's Commission on Constitutional Revision (January 24, 1964) contained a proposed schedule for the provisions therein recommended.
3. The Report of the Commission on Constitutional Revision (1959), p. 10.
4. The convention originally met in Harrisburg but it adjourned to Philadelphia where it met in Musical Fund Hall during all subsequent sessions.
5. Arensberg, "Election of Judges - 1850 style," Pa. Bar. Quarterly, Vol. 38, No. 1, p. 54.
6. In 1809 the number was again fixed at three; in 1826 it was increased to five and this number remained until 1874.
7. The principal documents of this nature were the Duke of York Laws, The Charter of Pennsylvania, Penn's Frame of Government, the Laws Agreed Upon in England and the Great Law established at Chester in December 1682.
8. Ch. II, §4.
9. Ch. II, §26.
10. *Ibid.*
11. Ch. II, §20.
12. Ch. II, §23.
13. Ch. II, §24.
14. Ch. II, §30.
15. Art. II, §§1,2.
16. Art. II, §8.
17. Art. V, §2.
18. Art. V, §4.
19. Art. V, §10.
20. Art. V, §1.
21. Art. V, §2.
22. Art. V, §3.
23. Art. V, §4.
24. Ch. II, §24.
25. Art. V, §6.
26. Art. V, §7.
27. Art. V, §8.
28. Art. V, §9.
29. Pennsylvania Constitutional Development, pp. 22-25.
30. Art. V, §2.
31. Art. VI, §7.
32. Branning, Pennsylvania Constitutional Development, pp. 81-82.
33. Prior to the Constitution of 1874 the number of judges on the Supreme Court was fixed by statute although in the Amendment to Article V, §2 of the Constitution of 1838 adopted in 1850 the number of judges was indirectly fixed in the scheduling portion of the amendment. It was there provided that in the first general election following the adoption of the

- amendment, one judge was to hold office for three years, one for six years, one for nine years, one for twelve years and one for fifteen years as decided by lot cast among them.
34. Art. V, §2.
  35. These writs were: writs of injunction against corporations, writs of habeas corpus, mandamus and quo warranto as to Commonwealth officers having statewide jurisdiction.
  36. See *Com. v. Reilly et al.*, 326 Pa. 56, 61 (1937), 191 A 14.
  37. Art. V, §22.
  38. Art. V, §12.
  39. Art. V, §6.
  40. Act 1965, Apr. 1, No. 5, §1, 17 PS §245.
  41. Act 1963, Aug. 2, PL 488, No. 1, 17 PS §790.17; Act 1963, Aug. 6, PL 507, §1, 17 PS §790.19.
  42. Art. V, §5.
  43. Art. V, §4.
  44. Pa. Law Encyclopedia, Vo. 20, Judges, §22, citing, *O'Mara v. Com.*, 75 Pa. 424 (1874).
  45. Much of the material has been derived from the CONSTITUTIONS OF PENNSYLVANIA compiled by Robert A. Weinert of the Legislative Reference Bureau under the direction of Edwin W. Tompkins, Director (1964).
  46. *Com. v. Green*, 58 Pa. 226 (1868).
  47. At the primary election May 17, 1966, the voters approved the consolidation of Articles VI, VII and XII. The text of the new Article is set out here as Article VI.
  48. 18:13-22.
  49. Article V, §1.
  50. *Carter's Estate*, 254 Pa. 518, 527, 99 A 58, (1916)
  51. *Margiotti v. Sutton*, 327 Pa. 337, 343, 193 A 250, (1937)
  52. Book III, Ch. III.
  53. Article V, §2.
  54. Article V, §5.
  55. *O'Mara v. Com.*, 75 Pa. 424 (1874).
  56. *Com. v. Dumbauld*, 97 Pa. 293 (1831).
  57. *In Re Contested Election of Law Judges*, 109 Pa. 337 (1885).
  58. *O'Mara v. Com.*, supra, Note
  59. See *Campbell v. Com.*, 96 Pa. 344 (1880).
  60. See, for example, *Kolbe's Case*, 4 Watts 154 (1835; *Reiber v. Boos*, 110 Pa. 594 (1885).
  61. Sheely, "Lay Judges in Pennsylvania," Pa. Bar Quarterly, Vol. 25, 139-140 (1954).
  62. Judges of the Supreme Court are courteously referred to as "justices" although the Constitution throughout refers to them as judges. In Article V, §2 there is a reference to the Chief Justice although it states that the court shall consist of seven "judges."
  63. Article V, §11.
  64. See Act 1901, Mar. 7, P.L. 20, Art. XVI, §§1 et seq. as amended, 53 P.S. §§22261 et seq.
  65. Act 1966, Feb. 1, No. 581, §1028, 53 PS§46028.
  66. Act 1959, April 29, P.L. 58, §102, as amended, 75 PS §102.
  67. Pennsylvania Manual, 1955-66, p. 524.
  68. Act 1931, June 23, P.L. 932, §1206, as amended, 53 PS §36207.
  69. Act 1901, Mar. 7, P.L. 20, Art. I, §1, as amended, 53 PS §22182.
  70. Article V, §5.
  71. Act 1895, June 24, P.L. 212, §7.4, added 1963, Aug. 14, P.L. 819, §2, 17 PS §191.4.
  72. Act 1895, June 24, P.L. 212, §7, as amended, 1963 Aug. 14, P.L. 819, §1, 17 PS §181.
  73. Act 1895, supra, §§ (a), 7 (c), 17 PS §§182, 184.
  74. Act 1895, supra, §7(e), as amended, 1963, Aug. 14, P.L. 819, §1, 17 PS §190.
  75. Art. 5, §4.
  76. Art. 5, §5.
  77. Act 1834, Apr. 14, P.L. 333, §18, 17 PS §221.
  78. See, Const. Art. 5, §6.
  79. Act 1834, supra.
  80. Act 1836, June 16, P.L. 784, §12.
  81. Art. 5, §20.
  82. Art. 5, §9.

83. Art. 5, §10.
84. Act 1834, April 14, P.L. 333, §58, 17 PS §371.
85. See *Com. v. Ralph*, 111 Pa. 365, 3A, 220.
86. Act 1901, July 2, P.L. 605, §1, 17 PS §393.
87. Const., Art. 5, §9.
88. Act 1834, Apr. 14, P.L. 333, §46, 17 PS §351.
89. Act 1860, March 31, P.L. 427, §32, 17 PS §361.
90. Act 1933, June 2, P.L. 1433, §1; 1939, June 15, P.L. 394, §1, 11 PS §243.
91. Const., Art. 5, §9.
92. Art. 5, §22.
93. *In re Webb's Estate*, 391 Pa. 584, 133 A2d 435.
94. *In re Brusstar's Estate*, 123 Pa. Superior Ct., 45, 186 A. 147.
95. Act 1913, July 12, P.L. 711, §1, as amended, 17 PS §681.
96. Act 1961, July 17, P.L. 781, §§1, 2, 17 PS §§705, 706.
97. Act 1913, July 12, P.L. 711, §10, as amended, 17 PS §693.
98. Act 1913, *supra*; Act 1951, Aug. 10, P.L. 1163, art. III, §301, as amended, 20 PS §2080, 301.
99. Act 1913, *supra*, §11, as amended 17 PS §694.
100. Act 1933, May 18, P.L. 809, §1, 17 PS §702.
  1. Act 1913, *supra*, as amended, 17 PS §694.
  2. Act 1911, May 5, P.L. 198, §1, 1925, Apr. 1, P.L. 109, §1, 17 PS §621.
  3. Act 1911, *supra*, §6, as amended, 17 PS §626. Jurisdiction in appeals from civil suits before an alderman or justice of the peace was conferred by Act 1913, Mar. 27, P.L. 17 PS §652.
  4. Act 1911, *supra*, §6, as amended, 17 PS §626 (Second Purdon reporting).
  5. Act 1933, June 2, P.L. 1433, §1; 1939, June 15, P.L. 394, §1, 11 PS §243.
  6. Act 1913, July 12, P.L. 711, §11, as amended, 17 PS §694.
  7. Act 1933, June 3, P.L. 1449, Art. II, §201, 11 PS §269-201.
  8. Const., Art. 5, §12.
  9. *McNair's Petition*, 324 Pa. 48, 187 A 498 (1936).
  10. Act 1901, Mar. 7, P.L. 20, Art. XVI, §1, as amended, 53 PS §§2261 et seq.
  11. Act 1901, *supra*, Art. XVI-A, §1, added 1951, Sept. 29, P.L. 1623, §§1, 53 PS §22291 et seq.
  12. Act 1937, June 15, P.L. 1743, No. 368, §10.1, added 1957, June 14, P.L. 315, §1, 42 PS §1110.1 et seq.
13. Introduction, p. XXXI.
14. Stammier, "The Theory of Justice," (1925) p. 22.
15. Speech on Mr. Justice Story, Sept. 12, 1845.
16. George Wharton Pepper, quoted on the inside cover of a booklet "In Support of the Pennsylvania Plan for the Selection and Tenure of Judges," printed by the Philadelphia Bar Association.
17. Horace Stern, former Chief Justice of Pennsylvania, quoted in the booklet cited *supra*, footnote 16.
18. As for example, in the Introduction to the American Bar Association handbook on the improvement of the administration of justice.
19. Page 82 of its Report.
20. Report of the Temporary State Commission on the Constitutional Convention, "The Judiciary," (No. 12, p. 12).
21. John W. Freels, "Illinois Court Reform-A Two-Year Success Story," 49 Jour. Am. Jud. Soc. No. 11, p. 266 (April 1966).
22. Hon. Richardson Dilworth, the then Mayor of Philadelphia and Dean Jefferson Fordham of the University of Pennsylvania Law School, in a minority report printed on pages 218-219 of the printed Report of the Commission.
23. Page 223 of the Commission's Report.
24. Tydings, "A Fresh Approach to Judicial Administration," 50 Jour. Am. Jud. Soc. (1966) No. 2, p. 44, cites the following: In 1965, the Southern District of New York with 24 judges had a backlog of 10,000 cases; the Eastern District of Pennsylvania, with 11 judges, had a median delay of 41 months between issue and trial and had a backlog of 6,000 cases.

- In Rhode Island with one judge, 17% of all cases had been pending for more than three years and in the District of Delaware, with three judges, the figure was slightly higher.
25. Senator Hugh Scott of Pennsylvania, in his "Legislative Proposals For the Reform of the Federal Judiciary," 50 Jour. Am. Jud. Soc. (1966), No. 2, p. 50, would substitute something in the nature of the Missouri Plan in place of Presidential selection as now obtains.
  26. Report of the Citizens' Conference on the Modernization of Pennsylvania's Judicial System, "The Consensus", p. 1.
  27. The Federal Courts received the rule-making power in 1938. The Pennsylvania Legislature was one year ahead with the Act of 1937, June 21, P.L. 982, as amended, 17 PS §61 et seq., which conferred such powers on the Supreme Court in civil matters, but in criminal causes the rulemaking power was not conferred upon the Supreme and Superior Courts until the Act of 1957, July 11, P.L. 819, 17 PS §2084.
  28. For example, in the two-year period 1963-65, the Legislature created three new common pleas courts for Philadelphia (See Acts 1963, Aug. 6, P.L. 547, §1, 17 PS §243; Act 1965, April 1, No. 5, §1, 17 PS §245) and added judges to ten courts of common pleas elsewhere (See 17 PS §§790.17-790.36).
  29. From the dissenting statements of the members of the Woodside Commission it would appear that Judge Woodside, Dean Fordham and Richardson Dilworth are among those who have such faith. Apparently, however, from the tenor of the Chairman's separate statement, there were some who lacked such faith.
  30. "Toward Judicial Reform," (1962) (University of Pennsylvania, The Law School, Institute of Legal Research, Philadelphia 1962) pp. 14-16.
  31. Albert L. Sturm, "Recent Trends in State Constitutional Revision," an address printed by the Arizona State University Bureau of Publications, 1964, p. 13.
  32. *ibid.* p. 15
  33. Annex 2, p.
  34. Webster's (New Twentieth Century) Dictionary, 2nd. Ed.
  35. *Com. v. Bulph*, 111 Pa. 365, quoting Blackstone, Book III, p. 42 to describe the powers of the King's Bench thus (p.376): "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below . . . It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. . . ."
  36. Report of the Commission on Constitutional Revision (1959), p. 220. Mr. Tompkins not only made a separate statement opposing the appointive-selective-elective system for selecting judges, he also joined a number of others on the Commission who filed a strong dissent against it.
  37. "In Support of the Pennsylvania Plan for the Selection & Tenure of Judges," the inside front cover, a pamphlet issued by the Philadelphia Bar Association.
  38. See, Report of the Temporary State Commission on the Constitutional convention for the State of New York (1967), Vol. 12, "The Judiciary", p. 76. Part of the layer system concept is staff-conceived.
  39. 50 Jour. Am. Jud. Soc. No. 6 (1967)
  40. The idea of a vertical system of specialized courts is, we believe, staff-conceived.
  41. SFE Annex Number 8.
  42. Deuteronomy 1:16
  43. Chapter XLV.
  44. Calamandrei, Piero "Eulogy of Judges," (The Princeton University Press, 1946), p. 7.
  45. Friggens, Paul "Is That Judge Fit to Sit?" Reader's Digest, July 1966, p. 2.
  46. The Consensus as published, p. 1.
  47. Art. V, §22
  48. Art. V, §15; Art. V, §9
  49. Art. V, §2
  50. Art V, §19.
  51. *Com. ex rel. Kelley v. Keiser*, 340 Pa. 59, (1940), 16 A2d 307.

52. Act 1851, Apr. 15, PL 648, §3, 17 PS §3 and §791; Act 1895, June 24, P.L. 212, §11, 17 PS §§11.
53. *Com. ex rel. Kelley v. Keiser*, *supra*, p. 63.
54. A number of situations of this nature are described by Jack E. Frankel in "The Case for Judicial Disciplinary Measures," 49 *Jour. Am. Jud. Soc.* (April 1966) p. 218, and "Removal of Judges—Federal and State," 36 *Pa. B.A. Quarterly* (1965) p. 286.
55. There is another possibility. Since the Supreme Court has the powers of the Court of King's Bench, which had general supervisory powers over all inferior courts, it may be that the Supreme Court has the power to prevent an incompetent or disabled judge from pursuing his duties. In June 1944 a group of judges and lawyers attempted to get the Supreme Court to exercise this power and remove an insane judge who had perpetrated all manner of injustices in Erie County. The Supreme Court entertained the petition but when the judge agreed to stay off the bench, no formal action was taken. The judge stayed off the bench but did not resign or retire. See, "Matter of the Alleged Mental Incapacity of Hon. Miles B. Kitts No. 1323 Miscellaneous Docket W.D.; No. 217 Miscellaneous Docket No. 8 E.D. Supreme Court of Pa.
56. "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," Reprint from *New York University Law Review*, March 1966, The Institute of Judicial Administration (New York 1966), p. 163.
57. *Const. Art. VI, §6*.
58. *Const. Art. VI, §7*.
59. *See Com. v. Knox*, 172 *Pa. Superior Ct.*, 510, 524 (1953), 94 *A2d* 138, affirmed 374 *Pa.* 343, 97 *A2d* 782.
60. *Com. v. Green*, 205 *Pa. Superior Ct.*, 539, 546 (1965), 211 *A2d* 5.
61. *Com. ex rel. Duff v. Keenan*, 347 *Pa.* 574, 583 (1943), 22 *A2d* 244.
62. *Com. v. Arcurio*, 92 *Pa. Superior Ct.*, 404, 415 (1927).
63. *Com. v. Shaver*, 3 *Watts & S.* 338, 342 (1842).
64. *See Com. v. Knox*, *supra*, footnote 59.
65. Frankel, Jack E. "Removal of Judges—Federal and State," 36 *Pa. B.A. Quarterly* (1965), p. 286.
66. Eastman, Frank M., "Courts and Lawyers of Pennsylvania," (The American Historical Society, Inc., New York, 1922), Vol. II, Ch. 32.
67. Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," (University of Pennsylvania, The Law School, Institute of Legal Research, Philadelphia, 1962) p. 80.
68. The objections as stated are paraphrased from those given by Hays, Jack N. in "The Discipline and Removal of Judges," 50 *Jour. Am. Jud. Soc.* (1966), p. 64.
69. Frankel, Jack E., "The Case for Judicial Disciplinary Measures," *supra*, footnote 54, p. 223.
70. *See Com. ex rel. Duff v. Keenan*, *supra*, footnote 61.
71. *See Matter of the Alleged Incapacity of Hon. Miles B. Kitts*, No. 1323 *Misc. Docket-W.D.; No. 217 Misc. Docket No. 8, E.D., Pa. Supreme Court*.
72. Article XXIII, §1.
73. "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges", *supra*, footnote 56, p. 164.
74. *ibid*.
75. *ibid* p. 166.
76. "The Improvement of the Administration of Justice," *American Bar Association Handbook*, 4th Ed. (1961), p. 39.
77. Report of the Temporary State Commission on the Constitutional Convention for the State of New York, "The Judiciary", No. 12, p. 49.
78. *Cal. Const. Art. VI, §1b*.
79. *Cal. Const. Art. VI, §10b*.
80. For example: "... the judicial article should contain only those provisions necessary to create the state court system, assure its independence and provide for its effective and efficient operation." Salient Issues of Constitutional Revision, The National Municipal League (1961) p. 115, "An independent judiciary must ever be a cardinal principle of constitutional government," Thompson, C.J. in *Com. v. Gamble*, 62 *Pa.* 343, 346 (1869).



81. The Federalist, No. 79.
82. von Moschizsker, J. in the lower court opinion printed in *Com. v. Mathues*, 210 Pa. 372, 401 (1904)
83. *Bailey v. Waters*, 308 Pa. 309, (1932), 162 A 819
84. *Com. v. Mathues*, supra, footnote 82.
85. *Com. V. Gamble*, 62 Pa. 343, 347 (1869).
86. *O'Conner v. Warner*, 4 Watts. & S. 223, 224.
87. *Com. v. Warwick*, 172 Pa. 140 (1895).
88. *DeChastellux v. Fairchild*, 15 Pa. 18 (1850).
89. *Pennsylvania Co. etc., v. Scott*, 346 Pa. 13 (1942), 29 A2d 328
90. *Com. v. Collier*, 213 Pa. 138 (1905), 62A567.
91. U. of Pa., The Law School, Institute of Legal Research, Philadelphia, 1962, Appendix B and C.
92. Article V, §18.
93. Act 1955, Aug. 9, P.L. 323, §§1623-1625, 16 PS §§1623-1625.
94. Const., Article V, §7.
95. See 17 PS §§1391 et seq.
96. *Leahey v. Farrell*, 362 Pa. 52, 57-8, (1949), 66 A2d 577.
97. "Salient Issues of Constitutional Revision," National Municipal League, New York, 1961, p. 129.
98. The prothonotaries of the Supreme and Superior Courts are appointed in Pennsylvania. See 17 PS §§18, 142.
99. State of New York Temporary Commission on the Constitutional Convention, "The Judiciary," (No. 12), pp. 78-84.
100. "The Improvement of the Administration of Justice," American Bar Association, Fourth Ed. (1961), p. 108.
  1. See §6.1, supra, particularly footnote 27.
  2. Act 1911, April 27, P.L. 101, §§1 et seq., as amended, 17 PS §§226 et seq.
  3. News media have contributed to the reluctance of judges to consent to assignments. Visiting judges have sometimes been referred to therein as "Tramp judges" or "Gypsy judges" and this terminology is less than acceptable to them.
  4. Article V, §15. Amendment of November 2, 1965.
  5. Act 1966, Spec. Sessions No. 1, Aug. 31, No. 3 §§1-8, 17 PS §§790.101-790.108.
  6. Solutions for Appellate Court Congestion and Delay," American Judicature Society Information Sheet No. 24 (September 17, 1963), p. 3.
  7. amendment Nov. 6, 1962, effective January 12, 1965, upon request of the Supreme Court the legislature may, by a 2/3 vote of each house, increase the size of the court from seven to nine.
  8. "Solutions for Appellate Court Congestion and Delay," supra, footnote 6, p. 5.
  9. *Ibid.*, p. 6.
10. Among these in Pennsylvania are: The League of Women Voters, The Pennsylvania Bar Association, A Modern Constitution for Pennsylvania, Inc., and Americans for Democratic Action. See Part VIII, *infra*, Submissions, 5, 7, 9, and 14.
11. In this category are the Pennsylvania Magistrates Association and several interested Justices of the Peace who have studied the system and its problems and have made suggestions to the Convention. See Part VIII, *infra*, Submissions 1, 3, 4, and 6.
12. See Part VIII, *infra*, Submission 6.
13. The research staff believes that not many justices have considered the implications arising from the constitutional amendment providing that the Legislature may require a course of training for justices of the peace. Such a provision comes close to a licensing provision and gives the Legislature a large measure of control over the judiciary which it has not enjoyed before. Rigid educational restrictions could easily prevent an elected justice from acting.
14. See Part VIII, *infra*, Submission No. 8.
15. See Part VIII, *infra*, Submission No. 12.
16. 33 P.L.E., SHERIFFS AND CONSTABLES, Ch. 1, §2.
17. Blackstone, Commentaries on the Laws of England, Book 1, Cap. 9.

## *Selection of Judges*

### §1. Introduction

The goals of a judicial system in a democratic society are simply and briefly highlighted in the following section of the Pennsylvania Constitution of 1874, which appeared also in similar language in the prior Constitutions of 1776, 1790 and 1838:

Article I, Sec. 11. Courts to be Open. Suits Against Commonwealth. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and *right and justice administered without sale, denial or delay* . . .

Though phrased in general language, there can be no doubt that this section was intended by the framers of those Constitutions to assure that personal and property rights of litigants would be secured promptly and without favoritism. The key to such equal justice under the law is a capable judiciary, dedicated to the proposition that "the law does not become the unjust distribution of justice."

We remind ourselves constantly that "we are a government of laws and not of men" yet there is no denial that the effective administration of justice depends on the capabilities and integrity of the men and women who fill our judicial offices. Succinctly stated, "The quality of our judges is the quality of our justice . . ."<sup>1</sup> Providing a capable, independent and fearless judiciary involves the informal means of recruiting candidates and the formal mechanics of selection, tenure of judicial offices and the possibility of reelection or reappointment. Other interrelated aspects of the problem, such as the removal, suspension and discipline of judges, their salaries, retirement and pension rights, are discussed in other sections of this source book.

It should be noted immediately that the method of selection of judges and the system of tenure given them involve two seemingly inconsistent goals. On the one hand, many contend that it is "indispensable to have a judiciary independent beyond reproach and without fear."<sup>2</sup> On the other hand, many

hold that it is essential "to make the judges in some degree accountable to the people."<sup>3</sup> Whether these goals are inconsistent, whether one of the goals must be tailored to accommodate the other or whether both goals can be maintained are questions that must be kept in mind in evaluating any system for the selection and tenure of judges. While tenure is discussed more fully in Part III, below, it is related directly to the independence or accountability of judges and indirectly to the selection process which seeks to obtain the best talent as judges, since many capable men cannot be encouraged to leave the financial security of a successful practice to become a judge if the tenure is short. Because of this interrelationship between selection and tenure, both are discussed in Part II.

§1.1. *Methods of Selection of Judges-In General.* There are three basic methods of selecting judges: (1) popular election, (2) appointment by the executive or legislative branch and (3) a combination of these two. Various groups have recently supported the combination method of selection by means of a non-partisan nominating commission which submits a panel of nominees to the appointing official, usually the governor, who selects one of the nominees. The appointed judge serves a short probationary term, followed by a popular election, whereby the candidate seeking retention of his judicial seat, "runs on his record alone" in a non-competitive election. This last is known by several names: the Merit Plan, the Missouri Plan or the Pennsylvania Plan.

§1.2. *Method of Selection of Judges in Pennsylvania-A Brief Resume.* Pennsylvania basically utilizes popular elections to select its judges. In addition there are several instances where judicial positions are filled by appointment: (1) appointments are made by the governor to fill new judicial positions or judicial vacancies resulting from death, resignation, removal or incapacity of a judge before the expiration of his term of office; (2) temporary assignments are made by the Chief Justice of the Supreme Court, to any court of record, of former judges learned in the law, who have served at least one term and have not been defeated for reelection and who are 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;<sup>4</sup> (3) appointments are made by the Mayor of the City of Pittsburgh of police magistrates;<sup>4a</sup> and (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. The special emergency judge 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.<sup>5</sup>

§1.3. *Method of Selection of Judges Followed in Various Jurisdictions.* Because of significant variations in the basic methods in use in the United States, the elective-appointive-combination categories can be expanded to include:

partisan elections, where candidates run with political designations.

nonpartisan elections, where candidates run without political designations.

appointment by the executive.

appointment by the executive, with confirmation by the legislature.

appointment by the executive, with confirmation by the electorate.

appointment by the legislature.

combination appointive-elective, utilizing a nominating commission, appointment by the executive, and a noncompetitive, nonpartisan election following a short term of office.

Partisan elections are used in 17 states: Alabama (all but trial judges in the largest county), Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas and West Virginia. In Illinois, the original election of a judge is by partisan ballot but subsequent retention is sought in a noncompetitive election, whereby the judge seeking reelection "runs on his record" with no opposition candidate or party designation.

Nonpartisan elections are used in 14 states: Arizona, Idaho, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. Trial judges in California are selected by nonpartisan elections.

Appointment by the executive is used for the federal judiciary, in Puerto Rico and nine states: California (appellate judges), Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire and New Jersey. In Maryland initial appointments are made by the governor but one year after appointment, the judge must seek a nomination in a party primary where cross-filing is permitted. If nominated he must run in a general election with no party label.

Appointment by the legislature is used in four states: Rhode Island, Vermont, Virginia and South Carolina.

The "Merit Plan," Pennsylvania Plan or Missouri Plan, involves the nomination of a small panel by a nonpartisan judicial nominating commission, and selection from this panel by the appointing official; after the judge has served for a short time, the people vote in a noncompetitive, nonpartisan election to retain or reject him. This plan is used in six states: Alaska, Colorado, Iowa, Kansas, Missouri and Nebraska. Occasionally, executives enjoying the power of appointment, have voluntarily adopted the nominating commission method for judicial appointments. Two mayors of New York City, the governors of several states and Puerto Rico have done so. In 1964, former Governor William W. Scranton became the first governor to establish a judicial nominating committee by executive action alone. He used the recommendations of his special nominating commission for the appointment to five new judgeships in Philadelphia.<sup>6</sup> In Pennsylvania, this voluntary establishment of a nominating commission is a variation of the executive appointment plan; it deviates from the Merit Plan in that the

judge who wishes to be retained must seek a nomination and election in the regular primary and general partisan elections.

Federal judges are appointed by the President and confirmed by the Senate. Recent Presidents have established voluntarily a formalized procedure for submitting nominations to the Senate, utilizing investigations by the Department of Justice and the answers to a questionnaire prepared by the American Bar Association's Standing Committee on Federal Judiciary. This committee regularly investigates and appraises those lawyers or judges being considered for federal judgeships, which information is forwarded for the consideration of the President and Senate of the United States. While there is nothing official or binding in these recommendations of the American Bar Association, they have served in some instances to focus public attention on the President's nomination of judges to the federal bench.<sup>60</sup> On at least one occasion, the public reaction caused the nominee to withdraw from consideration.

## **§2. Method of Selection and Tenure of Judges in Pennsylvania**

§2.1. *Historical Development.* The materials in this section trace the method of appointing judges and their tenure starting with William Penn's Charter of Privileges or Proprietary Frame of Government through the Pennsylvania Constitutions of 1776, 1790, and 1838 to the current Constitution of 1874. There were justices of the peace and judges in Pennsylvania prior to Penn's Charter, usually appointed by the royal authority. Penn's Charter is chosen as a convenient starting point because of its formal provisions for the appointment and tenure of judges. Much of the material discussed in this section identifies the source of the pressure for each constitutional revision of the method of selection and tenure for judges and describes the arguments for and against a particular proposal as developed in the debates of the various constitutional conventions. This emphasis serves not only to describe the pendulum swing of judicial selection and tenure principles utilized at various times in Pennsylvania but also to highlight the fact that previous constitutional conventions, wrestling with these problems of judicial selection and tenure, heard many of the same arguments that are being put forth today.

§2.2. *The Proprietorship.* Under the charter granted to William Penn by Charles II in 1681, the Proprietor had the "power and authority to appoint and establish any judges and justices . . . for what causes soever . . . and with what power soever . . . as to the said William Penn, or his heirs shall seem most convenient. . . ." In 1682, Penn issued his first Charter of Privileges or Proprietary Frame of Government, under which the provincial council was permitted to "elect and present to the Governor . . . a double number of persons to serve for judges . . . within the said province, for the next year ensuing."

The Frame of Government of 1683 granted this same power to the provincial council except that the judges' terms of one year were extended ". . . so long as they

shall well behave themselves . . .” By the last Frame of Government granted by Penn in 1701, the appointive power was transferred to the governor and while nothing was said about the terms of office of judges, they obviously depended upon the pleasure of the governor.<sup>7</sup> This method served the province until the Constitution of 1776.

Thus, the power to appoint judges inherent in the royal authority, was delegated in Pennsylvania to Penn, and through him to the provincial council and governor, so that one of the grievances enumerated in the Declaration of Independence (that the King “made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries”) was not specifically applicable to Pennsylvania. This did not mean, however, that the Proprietors, The General Assembly and the people of Pennsylvania had no complaints about royal interference with the laws and court structure of Pennsylvania. For instance, there was no Supreme Court in Pennsylvania and the Province’s laws to establish one were uniformly annulled by the Crown, which maintained the position that since all appeals should be decided in England, there was no need for a provincial Supreme Court. The Supreme Court was finally realized in Pennsylvania when the Crown, for some unknown reason, failed to void the act creating one in 1722. An attempt to limit the tenure of judges, who then served during good behavior at the pleasure of the governor, by permitting their removal only on the address of the general assembly, was vetoed by the Crown, on the grounds that to give Pennsylvania such a power would create jealousy in other colonies.<sup>8</sup>

§2.3. *The Constitution of 1776.* The Pennsylvania Constitutional Convention of 1776, assembled just after the Declaration of Independence, elected Benjamin Franklin to preside over its sessions. Franklin was also a member of the Continental Congress and had to divide his time between the two assemblies, indicating the dramatic background of Pennsylvania’s Constitution of 1776. That Constitution reposed executive power not in a single individual but in twelve members of an Executive Council (Chapter II, Section 19), which had the power to appoint judges (Article II, Section 10). The President of the Executive Council had the power to appoint justices of the peace, from persons elected by the freeholders (Chapter II, Section 30). Every member of the council was a justice of the peace for the whole state, by virtue of his office (Chapter II, Section 19).

The Constitution of 1776 provided that courts of justice should be established for Philadelphia and each county (Chapter II, Section 4), naming the following courts: Courts of sessions, common pleas, and orphans courts, to be held quarterly in each city and county. The legislature was empowered to create such additional courts as it might deem necessary (Chapter II, Section 26). See Part I, §2.2a, above.

The tenure of judges of the Supreme Court of Judicature was set at seven years; they were eligible for reappointment at the end of their terms and they were removable at any time by the General Assembly for misbehavior (Article II, Section 23). The justices of the peace were given seven year terms also but no mention was made of the tenure of other judges.

At the first meeting in 1783 of the Council of Censors, established by the Constitution of 1776, criticism was levelled at the judicial system (Chapter

II, Section 47).<sup>9</sup> The majority report of the council asserted: that the seven year term for judges was too brief and rendered the courts subservient to the will of the Executive Council, which appointed the judges; and that the power of the General Assembly to remove judges at any time for misbehavior made the judges hesitant to declare laws unconstitutional. The Council of Censors also noted that the provision of Chapter II, Section 23 of the Constitution of 1776, providing for "fixed salaries" had not been complied with, saying: "This most important injunction of the Convention has not been complied with, as it ought. Permanent salaries, should without delay be established by Act of Assembly for the justices of the supreme court, for and during their respective continuance in office." In obvious concern for the independence of the judiciary, which could be hampered by a refusal of its salaries, the Council of Censors' report concluded, "Judges should have nothing to hope or fear from any one."<sup>10</sup> No action was taken by the Council of Censors because the proponents of a change were unable to muster the two-thirds vote necessary for the calling of a convention to consider amendments. The debate, however, is indicative of the early concern over the judiciary's independence from the officials responsible for the appointing and removal of judges. The pressure continued to build up for revisions of the Constitution of 1776 generally and a constitutional convention was called for 1789.

§2.4. *The Constitution of 1790.* As noted above in Part I, Section 2.2b, under the Constitution of 1790 all judges and justices of the peace were to be appointed by the governor.

The tenure for judges was set at life, with the removal procedure being initiated by both houses of the legislature.

§2.4.1. *Criticism of the Governor's Power to Appoint Judges Under the Constitution of 1790.* The proponents of Jeffersonian democracy, believing that the popular election and limited tenure of all public officials were touchstones of democratic policy, attacked the appointive powers of the Governor and demanded popular election of judges to short terms of office. As early as 1805, the Democratic-Republicans waged a vigorous campaign for the governorship, stressing constitutional revision, but it was not until 1835 that the legislature authorized a referendum for a call of a constitutional convention. The call was approved by a narrow margin of the voters and the Constitutional convention assembled in 1837.

§2.5. *The Constitution of 1838.* Among the chief issues debated in the Constitutional Convention of 1837 were the method of choice of judges, the governor's appointive powers generally and tenure of office for all officials. It was openly charged that the Governor's broad power of appointment of state officers, major county officers and judges formed a base of patronage which resulted in the reelection of governors. The proponents of the popular election of judges were in the minority, however, so that there was

no chance of such reform; however, the popular election of justices of the peace or aldermen was provided (Article VI, Section 7). The debate on judicial reform centered on the tenure of judges.

The majority report of the 1838 Constitutional Convention's committee on the judiciary proposed that judges be appointed for life, on good behavior, to guarantee an independent judiciary. The minority report proposed limited terms, "... to make the judges in some degree accountable to the people."

This concern for amenability of judges to the people was also revealed in the report of the committee on the executive, which although recommending the continuation of the appointment power of the Governor, proposed the requirement that any appointment should be made with the advice and consent of the Senate, a feature not found in the Constitution of 1790. The feeling was that the legislators' knowledge about the appointees would result in raising the quality of appointments. It was even suggested that the approval of the House be sought, rather than the Senate, since it would give the people a greater measure of control over appointments. The compromise achieved on this issue of judicial tenure provided fifteen year terms for Supreme Court judges; ten year terms for the president judges of the courts of common pleas or other courts of record and for all other judges required to be "learned in the law"; and five year terms for associate judges of the courts of common pleas (Article V, Section 2). (For the difference between qualifications and functions of judges "learned in the law" and associate judges, see Part I, §5, *supra*.)

§2.6. *Constitutional Amendment of 1850.* The advocates of popular elections succeeded in 1850 in having the Constitution of 1838 amended so that all judicial offices were made elective. Judges of the Supreme Court were to be elected in a statewide election. Judges of the courts of common pleas and all other judges required to be "learned in the law" were to be elected in an election embracing the respective judicial districts in which they were to serve. Associate judges of the courts of common pleas were to be elected in an election covering the respective county in which they were to serve (Article V, Section 2, as amended).

#### *Filling of Vacancies*

Any vacancies happening by death, resignation, or otherwise, in any of the courts of record were to be filled by appointment by the governor, valid until the first Monday of December after the next general elections (Article V, Section 2, as amended). No change was made in Article II, Section 8 which authorized the governor to fill vacancies in judicial offices happening during the recess of the senate, such commissions to be valid until the end of the next session.

It has been suggested that the success of the reform movement was hastened by the intemperate attacks of judges upon the Constitution of 1838,



and by the political trickery used by some incumbent judges to extend their terms.<sup>11</sup>

## §2.7. *The Constitutional Convention of 1873.*

§2.7.1. *Election or Appointment of Judges—Recommendations of the Committee on the Judiciary.* While the modifications of the judiciary article were relatively minor, the debates over it were heated and carried over into the ratification campaign which followed the Convention. The method of choosing judges provided sharp division in the Convention. The Convention's Committee on the Judiciary recommended that popular election be continued for the common pleas and other local judges but that the Supreme Court judges should be appointed by the Governor with the consent of the Senate, a renewal of the method utilized by the original Article V, Section 2 of the Constitution of 1838, and a workable compromise between the proponents of the elective and of the appointive systems. It was argued that the popular election of local judges could be justified, in that the voters would know the qualifications of the local candidates and could intelligently pass judgment on them but that this factor would not apply to Supreme Court judges who were elected on a statewide ballot. Statewide candidates for election would be nominated on the basis of the strength that the candidate could add to the success of the party's ticket, including geographical balancing. A judge's election or rejection would depend on the political fortunes of the party ticket. It would be far wiser to have the judge appointed by the Governor, with the consent of two-thirds of the Senate. The two-thirds consent proposed would require the support of the minority party and would promote a nonpartisan spirit in appointments.

§2.7.2. *Arguments for Appointment Put Forth at the Constitutional Convention of 1873.* Judge George Woodward, a delegate, had served at the Constitutional Convention of 1838 where he had fought for limited tenure of judges, as a means of making them at least in some degree amenable to popular will. Judge Woodward, who had served under both an appointive and elective method of choosing judges, now argued for appointment of all judges. Popular election of judges was unwise, he felt, for the people were not in a position to judge the attainments and qualifications of judicial candidates. He held that under the elective method, a judge must be a politician to win office. Based on his experience under both systems, he felt that the appointive system was better and as a general rule the men who would make the best judges would be the candidates least likely to be chosen by the politically controlled nominating conventions.

Others contended that the experience in Philadelphia showed the fallacy of the elective method, since "no man in the city of Philadelphia could be elected judge no matter what his antecedents might be" against the opposition of the men "who understood the manipulation of party politics and the control of primary elections."

Other arguments in favor of the appointive method claimed: that where one man is vested with the power to appoint, he feels responsible for the appointment, whereas no voter blames himself if his vote proves bad; that the people in choosing judges generally are controlled by the political excitement involved in the contests for the political offices being filled at the same time; and that a judge elected in such a political contest feels beholden to the politicians who nominated and elected him. Independence of the judiciary could best be achieved by appointment, preferably for life.

Others suggested: that the judiciary should be appointed, since the courts are not representative bodies of the people and are degraded by being made a political department; that judges cannot represent the viewpoint of the people who elected them to office; that judges should be trained as an exclusive profession for the administration of justice; and that such a separate and trained profession should not be exposed to the ordeal of political selection. The proponents of the appointive method admitted that in either the appointive or elective systems, political partisanship would be involved but suggested that under the appointive method qualified judges would be selected by the Governor to preserve his own self-respect and reputation.

§2.7.3. *Arguments for Popular Elections Put Forth at the Constitutional Convention of 1873.* The proponents of popular elections were not willing to accept the compromise proposal mentioned above (appointment of Supreme Court judges only). They maintained that the people were the safest depository of power and that under the elective system the judges had been at least equal to if not better than the appointive judges who had preceded them. The explanation for the amendment of 1850, adopting popular election of judges, was described as preventing a politically one-sided bench which resulted when one party was in control for a long period of time.

Other proponents of popular election of judges denied that popular election was any more subject to base political influences than political gubernatorial appointment, which was subject to all the weaknesses alledged against the elective system. They argued that if the people were able to select a pure governor, why not good judges also? Finally they insisted that popular elections were the best method of maintaining the courts as a coordinate branch under the separation of powers envisaged by our scheme of government.

§2.7.4. *Combination Appointive and Elective Method Proposal.* An interesting proposal, combining both the appointive and elective methods of selecting judges was introduced by Mr. Barclay, a delegate, and although it was referred to the Constitutional Convention's Committee on the Judiciary, it was never debated. This plan, somewhat similar to the appointive-elective features of the Missouri Plan or the Merit Plan, developed many years later, authorized the Governor to appoint all but Supreme Court judges, followed by a popular vote upon each appointee, at the next general election. If approved, the appointee would serve a ten year term. If re-

jected, the Governor would appoint another, subject to the same provision. (See the details of the currently proposed Merit Plan, §7, below.)

§2.7.5. *Filling of Vacancies by Gubernatorial Appointment.* Any vacancy by death, resignation or otherwise, in any court of record, was to be filled by appointment by the governor, with tenure to continue till the first Monday of January following the first appropriate election, which shall occur three or more months after the happening of such vacancy. Article V, Section 25.<sup>11b</sup>

This power to appoint judges of courts of record must be read in conjunction with Article IV, Section 8, dealing with the governor's general power of appointments to "judicial offices" or any other elective office. There it is specified that executive appointments must be with the advice and consent of two-thirds of all the members of the senate. If the vacancy happens during the session of the Senate, the governor shall nominate to the Senate before their final adjournment, a proper person to fill the vacancy. If the vacancy occurs during the recess of the Senate, the governor fills the vacancy by granting a commission which is valid until the end of the next session of the Senate.

In either case, the office must be filled at the next appropriate election if the vacancy occurs three or more months prior to the appropriate election. If the vacancy occurs less than three months prior to the appropriate election the vacancy must be filled at the second appropriate election which follows.

The "two-thirds of all members of the Senate" requirement for approval of executive appointments differed from the "advice and consent of the senate" feature of the Constitution of 1838; Article II, Section 8.

§2.8. *Amendments to the Constitution of 1874 Relative to the Selection and Tenure of Judicial Officers.* At the election of November 2, 1909, several constitutional amendments were ratified, providing in part that the tenure of Justices of the Peace, Aldermen and Magistrates in Philadelphia be increased from five to six years (Article V, Sections 11 and 12, as amended). Municipal elections were shifted from February to November but they were continued in separate years from state elections. Vacancies occurring in judicial offices within two months (originally three months) prior to an appropriate election day shall be filled at the second succeeding election day. Article IV, Section 8, as amended.<sup>11c</sup>

At the election of November 4, 1913, a constitutional amendment was ratified which adjusted the tenure of judges then in office, necessitated by the shift of the municipal elections from February to November (Article VIII, Section 3, as amended).

Of the constitutional amendments adopted by the electorate since 1913, only one has dealt with the methods of selection and tenure of judges. The amendment to Article V, Section 15, ratified on November 2, 1965, enables the Chief Justice of the Supreme Court to designate and assign former judges

to temporary service on courts of record in any judicial district for the disposal of business under circumstances and qualifications that may be prescribed by the General Assembly. The purpose of this amendment was to provide experienced judges for any judicial district in need of additional judges. Since the original section required that all judges required to be learned in the law be elected by the qualified electors of the districts over which they are to preside, the amendment was needed to recall former judges to judicial service.<sup>11d</sup>

§2.9. *Current Situation of Proposed Amendments to the Constitution of 1874 Relative to the Selection and Tenure of Judicial Officers.* The Commission on Constitutional Reform, appointed by Governor Sproul, and authorized by the legislature in 1919, suggested some strengthening of the judiciary but the call for a constitutional convention was defeated in 1921. The Commission on Constitutional Revision, created by act of the 1957 General Assembly, completed its report in 1959 but no action was taken on the report by the legislature. The changes suggested in the Report of this commission, popularly known as the "Woodside Commission," dealing with selection and tenure of judicial officers are discussed in §7. below. The Governor's Commission on Constitutional Revision reported to Governor Scranton in 1964, recommending the adoption of a merit plan for the selection of some judges. No action was taken on this.

### §3. How Judges Are Elected in Pennsylvania.

As indicated above in §1.2, the principal method for selection of judges in Pennsylvania is by direct election, in which a judicial candidate seeks a nomination in a primary election and his election in the ensuing general election. Emphasis is laid here upon the mechanics of election, so that comparisons can be made between the present principal method of selection and the proposals for change.

§3.1. *Seeking the Nomination—Nominating Petitions—Filing.* A candidate wishing to run for judgeship seeks to gain his political party's endorsement in a primary election. To have his name appear on the primary election ballot of a political party, he must circulate nominating petitions and secure on them a minimum number of signatures of registered and enrolled members of the proper political party.<sup>12</sup> These petitions and the filing fee are filed with the election officials and if they are in proper order and form, the candidate's name is printed on the primary election ballot for the particular party whose nomination is sought. Candidates for judgeships in courts of record are permitted to "cross-file" or file nominating petitions for more than one political party's nomination.<sup>13</sup> Candidates for judgeships frequently seek the nomination of both major political parties in a primary election. A candidate securing both parties' nominations in the primary is practically

guaranteed victory in the ensuing general election. The practice of "cross-filing" provides a degree of nonpartisanship in judgeship elections.

§3.2. *The Primary Election.* Where there is harmony within the party as to the candidate to be favored for the party's nomination, the primary election usually does not present a contest. When, however, the party councils cannot agree upon a candidate or when members of the party challenge the party leaders' choice for the nomination, active primary campaigns are fought. These campaigns can generate much public interest and require great expenditures of time and money.

§3.3. *The General Election.* Candidates receiving the nomination of one or more political parties at the primary election are listed on the ballots for the general election, identified with the political party or parties whose nomination was won. Candidates representing "political bodies" which do not qualify as "political parties" under the Election Code, avoid a primary election and have their names appear on the ballots as the nominees of that political body at the general election, by filing "nominating papers" rather than by the "nominating petitions" procedure described above.<sup>14</sup>

Supreme Court or Superior Court judges can be elected at either a general election or a municipal election, while other judges can be elected at municipal elections only.<sup>15</sup> This is designed to separate local contests from political involvement with statewide or national elections.

After a candidate has been certified the winner of a general election, the Governor is required to issue a commission to the person elected.<sup>16</sup>

#### §4. *Qualifications for Judges in Pennsylvania.*

Since many of the proposals for change in the system of judicial selection and tenure emphasize the qualifications of the judicial candidates, it is proper to set out the current requirements for judicial officers. There are two types of qualifications: (1) those which are formal and easily determined and applied such as age, residence, etc. and (2) those which involve intangible characteristics not so readily identified in a candidate, if indeed they are identifiable at all, such as honesty, industry, intelligence or politeness. It is argued that these characteristics, even if ascertainable, are hardly susceptible to the voters' investigation and appraisal.

Inquiry into qualifications, both formal and intangible, crosses over into other problem areas of the judicial inquiry. For instance, age qualifications or temperament to suitably fill a judgeship are involved not only in judicial selection but also in retirement and removal. The proponents of new methods of judicial selection say that it is better and easier to prevent an unsuitable candidate from becoming a judge than to remove him after selection, and have, therefore, undertaken a study of the problems of establishing qualification standards and of determining whether a candidate meets them. For these reasons, qualifications must be taken up here also.

§4.1. *Proposed Qualifications for Judges.* The age, residency, qualified elector and other formal requirements are discussed above in Part I, §6.3, at footnote 52. Current proposals for the selection of judges embody suggestions as to qualifications based upon legal training, admission to the bar, minimum years of practice or certain types of experience, such as trial work. The Pennsylvania Bar Association's proposal lists only Pennsylvania citizenship, residence within the judicial district and membership in the bar of the Supreme Court as qualifications for judges.<sup>17</sup> The Model Judiciary Article proposed by the American Bar Association requires only United States citizenship, residence within the state and a license to practice law in the courts of the state.<sup>18</sup> The National Municipal League's Model State Constitution provides only that a person must have been admitted to practice before the Supreme Court for a minimum period, suggesting from five to ten years as a reasonable requirement. The legislature is authorized to establish qualifications for judges of the inferior courts.<sup>19</sup>

§4.2. *Requirement of Legal Training.* All judges of courts of record in Pennsylvania are required to be "learned in the law" while associate (lay) judges of courts of common pleas and the minor judiciary officers, such as justices of the peace, aldermen and magistrates are not required to be "learned in the law." See Part I, §6.3 at footnote 47, above, for a discussion of the term. While the term "learned in the law" is common in state constitutions which specify substantive qualifications for a potential judge,<sup>20</sup> it is not defined in the Pennsylvania Constitution and the Convention may wish to decide whether to adopt one of the suggestions that membership in the bar of the Supreme Court or a license to practice law in the state should be a qualification for a judge.

§4.2.1. *Requirement of Legal Training for the Minor Judiciary.* Critics of the minor judiciary often point to the lack of general and legal training as a prime fault of the system. Generally the members of the minor judiciary agree that some training in law is needed before taking office but they are almost unanimous in rejecting the idea that minor judges should be lawyers. In a survey taken in 1962 by the Institute of Public Administration of the Pennsylvania State University, questionnaires were mailed to 4,484 justices of the peace who were remitting fines to the Commonwealth.<sup>21</sup> The following chart reflects the anonymous replies:

| Question                                                                                                           | Responses of Minor Justices to Proposed Changes |     |      |       |
|--------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|-----|------|-------|
|                                                                                                                    | No. Responding                                  | Yes | (%)  | No    |
| Should a qualifying examination be required for each person desiring to become a justice of the peace or alderman? | 1,143                                           | 28  | 2.4  | 1,115 |
|                                                                                                                    | 1,144                                           | 793 | 69.3 | 351   |

The fact that over two-thirds of those replying advocated qualifying examinations is significant in considering whether training qualifications should

be established and what kind of training and examinations would be appropriate. Some individual responses to the survey contained suggestions that may be of interest to the Constitutional Convention should it consider legal training for the minor judiciary:

A justice should have more knowledge of the law . . . I realized my own shortcomings in law and have let my office become inactive for that reason.

Require all justices of the peace and aldermen to be a college or university graduate with a minor in Common Law.

I believe that some sort of mandatory schooling should be required as well as the establishment of an educational minimum (at least two years of college).

Require that all justices of the peace take a course of instruction. *This is very important.*

Before a justice can get a commission he should enroll or be attending the Pennsylvania State Minor Judiciary School in criminal and civil law.

The newly elected justice of the peace should have at least six months of schooling before taking office.

Not all the justices were enthusiastic about taking an examination, even though they favored schooling. One commented,

Is anyone running for a public office required to pass an examination? How many officials in Harrisburg were qualified for their jobs when taking office? Did John F. Kennedy take a test to become President? I do think a man or woman becoming a justice should attend school in order to become more apt at the job.

Many of the replies reproduced in the report of the survey indicated that the members of the minor judiciary were undertaking active campaigns to upgrade the performance of the system by education and organization.

Other critics of the system believe that more than education of the minor judiciary is needed to bring about an effective minor court system. For example, the Consensus on the Pennsylvania Judicial System, adopted by A Citizens' Conference on the Modernization of Pennsylvania's Judicial System on January 11, 1964 at Philadelphia, Pennsylvania discussed the problems of the minor courts,

Our minor courts are often located in makeshift and undesirable quarters. Justices of the peace, magistrates and aldermen too often lack both minimum education and professional qualifications. . . .

It is imperative that there be courts . . . supervised and administered with efficiency and economy, presided over by competent judges whose behavior is beyond reproach and who dispense justice under law promptly, fairly, economically and without favor.

The minor court plan contained in the Pennsylvania Bar Association's proposal is approved in principle as meeting these desirable and necessary objectives.

Several proposed plans call for lawyers to man all the judicial offices, including the minor courts of inferior jurisdiction. The Pennsylvania Bar Association Plan<sup>18</sup> proposes that all judges, including those of the Community Courts, courts of limited jurisdiction proposed to replace our present courts not of record (justices of the peace, aldermen and magistrates), shall be members of the bar of the Supreme Court. In 1959, the Commission on Constitutional Revision reported that the members had considered and rejected a proposal that the minor judiciary be learned in the law.<sup>19</sup> The Model State Constitution of the National Municipal League is silent on this issue, leaving the determination to the legislature which may prescribe such qualifications for the minor judiciary as it deems necessary.<sup>20</sup> The proposed Judiciary Article of the American Bar Association requires that all judges, including those on the Magistrate's Courts (comparable to our minor judiciary) be licensed to practice law in the state.<sup>21</sup>

§4.2.2. *Arguments Supporting the Requirement of Legal Training for the Minor Judiciary.* There are those who would require that all persons who fulfill judicial functions be law trained and preferably lawyers. They emphasize the importance of having competent minor court judges, pointing out that most people who are involved in litigation have their first and perhaps only judicial contact in an appearance before a member of the minor judiciary. While the amount involved in litigation may be "minor" according to the jurisdictional scale set up by statute, it may not be minor to the litigant. Most of such litigants are unable to hire an attorney and must rely solely on the wisdom, experience and training of a magistrate, justice of the peace or alderman.

The problem of law training is resolved easily by those who favor a complete change in the present minor judiciary system and who would replace it with a system of community courts, staffed by lawyers as judges. The Pennsylvania Bar Association proposal would do this. Others would retain the system, although reducing the number of the minor judiciary, but requiring the minor judges to be law trained, as is done in Alaska and other states which have revised their minor judiciary systems. Most advocates of law training for the minor judiciary argue that the complexity of today's laws, especially the criminal laws and constitutional rights, require the training of lawyers to interpret and decide properly. Further, the control over lawyer-judges by higher courts would guarantee greater adherence to ethics in the administration of the office.

§4.2.3. *Arguments Against the Requirement of Legal Training for the Minor Judiciary.* Those who wish to retain the present system of minor courts admit that the system can be improved but contend that education of the minor judiciary through pre-service or in-service training would be preferable to making a law degree a qualification. They strongly deny that the functions of the minor judiciary require a lawyer-judge, pointing out that



most of the questions involved in litigation are questions of fact, not of law and can be judged by a non-lawyer with experience and common sense. They stress the local nature of the minor courts which enables the justice of the peace or alderman to decide a case properly or to settle a domestic dispute before it gets to the litigation stage. Advocates of the present system call attention to the fact that the minor judiciary provides service to litigants in the evenings and on weekends and even in the middle of the night; that costs paid to the officials are relatively low and stable; and finally that there are not enough lawyers willing to take minor court positions.

In reply to charges of impropriety in the minor judiciary, the advocates of the present system argue that only a small number of officials are involved and that conditions existing in the Philadelphia Magistrates Courts are not typical of conditions throughout the state. While willing to impose some controls, they are reluctant to have the controls or sanctions imposed by courts which would be likely to follow lawyer-oriented standards. One justice of the peace sees in the requirement of law-trained minor judges an attempt by the Bar Association to get a "monopoly on law in this state and there are more and bigger crooks in the Bar Association than in the Minor Judiciary Association."<sup>20</sup>

*§4.2.4. Constitutional Amendment Providing for Training.* To meet the criticism that members of the minor judiciary were ill-trained for their functions, the backers of the present system proposed a constitutional amendment authorizing the General Assembly to "... provide that a course of training and education be completed by justices of the peace and aldermen hereafter selected . . ."<sup>20a</sup> This Amendment was ratified by the voters at the election of November 8, 1966 and covers only justices of the peace and aldermen, with no provision made concerning the magistrates of Philadelphia. Two other groups are specifically exempted from the operation of the Amendment: (1) those who have been admitted to the practice of law and (2) those who have served as justices of the peace or alderman prior to the adoption of the amendment. The three months course, when given, is to be at the expense of the Commonwealth.

Opposition to the adoption of the proposed Amendment was expressed by those who considered the Amendment a feeble attempt to qualify the minor judiciary as trained in the law. The Pennsylvania Bar Association spoke against the Amendment, giving the following reasons:

the Amendment reduces the legislature's powers to enact qualifications for the minor judiciary. Without the Amendment, the legislature could require members of the minor judiciary to take a course of reasonable length, with penalties for refusal to take the course. Under the Amendment, the following limitations are placed on the legislature

the course of instruction is available only to newly elected officials and not to the magistrates of Philadelphia.

officials elected prior to the amendment would not be required to take such a course and if they did voluntarily, the state couldn't pay for their cost of instruction.

the course of three months' length is not adequate training in the law, there is no requirement that the official pass an examination in the course taken. Limiting his jurisdiction to summary offenses until he passes the course is meaningless, since the most prevalent summary offenses are violations of the Vehicle Code.

In many instances, such violations account for the greatest volume of cases before the minor judiciary.

the legislature is not required to pass any law providing the course, since the amendment says merely that the legislature may provide such a course.

The strongest attack on the Amendment involved the accusation that it was a bold attempt to fool the voters into the belief that something is really being done to improve the competence of the minor judiciary.<sup>20c</sup> No implementing legislation has been passed to provide such a course. Voluntary attendance continues at courses given at regular intervals by the organizations representing various sections of the minor judiciary.

## **§5. Current Proposals for Change in the Selection and Tenure of Judges**

§5.1. *Background.* Much of the criticism of the defects of judicial systems has been focused on judges who staff the systems. It is most unfair to blame the judges for all the problems of the courts but since they are the visible members of the court system, they bear its image. Problems of backlogs and delay, resulting in part from the increased litigation brought on by expanding populations and from the frictions inherent in a complex, industrial society, have not been solved by the simple expedient of adding judges, courts or even by utilizing compulsory arbitration for certain claims under \$2,000. Public attention has been brought to bear upon the recruitment, selection and retention of outstanding men and women to staff the court system as a means of having it function speedily, efficiently and, more importantly, to serve the people impartially.

This criticism has usually been directed to the partisan election of judges, and the limited tenure given them, although there are many who favor the retention of the present system of electing judges for limited terms. Among those who would change the direct partisan election system, there are three main lines of thought.

One would continue direct elections on a nonpartisan basis, usually at an election separate from other elections.

One would substitute appointment of judges by the governor, either with or without legislative approval.

A third system, "nominative-appointive-elective," would substitute gubernatorial appointment made exclusively from a small panel selected by a nominating commission.

This third line of thought would have the appointed judge serve a short term of office after which he would have to be approved by the electorate in order to be retained in office. Even among the advocates of change in selection methods, there is no unanimity as to the proper length of the judges' tenure, some advocating reappointment or reelection at regular periods, while others advocate life tenure during good behavior.

The arguments for and against the various proposals are discussed below. The proposals discussed include not only those made by persons and groups who have appeared at public hearings held by the Sub-Committee on the Judiciary, of The Preparatory Committee for the Constitutional Convention but also proposals offered in writing by various individuals and organizations, proposals made to or considered by recent or current constitutional conventions in other states and those derived from the judicial sections of model state constitutions proposed by various groups.

An attempt has been made to include as many proposals as possible within the limits of this source book, so that the delegates may know of the many alternative plans of judicial selection and tenure. It must be emphasized that the proposals, arguments or recommendations are put forth on behalf of individuals or groups, not the Preparatory Committee or its staff.

*§5.2. Arguments in Defense of the Present Method of Partisan Election of Judges.* Those who favor the retention of our present system of direct election of judges on a partisan basis point to the fact that the system has worked well, bringing many distinguished and capable men to the offices of the judiciary in this state. They argue that if there are problems of court congestion, overlapping jurisdiction, inadequate salaries and retirement benefits or delay, those can be corrected by modernization of the court structure and by legislative action to provide more judges, higher pay, etc., without changing the method of selecting judges.

Popular election of judges has been described as one of the most distinctive contributions that the United States has made to world political theory of judicial systems<sup>21</sup> and is engrained in Pennsylvania's history. As indicated above (Part II, §2.3.), the Constitution of 1776 provided for justices of the peace to be elected by the freholders and their names submitted to the President of the Executive Council for appointment. While popular elections were not the rule for selection of judges in the United States' early history, the pressure of Jacksonian democracy resulted in the election of all public officials, including judges. Popular elections were established in the 1850 Amendment to Pennsylvania's Constitution of 1838 and they were retained in the present Constitution of 1874. Thus, for at least 117 recent years of the 191 years of the Commonwealth's constitutional history, the principal method of selecting judges has been by popular election.

The elective system assures that the judicial branch of our government is directly responsible to the people in the same manner as the legislature and

executive branches. Popular election of all public officials, including judges, keeps these officials from becoming too independent of popular will. It is argued that popular elections at periodic intervals prevents the judiciary from following political social and economic policies which are at odds with the basic aims of the people.

Further, the fact that judges must be elected as part of a partisan, political system has the advantage of assuring various ethnic, religious, racial and other groups with representatives on the bench.

From another standpoint, it has been argued that election of judges gives the people an important part in governing themselves and enables them to oust a judicial tyrant by voting him out of office.<sup>22</sup>

Even judges who have been subjected to the rigors and vicissitudes of campaigning and running for their offices under the present partisan system seem willing to continue it. A limited study of judicial attitudes toward methods of selection of judges made in 1957 in Pennsylvania showed responses from fifteen judges who had previously held an elective office. Nine of them indicated a preference for the present partisan election system. Three favored the nonpartisan selection and three would prefer a merit plan of selection.<sup>23</sup>

This same study also canvassed the attitudes toward change of the method of selection of judges among Pennsylvania legislators. Sample responses from judges and legislators favoring retention of the present partisan election plan showed the following attitudes:

democracy rests upon "faith in the people" and in a democracy, no public official should be beyond elections.

party government fosters better candidates. Since a properly led party will make selections for judicial office with an eye to winning elections, the best available candidates will be chosen.

popular elections assure a more representative court. Since every person feels that he has a friend in court, justice has a better chance to triumph under this system than any other suggested.

judicial decisions should reflect public and party opinion. Judgments reflect not only the body of substantive law but also the changed economic conditions and social mores of the times. A judge's political affiliation cannot help but have an impact on his decisions and should be representative of the party which elects him.

politics is found in any system of selection of judges.<sup>23a</sup>

In conclusion, those who favor retention of the present system of partisan, political election of judges draw upon the philosophy of the Jacksonian era which ushered in popular elections and contend that such elections foster and promote the ideals of a representative democracy. Most other arguments challenge the proponents of change to justify their conclusions that the defects in our judicial system can be cured by abandoning the pres-

ent direct, partisan and political elective method of selecting judges. These other proposed methods are discussed below, §§5.4 to 7.

### §5.3. *Arguments Against the Present Method of Partisan Election of Judges.*

§5.3.1. *Introduction.* Once it is established that judicial systems, no matter how well designed, cannot function properly without qualified judges, it is easy to understand that efforts to improve or modernize our judicial system would focus attention on the selection and tenure of judges. Such efforts involve a two-step process: (1) a criticism of and demonstration that the present partisan political election of judges is not the best method to bring qualified men to judicial office; (2) a proposal to substitute a new method of selection for the present method. Much has been written and spoken about the first step and most but not all of those expressing their opinions are critical of the effectiveness of the system of popular election of judges to tap our best talents. Perhaps the volume of criticism of the present system is explained by the fact that the proponents of change realized that change results only from a continuous and concentrated public discussion, while the advocates of the present system do not feel that it is necessary to campaign to state their position. Certainly political action is always more difficult and more disturbing than maintaining the status quo and inertia is on the side of those advocating retention of the present system. For whatever reason, there is no doubt that the volume of public discussion is greater on the part of those advocating a change and this volume dictates a greater allocation of space in the material in this section to arguments against the partisan election of judges.

Among the advocates of a change, there is unanimity as to the first step mentioned above, the need for change. As to the second step, which method of selection should be chosen to replace our present system, there is not such great concurrence of opinion.

§5.3.2. *Evaluation of the Capabilities of Judges Selected under the Present Elective System.* Many of those criticizing the present system of election of judges make a brief tribute to the high capabilities of the judges now serving but conclude that better judges could be selected under another system. Then they pass on to the discussion of the type of system that would best serve to secure better judges. Others have appraised our system of choosing judges by attempting to determine the qualifications desired in an "ideal" judge and then evaluate the system by comparing the characteristics of those judges selected by the present system with those of the "ideal" judge.

There is no question about the fact that the qualities that make for a good judge are difficult to list, without lapsing into generalities such as "Recipe for Judge: Pinch of all virtues stirred in integrity." Extremely well qualified and extremely inadequate judges are generally identifiable. At one end of the scale there are the distinguished judges who have earned the ad-

miration and respect of the public by their courage in the face of adverse force of public emotion or for their scholarly or learned reshaping of the law to meet the ever-changing needs of society. At the other end of the scale are those judges who occasionally come before the public attention because of long absences from the bench, the tyrannical handling of their court room or because of some conflict of interest or violation of the law. It is contended that in the center, however, are those judges operating in a gray area of mediocrity, where it is impossible for the public to determine whether the judge is operating in the proper manner to discharge his duties. The proponents of change focus their attention on this gray area and hope for improvement.

§5.3.3. *Factors Considered Important in a Judicial Candidate.* In 1964, Governor William W. Scranton became the first governor to voluntarily adopt a merit selection plan for judges, when he appointed a judicial nominating commission to seek out, investigate and recommend candidates for judicial offices to be filled in Philadelphia as a result of the creation of five new judgeships by the legislature. Factors considered by this nominating commission included the character, temperament, experience, legal ability, including trial experience, scholastic background, public and professional service.<sup>24</sup> The candidates submitted answers to a detailed questionnaire and appeared for personal interviews with the members of the nominating commission. A panel of names of those recommended for appointment was submitted to Governor Scranton, who appointed the five judges from those names, on a nonpartisan basis.

The critics of the present partisan election system contend that it is not designed to recruit and select the best possible talent to fill our judicial posts and that the type of meaningful analysis of a candidate's qualifications described above is not made when the political party leaders select their candidates for office, including judgeships. The local party leaders are more concerned with political factors, such as whether the candidate can receive support of the organization, whether he has performed routine party service in the past, whether his geographic location, ethnic, religious or racial background will round out the ticket, whether he can make financial contributions to the campaign and whether he can be expected to make the type of campaign, both in the primary and general elections, that will aid the party ticket. In short, the party leaders are interested in winning elections, not in whether the judicial candidate is the best one available for the office. It is contended also that, under this system, it is impossible to elect able men who have not been active politically or who belong to the party out of power.

The Woodside Commission reported in 1959 that a majority thought that the elective system is not adequate to determine the ability of a judge and that the selection was made by politicians, rather than the people. Under

this procedure, the nominee is selected not on a basis of judicial ability but on the basis of extra-judicial considerations.<sup>24a</sup>

§5.3.4. *Replies to Those Who Advocate the Elimination of Partisan, Political Elections.* Those advocating the retention of the present system answer that it has produced a well qualified judiciary and that other systems employed in other states offer no evidence of the superiority of the judges so selected. They discount the model of the federal appointive system, contending that factors other than the appointive method of selection account for the high quality of the federal judges.

They also contend that political leaders, in choosing candidates for judicial office, do give weight to the qualifications mentioned above and that the party could not stay in power if its candidates were not capable.

As to the geographical, ethnic, religious or racial factors, they contend that these are valid considerations in choosing a candidate for judicial office. If the judicial system is to operate properly, the judges who staff it must have the confidence of these various groups which make up our population. Also, these factors help a judge in dealing sympathetically with the everyday problems of ordinary people and this ability is every bit as important as legal talent.

§5.3.5. *Additional Arguments Against the Present Method of Partisan Election of Judges.* The critics of the present elective system maintain that in practice it does not promote the democratic selection of judges ascribed to it, in that the electorate does not have any meaningful voice in the selection of judicial candidates. The designation by political leaders of a favored candidate for judicial office is most often the equivalent of nomination in the direct primaries and subsequent victory in the general election. This is especially true in an area where a political party has a traditional and decisive numerical advantage. Therefore, the electorate has no real choice, and merely endorses the selection made in party councils, which are private and often secret.

The critics of the present system also contend that the financial and physical hardships of campaigns to seek nomination and election make it impossible for most men to seek judicial office without the active support and backing of a political party. Campaigns are expensive and require extensive organizational machinery and personnel. Without a well-financed campaign and the backing of a political party, it is difficult to get the public exposure required for election.

§5.3.6. *Voters' Apathy and Lack of Information as to the Candidates' Qualifications.* It is further contended that the present system of election of judges may have been adequate for past times, when the population was smaller and it was possible for the electorate to make effective appraisals of a candidate's qualifications for judicial office. Such a situation does not pre-

vail now, it is argued, especially in the metropolitan areas. Critics of the elective system cite recent studies showing that few voters availed themselves of the opportunity to vote for a judicial candidate in an election in which other public offices were at stake. Of those people who did vote for a judicial candidate, few could remember his name. A widely quoted survey, sponsored by various New York groups and the Institute of Judicial Administration, was made by the Elmo Roper organization in New York State within ten days after the general election of November 2, 1954, which included contests for judicial offices. The survey sampled 1,300 persons, divided equally among a metropolitan city, an upstate city and a semi-rural area. Those who had voted were asked the following questions:

There were a number of candidates up for judgeships this time. Did you vote for any of them?

Had you paid any attention to who was running for judgeships before you went to vote, or had you just paid attention to the candidates for the other offices?

What judges do you remember voting for last Tuesday?

The following are the replies:

|                                                                                              | New York | Buffalo | Cayuga<br>County |
|----------------------------------------------------------------------------------------------|----------|---------|------------------|
| Of those who had voted at all, the percentage that had voted for any judicial candidates was | 75%      | 88%     | 80%              |
| Paid attention to judicial candidates before the election                                    | 39%      | 52%     | 25%              |
| Could name one or more judicial candidates voted for                                         | 19%      | 30%     | 4%               |

Those who had paid attention to judicial candidates before the election were asked what they had done to help them decide which judges to vote for. About half of those in New York (18 out of 39 per cent) and a third of those in Buffalo (15 out of 52 per cent) and Cayuga County (9 out of 25 per cent) admitted that the "attention" they had given the matter was to take the party's word for it and vote a straight ticket. A smattering of others said they had consulted friends, both lawyers and non-lawyers, or had followed a newspaper's or a bar or lawyer's association's recommendation.<sup>25</sup>

"The figures on the proportion of voters who could name a judge they had voted for look better than they really are. Nearly a third in Buffalo could pass this test, but five out of six (26% out of 30%) named . . . a widely known local figure who had served many years as corporation counsel (who) . . . had just been defeated in a primary contest for another office."<sup>26</sup>

Similar results were revealed in polls taken in November, 1966 in New York City, Buffalo and Syracuse, New York.<sup>27</sup>



Of those who had voted at all  
the percentage that—

|                                           | New York | Buffalo | Onondago Co.<br>(Syracuse) |
|-------------------------------------------|----------|---------|----------------------------|
| —had voted for any judicial candidate was | 55%      | 94%     | 88%                        |

Of the 55% who had voted in New York City, 42% of those voting could not remember the name of any judge they voted for, 8% named one or more judges actually running in their districts and the remaining 5% named someone running elsewhere or not running at all.

Critics of the elective system claim that it is practically impossible for the electorate, especially in metropolitan areas, to know which judicial candidates have the necessary qualifications to make them competent judges. Campaigns for judicial office get little coverage in the news media, since the voter interest is focused mainly on the legislative or executive elections. Since most voters are unfamiliar with the judicial candidates who appear on the ballot, they either do not vote for them at all or else vote on the basis of party affiliation, on considerations of ethnic, religious or racial background of the candidate as surmised from his name, or similarity of the candidate's name to a well-known public figure or some other arbitrary or fanciful basis.

*Reply:*

*Proponents of the elective system point out that the electorate has in fact the ultimate power to elect or reject a judicial candidate and from time to time the electorate does develop an interest in a judicial contest. This possibility affords a safeguard that the judiciary remains responsible to the people, and prevents the judiciary from using its power to promote the interests of a small group or class, contrary to the desires of the majority of the people.*

*The fact that voters cannot remember the name of a judicial candidate or do not vote for them is not a valid criticism of the elective process for judges, since similar situations prevail in contests for the legislature and many local contests. If partisan elections are to be used only on a showing that the majority of the electorate is interested in the candidates and fully informed as to their qualifications, the right to vote may have to be curtailed for all but a few major national and state officers. Supporters of the elective system challenge the implication that because voters do not remember the names of the candidates they voted for that they were not informed at the time of the election. Voters can make rational decisions at the polls but when the election is no longer of current interest, they may be unable to remember the names of their chosen candidates. Further, polls such as those cited above cover too small a sampling to merit confidence in them.*

**§5.3.7. The Judicial Offices Should Not Be Political.** In the Constitutional Convention of 1873, the argument was put forth that judges should not be elected by party labels, since one who was elected on a party ticket owed his allegiance to the political leaders who put him on the ticket. It was asserted that judges should belong to a profession devoted to judging, separate and apart from other elected officials and that it was demeaning to

a judge to seek office on a political platform.<sup>28</sup> This argument has been brought forth recently in new dress with the observation that judges should represent all people, not just those who elected them. "A judge has no constituency except the unenfranchised lady with the blindfold and scales, no platform except equal and impartial justice . . ."<sup>29</sup> Since it is important that judges decide cases and issues impartially, without reference to partisan politics, it is necessary that judges be removed from the political arena so as to put them above all suspicion of partisan leanings. As important as having a system to select judges without political bias, is convincing the public that judges operate with impartiality. Having a judge elected on a partisan political ticket does not encourage the people to have confidence in his impartiality. We ". . . worry as much as we do about the bench because of a certain feeling in our society that a man who has been active enough in party politics to have earned the reward of a coveted judgeship may not be as righteous as he ought to be."<sup>30</sup>

§5.3.8. *Judges Should not be Exposed to a Political Campaign.* As mentioned above, a political campaign involving both primary and general elections, is an expensive, time and energy consuming rigor that substantially affects the quality of work performed by a judge who seeks reelection. Not only must he take time from his official duties to devote to a campaign but on his personal time he must exert his physical and mental energies toward his reelection, with the result that his official duties suffer. As a public figure a judge is called upon to attend many public functions and this is magnified during his active campaign.

As to those who seek judicial office for the first time, the same problem exists. Many men who are capable and highly qualified to serve as judges are not able to leave their private affairs for a political campaign, nor can they stand the financial loss involved if they do.

Where judges do get involved in extensive campaigning, this raises serious problems of ethics and conflict of interest. Most of the partisan or non-partisan committees formed to support the candidacy of a particular judge or group of judges are composed of lawyers who lend their names or financial support or both to the campaign. This places lawyers in a delicate position since they are often required to appear before judges whose candidacies they supported or failed to support. In some courts lawyers depend upon the good will of a judge to receive appointments as masters, guardians, etc., which provide fees or emoluments.

From the aspect of dignity of a judge, critics of the elective system point to political campaigns where judges do manage to get their names and faces before the public. One critic suggested that it is demeaning to a judge to have his name and photograph spread before the public on billboards, to be sold to the voters "like a cake of soap."

Judges of courts are prohibited by the Canons of Judicial Ethics<sup>31</sup> from

engaging generally in partisan political activities, except in their own campaigns (Canon No. 28) and from accepting any gifts or financial contributions from lawyers practicing before them (Canon No. 32). This does not prohibit financial contributions to a committee supporting the election of a judge. To many people, this distinction does not remove the suggestion that a judge must, of necessity, be beholden to those who are responsible for his nomination or support, financial or otherwise.

It is also contended that the elective system detracts from the people's confidence in judges in that the elective system fosters the impression that elected judges, in order to keep their political connections, must refrain from taking action which could offend party leaders who are responsible for or influential in their renomination at the end of their terms.<sup>31a</sup>

*Reply:*

To the assertion that "judges after their election do not sever their ties to political bosses—in other words, that judicial acts are controlled or influenced by politicians," creditable judges have maintained strongly that there is no evidence of politically controlled judicial acts. C.S. Desmond, former Chief Judge of the Court of Appeals of the State of New York, in attacking the assertion made in a statement published by the Bar Association of the City of New York that judicial acts are politically influenced, pointed out that the source of the charge could cite no instance of such influence and would withdraw the charge. (Letter to the Editor, New York Times, June 27, 1967.)

The defenders of the elective system not only contend that there is no justification for the suggestion that elected judges generally can be influenced by political considerations in performing their judicial functions but assert that the overwhelming majority of elected judges lean over backward to avoid even the appearance of partisanship.

§5.3.9. *Political Issues Cannot Be Framed for Judicial Candidates.* One of the most frequent contentions of the opponents of the elective system for judicial offices is that the selection or rejection of a judge often has nothing to do with the judge's individual qualifications. Since judges run, for the most part, in elections with national or state candidates, the judge's fortunes rise or fall with those of his political party or on a national or state issue that has nothing to do with the judicial office concerned.<sup>32</sup>

Opponents of the judicial elective method admit that partisan political elections are proper for legislative or executive offices which are the usual instruments for the exercise of political judgments. They just as strongly contend that judicial offices should not be instruments of partisan political decisions. Legislators or executives can be elected on platforms that call for extension or reduction of certain public services, for changes in insurance regulation or for a score of issues that offer the voters an opportunity to express a policy to those elected. The voters have every right to expect that the officials elected will carry out their mandate. On what kind of a campaign promise can a judge run? If a judge runs on a platform that if elected, he will be "hard on criminals," no matter what the circumstances, he is

foreclosing the exercise of the discretion expected of a judge. Similarly, a judge should not curry favor with a substantial part of the electorate by promising that if elected, he will "go easy on civil rights demonstrators."<sup>33</sup> Since it is difficult for a judicial candidate to frame issues of policy which can be carried out when he is on the bench, the tendency is to adopt catchwords or slogans, such as "Justice for All" or other phrases which are superfluous or meaningless when he is in office.

Therefore, it is claimed, judges should not run at all in partisan campaigns.

#### *§5.4. Proposals Which Retain Popular Election of Judges but Vary the Form*

*§5.4.1. The Nonpartisan Ballot.* Many states have adopted the nonpartisan election method, where the candidates for a particular office are grouped together on the ballot under that office, identified by name without any reference to each candidate's political affiliation or support. This plan was adopted in the early 1900's as part of a reform movement, resulting from dissatisfaction with the political involvement in the selection of judges. The nonpartisan ballot was adopted in many states of the northwest, and in Arizona, Michigan, Ohio and Tennessee. It is still used today in many of these states.

*§5.4.2. Arguments for the Nonpartisan Ballot.* The rallying cry of the reformists was "Let's get our judges out of politics" and it was hoped that by eliminating any party identification the evils of partisan election of judges, discussed in §5.3.6., above, would be eliminated.

*§5.4.3. Arguments against the Nonpartisan Ballot.* As early as 1913, former President William Howard Taft asserted that the nonpartisan ballot was a failure and that the system would lower the quality of judicial personnel by making it possible for unqualified persons to run entirely on their own, even though they could never get party support, and to be elected by means of aggressive campaigning.<sup>34</sup>

Under the nonpartisan system there is no process of screening the qualifications of candidates before they appear on the ballot. Candidates who would never be considered by a political party may be elected by irrelevant factors such as having a large campaign fund, a pleasing television image or the proper place on the ballot. These factors may be more influential on the outcome of the election than the usual qualifications of character, legal ability, judicial temperament or public service.<sup>35</sup>

*§5.4.4. Pennsylvania's Experience with the Nonpartisan Ballot.* In 1913, Pennsylvania adopted a nonpartisan plan for the election of all judges of courts of record and for city officials of cities of the second class. Nominations for the primary elections were made by filing of petitions by the candidates, without disclosure of party affiliation. The two candidates receiving

the highest number of votes for an office in the primary were certified for a subsequent nonpartisan election in the general election. If there were two offices to be filled, the four candidates receiving the highest number of votes ran in the general elections. Since there were no political party designations for the judgeship candidates, it was impossible to vote for judicial candidates by voting a "straight ticket" and the statute required this fact to be called to the attention of the voter by prominent printed notice on each ballot carrying the nonpartisan candidates (Act 1913, July 24, P.L. 1001).

The nonpartisan ballot was used for the first time in Pennsylvania for the election of judges for the new Municipal Court of Philadelphia. Over 40 candidates entered their names in the primary for the six judgeships to be filled, but the dominant political party quickly adjusted to the plan. The late Chief Justice Schaeffer of the Pennsylvania Supreme Court reported that a very potent leader of the dominant political party privately selected the names of his favored candidates for the six judgeships. These names were distributed on sample ballots. Despite the prohibition against overt endorsement by a political party and despite the control of Philadelphia's government by a reform administration at the time, five of the dominant party's selections were elected.<sup>36</sup>

Critics of the nonpartisan ballot contended that candidates were plunged more than ever into politics. Deprived of open party support, the candidates were required to create their own campaign organization or to seek clandestine support within the party. The nonpartisan primary encouraged a multitude of publicity-seeking candidates and made an informed choice almost impossible. The Pennsylvania Nonpartisan Election Act was repealed in 1921 (Acts 1921, May 10, P.L. 423 and P.L. 426).

§5.4.5. *The Ohio Experience with the Nonpartisan Election of Judges.* Ohio currently elects judges on a ballot in the general election on which no designation of political affiliation is permitted.<sup>37</sup> There are two methods for candidates to have their names appear on the ballot at the general election. One is definitely partisan, in that it permits a candidate to seek the nomination at a party primary. The other nomination method, nomination by petitions with no mention of party affiliation, requires so many signatures on the nominating petitions that it is impractical, at least for a statewide judicial office. For example, a person seeking a nomination for a statewide judgeship must accumulate on his petitions sufficient names to constitute at least 7% of the electors who voted for governor at the previous election. Based upon the vote at the 1962 election for governor, one who wanted to be an independent candidate for judge of the Ohio Supreme Court would have to obtain over 218,000 signatures of qualified electors, representing at least 200 signatures from each of at least thirty counties. On the other hand, one who wanted to secure the nomination as a candidate of a political party would need only 1,000 signatures of persons of his own political party.

§5.4.6. *Criticism of the Ohio Nonpartisan Election of Judges.* Dissatisfaction with the Ohio nonpartisan plan adopted in 1911 could not be more authoritatively established than by the following statement by the late Honorable Newton D. Baker. In 1934 during a symposium of judicial selection, Mr. Baker said:

"Just before Senator Burton died, I happened to call on him in his apartment at Washington. He was very mellow. He knew he was approaching the end of a very long and very illustrious and useful public life. He had come to a time when he was very much more interested in making a political testament than he was in acquiring further distinction, and the reports I got of those who called on him at that time were that he loved to distill his experience and his observations for the benefit, particularly, of younger men who came to him as a sage for advice. In the course of the conversation he said to me: "Baker, you and I together drew the nonpartisan primary law in Ohio. Do you think we did the people of Ohio a service?" And I said to him: "No, Senator, I regret to say I think we did them a very great dis-service." He said to me: "Baker, I regard that as the most vitally wrong public act of my long career." And I was under no need of asking him why. I could see what was going on."<sup>38</sup>

There is a current movement in Ohio to change the method of selection of judges. The proponents of a change claim that where there is no political designation, the candidate runs on his own responsibility. With party responsibility absent, the only guarantee of the candidate's qualifications that the voters have is that the candidate wanted the position badly enough to secure the necessary signatures and to make the campaign for election.<sup>39</sup>

§5.4.7. *Bipartisan Practices in the Selection of Judges.* One method of having representatives of both major parties on the bench is to divide the selections according to some prearranged plan. There are minor examples of bipartisan selection in Pennsylvania, by constitutional, statutory or informal arrangements. The Constitution of 1874 provides for bipartisan representation on the Supreme Court, when there are two or more vacancies to be filled at an election. Article V, Section 16, Voting for Supreme Court Judges, provides:

Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two; candidates highest in vote shall be declared elected.

Similar restrictions are imposed by Article V, Section 12 on the election of the Magistrates in Philadelphia,

... and in the election of the said magistrates no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen;...

When the Superior Court was created in 1895, the statute provided that the electorate could vote for only six of the seven judges to be elected, thus giving the minority party representation in the original selection.<sup>39a</sup>

The statute creating the Police Magistrate system of the City of Pitts-

burgh provides that the judges may not all be of the same political party. Of the seven judges, a token appointment is given to the minority party.<sup>40</sup>

Informal arrangements may result when the appointing official agrees that certain new judgeships shall go to representatives of both parties. Another type of informal but hardly voluntary division may arise when a United States Senator announces that he will exercise his senatorial prerogative so that none of the judicial nominations desired by the President will be approved unless certain judicial appointments are made to members of the Senator's party.

In some states, tradition has developed to divide judicial appointments equally between both major parties. In New Jersey, this tradition was enacted into law for all courts.<sup>41</sup>

§5.4.8. *Bipartisanship Through the "Sitting Judge" Principle in Pennsylvania.* To reap the benefit of the experience gained through judicial service, agreement is sought to the end that competent judges should be continued in office, through reelection. This protects an incumbent judge from the rigors of electioneering and from the vicissitudes of primary and general elections. The principle demands that bipartisan primary and general election support should be given to "sitting judges" by the bar, political parties and the public to insure their reelection. Despite occasional instances when sitting judges have retained their offices despite opposition from both parties, the "sitting judge" principle seems to have been honored only in local judicial contests in Philadelphia and there only as a mutual accommodation between the parties.<sup>42</sup>

§5.4.9. *Arguments for Bipartisan Division of Judicial Offices.* Former Chief Justice Vanderbilt, who was responsible for many of the judicial reforms in New Jersey, has extolled bipartisan division of judicial offices as a means of minimizing political influences in the selection of judges.

"There is much to be said for requiring, under any plan, the appointment of all judges on a bipartisan basis. Justice, on principle, should be bipartisan. Its administration should not be vested in a single party. Bipartisan appointments are the best way of proving to the public that one party does not control the courts, and that the courts are not in politics. The matter is of essential importance in the decision of highly controversial political issues. If all the judges in the bipartisan court, regardless of party affiliations, concur in the decision of such an issue, as they frequently do, then decisions carry a weight with the public, that an opinion from a partisan bench could not possibly do."<sup>43</sup>

§5.4.10. *Arguments against Bipartisan Division of Judicial Offices.* It has been pointed out that the statutory scheme for bipartisan representation on the Magistrates' Court in Philadelphia has not improved the quality of that bench.<sup>44</sup> The only true bipartisanship results when the nominating or appointing officials ignore party lines in selecting judges. When bipartisanship is required by constitution or statute, it encourages political chame-

eons, is cloaked by spurious party designations and lulls the public into the erroneous belief that political influence in selection has been minimized. Finally, bipartisanship is little more than a division of the spoils between the two major political parties, and it is contended that the only plan of selection which results in a bipartisan bench is the merit plan of selection,<sup>45</sup> described below, §7.

§5.5. *The Judicial Nominating Conventions.* At the present time in Pennsylvania, a political party makes its nominations for state and local public offices by direct primary elections, if the party has polled enough votes in the prior statewide elections to qualify for a place on the primary ballot. Other political bodies make their nominations by nominating papers in accordance with their rules and by-laws. This current system replaced the political nominating convention system, under which each political party elected delegates to the party's appropriate county or statewide convention. The function of nominating candidates for office for the general election was performed by these nominating conventions. New York still utilizes judicial nominating conventions.

§5.5.1. *Distinction between Judicial Nominating Conventions and Judicial Nominating Commissions.* Judicial Nominating Conventions are partisan, political gatherings of delegates chosen to nominate their party's candidates. Judicial Nominating Commissions are lay-lawyer-judge committees whose function is to recommend a panel of names to the appointing official who selects one of the panel for the judgeship under consideration. The Judicial Nominating Commissions are required to make their nominations without considerations of political affiliations of the candidates and their members can hold no political or public office. See §7, below.

§5.5.2. *Arguments in favor of the Judicial Nominating Convention.* The late Chief Justice Shaefter of the Pennsylvania Supreme Court, speaking in opposition to a merit plan of selection of judges (See §7, below), called for a return to the judicial nominating convention.

"I think, furthermore, the way to select judges, the way to nominate them, and that is where the thing starts, the way to nominate them is by judicial convention, statewide and districtwide. I think the convention system of all nominations is the best system we have ever had (applause). Because it is a representative system. This is a representative republic, and you start in the precincts to select delegates, and if you want to adopt what in the old days we knew as the Crawford County system, the voters can indicate who they want . . . the delegates to vote for, and in that way it becomes a more popular choice."<sup>46</sup>

§5.5.3. *Arguments against the Judicial Nominating Convention.* Experience has shown, it is argued, that the delegates to a judicial nominating convention are hand-picked by district party leaders and that in New York the nominations are still dominated by the party bosses.<sup>47</sup> While the current indications are that New York's Constitutional Convention will not give up



the present elective system for judicial offices.<sup>48</sup> Iowa, which until recently utilized Judicial Nominating Conventions as part of the elective system for judges, has embraced the merit plan, described below, §7. No serious student of judicial reform advocates the return of the Judicial Nominating Convention,<sup>49</sup> and it would be a step away from popular party primaries for nominating candidates for public office.

#### §5.6. *Judicial Offices Filled by Partisan Election, with Noncompetitive Re-election.*

§5.6.1. *Arguments in favor of Noncompetitive Reelections.* Illinois had adopted a variation on the usual partisan election of judges. Since 1962, the judges of all courts in Illinois do not have to seek reelection in the usual partisan primary and general elections. Although the judge must seek his position initially by a regular, partisan election, at the end of his term of office, if he seeks another term, he runs only on "his record" in an election where he is the only candidate and the only question involved is whether that judge shall be retained in office for another term. This system combines the direct election by the people with a nonpartisan, noncompetitive reelection but it eliminates the rigors of a campaign for the incumbent judge, retains his skill and experience and permits the electorate to pass on his qualifications and fitness for office as demonstrated by his prior term of office.<sup>50</sup>

§5.6.2. *Arguments against the Noncompetitive Reelection.* The opponents of this system maintain that it is difficult to remove an incompetent judge under this system. "Who is to tell the Queen that she is fat?" one attorney argues. Since there is no opposition in the reelection, the duty of campaigning against the incumbent judge falls upon lawyers, who are put in the delicate position of opposing a judge before whom the lawyers may be required to appear, at the time of the campaign or in the future. Under this situation, there will be no real contest and unless there are two contestants, there is no doubt about the outcome of the race.<sup>51</sup>

Former Judge Woodside, speaking in opposition to a merit plan for selection of Judges, observed about the possibility of unseating a judge running for reelection on a noncompetitive ballot: "Where officials are 'elected' on a 'Yes' or 'No' vote, approval is nearly unanimous. 'You cannot lick somebody with nobody,' is a tried and accepted political slogan, even in America."<sup>52</sup>

#### §6. **The Appointive Method**

The proponents of change in the method of selection and tenure of judicial officers have joined forces to criticize the partisan political elective method. After having combined their attacks to demonstrate the defects in the present method, they part company when they come to suggested sub-

stitutes: some advocating the return to the gubernatorial appointive method, while others advocate the nominative-appointive-elective method of the merit plan, also called the Missouri Plan or Pennsylvania Plan. (See §7, below)

Nowhere is this divergence of opinion illustrated more sharply than in the Judicial Article of the Model State Constitution, recommended by the National Municipal League in its 1963 version.<sup>53</sup> The National Municipal League suggests the adoption of a straight executive appointment system based on the federal, Hawaii and New Jersey experience, at least for courts of general jurisdiction. The National Municipal League, however, recognizes the division of informed opinion and presents in the Model an alternate section which utilizes the Judicial Nominating Commission feature of the Merit Plan.

As to tenure, the National Municipal League proposes appointment for an initial term of seven years, followed by reappointment for life, which also differs from the general format of the Merit Plan which requires non-competitive reelections at the end of each judge's original or successive term of office.

Commenting on the alternate proposals, the National Municipal League says, <sup>54</sup>

"Each of the two systems proposed is likely to bring with it an improvement compared to an elective judiciary. Straight gubernatorial appointment with the advice and consent of the legislature recommends itself to the National Municipal League because of the high degree of visibility. The alternative recommends itself to members of the bar because of the more searching and private evaluation of judicial qualifications it makes possible. Given responsible administration, both appointive systems can be expected to improve the judiciary."

§6.1. *The Mechanics of the Appointive System.* Although several states utilize appointment by their legislatures for judicial offices, there does not seem to be much current movement toward this method. Most proponents of the appointive method would place the power in the hands of the governor, acting alone or with the approval of one or both houses of the legislature.

Acting within the constitutional or statutory limitations on his power of appointment, the governor nominates a person to a judicial position. In states where the consent of the legislature is required, the nomination is sent to the appropriate house or houses of the legislature for confirmation. In such states, if the legislature is in session, usually the governor is required to submit the nomination prior to the end of the session. If the legislature is not in session, the governor is often authorized to make interim appointments, with the judge's commission ending at certain specified dates, such as at the end of the next session of the legislature<sup>54a</sup> or until his successor qualifies.<sup>54b</sup>

While the formal requirements of gubernatorial appointments are simple,

the informal aspects may involve consultation with the appropriate political leaders, public groups, bar associations or other interested groups.

§6.2. *The Federal Experience with the Appointive Method.* The United States Constitution provides for the appointment for life of all federal judges by the President, with the advice and consent of the Senate. This was the prevalent method of selecting judges at the time the Constitution was adopted and the framers merely substituted the elected executive or legislature for the Crown as the appointing office. The "advice and consent" of the Senate was required as a part of the "checks and balances" system built into the Constitution. This "advice and consent" has been interpreted to mean "confirmation" of an appointment by the Senate, rather than actual consultation prior to an appointment. There is nothing, however, to prevent a Senator from informally suggesting to the President the name of a prospective nominee. In fact, because of the Senatorial courtesy which has developed, whereby a Senator can block the confirmation of a nominee from his state who is unacceptable to him, it is expedient for the President to consult with the Senators from the state where the appointment is to be made.<sup>55</sup> Before the Senate acts on a nomination, the appointee must appear and testify as to his qualifications and attitudes before a sub-committee of the Judiciary Committee of the United States Senate.

In recent years, it has become the President's practice to have the Attorney General of the United States screen all likely candidates and make recommendations. Those under serious consideration for a nomination to any federal judicial office are investigated by the Federal Bureau of Investigation. Their names are also submitted to the American Bar Association's Standing Committee on Federal Judiciary, which appraises their qualifications and reports its ratings to the Attorney General. Such ratings are also made known to the Senate Judiciary Committee.

While the ultimate appointment is the President's responsibility, there is no doubt that his decision is influenced by the recommendations of the Attorney General, the American Bar Association and political leaders. The effect of public attention cannot be discounted, especially since the Senate hearings are public and are often widely reported by the news media. The arguments on behalf of the federal appointive system, as well as those critical of it, are discussed in §6.5.1. to §6.5.3., below.

§6.3. *The Pennsylvania Experience with the Appointive Method.* As indicated above, §1.2, Pennsylvania utilizes the gubernatorial appointive method, with confirmation by a two-thirds majority of the Senate, mainly in the filling of a vacancy created by the death or resignation of a judge prior to the end of his term of office or for the filling of a new judgeship created by the legislature. In most instances the appointment is made to a member of the same political party as the governor but the fact that seven-

teen Senators can hold up a confirmation assures some degree of bipartisan approval for the appointment.

While the judge appointed to a vacancy must run for a regular term of office at a later partisan election, the importance of the original appointment is not to be minimized. In areas where the "sitting judge" principle has some effect, the appointed judge often receives bipartisan support in the election. Experience has shown however, that an appointed judge may not receive the nomination of his own party and if he does, he may be defeated by the candidate of the opposite party in the election. In spite of this possibility, many judges who have been elected to the bench in Pennsylvania started their judicial careers by a gubernatorial appointment.

§6.4. *Arguments Supporting the Appointive System.* Those favoring gubernatorial appointment of judges call attention to the fact that historically this was the most prevalent method and that popular election of judges did not come into existence until the wave of Jacksonian democracy in the early nineteenth century. They admit that election of all public officials, including judges, was a popular reaction to the excess and abuse of power prevalent at that time. They contend, however, that the same conditions do not prevail today and that "when the reason for the rule dies, the rule should die" especially since the original attitude of the Jacksonian era was against "professionalism" and that any citizen was capable of discharging a judge's functions. The complexities of modern law repudiate the idea that anyone can be a judge and it is suggested that the selection of judges be made by an appointing official who can evaluate the professional qualifications needed.

They claim that the appointive method is more likely to select able, qualified judges than the elective method, which is controlled by local party leaders. Two principle reasons are cited for this:

... under the appointive system, the governor is clearly responsible for the quality of the appointees. The hope for the governor's reelection and for the continued success of his political party depends, in part, on the electorate's evaluation of the integrity and capability of the judicial appointments. Under the elective system, no one person is clearly responsible for the quality of the judges elected. This responsibility is cast upon local party officials, who are concerned primarily with local public offices. The responsibility is diffused among the individual voters, who are not likely to share any sense of blame if the elected judge proves incapable. ... under the appointive system, the governor has the opportunity and resources to recruit and determine the most capable candidates for judicial office. Because of the governor's prestige and power, he can insist on the appointment of able men who would not normally be considered because of their lack of political experience or support. When local party leaders choose a judicial candidate, they do not have the resources to search out the most talented person available nor do they have the power or desire to select an outstanding candidate in preference to a less qualified one who enjoys political support. Further a governor's appointment is newsworthy and subject to public scrutiny, while the selections made in party councils or judicial nominating commissions under the Merit Plan (see §7, below) are not.

Those who criticize the elective method claim that the appointive method results in better judicial choices but there is a divergence of opinion as to whether the appointive method should involve selection by the governor alone or by the governor with the advice and consent of the legislature. The proponents of straight gubernatorial appointment contend that an appointive system could produce better judges if consideration of party affiliation were ruled out and if factors of experience and aptitude for judicial officers were the sole considerations. They further contend that party affiliation carries undue weight when left to the governor with the advice and consent of the legislature. See Section 6.04, comment (a), Annex Number 7.

*§6.5. Arguments against the Appointive System.* It is contended that the appointive system is not as democratic as the elective system, in that it deprives the people of direct control of the judicial branch of government. A judge must be responsible to the people not only for his position but for his reelection. A judge must feel responsibility to the appointing official, and will be hesitant to act unfavorably toward him. This would encourage a governor to appoint only those judges who would favor his programs and policies. Further, a governor could utilize the patronage involved in judicial appointments to build his own political machine.

If the judge is not responsible to the electorate and his political party for his reelection, the judiciary too could become an independent political force through astute use of the appointments to the many quasi-judicial offices under his control. Also, the appointive method does not divorce a judge from politics for there is just as much politics involved in an appointment as in an election, except that the political decisions are exercised by different people. The appointing official is a political leader, subject to the same political pressures as party officials.<sup>55a</sup>

In reply to those who extol the quality of the judges selected under an appointive system, the opponents of an appointive system refuse to admit that appointed judges are superior to elected judges. As to the high caliber of the federal judiciary, it is contended that the prestige, power and influence of these posts make them highly desirable career opportunities, especially because of life tenure given federal judges. It is also maintained that in those states where the courts enjoy similar power and prestige, exceptionally able judges have been attracted to elective judicial offices.

*§6.5.1. Criticisms of the Appointive System in the Federal Courts.* Critics of the Presidential appointive system deny that the quality of the nominees is assured by the fact that the responsibility for the appointment always rests on the President. To show that the President can absolve himself from this responsibility, they cite President Harding's statement that he would look to the Republican Senators from the nominee's state to give final judgment as to the wisdom of the appointment. "If, according to Harding, the senators were to recommend men 'who prove to be unworthy or lack the

ability to perform the duties of the officers to which they are appointed, the President will place upon them the responsibility for whatever trouble arises through this means."<sup>56</sup>

Throughout the history of the United States, the federal judiciary has come under attack, not so much for the quality of the judges who man it, but for the economic and political attitudes of the judges. During the New Deal era federal judges were criticized for blocking reforms considered important by the party in power. More recently, federal judges were attacked for many civil rights decisions which were contrary to substantial segments of the electorate. It is argued that if the federal judges were responsible to the people, at least for reelection, they would not have decided school desegregation or political apportionment cases the way they did. This lack of responsibility to the people, plus life tenure during good behavior, permits the federal judges to wield unrestrained power. After the decision in the school desegregation cases in 1956, fourteen bills were introduced in Congress in 1957 alone to alter the process of choosing the federal judges. Proposals were made: to limit the terms of Supreme Court justices to twelve years, renewable with the consent of the Senate; to provide for the election of federal judges in the states where they serve; to provide for nomination by the President from a list of seventy-five names submitted by the American Bar Association; to provide for the appointment of federal judges by the sitting judges of the highest state courts; and to require judicial nominees to have five years prior judicial experience.<sup>57</sup>

§6.5.2. *Political Considerations in the Appointments to Federal Judgeships.* There is no doubt that political affiliation influences the appointment of federal judges. The following tables show the number and percentage of judges appointed by recent Presidents from the ranks of their respective political parties:

TABLE 1<sup>58</sup> SUPREME COURT APPOINTMENTS BY POLITICAL PARTY, 1933-1962

| President         | Democrat | Republican | Per Cent Own Party |
|-------------------|----------|------------|--------------------|
| Roosevelt (Dem.)  | 8        | 1          | 88.9               |
| Truman (Dem.)     | 3        | 1          | 75.0               |
| Eisenhower (Rep.) | 1        | 4          | 80.0               |
| Kennedy (Dem.)    | 2        | 0          | 100.0              |

The fact that the President appoints judges mainly from his own party does not mean that the appointees are not able judges. It does demonstrate that able lawyers of the opposite political party are not likely to be considered in the selection process, with the result that a substantial portion of the available legal talent is not being recruited or developed in the search for the best judicial candidates.

TABLE 2 LOWER-COURT APPOINTMENTS BY POLITICAL PARTY, 1933-1962

| <i>Court</i>         | <i>President and Party</i>      |                              |                                    |                               |
|----------------------|---------------------------------|------------------------------|------------------------------------|-------------------------------|
|                      | <i>Roosevelt<br/>(Democrat)</i> | <i>Truman<br/>(Democrat)</i> | <i>Eisenhower<br/>(Republican)</i> | <i>Kennedy<br/>(Democrat)</i> |
| Courts of Appeals    |                                 |                              |                                    |                               |
| Democrat             | 50                              | 24                           | 3                                  | 17                            |
| Republican           | 4                               | 3                            | 42                                 | 0                             |
| (Per cent own party) | (92.6%)                         | (88.9%)                      | (93.3%)                            | (100.0%)                      |
| District Courts      |                                 |                              |                                    |                               |
| Democrat             | 138                             | 92                           | 6                                  | 83                            |
| Republican           | 2                               | 6                            | 123                                | 8                             |
| (Per cent own party) | (93.6%)                         | (93.3%)                      | (95.3%)                            | (91.2%)                       |

Some critics of the federal appointive system claim that political considerations have a more detrimental effect than merely narrowing the field of available candidates. They contend that in many instances a federal judgeship has been awarded for faithful party service, resulting in the appointment and confirmation of many incompetent judges. The efforts of the American Bar Association's Standing Committee on Federal Judiciary to press for the appointment of the most capable judges has not been entirely successful to keep appointees rated "unqualified" off the federal bench. The following table shows the appointments of recent Presidents to the federal bench of judges, by percentage, from the various categories of ratings supplied by the American Bar Association's Standing Committee on Federal Judiciary and that nominees were appointed despite a "Not qualified" rating.

TABLE 3 AMERICAN BAR ASSOCIATION RATING OF JUDICIAL NOMINEES, 1953-1962

| <i>Rating</i>                                                     | <i>Eisenhower</i> | <i>Kennedy</i> |
|-------------------------------------------------------------------|-------------------|----------------|
| Exceptionally well qualified                                      | 17.1%             | 16.4%          |
| Well qualified                                                    | 44.6              | 45.4           |
| Qualified                                                         | 25.1              | 30.0           |
| Recommended (no other information)                                | 6.9               | .9             |
| Neither recommended nor opposed                                   | .6                | 0.0            |
| Not qualified or opposed                                          | 5.7               | 7.3            |
|                                                                   | 100.0%            | 100.0%         |
| Total Nominations Submitted to<br>A.B.A. Committee for evaluation | 175               | 110            |

On at least two occasions, the opposition of the American Bar Association's Standing Committee on Federal Judiciary has engendered much public interest in the appointments. On one of these occasions, the opposition was unable to prevent the appointment of a judge to a District Court in New

York but the public attention may have had the indirect effect of preventing future nominations opposed by the Committee. More recently, under the Johnson Administration, a nomination to the District Court in Massachusetts was withdrawn because of public clamor, just prior to Senate confirmation. It has also been suggested that the American Bar Association ratings may be of value to the Attorney General, to bolster his decision not to recommend an unqualified lawyer who has strong political support for the nomination. The Attorney General may be able to cite the American Bar Association's opposition, in his explanation to the political leaders pushing a nomination. "You know, the President would love to appoint your man but he can't in view of the 'unqualified' rating."

§6.5.3. *Proposals to Change the Federal Appointive Method.* Some people, however, are not satisfied with the present system of investigation by the Department of Justice and recommendations by the Attorney General and the American Bar Association's Committee. As to the Attorney General's participation in the selection process, many feel that the fact that he is a principal litigant in the federal courts colors his objectivity. The same argument can be made at the state level, should a governor seek similar recommendations from his Attorney General.

As to the American Bar Association's efforts, many critics are perturbed by the fact that its ratings and advice can be ignored and they would like to achieve a more effective and regularized procedure to guarantee continued high quality appointments. Such a method would lessen the reliance on political partisanship and would cancel the present tendency to prefer "political" over "professional" lawyers in the selection process.

Senator Hugh Scott of Pennsylvania has studied the problem of appointments to the federal judiciary and has introduced a bill in the United States Senate that would utilize a Judicial Service Commission to ascertain the qualifications of prospective appointees to positions as federal judges. On the occasion of a vacancy on the federal bench, the Commission would make recommendations to the President for the filling of the vacancy. Under Senator Scott's bill, the President may nominate an appointee not recommended by the Commission but in that case he must submit to the Senate a statement of his reasons for failing to follow the recommendation.

Senator Scott's bill provides that the Commission would consist of seven members appointed for three-year terms by the President, with the advice and consent of the Senate. At least two members would be retired federal judges, at least three would have past or current service on the American Bar Association's Standing Committee on the Federal Judiciary. To assure bipartisan representation on the Commission, no more than four members could come from the same political party. The Commission would be a continuing body with the authority to hire an adequate staff to carry on its function. Senator Scott explains that the permanency and continuous activ-



ity of the Commission would serve not just to keep unqualified judges off the bench but would provide a means of bringing to the bench the very best legal talent willing to serve. Senator Scott contends that this system would be superior to the present Presidential appointive method for selecting federal judges, which suffers from the fact that it relies heavily on political affiliation and activity, along with friendship and congeniality. Such considerations should not be substituted for competency when a seat on the federal bench is at issue, he concludes.<sup>61</sup>

§6.6. *Summation of Arguments for and against the Appointive System.* The proponents of the appointive method maintain that it results in better judicial appointments by localizing responsibility for the quality of the judges selected in the appointing official, and that the appointing official is able by his prestige and investigatory facilities to select judges who would not normally be available or acceptable through the elective processes.

The opponents of the appointive method are divided into two camps:

those who favor retention of the elective system;

those who would reject both the elective and appointive methods.

Those who favor retention of the elective process contend that it provides a means of keeping the judicial selective system democratic and responsive to the people by requiring judges to submit to reelection at the end of stated periods. This is challenged by those who feel that the elective system is not democratic, since the actual selection is made not by the people but by party leaders. They further criticize the elective system on the ground that it precludes the selection of the best talent from among those lawyers who cannot afford the time or expense of primary and general election campaigns. These opponents of the elective system contend: that the dual requirements of election and reelection interfere with the independence of the judiciary; and that this is too high a price to pay for its retention.

Those who oppose both the elective and appointive systems contend that each is subject to political pressures, with the result that poor judges have been placed on the bench under both systems. They are not satisfied with the occasional, voluntary use by the President, governors or mayors of nonpartisan judicial nominating committee recommendations; they would like to have the nonpartisan nominating method formalized and incorporated by statutory or preferably by constitutional provisions in an overall revision of methods of selection and tenure of judges. These efforts are described in §7, below.

## §7. **Proposals to Adopt the Merit Plan for the Selection of Judicial Officials**

§7.1. *Introduction.* Critics of both the elective and appointive methods for the selection of judicial officers have offered a variety of alternate or substitute plans. The variety of plans is voluminous, drawing upon the ingen-

uity of the many people who have devoted themselves to the problem of manning our courts with the best talent available. In fact, the plans actually adopted by the states are quite varied and often unique. Mention might be made of the Illinois method, whereby a judge is elected in a regular partisan election but he seeks reelection in a noncompetitive and nonpartisan primary. Under the Maryland method, a judge is appointed by the governor for a short term. If that judge wishes to be retained, he must seek his party's nomination at a subsequent primary election, where he runs with a party label. If nominated, he runs in a biennial election, where party labels are prohibited. In similar reforms of methods of judicial selection, many states have adopted various elective and appointive features but the most recent emphasis and trend have followed the special combination features of the Merit Plan, also called the Missouri Plan, the Pennsylvania Plan, the American Bar Association plan or by the name of any organization promoting an identical or closely similar plan.<sup>62</sup>

*§7.2. Identifying Features of the Merit Plan and Its Function.* The backers of the merit plan claim that it has welded together the best features of the appointive and elective procedures for selecting judges, adding the nominating commission idea. They claim that the plan is effective in securing the best available talent, that it is democratic in execution and that it provides the best method of producing a trustworthy, independent and competent judiciary. There are three stages in the judicial selection process which identify the merit plan:

- the recruiting and nominating stage.
- the appointing stage.
- the reelection or retention stage.

The recruiting and nominating function is performed by a continuing body known as a judicial nominating commission, which seeks out legal talent to fill judicial vacancies. When a vacancy occurs, the commission submits a panel of names to the appointing official.

The appointing official for a state is usually the governor, although the power to appoint judges to city courts could be given to a mayor of a large city. To fill a judicial vacancy, the appointing official must choose the judge from the panel of names submitted to him by the judicial nominating commission.

The judge appointed serves a short, probationary term of office and if he wishes to be retained for a regular term, he must seek election in a nonpartisan election, where he has no opponent and runs only on his record. A judge is eligible for reelection and if he wishes to be retained after a regular term of office, he may have his name placed on a ballot in a similar noncompetitive, nonpartisan election.

§7.2.1. *The Nomination Stage.* The most important stage, according to the proponents of the merit plan, is in the initial nomination. Rather than have the initial selection made in private party councils, or even in party primaries, the proponents of the merit plan propose the establishment of a judicial nominating commission, whose task is to recruit and nominate the best qualified lawyers for judicial office. As long as the commission is non-partisan, it is argued that its nominees will be chosen on a nonpartisan basis, thus eliminating the political affiliation of a candidate as a prime consideration in his selection. This is not meant to disqualify lawyers who have been active politically; selection committees have considered public service, including political activity, as a desirable characteristic in a judicial nominee.<sup>63</sup> The duty of the judicial nominating commission is to recruit, evaluate and recommend judicial candidates to the appointing official. The names of recommended candidates are submitted in panels of two to six nominees, the number differing under the various merit plans.

§7.2.2. *The Appointing Stage.* The second feature of the merit plan involves appointment by the governor for state judicial offices and by the President for federal judicial offices. This appointment must be made from the panel of nominees submitted by a judicial nominating commission, and it is to be made with or without legislative approval as each jurisdiction chooses. The various modifications of the merit plan show some differences as to the procedure to be followed when the executive responsible for the appointment rejects all the names on the panel. The original plan in Missouri was faced with this situation when the governor refused to accept any of the names submitted to him by the Judicial Nominating Commission. Several resolutions of this problem have been suggested. One modification of the merit plan calls for submission of new panels to the governor until a name acceptable to him appears. Another significant modification specifies a time period within which the governor must act. If the governor fails to appoint within that period, the appointive power is passed to another body or person, such as the Supreme Court or Chief Justice of the state, which appoints from among the names of the original panel. The Pennsylvania modifications are discussed below, §7.3.1. The proponents of the merit plan admit that political considerations can be important to the appointing official but contend that the nonpartisan nature of a judicial nominating commission produces well-qualified nominees, so that political affiliation is minimized in the process. They also point out that several governors and mayors have voluntarily agreed to appoint judges recommended by judicial nominating committees. This indicates, they say, that appointing officials are interested more in securing the best judges than in utilizing judicial appointments for political purposes.

§7.2.3. *The Reelection Stage: Retention of an Appointed or Elected Judge.* The third feature of the merit plan is intended to relieve a judge from the

rigors and uncertainties of political campaigns should he seek to retain his office. The proponents of the merit plan wish to remove the reelection of a judge from the normal elective process. To this end, they suggest that at the end of a judge's appointive term of office, if he desires to be retained, he should seek the approval of the electorate at a special election or on a special ballot at a regular election, without opposition and without any political designation. In short, the judge would "run on his record", with this question being posed to the voter: "Should Judge \_\_\_\_\_ be retained for another term of office? Yes? \_\_\_\_\_ No? \_\_\_\_\_." If the voters approve his retention, the judge is retained for another term of office. If the voters disapprove of the judge's retention, a vacancy exists at the end of the judge's term and the nomination and appointing procedures described above are put into motion again to fill the vacancy.

§7.3. *Analysis of the Pennsylvania Plan.* The current proposal of the Pennsylvania Bar Association in essence adopts the Merit Plan and follows the general design recommended by the Commission on Constitutional Revision, 1959,<sup>64</sup> the American Bar Association's Model Judicial Article and the Missouri Plan. For convenience, it will be called the "Pennsylvania Plan" in this section. The full text of this judicial article can be found in Annex No. 5.

§7.3.1. *The Judicial Nominating Commissions: Composition and Procedure.* Under the Pennsylvania Plan, the Judicial Nominating Commissions are organized according to geographical coverage. There is one for the appellate courts, chosen on a statewide basis, consisting of a judge, three members of the bar and three lay citizens. The bar representatives are chosen by the members of the statewide bar and the lay members are appointed by the governor. Rules for the selection of the bar members and the judge or justices are made by the Supreme Court. There are separate Judicial Nominating Commissions for each judicial district which utilizes the merit plan. The bar and lay members of each commission are chosen from the judicial district; the judge may be from another judicial district.

When a vacancy occurs on the Supreme or Superior Courts, the Judicial Nominating Commission for the appellate courts nominates six candidates and sends the panel of names to the Governor. If the Governor fails within sixty days to make an appointment from the panel submitted, the Judicial Nominating Commission certifies the same six names to the Chief Justice who shall promptly appoint one of the six nominees.

The procedural details of the Judicial Nominating Commissions for the individual judicial districts differ slightly in their operations from the statewide commission's. First, they submit panels of three names only and in the event that the governor refused or fails to appoint a judge within sixty days from the names submitted to him, the Judicial Nominating Commission submits another panel of three names. If the governor fails to appoint from

this second panel within thirty days of his receipt of the nominations, the appointment is made by the Chief Justice from among the persons nominated on either panel. Provision is made that the nominees must come from the judicial district involved, unless there are less than six lawyers qualified and willing to serve in that district, in which case the nominees may come from another judicial district.

Membership is for three year terms and restrictions are placed on more than two terms unless a year lapses. Selection is staggered so that one bar member and one lay member are selected each year, to prevent an appointing power from being responsible for too many appointments.

§7.3.2. *Nonpolitical Nature of the Judicial Nominating Commissions.* The members of the Commissions are not to hold any office in a political party or organization nor, except for the judicial member, are they to hold any public office for which they receive salary or other compensation. No compensation is payable for the services of the Commission members, so that membership cannot be a source of patronage. These restrictions against political activities are considered essential to the operation of the selection plan in a nonpartisan manner. While those who have rallied to the cry, "Let's get our judges out of politics!" believe that partisan considerations should be eliminated at each stage—nominative-appointive-elective—they stress the nonpolitical nature of the nominating process as the key to removing the selection process from politics.

§7.3.3. *Arguments in Favor of the Judicial Nominating Commissions.* Experience with the operation of the judicial nominating commission in the states which follow the Missouri or merit plan has shown that these commissions operate in a nonpolitical fashion, recommending nominees according to their qualifications, not their political affiliations. In the one instance where a commission did nominate on the basis of political affiliations, the governor refused to appoint anyone from the panel submitted. The 27 years of experience in Missouri has shown that the judicial nominating commissions work well to eliminate the evils of partisan selection. A recent Democratic governor of Missouri appointed eight Democrats and seven Republicans during his term of office, although in each case the governor could have appointed a Democrat. The Missouri courts operating under the merit selection plan are as far removed from politics as is possible. A judge who served under both elective and merit selection methods has stated, "Political pressure has been taken off their (the judges') backs."<sup>65</sup>

The elimination of political considerations, such as ethnic, religious or geographic characteristics utilized to "round out a ticket," makes many more capable men available to serve as judges. In fact, candidates from both parties can be considered for judicial posts. In addition, the fact that a judge no longer owes his seat to a political party or leader removes the suspicion that his decisions can be politically motivated or influenced.

Aside from the elimination of political considerations, the proponents of the Pennsylvania Plan contend that a continuing commission, designed to recruit, rate and recommend nominees can function much better than the current methods of selection by the party leaders or by the governor. Over a period of time, a commission can develop standards for rating and selecting judicial candidates. The fact that the judge and lawyer members will have the ability to evaluate the candidates from a professional standpoint answers the alleged failing of the elective system that the public cannot know a candidate's professional qualifications. The inclusion of lay members on the commission assures the public of representation in the nominating process.

§7.3.4. *Arguments against the Judicial Nominating Commissions.* Opponents argue that politics can still be prevalent under the Pennsylvania Plan, except that bar association politics will replace normal partisan politics. The tendency of the lawyer members of a commission would be to favor a man active in bar association work, who is usually from a large law firm. Furthermore, there is nothing to prevent a commission from making a nomination based on partisan political considerations.<sup>66</sup>

Further, placing a judge in a nominating role puts him right in the middle of political pressures exerted on behalf of a candidate. Many have doubts whether it is proper to give a judge what may be considered a "non-judicial" duty. Even if the selection of judges is considered a judicial duty, it still takes a judge away from his prime function—hearing and deciding cases. There will be many judicial Nominating Commissions throughout the state, and service may become burdensome, especially for the Supreme and Superior Court judges.

There is hesitancy on the part of many to place such a significant role in the initial stage of the selection process in the hands of lawyers. One proponent of the Pennsylvania Plan preferred to change it so that lawyers only should be members of the judicial nominating commissions. He recognized, however, the problem of putting this power of nomination in the hands of a non-public group, such as a bar association, and was willing to include non-lawyer members on the commissions.

Others attack the use of judicial nominating commissions as delivering less reform than they promise. One member of a commission set up voluntarily by the Mayor of New York City pointed out that if the Mayor suggested a lawyer to the commission, it was almost conclusive that the Mayor would appoint him when the panel of names was submitted to the Mayor.

It has been suggested that judicial nominating commissions may not be able to function properly in small judicial districts, where the number of lawyers eligible and willing to become judges is small. Since the three lawyer members of the judicial nominating commission for a judicial district must be selected from that district, those lawyers are removed from consideration immediately. The Pennsylvania Plan, however, provides that where there

are less than six lawyers qualified and willing to accept a judicial appointment, the Judicial Nominating Commission is permitted to go outside the judicial district for a candidate. If further restrictions are imposed on members of the commissions, such as suggested by the American Bar Association's Model Judicial Article, prohibiting a member of a commission from being eligible for a judicial office for five years after his term of office is up, (See Annex No. 6, Section 10), small judicial districts may have no eligible judicial candidates.

#### REPLIES:

The advocates of the merit plan admit that it is not perfect but that it has the most promise to effectively screen out reliance on political affiliations. Occasional nominations evidently inspired by political considerations have been blocked by the governor who refused to appoint anyone from such a politically chosen panel.<sup>67</sup> As to the objection that lawyers will control the nominations and favor men from large law firms, the advocates of the Pennsylvania Plan point to the five judges appointed by former Governor Scranton on the recommendation of a voluntarily established nominating Commission in 1964: four of the appointees were individual practitioners or came from small law firms; one was a member of a firm of fifteen partners and four associates. Of those appointed to the court of common pleas, two were Republicans and one a Democrat; of those appointed to the county court, one was a Republican and one a Democrat.<sup>68</sup>

As to the contention that service on a commission is non-judicial work and burdensome for a judge, the advocates of the merit plan reply that the selection of the best qualified men for judicial office is a part of the improvement of our court system and the concern of every judge. Also, once the system is under way, there will be relatively few vacancies to be filled by the commissions and the work will not be burdensome.

The Pennsylvania Bar Association's alternate proposal would give judicial districts other than Allegheny and Philadelphia Counties the right to adopt by local option the merit plan of judicial selection. See §7.4.1, below. Thus, it is suggested that if a judicial district cannot operate comfortably under the judicial nominating commission plan, it would not adopt it.

*§7.3.5. The Appointive Powers under the Pennsylvania Plan.* The Pennsylvania Plan places the actual appointive power in the hands of the Governor, limiting his choice to one of the nominees appearing on the panel of names submitted by the appropriate judicial nominating commission.<sup>69</sup> There are also time limitations within which the Governor must exercise his right to appoint, described in §7.3.1, above. If the Governor fails to appoint within these time limits, the appointive power passes to the Chief Justice of the Supreme Court.<sup>70</sup> No approval by the Senate is required for either the Governor's or Chief Justice's appointments.<sup>71</sup>

*§7.3.6. Arguments in Favor of the Appointive Power Proposed.* The proponents of the Pennsylvania Plan hold that the Governor, as the elected representative of the people, is a proper repository of the appointive power, noting that the Governor's choice is limited to those candidates recommended by a judicial nominating commission. This further limits the Gov-

error's opportunity to use appointments to judgeships for political patronage. The ultimate choice is still the Governor's and the responsibility is his. Section 9 of the proposed Judiciary Article makes this clear: "The Governor and the Chief Justice shall have full responsibility for all appointments made by them, respectively under this article."<sup>71</sup>

§7.3.7. *Arguments Against the Appointive Powers Proposed.* The National Municipal League recommends that the Governor be given the straight appointive power, to be exercised with the consent of the legislature. See Annex No. 7, Article VI, Introductory Comment. A Minority Statement in the Report of the Commission on Constitutional Revision, 1959, stressed that under the Pennsylvania Plan proposed by the majority, there is every indication that governors will continue to appoint judges from members of their own parties. Only token interim judicial appointments have been made by the Presidents of the United States outside their political parties. In fact, the electorate of Pennsylvania has a better record of crossing party lines in selecting judges than have either Presidents or governors. Further, only the Governor has the power to present a candidate to the electorate under the Pennsylvania Plan, since the only way to be elected to regular term of a judgeship is to receive an appointment from the Governor.<sup>72</sup>

The provisions limiting the right of the Governor to reject panels has met the charge of the minority report of the Woodside Commission that a politically partisan governor could defeat the nonpolitical aspects of the Pennsylvania Plan by continually rejecting panels unacceptable to him.<sup>73a</sup> It may be questioned whether the solution to this problem proposed by the Pennsylvania Plan is the proper one; it gives the Chief Justice of the Supreme Court not just a voice in the nominating process described in §7.3.4. above, but the actual appointing power, subjecting the Chief Justice to political pressures and time-consuming duties. A further complication may arise if the Chief Justice is a member of the Judicial Nominating Commission which supplies a panel of names to the Governor, who rejects the panel: the Chief Justice would then be called upon to appoint from a panel he helped to form. A provision could resolve this problem by permitting the Chief Justice to delegate his responsibility to the justice next in seniority because of incapacity or self-interest.

§7.3.8. *The Elective Powers under the Pennsylvania Plan.* A judge appointed to a vacancy by the Governor or Chief Justice in the manner described above serves a probationary term of at least two years. If he wishes to seek a full term, he files a declaration of candidacy for retention at least 120 days before the expiration of his term. His name is submitted to the electors on a separate judicial ballot or in a separate column on voting machines, without party designation. The only question is whether he shall be retained in office. If a majority of the votes cast are against retaining him, a



vacancy exists on the expiration of his probationary term. If a majority approve his retention, he shall serve for a full term and is eligible to succeed himself at the end of each term. See Section 7 (d), Annex No. 5.

§7.3.9. *Arguments For and Against the Proposed Elective Powers.* The proponents of the Pennsylvania Plan feel that the provision for an election to decide whether a judge is to be retained gives the electorate sufficient democratic control over the judiciary. The election contemplated does not follow the usual type of political campaign, since the judge who seeks to be retained for a regular term runs on his own record. He does not have to spend the time, physical and mental energy nor the money required by a typical partisan, competitive campaign. His only investment in effort and money to be retained is in the work he has put into his judicial duties to gain a satisfactory record and in the cost of the postage stamp used to notify the election officials that he desires to be retained for another term.

Some who support the judicial nominating commission and gubernatorial appointment features of the Pennsylvania Plan express dissatisfaction, however, with the elective feature. They feel that there is no particular merit in an election subsequent to the judge's appointment to determine if the public believes that the judge is doing a good job. If the election is an automatic stamp of approval, it is a useless gesture. If it is to maintain the public's view of a judge's conduct, it requires him to make his decisions with an eye on public approval, a consideration which is clearly not appropriate. Decisions on civil rights or labor disputes are examples of this.

Other critics who oppose the Pennsylvania Plan completely view the elective feature as a mere ratification of a previous screening of candidates and a less important part of the entire process. "It does not advance the aims of democratic self-government, of course, to retain the mere form of judicial election if the appointive features are the truly significant and determinative ones."<sup>73</sup> The Minority Statement in the Report of the Commission on Constitutional Revision, 1959, entitled "Selection of Judges," criticized the Pennsylvania Plan for providing the people with no means of selecting judges, but only in rejecting them. The "Yes" or "No" vote was criticized as not being effective to test a candidate's acceptability, since approval under such an election is nearly unanimous. The qualifications of officials are best determined by comparisons between contestants for a post. One who would be willing to speak for the superior qualifications of a candidate seeking a judgeship from an incumbent judge would not be so willing to attack the same incumbent running unopposed, even if he knows the incumbent lacks the necessary qualifications. "You cannot lick somebody with nobody."<sup>74</sup>

The fact that only one judge seeking retention in Missouri has been defeated would seem to support this position. This fact, however, is also cited

by the proponents of the Pennsylvania Plan to show the high quality of the merit selected judges, in the eyes of the voters, and the ability of the voters to turn out an occasional incompetent appointee who has lost the public's confidence."<sup>5</sup>

§7.4. *Applicability of the Pennsylvania Plan to All Judgeships in Pennsylvania.* The Pennsylvania Bar Association, in common with the Commission on Constitutional Revision, 1959, originally recommended that the merit plan of selection of judges be made mandatory for only the statewide courts (Supreme and Superior) and for the courts of record of Allegheny and Philadelphia Counties. Unless the other judicial districts would choose to adopt the merit plan of selection provided for Allegheny and Philadelphia Counties, the judges in these districts would continue to be elected or appointed as now provided. The Pennsylvania Bar Association recently revised its position so that its recommendations for the merit plan of selection would apply to all judges and courts in Pennsylvania.

As currently proposed, the Pennsylvania Plan's preferred nominative-appointive-elective features would apply to the selection of all judges, namely the Supreme Court justices, judges of the Superior Court, District Courts (comparable to the present common pleas and county courts), Estates Courts (comparable to the present Orphans' Courts), and Community Courts (designed to replace the present courts not of record: justices of the peace, aldermen or magistrates). See Annex No. 5A.

§7.4.1. *Applicability to Selected Judgeships. Alternative Proposal. Local Option.* While the Pennsylvania Bar Association has expressed itself as preferring the merit plan of selection to apply to all judges in Pennsylvania, it offers an alternative proposal that would make the merit plan of selection of judges mandatory for only the statewide judgeships and for all the judgeships in Allegheny and Philadelphia Counties but optional for all other judicial districts. This alternative plan provides that the voters of any judicial district outside Allegheny or Philadelphia Counties may decide, by local option, to adopt the merit plan of selection and, having adopted it, to vote at a later date to repeal it. For those judicial districts which do not adopt the Pennsylvania Plan, judges will be elected to vacancies resulting from the expiration of a term of office or appointed by the Governor to fill vacancies created by new judgeships or by death, resignation, etc., before the end of an unexpired term, the same method in use now. See Section 7 (e) to (g), Annex No. 5.

The alternative proposal follows the experience of the Missouri Plan, which first applied merit selection of judges in that state to the statewide appellate courts and the courts of the metropolitan areas. The other courts in Missouri are included in the Plan in a proposed constitutional amendment to be submitted to the voters in 1968.<sup>6</sup>

## Notes to Part II

1. Leflar, *The Quality of Judges*, 35 *Ind. L.J.* 289, 305 (1960).
2. Traynor, *Rising Standards of Courts and Judges: The California Experience*, Address to the Pennsylvania Bar Association, Bedford, Pa., June 24, 1965.
3. Rhoads, *The Facts about Pennsylvania Courts and Judges Today*, Citizens' Conference, Philadelphia, January 9-11, 1964.
4. Constitutional Amendment, ratified November 2, 1965, to Article V, Section 15, implemented by Act 1966, Spec. Sess. No. 1, Aug. 31, No. 3, §§1-8, 17 PS §§790.101-790.108. Sitting judges may also be assigned by the Chief Justice to other judicial districts where a backlog, temporary vacancy or other special condition makes it expedient to provide an outside judge for a particular judicial district. Act, 1911, April 27, P.L. 101, §3, as amended, 17 PS §228. Strictly speaking, this is not a variation of the selection process, since the judge assigned to another judicial district has been selected in the normal manner. This assignment procedure is more directly concerned with the administration of the courts as a unified system. See Part VII, §2.2, below.
- 4a. Act, 1901, March 7, P.L. 20, Art. XVI, §1, as amended, 52 PS 22261.
5. Act, 1959, Oct. 23, P.L. 1369, §8, 71 PS §779.8.
6. Segal, *Nonpartisan Selection of Judges*, 50 *A.B.A.J.* 830 (1964).
- 6a. Grossman, *Lawyers and Judges*, (Wiley & Sons, Inc., New York, 1965), p. 195.
7. Selsam, *A History of Judicial Tenure in Pennsylvania*, 38 *Dick. L.R.* 168, 169 (1934)
8. Selsam, *op. cit.*, pages 170-171.
9. Branning, *Pennsylvania Constitutional Development*, (Univ. of Pittsburgh Press, 1960), pp. 15-18.
10. Selsam, *A History of Judicial Tenure in Pennsylvania*, 38 *Dick. L.R.* 168, 171.
11. Branning, *Pennsylvania Constitutional Development* (Univ. of Pittsburgh, 1960) p 32, note 65.
- 11a. This section was not affected by the 1909 Amendment to Article IV, Section 8, dealing with the Governor's power to fill vacancies in "judicial offices" by appointment, when such a vacancy occurs prior to two calendar months before the next election day appropriate to the office. It was held that Article V, Section 25 applies to vacancies on courts of records, while Article IV, Section 8 covered only justices of the peace or alderman, *Buckley v. Holmes*, 259 Pa. 176, 102 A. 497 (1917).
- 11b. See footnote 11a.
- 11c. This Amendment has been implemented by the legislature, Act of 1966, Spec. Session No. 1, Aug. 31, P.L. — No. 3 §1, 17 PS 790.101 - 790.108.
12. Act 1937, June 3, P.L. 1333, art. IX, §912, as amended, 25 PS §2872.
13. Act 1937, June 3, P.L. 1333, art. IX, §976, as amended, 25 PS §2936.
14. Act 1937, June 3, P.L. 1333, art. IX, §951, as amended, 25 P.S. §2911.
15. Act 1937, June 3, P.L. 1333, art. VI, §§601-602, 25 PS §§2751-2752.
16. Act 1937, June 3, P.L. 1333, art. XIV, §1415, 25 PS §3165.
17. Section 6 (a), Annex No. 5
- 17a. Section 5, §2, Annex No. 6
- 17b. §6.04 (b) and (c), Annex No. 7
- 17c. Rosenberg, *The Qualities of Justice — Are They Strainable?* 44 *Tex. L.R.* 1063, 1073 (1966)
- 17d. Ferguson and Cowell, *Minor Courts in Pennsylvania, a Study of the Justices of the Peace and Aldermen*, conducted by The Committee on Minor Judiciary of the Pennsylvania Bar Association with the cooperation of The Institute of Public Administration (The Pennsylvania State University, 1962) pp. 56-59.
18. See Annex Number 5, Section 6 (a).
19. See Annex Number 4, Art. V, Section 11, Comments.
- 19a. See Annex Number 7, Section 6.04 (e).
- 19b. See Annex Number 6, Section 5, Par. 2.
20. Ferguson and Cowell, *Minor Courts in Pennsylvania* (The Institute of Public Administration, The Pennsylvania State University, 1962) p. 57.

- 20a. The full text of this Amendment is set out as Article V, Section 28, in Part I, §3, above.
- 20b. Special pamphlet entitled "The Pennsylvania Bar Association Is Opposed to Constitutional Amendment No. 6-A Which Will Be On the Ballot at the November, 1966 Election."
21. Keefe, Judges and Politics: The Pennsylvania Plan of Judge Selection, 20 Univ. of Pitt. L.R. 621 (1959).
22. Winters, Judicial Reform From Coast to Coast, 2 Tulsa L.R. 115, 117 (1965).
23. Keefe, *supra*, footnote 21, at page 626.
- 23a. *Ibid.*, pages 627-630.
24. Segal, Nonpartisan Selection of Judges: Pennsylvania's Experiment, 50 Am. Bar. Assn. J. 830, 832 (1964).
- 24a. See Annex No. 4, Art. 5, Sec. 25, Comments.
25. 38 J. Am. Jud. Soc'y 141 (1955).
26. *Ibid.*
27. Citizens Union, "Judges by Popular Inattention," reported in the New York Times, January 29, 1967, page 46.
28. §2.7.2., above
29. Rosenberg, The Qualities of Justices — Are They Strainable?, 44 Texas L.R. 1063, 1069 (1966).
30. Jones, The Trial Judge — Role Analysis and Profile, in the Courts, The Public and The Law Explosion 140, 143 (Jones ed. 1965).
31. Adopted by the Supreme Court of Pennsylvania on February 11, 1965. See Annex No. 10.
- 31a. Report of the Commission on Constitutional Revision, Annex No. 4, Art. 5, Sec. 25, Comments.
32. *Ibid.* A Missouri jurist related how he ran for the Missouri Supreme Court on a ticket headed by Woodrow Wilson, who campaigned on the promise that he would keep the country out of war. The judge stated that he was elected in 1916 because President Wilson kept us out of the war, and he was defeated in 1920 because Wilson did not keep us out of war. Schroeder and Hall, Twenty-Five Years' Experience with Merit Judicial Selection in Missouri, 44 Tex. L.R. 1088, 1092-93 (1966). Local judges in Pennsylvania run in "off-year" municipal elections only but statewide judges may be running in a general election where particular attention is focused on a state or national political issue.
33. Canons of Judicial Ethics, No. 30. See Annex Number 10.
34. Taft, "The Selection and Tenure of Judges," 38 A.B.A. Rep. 418 (1913).
35. Editorial, "The Dictatorship of Irrelevancy," 48 J. Am. Jud. Soc'y 124, 125 (1964).
36. Schulman, Toward Judicial Reform in Pennsylvania, (University of Penna, 1964) page 44.
37. Ohio Revised Code, Section 3505.04.
38. Brand, Selection of Judges — The Fiction of Majority Election, J. Am. Jud. Soc'y 136 (1951), reported in Indiana, Report of the Judicial Study Commission, 1965, pages 118-119.
39. Staff Research Report No. 75, Problems of Judicial Administration, Ohio Legislative Service Commission, Columbus, Ohio (1965), page 26.
- 39a. Act 1895, June 24, P.L. 212, 17 PS §112.
40. Act of 1901, March 7, P.L. 20, art. XVI, Section 1, as amended, 53 PS §2226.
41. New Jersey S.A., Tit. 2A: 3-14: "In every county in which there are or may be 2 or more judges of the county court, all appointments to such judgeships shall be made in such manner that the appointees shall be, as nearly as possible, in equal numbers, members of different political parties, so as to constitute the county court in any such county bipartisan in character."
42. Schulman, *op. cit.*, at pages 28-31.
43. Quoted in Schulman, Toward Judicial Reform in Pennsylvania (University of Pennsylvania, Philadelphia, 1962), page 46.
44. *Ibid.*
45. *Ibid.*
46. Schulman, *op. cit.*, page 43.

47. Schulman, *op. cit.*, page 43.
48. New York Times, June 13, 1967, page 96, col. 1.
49. Schulman, *op. cit.*, page 43.
50. Report of the Temporary State Commission on the Constitutional Convention, *The Judiciary* (New York), 1967, page 26.
51. Burnett, "Observations on the Direct-Election Method of Judicial Selection," 44 *Texas L.R.* 1098, 1099, note 4 (1966).
52. Report on the Commission on Constitutional Revision, 1959, Minority Statement, page 215.
53. See Annex Number 7.
54. See Annex Number 7, Subsection 6.04 (a), comment (a).
- 54a. Pennsylvania Constitution of 1874, Article IV, Section 8.
- 54b. California Constitution, Article VI, Section 16 (d). The California procedure provides that a nomination or appointment by the Governor to fill a vacancy is effective only if it is approved by the California Commission on Judicial Appointments. Contrast this to the right of a governor to appoint only from a panel initially recommended by a judicial nominating commission, discussed in Sec. 7 below.
55. Grossman, *Lawyers and Judges* (John Wiley & Sons, Inc., New York, 1965) page 27.
- 55a. The majority of the Commission on Constitutional Revision, 1959 rejected the purely appointive system because "... partisan politics play a leading role in the selective process in that the appointing power will in nine cases out of ten appoint a member of his own party and, in so doing, will frequently yield to the political needs of his associates, or make the appointment as a reward for political service." See Annex Number 4, Section 25, Comments.
56. Grossman, *Lawyers and Judges* (John Wiley & Sons, Inc., New York, 1965), page 27.
57. *Op. cit.*, pages 216-217.
58. Grossman, *Lawyers and Judges* (John Wiley & Sons, Inc., New York, 1965), page 28.
59. *Op. cit.*, page 33.
60. Grossman, *Lawyers and Judges* (John Wiley & Sons, Inc., New York, 1965), page 198.
61. Scott, Legislative Proposals for Reform of the Federal Judiciary, 50 *J. Am. Jud. Soc'y* 50-53 (1966).
62. The term "merit plan" will be used generally to designate such plans, unless a particular, named plan differs in some critical feature from the general methods of selection and tenure proposed by this group of plans. The term "merit plan" was utilized in Nebraska and imports that judicial candidates are selected on their merits, rather than on extraneous characteristics. The use of the term "merit plan" is not meant to imply that other elective or appointive plans are without merit.
63. Segal, Nonpartisan Selection of Judges, 50 *A.B.A.J.* 830, 832 (1964).
64. This recommendation was made on an 8-7 vote of the members. See the Minority Statement on Selection of Judges, Report of the Commission on Constitutional Revision, 1959, pages 214-216.
65. American Bar Association, *Handbook on the Improvement of the Administration of Justice*, 4th ed., 1961 p. 34. See also Schroeder and Hall, *Twenty-Five Years' Experience with Merit Judicial Selection in Missouri*, 44 *Tex. L.R.* 1088 (1966).
66. Staff Note: While the appointing officials are directed to make "appointments solely on the basis of merit regardless of the political affiliations of the appointees" (See Section 9, Annex No. 5), there is no specific, comparable direction to the Judicial Nominating Commissions.
67. American Bar Association, *Handbook on The Improvement of Justice* (4th ed., 1961), page 32.
68. Segal, Nonpartisan Selection of Judges, 50 *A.B.A.J.* 830, 833 (1964).
69. Section 7 (a), Annex No. 5.
70. Section 7 (b) and (c), Annex No. 5.
71. Section 9, Annex No. 5.
- 71a. *Ibid.*
72. Report of the Commission on Constitutional Revision, 1959, pages 214-215.
- 72a. *Ibid.*

73. National Municipal League Model State Constitution, 6th ed.; see Annex No. 7, Article VI, Introductory Commentary.
74. Report of the Commission on Constitutional Revision, 1959, pages 214-215, Minority Statement.
75. Schroeder and Hall, Twenty-Five Years' Experience with Merit Judicial Selection in Missouri, 44 Tex. L.R. 1088, 1095 (1966).
76. Winters, "The Court Reform Bandwagon — A Report of Progress," an address to the Pennsylvania Bar Association, Bedford, Pa., June 30, 1967.

## *Tenure of Judges*

### §1. Introduction to the Problem of Tenure.

A riddle popularly attributed to Abe Lincoln is "How long should a man's legs be?" The answer, "Long enough to reach the ground!" gives the clue to how long a judge's term of office should be according to the commentators on the problem. The American Bar Association observes:<sup>1</sup>

"There is no ideal duration for judicial tenure. As a general principle, tenure should be long enough to safeguard the independence of the judiciary and to provide the stability of employment necessary to attract highly qualified personnel. Only when a judge is confident of his position for a reasonable long period of time can the people expect a successful lawyer to give up a lucrative practice to assume the bench . . . On the other hand, it may be unwise to establish an indefinite period of judicial tenure. Judges, like other humans, sometimes fail to recognize their own limitations, desiring to continue serving the public long after their capacities have declined. More important, judicial tenure must be limited to give voice to the will of the electorate. Persons who do not perform their functions adequately must periodically be judged by the electorate."

Here again, somewhat inconsistent aspirations for our judicial system are put forth. The people want:

independent judges, whose terms of office are long enough to attract them to a judicial career and to protect them from political pressures.

judges dependent on the will of the electorate, whose terms of office are short enough to enforce the will of the people through the threat of rejection.

If both desires cannot be put into effect simultaneously, what kind of a compromise, if any, is needed?

One of the answers to the problem is to give judges maximum tenure and a system of removal or retirement that will eliminate unsatisfactory judges. This is not a complete or even a satisfactory answer, for as is developed in Part V, the removal of a judge is a delicate and sometimes impossible matter. It has been asserted that it is easier and far more desirable to give a judge

a relatively short initial term during which he is given an opportunity to prove his capabilities. If he should prove himself incapable, the selecting power would refuse to reappoint or elect him to a full term of office.

§1.1. *Tenure of Judges in Pennsylvania, Historically.* Under Penn's original Frame of Government of 1681, the judges were appointed for one year only. It did not take Penn long to realize that such a short term of office produced too quick a turnover and in the following year, the tenure of judges was extended to "... so long as they shall well behave themselves ... ." Continuance in office was not for life but depended upon the pleasure of the governor.<sup>2</sup>

In Part I, Table 1, following §2.2, shows the pendulum swing of tenure afforded justices and judges in Pennsylvania. Supreme Court justices have been given terms of office of 7, 15, and 21 years or life tenure. The 21 year term, reached as a compromise between the proponents of life tenure and those advocating a short tenure, is the longest "term of years" in effect in the United States. Other judges have been given terms of 5, 6 or 10 years or life tenure under Pennsylvania's Constitutions.

Thus Pennsylvania's experience has run the gamut from one year to life tenure for its judges at various periods in its history.

§1.2. *Present Tenure of Judges in Pennsylvania; Elected or Appointed.* Judges of the Superior Court, of the Common Pleas, County, Orphans' and Juvenile Courts who are elected to fill vacancies caused by the expiration of a judge's term of office are given ten year terms. Associate judges, not learned in the law (See Part I, §6.3 at note 47), are elected to five year terms, while justices of the peace, aldermen and magistrates are elected to six year terms. Police Magistrates in Pittsburgh serve no longer than the term of the mayor who appoints them.

Where the Governor appoints a judge to fill a vacancy resulting from a new judgeship or from death, retirement, etc. before the expiration of a term, the appointee serves a short term, and must seek election at an appropriate ensuing municipal or general election.<sup>3</sup>

§1.3. *Eligibility for Reelection.* Under the present law, all judges are eligible for election following gubernatorial appointment or for reelection following a full term of office, except Supreme Court justices. Article V, Section 2 of the current Constitution specifically provides that Supreme Court justices shall not be eligible for reelection following a 21 year term.

## §2. Proposals for Change in the Tenure of Judges.

The proponents of change in the method of selection of judges usually have suggestions for judicial tenure as an integral part of the desired reform.

§2.1. *The Pennsylvania Plan.* The Pennsylvania Plan, backed by the Pennsylvania Bar Association, recommends generally that the regular term for all judges be set at ten years. This contemplates a reduction from the



term of 21 years provided currently for Supreme Court justices. They would, however, be eligible for reelection at the end of any ten year term. Presently, the Supreme Court justices are not eligible for a second term and this has been criticized as an unfortunate limitation on a justice who receives an appointment when he is 40-45 years old. He could still be capable of performing his judicial functions at the end of a 21 year term but the current constitutional prohibition against another term would deny the public the benefit of such a justice's experience on the bench.

§2.1.1. *Appointments to a Probationary Term.* Tenure under the Pennsylvania Plan is part of the method of merit selection described in Part II, §7, above. The nominee recommended by a judicial nominating commission is appointed by the Governor to a probationary term of office of slightly more than 24 months. The exact length of the probationary term depends on the proximity of the judge's date of appointment to an ensuing, appropriate election. (See Section 7 (d), Annex No. 5A.)

There are slight variations in the length of the initial, probationary terms suggested by the plans similar to the Pennsylvania Plan. The Report of the Commission on Constitutional Revision, 1959, recommended that the initial term of an appointed judge be slightly over twelve months (See Article V, Section 25, Annex Number 4.) as does the Missouri Plan (see §29(c), (1), Annex Number 3). The American Bar Association's Model Judicial Article specifies a probationary period of three years, from the date of the judge's appointment. (See §6, Par. 1, Annex Number 6.) All three of these plans and the Missouri Plan use regular terms of ten years.

§2.2. *The National Municipal League Plan.* The Judiciary Article of the Model State Constitution proposed by the National Municipal League indicates a strong preference for a straight appointment by a governor, with an initial term of seven years, followed by a lifetime appointment. New Jersey follows this system. (See Section 6.04 (c), Annex Number 7.) The advantage claimed for this tenure is that it gives a nominee assurance of a reasonable length of time in which to establish his capabilities, with the possibility of a lifetime appointment if his record is good.

§2.3. *The Lifetime Tenure Proposal.* The proponents of lifetime tenure argue that only an appointment until retirement age will attract a capable, successful lawyer to the judiciary. They point to the experience of the federal judiciary as supporting their contention that lifetime appointments attract the best legal talent. Political motivation is lessened since the judge does not have to depend upon party leaders' support for his nomination to another term. The judge enjoying lifetime tenure is relieved of the pressure of keeping his eye on his next campaign for reelection and of the need to finance a campaign.

Another argument made by the proponents of lifetime tenure for judges involves the experience garnered by a judge during his judicial career. The

skills acquired by an experienced judge cannot be acquired in law school, practice or even a judges' training school. Judges acquire these skills through experience and in the early years of a judicial career, the judge must devote more time and effort to the discharge of his duties than is required for the same work performed in later years. Tenure, therefore, affects the time during which a judge can perform at the highest level of his capacity, using the experience he has acquired.

### **§3. Advantages and Disadvantages of Limited Tenure.**

A limited term of office is said to make it possible to remove judges who have not performed their duties well, for, like other officials, judges should be responsive to the wishes of the electorate. Moreover, limited tenure makes it possible to remove judges who, owing to advancing age, can no longer perform their duties adequately and fail to realize it.<sup>4</sup> At the same time, the disadvantages of limited tenure are numerous. As the Report of the Commission on Constitutional Revision, 1959, the tenure of an elected judge is often tied to the fortunes of his party.<sup>5</sup> On the basis of state or national issues, with no relevancy to his judicial functions, an elected judge may be removed from office. Moreover, an elected judge is forced to demean his office by campaigning for reelection and political affiliations may play a role in judicial decisions.<sup>6</sup> Finally, limited tenure may make it difficult to attract the best people available for the office if serving on the bench would require giving up a lucrative private practice for a few short years of security followed by the rigors and hazards of another election campaign.<sup>7</sup>

As a general principle it seems clear that tenure should be long enough to attract the best men and assure the independence of the judiciary. At the same time, it should be short enough to insure that incompetent judges will not remain on the bench for too long. Perhaps this last consideration should not be a question of tenure but of removal of judges who become incompetent.

### **§4. Significance of Changes Proposed.**

There does not appear to be any desire to shorten the terms of office presently used, except for the reduction of the 21 year term of Supreme Court justices under the Pennsylvania Plan and this is counterbalanced by a recommendation that such justices be eligible for another term. Since the justices of the Supreme Court would be permitted to seek retention at the end of each ten year term, there is a possibility that a justice could serve longer in office than is now permitted.

The ten year term suggested by most proponents of the Pennsylvania Plan is the same term used currently for most judges in Pennsylvania. Under the Pennsylvania Plan, the legislature would be authorized to set the terms for the minor judiciary (judges of Community Courts), up to a maximum of ten years.

The plans suggesting a lifetime tenure or an initial seven year term followed by appointment for life have no counterparts in the present Pennsylvania system. Lifetime tenure, of course, has been utilized for the federal judiciary since 1789.

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### *Notes to Part III*

1. American Bar Association, *Handbook on the Administration of Justice*, 4th ed., (Chicago, Ill., 1961) page 36.
2. Selsam, *A History of Judicial Tenure in Pennsylvania*, 38 Dick. L.R. 168, 169 (1934).
3. Pennsylvania Constitution of 1874, Article IV, Section 8 (judicial offices); Article V, Section 25 (courts of record).
4. American Bar Association, *Handbook on The Improvement of the Administration of Justice*, (1961) p. 36.
5. See Article V, Section 25, Comments, in Annex Number 4.
6. *The Consensus on the Pennsylvania Judicial System*, A Citizens' Conference on the Modernization of Pennsylvania's Judicial System, (1964), p. 2.
7. Interim Report of the Constitutional Convention Commission, Maryland, 1967, p. 129.

## PART IV

### *Incompatible Activities*

#### §1. *Incompatible Judicial Activities as a Constitutional Problem.*

While it is highly important that judges comport themselves well while pursuing their official duties, it is also important that their conduct off the bench be above reproach. Society does not accord the freedom of action to judges that it gives to other officials, and although they are not required to live in a vacuum, judges must be careful of their associates, their private businesses, their political activities and their morals. Plutarch, in his *Apophthegms of Kings and Great Commanders*, said of Philip of Macedon that he once removed a judge who dyed his hair and beard, saying "I could not think that one that was faithless in his hair could be trusty in his deeds."

The central public fear is that what is done off the bench may have a material impact upon what is done on it, and further, since judges must function in an atmosphere of public respect, care must be taken not to bring the judiciary into disrepute. The Toshoguian monkeys of judicial life are: "Do no evil; Avoid the temptation to do evil; Avoid the appearance of evil."

Since judges are not slaves or robots it is difficult to find inflexible standards which may be imposed upon their private activities. Indeed, it is not always possible to frame guidelines which are totally acceptable or which do not admit of exceptions.<sup>1</sup> Attempts have been made to set up official restraints in the form of constitutional prohibitions or statutory controls and the legal profession has unofficially established precepts which, it hopes, will have persuasive effect upon the judges.

The large areas of public concern over the incompatible activities of judges [Universally called "Incompatible activities" because they are inconsistent with the judicial role] seem to be:

*political activity.* In attempting to circumscribe a judge's activities in the political arena, the public's fear is that judges in politics may owe political debts which might be paid off with judicial favors, hence thwarting justice and corrupting the office.

*election to nonjudicial office.* The consensus seems to be that a judge who seeks another office, nonjudicial in character, should resign his position because, if he does not do so, (a) he will be open to the criticism that he is using his judicial office to further his personal ambitions, (b) he is lowering the dignity of his office, (c) he is neglecting his official work while campaigning, and (d) has an advantage over other candidates which is inconsistent with American ideas of fair play.

*charitable and community activities.* Membership on boards, executive committees and other governing bodies of charities, churches, colleges and foundations often puts judges in the position of sanctioning or supporting fundraising activities on behalf of the organizations. The possible misuse of the judicial office by putting pressure on attorneys, litigants and racketeers for contributions is regarded as a hazard to the purity of the bench. Further, there is always the possibility of litigation in which organizations are involved, particularly hospitals, and this opens the door to suspicion of judges who though not personally, are nevertheless practically involved.

*business activity.* A judge engaged in business of any sort is always faced with the possibility of a conflict of interest or a situation in which bias may affect his judgment. Therefore, even though restrictions may seriously affect a judge's private life or become an obstacle to securing good judges to serve on the benches, some regulation seems imperative. Obviously, of course, a judge should not be permitted to practice law in the court where he presides and perhaps, should not be permitted to practice law at all, particularly in areas where court business is extensive.

*social activity.* A judge's social activity is a matter of private choice and is rarely open to regulation by the public. Of course, if those activities result in excessive uses of alcohol or drugs which affect the judge's conduct on the bench, disciplinary measures might be taken but there seems to be no way in which this can be controlled in advance. There is also the problem of association with disreputable characters which lends a suspicion that the judge is owned or controlled. Akin to this problem is the association of judges with lawyers who practice before them. If this association does not lead to exceptionally close personal ties, there is no danger. On the other hand, there is always the public suspicion that a judge favors a side represented by his close personal friends. The matter of associates off the bench is one of delicacy which must be balanced by the judge alone; it is one which can rarely be managed by rule or law.

As a problem to the convention, the questions of incompatible judicial activities seem to be:

how much restraint should be constitutionally imposed upon judges with respect to incompatible activities?

if restraints are to be imposed, what standards should be followed in framing such restraints?

should power be given to the Legislature or another governmental agency to impose restraints not constitutionally established?

## **§2. Unofficial or Semi-Official Attempts to Control Incompatible Activities.**

Apart from the self-imposed restraints put upon the judge by the nature of his regard for his oath,<sup>2</sup> the simplest but perhaps the most ineffective means of controlling the off-bench conduct of a judge is through the intercession of his relatives, friends, associates and leaders of the bar. Persons interested in the personal fortunes of the judge, or in the judicial office itself, or both, often try to use persuasion, argument and reason in an effort to get an erring judge to see the light. Sometimes this is successful; often it is rejected with indignation. Similarly, such means are sometimes adopted as an informal aspect of a more formal mechanism, such as the one in use in Missouri. As an adjunct of a formal mechanism the informal approach is not overwhelmingly successful.<sup>3</sup>

As noted in §1, the legal profession has undertaken to outline its concepts of the norms of off-bench conduct for judges. These ideas are contained in precepts or guidelines of judicial behavior which are adopted and circulated for whatever persuasive effect they may have. The foremost attempt to pinpoint judicial activity incompatible with the office of judge was the adoption by the American Bar Association in 1924 of Canons of Judicial Ethics [rules of discipline or standards of judicial morals]. These canons, which have been set forth in detail in Annex No. 10, have been accepted in most states<sup>4</sup> as standards which serve to provide precept guides for the judiciary. Various local bar associations have adopted them, or modifications of them, including the Pennsylvania Bar Association,<sup>5</sup> and in some instances they have been incorporated into a rule of court or a statute. In Pennsylvania, for example, the canons as modified by the Pennsylvania Bar Association have been adopted by the Supreme Court<sup>6</sup> and the legislature has made them a part of the statutory law governing the assignment of former judges to judicial service.<sup>7</sup>

The main concern of the canons is that the work of the courts will suffer if judges are involved in outside business and political activities. The judicial office should not be used for personal gain. All of the prohibitions and suggestions of the canons evidence the fear of hazard to the impartiality of the judicial office through outside connections, business, political or personal, which may conceivably be related to court work.

## **§3. Constitutional Provisions Dealing with Incompatible Activities.**

The Constitution in several articles seeks to protect the Commonwealth's general offices from simultaneous occupation by federal officers.<sup>9</sup> In one of these (Article II, §6) Senators and Representatives are made ineligible to be appointed to any civil office under the Commonwealth during the time for which they shall have been elected, but it is only in the case of judicial officers that there is a real impingement of constitutional authority upon in-

compatible activities. In Article V, §18, judges are forbidden to receive from any source any compensation, fees or perquisites of office for their services other than the compensation fixed by law, and they are forbidden to hold any other office for profit under the United States or any other State. These provisions, standing out in bold relief in the judiciary article and curiously unique in the Constitution, illustrate a special constitutional intention to maintain the purity of the bench. It is not merely an expression of the public policy that the best government requires undivided loyalty,<sup>10</sup> for this could have been spelled out with respect to all public servants; it is a singling out of the judiciary for pointed instructions on judicial comportment.

In framing amendments to the judiciary article it is important to understand that unless a constitutional provision on incompatible offices is self-executing, the courts have no way of deciding what offices are or are not incompatible without legislative help. The general constitutional provisions set forth in Article VI, §2 will control in the absence of (a) another self-executing constitutional provision or (b) an act of the General Assembly.<sup>11</sup> The courts have no common law power to make a determination of incompatibility themselves.<sup>12</sup> If Article V, §18 is removed, Article VI, §2 will become the sole controlling constitutional law as follows:

No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

There seems to be no doubt that, absent Section 18 of Article V, this would be the controlling provision, for Section 18 as now constituted contains a prohibition against judges holding "any *other* office of profit" — a clear indication that a judicial office is an office of profit. The Supreme Court has said in this regard, "... where the elements of trust, honor and compensation combine with definite duties and responsibilities, the position having these elements is an office of profit."<sup>13</sup> With reference to constitution-framing, this means that consideration must be given to whether or not offices or activities incompatible to judicial office should be spelled out or whether these are matters which should be left to the simple controls of Article VI, §2. If control over the judiciary is to be accorded the high court or some other charismatic office, the determination of what is or is not incompatible with judicial office might be left untouched in the Constitution: the determination thereof being specifically given to the controlling power. As matters now stand there is a constitutional definition of what constitutes an incompatible public office to judicial office, but there is no constitutional definition or proscription against a judge engaging in private enterprise for profit.

There remains a necessity to look through the other end of the telescope

to see whether nonjudicial duties may be forced upon judges against their will. The Constitution has not left this topic completely untouched. In Article V, §21, it forbids the imposition of nonjudicial duties upon the judges of the Supreme Court and proscribes the exercise by its judges of any power of appointment other than those constitutionally established. This provision does not apply to judges other than of the Supreme Court.<sup>14</sup> As noted in §6.5, *supra*, there is a host of statutes imposing nonjudicial duties upon lower court judges and the question is there posed whether there should not be some constitutional limitation upon this practice. The problem is twofold: (1) the imposition of nonjudicial duties upon judges gives some measure of legislative control over the judiciary, and (2) since most nonjudicial duties are political in nature, their exercise by judges affords opportunities to exert political and personal influence incompatible with the judicial office.<sup>15</sup> While historically the wisdom and restraint of the judiciary have been sought as a leavening medium for local government officials through appointments and participation, and has, apparently, been somewhat satisfactory, the question remains whether the law should force a judge into an activity which his nature and instincts may reject or where he may be subjected to temptation. As shall be seen, (§5, *infra*) the legal profession appears to favor a proscription against the imposition of non-judicial duties upon judges.

#### **§4. Statutory Definitions of Incompatible Activities.**

Apart from the criminal statutes which indirectly impose limitations upon both the on-bench and the off-bench activities of judges, the legislature has enacted several statutes which affect the judiciary.

With respect to the minor judiciary, both the County Code<sup>16</sup> and the Second Class County Code<sup>17</sup> provide that no person shall at the same time hold the office of justice of the peace and that of prothonotary or clerk of any court. In the original act of 1874, May 15, P.L. 186, §5, 65 PS§5 the offices of justice of the peace and associate judge were made incompatible, and by act 1963, August 1, P.L. 436, No. 229, §1, 65 PS §5.1 there was added a provision that the office of alderman or justice of the peace shall be incompatible with the office of treasurer or tax collector or assessor of any city, borough, town or township of the first class and with the office of secretary or secretary-treasurer or tax collector or assessor of any township of the second class.

An umbrella provision applying to all justices of the peace and judges with respect to the practice of law states:

No judge of any court of this commonwealth shall practice as attorney or counselor in any court of justice in this commonwealth or elsewhere, nor shall he hold or exercise the office of alderman or notary public. Nor shall any alderman or justice of the peace practice as aforesaid, in any case which has been or may be re-



moved from before him by appeal or by a writ of certiorari, or act as agent in any such case . . . ."<sup>18</sup>

As the result of several instances made known in the early 1960's of judges receiving substantial arbitration fees in out of court controversies, the Legislature enacted a statute which provides that no judge of a court of record shall, during his term of office, receive any compensation for acting as an arbitrator in cases where arbitration is required or authorized for the settlement of adverse claims by statute, rule of court, or agreement of the parties, except where the case is before a court of record for determination.<sup>19</sup> Where a case is before the court, the judge may, of course, attempt settlement by arbitration and receive his usual salary.

Finally, the Legislature has recognized that there may be incompatible activity on-the-bench as well as off it. To this end it has enacted a statute covering situations where the judge is personally interested in a cause before him, where a disputed title before him has been derived from or through him, where a near relative is a party before him or where he has been attorney or counsel for either of the parties or in a companion related cause. In such cases, the statute provides for the holding of a special court for their disposition.<sup>20</sup> The Legislature has also forbidden a judge to appoint as auditor, master in chancery, master in divorce, examiner, commissioner or appraiser, any person related to or connected with the judge by ties of consanguinity or marriage.<sup>21</sup>

#### **§5. Standards Conceived by the Legal Profession.**

As noted in §§1, 2, supra, The American Bar Association, the Pennsylvania Bar Association and related organizations have established or adopted canons of judicial ethics, the most authoritative and respected of which are those created by the American Bar Association in 1924.<sup>22</sup> Ten of these canons (24 through 33) bear, directly or indirectly, on the problem of incompatible activities of judges while acting off the bench. These are numbered and headed as follows:

24. Inconsistent Obligations.
25. Business Promotions and Solicitations for Charity.
26. Personal Investments and Relations.
27. Executorships and Trusteeships.
28. Partisan Politics.
29. Self-Interest.
30. Candidacy for Office.
31. Private Law Practice.
32. Gifts and Favors.
33. Social Relations.

Others, such as Canon 13 which says that a judge shall not act in a controversy where a near relative is a party, have a bearing on a judge's on-the-bench activities.

Two of the Canons – Canon 24 and 31 – are common to the Pennsylvania Constitution, to Pennsylvania Statutory provisions and to the Pennsylvania Bar Association proposed judiciary article.<sup>23</sup> Canon 24, for example, provides that a judge should not accept inconsistent duties, and should not incur obligations, pecuniary or otherwise, which will in any way interfere with his devotion to the expeditious and proper administration of his official function. This reflects the spirit of Article VI, §2 of the Constitution which prohibits members of congress or other officers who exercise a federal office or appointment of trust or profit from holding or exercising a compensated office in this State. It also reflects the spirit of Article V, §18 which prohibits judges from receiving any compensation other than that fixed by law for doing their work and from holding any other office of profit under the United States, the Commonwealth or any other State. Section 13 (3) of the Pennsylvania Bar Association proposed judiciary article provides, *inter alia*, that no judge shall (with minor exceptions) engage in any other employment for compensation.

While Canon 24 does not specifically coincide with a statutory provision in Pennsylvania, it does reflect the Constitutional prohibition (Article V, §21) against the imposition of nonjudicial duties on a judge. Although the Constitutional prohibition applies only to judges of the Supreme Court, the Pennsylvania Bar Association proposal goes further. In Article V, §13 (a) it provides that no duties other than judicial duties shall be imposed by law upon any court or upon any of the justices or judges thereof, nor shall any power of appointment be conferred upon them except such as relates to judicial power or the administration of the courts.

Judicial Canon 31 prohibits the private practice of the law by a judge unless the State permits it. While Pennsylvania statutory law expressly prohibits a judge from practicing law,<sup>24</sup> the pertinent constitutional provisions only forbid the holding of offices of profit by judges without mention of other gainful occupations. The Pennsylvania Bar Association proposal (Article V, §13(c)) says bluntly, "No justice or judge shall practice law . . ."

In order to provide some understanding of the other canons which bear upon incompatible activities of judges, a brief comment with respect to each may be in order. This comment follows:

*Canon 25. Business Promotions and Solicitations for Charity.* This canon instructs the judge that he should avoid giving ground for a reasonable suspicion that he is using the power or prestige of his office to persuade or coerce others to patronize or contribute either to the success of private business ventures, or to charitable enterprises. The Pennsylvania Bar Association accepted this canon but added the interpretation that it should "not prevent a judge from occupying a position on any charity board or joining in a general appeal on behalf of such charity if the same does not involve any personal solicitation on his part." There is some ambiguity in this

interpretation. If a judge is on a charity board and joins in a general appeal for funds, this, it would seem, constitutes as much a personal solicitation as though he made the appeal by himself. The fact that others join with him would not necessarily weaken the objection that the appeal is being made by a judge with prestige and power. Further, membership on a charity board alone might not be advisable. If, for example, the charity happens to be a hospital which is being sued for injuries to a patient, the judge would be open to the criticism that he is vitally—though not necessarily personally—interested in the welfare of a litigant. This might be a particularly embarrassing situation if there is a campaign for public funds in progress while the suit is open.<sup>25</sup> On the other hand, perhaps there is merit in the argument sometimes advanced that there is nothing wrong with the use of the prestige of judicial office in behalf of a charity.

*Canon 26. Personal Investments and Relations.* This canon is a fairly broad impingement upon off-bench judicial conduct. In essence it instructs that:

- (a) a judge should not invest in enterprises which are apt to be involved in litigation. This, of course, is a requirement of almost absolute prescience.
- (b) a judge should liquidate investments made prior to his ascension to the bench if made in enterprises which are apt to be involved in litigation. He may retain such investments no longer than necessary to enable liquidation without serious loss.
- (c) a judge must, so far as reasonably possible, refrain from relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent impartiality in the performance of his duties. This might involve resignation from many organizations, clubs, etc.
- (d) a judge should not take advantage of information coming to him in his judicial capacity for purposes of speculation. If this means what it says, a judge hearing an audit should not buy stocks listed in the account which have been testified to as sound investments and which the account shows to be highly productive. It should be noted that the canon does not apply solely to the use of information coming to the judge in a confidential capacity; it includes information which is generally available through public records of the court.
- (e) a judge should not speculate on margin as this detracts from public confidence in his integrity and judicial judgment.

*Canon 27. Executorships and Trusteeships.* This canon agrees that judges are not disqualified from holding executorships or trusteeships but it advises that they should not take or hold such a position if it would interfere or seem to interfere with the proper performance of their judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before them judicially, or to be involved in legal questions which they must determine. The Pennsylvania Bar Association proposed judiciary article (Section 13(c)) specifically allows a judge to be a fiduciary [one who holds something in trust for another] of the estate of a member of his family. The making of investments and the initiation or de-

fense of lawsuits are normal incidents of most trusts and, therefore, there may be a minor conflict between Canon 27 and Section 13 of the Bar Association proposal.

*Canon 28. Partisan Politics.* This controversial canon in its original form is as follows:

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

The Pennsylvania Bar Association, in adopting this canon, added the words "except for his own campaign" as a qualification of the prohibition against political speeches. It also interpreted the canon as not denying the privilege of making speeches involving fundamental principles of government which may be supported or opposed by a political party. In 1950, the American Bar Association adopted part of the Pennsylvania view and amended Canon 28 by adding at the end thereof, "Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election." The Pennsylvania Bar Association adopted this in its proposed judicial article, Section 13(b) with a further modification allowing a judge to make a contribution to the political campaign of a member of his family. The New Jersey Constitution (Art. VI, §6<sup>1</sup>) embodies Canon 28.

The whole tenor of the arguments in favor of judicial appointment rather than judicial election by popular vote is based upon the premise that the elective system forces judges into politics, sometimes against their will, and subjects the bench to all of the criticisms attendant upon the word "politics" in its more sinister connotation. If the elective system is not chosen for judges in the future, only some of the proscriptive and advisory material in the canons would be appropriate.

*Canon 29. Self-Interest.* This canon declares that a judge should not perform or take part in any judicial act in which his personal interests are involved. It is not at all unusual to see this canon put into effect in appellate judicial opinions which frequently state, "Judge \_\_\_\_\_ did not sit or participate in the disposition of this case." While this does not always mean that the absent judge had a personal interest in the outcome, it frequently means that the judge had some reason which, in his own mind, might have a disqualifying aspect. To avoid bringing disrepute upon the court, he merely

retired from the bench during argument and did not participate in the court's deliberations afterward.

Although there is some integration of all the canons by reason of their content, there is particular integration of this canon with Canon 24 which has already been discussed. As noted in §4, *supra*, the Legislature has enacted a statute which directly deals with the problem of a judge having a personal interest in litigation before him.<sup>26</sup>

*Canon 30. Candidacy for Office.* This canon has a number of significant parts summarized as follows:

- (a). a candidate for judicial office should not make or allow others to make for him promises of conduct in office which appeal to the cupidity or prejudices of the appointing or elective power, nor should he announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing to create the impression that he will administer his office with bias, partiality or improper discrimination.
- (b). while holding office he should not become a candidate in any type of election for any office other than a judicial office. If he decides to become a candidate for other than a judicial office, he should resign so that it cannot be said of him that he is using the power or prestige of his office to promote his own candidacy or the success of his party.
- (c). if a judge becomes a candidate for a judicial office he should refrain from conduct which might afford grounds for suspicion that he is using the power and prestige of his office to promote his candidacy or the success of his party. He should not allow others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Two events of recent history illustrate the application of this canon. In testifying before a senatorial committee during July 1967 on his qualifications for the Supreme Court of the United States, a nominee of the President had steadfastly refused to indicate his intentions with respect to or opinions on recent decisions of the Supreme Court of a controversial nature.<sup>27</sup> This refusal is in complete accord with the provisions of the canon summarized in (a), *supra*. On the other hand, in a 1964 campaign for the office of United States Senator, a justice of the Supreme Court of Pennsylvania did not resign from the bench as set forth in summary (b), *supra*.<sup>28</sup> There was nothing illegal about this course since there was no compulsion of law for him to resign; the canon being merely an expression of opinion of the framers with respect to the ethics of the occasion.

The provisions of the canon summarized in (c) would be most difficult to impress upon a judge's supporters in a heated campaign. While the judge could readily accommodate his own conduct to its requirements, he might not be able to control the actions of his supporters. Laymen engaged in political activity have difficulty in seeing a distinction between judicial campaigns and others and might misunderstand a candidate-judge who cautions them about their campaign approaches. This canon puts a judicial candidate

in an awkward position: it requires him to exercise control over his supporters but even if control is possible, he must risk offending the very people upon whom he must rely for election.

*Canon 31. Private Law Practice.* (This canon has already been commented upon, *supra*.) Attempts to draft a comprehensive canon on the practice of law by judges is complicated by the fact that there are different classes of judges and courts and different customs and laws throughout the United States. For this reason Canon 31 meanders considerably but, in substance, advises judges generally not to practice law, particularly in superior courts of general jurisdiction [superior as here used means "higher" and does not refer to a court having the word "superior" as part of its name]. The canon deals with situations where the law allows judges to practice law because the county or municipality is not able to pay adequate living compensation for a competent judge<sup>29</sup> and advises that a judge who is allowed to practice should not practice in his own court, even when another judge presides.

The canon allows a judge to act as an arbitrator or to lecture upon or instruct in law, or write upon the subject, and accept compensation therefor unless forbidden by law or such activity interferes with the proper performance of his duties. Section 13 of the proposed judiciary article of the Pennsylvania Bar Association is in general accord with this canon.

*Canon 32. Gifts and Favors.* This canon prohibits the receipt by judges of presents or favors from litigants, or from lawyers practicing before them or from others whose interests are likely to be submitted to them for judgment. With respect to the acceptance of gifts from litigants, there are situations where this might constitute a direct violation of Article V, §18 of the Constitution which forbids the receipt of compensation for doing judicial service other than the compensation allowed by law.

*Canon 33. Social Relations.* This canon generously allows a judge to have a semblance of social life and even encourages him to attend Bar meetings and to maintain an interest in the lawyers who practice before him. It cautions, however, that, in prospective or pending litigation before him he should be particularly careful to avoid such action as may reasonably tend to awaken suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct. A strict compliance with this canon would, of course, cause a judge to lead a lonely existence. In framing canons of judicial ethics, so much consideration was given to the conduct of the judge himself that not much thought was given to the circumstances that most judges are married and have children. By imposing strict limitations upon the head of the household, there is an impingement upon the social life of the rest of the family; this would be a most difficult canon to enforce and strict enforcement would seriously jeopardize family relationships.

## *Notes to Part IV*

1. For example, The Pennsylvania Bar Association in adopting the American Bar Association Canons of Judicial Ethics made two interpretations and one minor change.
2. The oath as constitutionally established in Article VI, §3, as amended May 17, 1966 and renumbered, is to "... discharge the duties of my office with fidelity."
3. See "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," Reprint from New York University Law Review, March, 1966. The Institute of Judicial Administration (New York, 1966), pp. 167 et seq.
4. Brand, Geo. "Bar Associations, Attorneys and Judges: Organization, Ethics, Discipline," pp. 872-913, Supplemented 1959, pp. 287-8.
5. The adoption by the Pennsylvania Bar Association on January 8, 1949 of the American Bar Association Canons of Judicial Ethics was accompanied by an explanatory interpretation of Canons 25 and 28, and a slight modification of the latter canon. The modification was accepted by the American Bar Association itself in 1950.
6. The modified canons were adopted February 11, 1965, effective January 28, 1965 (sic). See 75 Advance Reports, No. 28, July 14, 1967, pp. 5 et seq. New Jersey adopted them in 1963 (Rules 1:25, 8-13-7 (a)).
7. Act 1966, Spec. Sess. No. 1, Aug. 31, No. 3, §7, 17 PS §790.107.
8. See Frankel, "Judicial Discipline and Removal," 44 Tex. L.R. 1117, 1123 (1966).
9. Article II, §6 (Senators and Representatives); Article IV, §6 (Governor and Lt. Governor); Article VI, §2 (all offices to which a salary, fees or perquisites attach).
10. Com. ex rel. Holleran, 350 Pa. 461 (1944), 39 A2d; "No man can serve two masters..." The Bible, Matthew 7:24.
11. The enabling act does not authorize the Convention to deal with Article VI, §2.
12. Com. ex rel v. Swing, 409 Pa. 241 (1962), 186 A2d 24.
13. Com. ex rel v. Holleran, *supra*, footnote 10.
14. Com. v. Collier, 213 Pa. 138 (1905), 62 A 567.
15. Hamilton, Alexander, The Federalist. "The General liberty of the people can never be endangered from the judiciary so long as it remains truly distinct from both the legislative and executive..."
16. Act 1955, August 9, P.L. 323, §1304, 16 PS §1304.
17. Act 1953, July 28, P.L. 723, Art. XIII, §1303, 16 PS §4303.
18. Act 1834, April 14, P.L. 333, §75, 17 PS §1607. A wholly unnecessary provision with respect to judges of the County Court of Philadelphia appears in the Act of 1913, July 12, R.L. 711, §2, as amended. 17 PS §682. This provision makes it unlawful for the judges of that court to practice law during continuance in office. The 1834 Act was insufficient for that purpose.
19. Act 1834, April 14, P.L. 333 §75.1, added 1963, April 2, P.L. 11, No. 8, §1, 17 P.S. §1607.1.
20. Act 1834, April 14, P.L. 333 §§37, et seq., 17 PS §§581, et seq.
21. Act 1849, January 24, P.L. 678, §16; 1947, April 25, P.L. 125, §1, 17 PS §1743
22. See Annex No. 10.
23. See Annex No. 5.
24. Act of 1834, *supra*, footnote 20
25. Of recent years there have been many suits by plaintiffs claiming injury at the hands of hospitals. An interesting discussion of this type of litigation appears in *Flagiello v. Pennsylvania Hospital*, 417 Pa. 486, (1965), 208 A2d 193.
26. Act 1834, *supra*, footnote 20.
27. See "Marshall Balks at Ervin Querics," N.Y. Times, July 15, 1967 p. 20C.
28. See Pennsylvania Manual 1965-1966, pp. 466, 627.
29. This situation does not exist in Pennsylvania and in the Commonwealth judges are forbidden by statute to practice law. See footnote 28, *supra*.

## *Removal, Suspension, and Discipline of Judges*

### **§1. Introduction**

Over the years the subject of selection of judges has received much more attention than the subject of removal or discipline of judges. Apparently the feeling was that once you selected a good man to be judge you need not worry too much about his conduct or capacity thereafter. By and large this supposition has proved to be well-founded. The number of problem judges has been and continues to be only a small percentage of the members of the bench. Nevertheless even a small number of corrupt, incompetent, or disabled judges can cause great harm because of the important role that judges play in our society.

Almost all experienced members of the bar are acquainted with one or more problem judges—judges who are lazy or neglect their duties, often delaying unduly the disposition of cases; judges who mistreat the lawyers and witnesses who appear before them; judges who drink too much; or judges whose age or health renders them incapable of performing the normal duties of their offices. Traditionally, members of the legal profession have been reluctant to talk about problem judges outside of the profession. Fellow judges generously increase their workloads to carry along a senile or disabled colleague, and lawyers employ various stratagems to avoid trying their cases before certain judges. Lawyers are genuinely concerned also lest public talk about problem judges should impair the public image or independence of the judiciary.

In recent years, however, the impetus of the judicial reform movement has been so strong that lawyers are beginning to speak about the unspeakable, and trying to devise effective means for coping with problem judges without impairing the judiciary. Moreover, as reported, the experience in several jurisdictions under modern removal and disciplinary plans, notably the California plan, has been so favorable that numerous jurisdictions are



moving towards the adoption of similar plans. Most students of the judiciary agree that the old, traditional methods of removing judges—impeachment, address, and recall—are unsatisfactory for dealing with the usual run of judicial misconduct and disability. Broadly speaking, plans to remove or discipline judges fall into one or more of the following classifications: (1) legislative action; (2) judicial action; (3) executive action; and (4) popular vote. Impeachment and address, of course, are forms of legislative action, or legislative and executive in the case of address. Recall is a form of popular vote. Most modern proposals are predominantly judicial forms of action.

## **§2. Present Constitutional Provisions**

The Pennsylvania Constitution specifically provides three different methods of removing judges from office: (1) impeachment, (2) address, and (3) conviction of misbehavior in office or of any infamous crime. Of course, judges who must run for reelection are subject to removal by the electorate also. There is no express provision for suspension or discipline of judges short of removal. Nevertheless, a fourth method might be available to remove, suspend or discipline judges; namely, the exercise by the Supreme Court of its inherent common law supervisory powers over the entire judicial system. The word "might" is used advisedly because apparently the Supreme Court has never squarely decided whether its inherent supervisory powers extend to the removal, suspension or discipline of judges. A major difficulty standing in the way of using removal procedures not explicitly authorized by the Constitution is the holding by the Supreme Court that the constitutional methods are exclusive.<sup>1</sup>

§2.1. *Impeachment.* The impeachment of "civil officers", which term includes judges, is provided for in Article VI, §§4-6 (formerly §§1-3 prior to Amendment adopted on May 17, 1966) of the Constitution. These sections provide as follows:

### *§4. Power of impeachment*

The House of Representatives shall have the sole power of impeachment.

### *§5. Trial of impeachments*

All impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.

### *§6. Officers liable to impeachment*

The Governor and all other civil officers shall be liable to impeachment for any misbehavior in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under this Commonwealth. The person accused, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

The Constitutions of 1790 and 1838 contained basically the same provisions, with slight differences of wording, but the 1966 Amendment, which consolidated Articles VI, VII, and XII into Article VI and renumbered

the impeachment sections, changed the wording of the important ground-for-impeachment provision in section 6 (formerly section 3) from "misdemeanor in office" to "misbehavior in office".

#### *Experience with impeachment.*

Impeachment is still the most common method provided for removing judges from office in the United States. Most state constitutions contain impeachment provisions, and impeachment is the only procedure specifically authorized in the United States Constitution for removing federal judges.<sup>2</sup> Despite the prevalence of constitutional impeachment provisions, however, this procedure has fallen into comparative disuse, because of its many deficiencies which will soon be discussed. Apparently, only seven judges have been impeached in the entire history of Pennsylvania and the last one of those was in 1811.<sup>3</sup> No charges appear to have been considered since 1936.<sup>4</sup> The experience in England, the federal government, and other states is similar. The English Parliament has not impeached and removed a government officer since Viscount Melville was tried for misappropriating Royal Navy funds in 1806.<sup>5</sup> The United States House of Representatives has voted to impeach only eight federal judges since 1789, and the Senate has convicted only four. The last federal judge to be impeached and convicted was Halsted L. Ritter, District Judge for the Southern District of Florida, in 1936. Figures from other states present a comparable picture.

#### *Procedure and effect of impeachment.*

An impeachment proceeding is composed of two main parts: (1) a charge of misconduct presented by the lower house of the legislature, the House of Representatives;<sup>6</sup> and (2) a hearing and decision on the charge by the upper house, the Senate, sitting as a court of impeachment.<sup>7</sup> Conviction requires the concurrence of two-thirds of the Senators present.<sup>8</sup> "Therefore, the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, so long as actions taken are within constitutional lines."<sup>9</sup> On the other hand, the legislature's impeachment power extends no further than to removing the offender from office and disqualifying him from holding any state office of trust or profit.<sup>10</sup> The accused person remains subject to criminal prosecution whether he is convicted or acquitted of the impeachment charge.<sup>11</sup>

#### *Ground for impeachment.*

The present ground for impeachment is misbehavior in office!<sup>12</sup> As mentioned above, the 1966 Amendment of Article VI changed the wording of the ground for impeachment from "misdemeanor in office" to "misbehavior in office". This change may have broadened the ground for impeachment, but this remains to be seen. The relative disuse of the impeachment remedy has resulted in an understandable dearth of cases construing the impeachment provisions. Nevertheless, the Supreme Court in dictum has stated that

the term "misdemeanor in office", as the words imply, means "a criminal act in the course of the conduct of the office, to which impeachments are limited. For crimes not misdemeanors in office, impeachment cannot be brought."<sup>13</sup> On the other hand, the Superior Court recently equated the above terms and others when it declared that "The common law crime of misconduct in office, variously called misbehavior, misfeasance or misdemeanor in office, means either the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive."<sup>14</sup> Further guidance to the meaning of the term "misbehavior in office" may be furnished by the fact that conviction of misbehavior in office is one of the constitutional grounds for automatic removal of officers, the third constitutional procedure available for removal of judges discussed in §2.3 *infra*. The multiple usage of the term "misbehavior in office" appears to be a codification of the common law offense.

From the foregoing authorities, it seems fair to conclude that at present judges in Pennsylvania can be impeached for criminal conduct in office, breach of a positive statutory duty, and perhaps for certain other types of misconduct in office. On the other hand, it seems doubtful whether judges can be impeached for simple neglect of non-statutory duties or for misconduct or misbehavior. There is some evidence in the Constitution itself that impeachment is limited to the more serious types of misconduct. This appears in Article V, §15, the general provision for removal of judges by address of the legislature to the Governor, which provides that address is available "for any reasonable cause, *which shall not be sufficient ground for impeachment.*" (emphasis added) Recent adoption by the Supreme Court of Pennsylvania of the Canons of Judicial Ethics promulgated by the American Bar Association raises the interesting question whether violation of such canons would constitute ground for impeachment. Formal adoption of the Canons furnishes some basis for arguing that violation thereof is similar to breach of a positive statutory duty.

#### *Arguments for and against impeachment as removal procedure.*

Legal writers are practically unanimous in declaring the ineffectiveness of impeachment as a procedure for removing judges.<sup>15</sup> The rarity of its use demonstrates this ineffectiveness.

Impeachment has been criticized as a cumbersome, expensive, limited, unfair, and partisan device for removing judges. Some of the most common criticisms made are the following:

ground for impeachment too narrow. Although the exact extent of the ground for impeachment is in doubt (see discussion *supra*), impeachment appears to be limited, if not in theory, then certainly in practice, to the more serious and flagrant offenses, and does not get at the most common, and, therefore, the most important types of judicial inadequacy, such as physical and mental incapacity, ordinary incompetency, and simple neglect.

legislature lacks time. The volume and complexity of business before a modern legislature leaves no time for a time-consuming impeachment proceeding. As an example, Senate impeachment trials of federal judges are said to average 16 or 17 days, and one trial ran for six weeks.<sup>16</sup> The natural consequence is that the legislature tends to initiate impeachment proceedings only in the most flagrant and notorious cases.

legislature is not equipped to act as a judicial body. The size and procedures of the legislature are those of a policy-making body, not an adjudicative body. Neither are the Senators particularly qualified to adjudge judicial ethics, even allowing for the usual large quota of lawyers in the Senate.

political partisanship. The legislature being a partisan body and set up along partisan lines, political considerations often dominate the disciplinary trial of a judge who usually belongs to one of the major parties. The constitutional provision requiring Senators sitting in an impeachment proceedings to be upon oath or affirmation<sup>17</sup> apparently is aimed at reducing partisanship, but its effectiveness is questionable.

rights of accused judge inadequately protected. In addition to the fact that the size and procedures of the legislature are poorly suited for an adjudicative body, attendance by the judges, the Senators, at the whole trial is not required.<sup>18</sup> As a result, the average attendance in the United States Senate during an impeachment trial has been fifteen Senators per day.<sup>19</sup>

harmful publicity. The rarity and notoriety of an impeachment trial produces an outpouring of publicity which jeopardizes the fairness of the trial and reflects adversely upon the entire judicial system.

reluctance of lawyers and other citizens to press charges. The difficulty of obtaining an impeachment conviction and the notoriety of the proceedings combine to inhibit lawyers and others in a position to press charges from doing so except in flagrant cases, principally because of a fear of reprisal.

Some of the arguments traditionally made in favor of a legislative removal procedure such as impeachment are the following:<sup>20</sup>

vital safeguard against abuse of judicial power. Although impeachment is rarely used, its very existence serves as a deterrent against the flagrant misuse of judicial authority.

valuable supplement to judiciary's power to remove its own members. Circumstances may arise when the judiciary is not in a position to discipline its members, and the legislature may be the only body with the requisite independence, power and direct responsibility to the people to perform this function.

history shows legislature has not abused impeachment power. Some assert that history has demonstrated that the legislature has not abused its disciplinary powers over the judiciary by initiating politically motivated removal proceedings. Other critics, however, although acknowledging that the danger today of politically motivated impeachment proceedings is minimal, point to numerous instances<sup>21</sup> of such proceedings in the early history of our country.

It is worth noting that the above arguments in favor of a legislative removal procedure like impeachment do not necessarily imply a removal scheme

comprised solely or even primarily of impeachment, but allow for a removal scheme based primarily on a different type of procedure, such as removal by the judiciary, with impeachment as a necessary or valuable supplement.

§2.2. *Address.* The second procedure expressly authorized by the Pennsylvania Constitution for removing judges from office is address, a procedure whereby the Governor removes the offending judge on the address of one or both houses of the legislature. The Constitution contains two address provisions, one of which, Article V, §15, pertains to all judges required to be learned in the law, with the apparent exception of Supreme Court judges; and the other of which, Article VI, §7 (formerly §4 prior to 1966 amendment of Article VI) pertains to all civil officers elected by the people, with the exception, *inter alia*, of judges of the courts of record. These provisions are as follows:

*Article V, §15. Election of judges; term; removal; temporary assignment of former judges*

All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of the General Assembly.

*Article VI, §7. Removal of civil officers*

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

The address provisions in these sections, of course, are the final clause following the semicolon in section 15 and the final sentence in section 7. Both sections have been set forth in full because certain ambiguities or supposed ambiguities have arisen both within each section and between the two sections. These ambiguities will be considered against the background of the two sections.

*Construction -- ambiguities.*

Briefly the supposed ambiguities are as follows: (1) Does the address removal procedure set forth in Article V, §15 apply to Supreme Court Judges?<sup>22</sup> (2) Are the address provisions of Article V, §15 and Article VI, §7 inconsistent because the latter exempts judges of courts of record from removal by address whereas the former provision expressly includes them?<sup>23</sup> (3) On address by the legislature, is it mandatory that the Governor remove

the officer or does he have discretion?<sup>24</sup> If removal is mandatory, suppose that the Governor refuses to remove? Notice that Article V, §15 provides that the Governor "may remove, whereas Article VI, §7 provides that the Governor "shall" remove. None of these supposed ambiguities appears to have been definitively resolved by the Supreme Court, but some of them are probably more apparent than real. Nevertheless, these ambiguities could be put to rest rather easily by clarifying language in the process of constitutional revision.

*Can Supreme Court judges be removed by address procedure?*

The first ambiguity, i.e., whether Supreme Court judges are subject to the address removal procedure set forth in Article V, §15, arises because the address provision fails to specify which judges are meant when it states that the Governor may remove "any of them." Does "them" refer back to "All judges required to be learned in the law" *without* the excepting clause, or does it refer back to the quoted phrase *plus* the clause excepting Supreme Court judges? The question is further complicated by the fact that the earlier versions of this section in the Constitutions of 1790 and 1838 did not contain the initial excepting clause, so that under those Constitutions Supreme Court judges clearly were subject to the address provision. Was the excepting clause inserted in the present Constitution of 1873 solely for the purpose of excepting Supreme Court judges from the election and term-of-office provisions in the first part of the section, or was it inserted also for the purpose of excepting Supreme Court judges from the address provision in the last part of the section? The research staff is inclined to believe that the draftsmen intended only the former exception, and that sloppy draftsmanship produced the ambiguity. Nevertheless, applying ordinary rules of statutory construction, it comes to us that Supreme Court judges are excepted also from removal by address; that seems to be the plain and ordinary meaning of the section as written.<sup>25</sup>

*Are Article V, §15 and Article VI, §7 inconsistent?*

The second alleged ambiguity stated above, i.e., the seeming inconsistency between the address provisions in Article V, §15 and Article VI, §7, appears less troublesome than the first. First and foremost, there is a fairly strong rule of statutory construction, and particularly of constitutional construction, that apparent inconsistencies between different provisions should be resolved in such a way as to give meaning to both provisions if at all possible without doing violence to the overall meaning. Applying this rule, it seems evident that the exception of judges of the courts of record from the address removal procedure in Article VI, §7 does not also except such judges from the address procedure in Article V, §15. Such a construction would produce the drastic result of effectively eliminating the address provision in Article V, §15. For one thing, the address provisions are different. Article VI, §7 provides for address by two-thirds of the Senate, whereas

Article V, §15 provides for address by two-thirds of each House of the General Assembly. Also, as mentioned, §7 states that on address the Governor "shall" remove the officer whereas §15 states that the Governor "may" remove. Moreover, unlike §15, §7 requires notice and a hearing. As mentioned previously the Constitutions of 1790 and 1838 contained address provisions similar to that in Article V, §15. On the other hand, the address provision in Article VI, §7 had no counterparts in previous constitutions. The rule that a later enactment supersedes or controls a prior enactment is not applicable, however, because both sections were enacted at the same time when the Constitution of 1873 was adopted, even though this was a Reenactment of Article V, §15.

*Is the Governor required to remove after address?*

In answer to the third question posed above, Article VI, §7 seems to *require* the Governor to remove the offending officer on address by the legislature, but Article V, §15 seems to allow him some *discretion*. An earlier version of the former section also contained the word "shall" instead of "may" from the Amendment of 1850 until the enactment of the present Constitution in 1873.<sup>26</sup> In some states having the address removal procedure, the offending officer is ipso facto removed from office by the passage of the legislative resolution.<sup>27</sup>

*History, procedure and experience.*

Like impeachment, address dates back to English law.<sup>28</sup> Approximately one-half of the state constitutions authorize removal of judges by some form of address.<sup>29</sup> Technically address is a formal request by one or both houses to the governor requesting him to perform some act, such as the removal of a judicial officer. Usually a two-thirds vote of the members of both houses is required. As we have seen, the two Pennsylvania address provisions differ: one, Article V, §15 requires a two-thirds vote of members of each house, but the other, Article VI, §7 requires only a two-thirds vote of members of the Senate. Historically, address, like impeachment, developed into a quasi-judicial proceeding in which the accused official was entitled to notice and a hearing even when not specifically provided. Only Article VI, §7 specifically requires notice and a hearing. This section also requires the Governor to remove the offending officer on address by the Senate, but Article V, §15 apparently permits the Governor some discretion. Address has become a largely theoretical device of even less practical significance than impeachment, mainly because it is subject to most of the same criticism made about impeachment. Apparently even fewer judges in Pennsylvania have been removed by address than by impeachment.<sup>30</sup>

*Grounds for removal by address.*

The grounds for removal by address are broader than those justifying impeachment. Article V, §15 authorizes removal of judges "for any reasonable cause, which shall not be sufficient ground for impeachment." Article

VI, §7 authorizes removal "for reasonable cause." The latter provision appears to be broader because it does not exclude any cause which is grounds for impeachment. The former provision clearly restricts the grounds for removal to causes less serious than those which justify impeachment. Whether Article VI, §7 would be given the same restricted interpretation has not been decided. In fact, the research staff was unable to locate a single case construing either of these provisions, which indicates the dormancy of the address procedure. There is a Supreme Court dictum, however, which gives some indication of the meaning of Article VI, §7: "Any judge who either by his 'sale', his 'denial', or his 'delay' of justice destroys or prejudices a suitor's rights subjects himself to removal from office under either of the two methods prescribed in Article VI, Sec. 4 (predecessor of Sec. 7) of the Constitution."<sup>31</sup> The term "reasonable cause" present in both of the above sections would seem to include all matters which affect a person's fitness as a judge, such as physical and mental incapacity, neglect of duty, incompetency, and misconduct in office. Of course, whether two-thirds of the members of one or both houses of the legislature, as the case may be, would be willing to vote for removal in any but the most serious cases is another question. In other words, the practical limits of the grounds for removal probably are much narrower than the theoretical limits. This leads us directly into the arguments for and against address as a procedure for removing judges.

*Arguments for and against address as procedure for removing judges.*

Practically all of the arguments for and against impeachment as a procedure for removing judges, discussed in §2.1 supra, are applicable also to address as a removal procedure, with the possible exception that the grounds for removal by address are broader. Address, like impeachment, is open to the complaints that the legislature lacks time and is not equipped to act as a judicial body; that the proceeding often is dominated by political partisanship and gives rise to harmful publicity; that the rights of the accused judge are inadequately protected; and that the nature of the proceeding causes lawyers and other citizens to refrain from pressing charges. Also, like impeachment, address is defended as a safeguard against the abuse of judicial power and a valuable supplement to the judiciary's power to remove its own members where the latter power exists.

§2.3. *Conviction of misbehavior in office or of any infamous crime.* The third and last procedure expressly authorized in the Constitution for removing judges is removal on conviction of misbehavior in office or of any infamous crime, as provided in the first sentence of Article VI, §7 which reads as follows:<sup>32</sup>

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime.



The Constitution of 1838 contained a similar provision which was applicable to all officers for a term of years. The provision was broadened in the present Constitution to apply to all civil officers without exception. Thus, it applies to all judges, Supreme Court judges as well as all lower court judges. The constitutional provision has been held to be self-executing; that is, conviction of the named offenses results in automatic removal from office.<sup>33</sup> Statutory implementation of the provision is not required. There is lower court authority that an officer cannot be removed on conviction for an offense committed prior to his current term of office.<sup>34</sup>

*What is "misbehavior in office"?*

What offenses are included within the categories, "misbehavior in office" and "infamous crime"? We have seen in our discussion of the grounds for impeachment in §2.1 *supra* that the term "misbehavior in office" appears to be a codification of the common law offense of misconduct in office variously referred to as misbehavior, misfeasance, or misdemeanor in office, and that the common law crime is committed when a positive statutory duty is breached or when a public official performs a discretionary act with an improper or corrupt motive. In *Commonwealth v. Knox*<sup>35</sup> the Supreme Court held that a Philadelphia magistrate's violation of the bail provisions of the Magistrate's Court Act of June 15, 1937 constituted misbehavior in office and resulted in removal from office. The Court declared:

Although appellant's offense affected the public administration of justice \* \* \* it was probably not an "infamous crime" but most certainly it constituted "misbehavior in office". The latter offense is committed whenever a public officer fails to perform a positive statutory duty \* \* \* (cases cited) It is not essential to a removal that the public official be validly convicted of the common law offenses of malfeasance or misconduct in office. A removal is justified where the officer has been convicted of the violation of a statute which commands the performance of a positive, ministerial duty of his office.<sup>36</sup>

The full extent of the term "misbehavior in office" perhaps has yet to be decided. For example, would violation of the Canons of Judicial Ethics constitute misbehavior in office? The Supreme Court's recent formal adoption of the Canons, as promulgated by the American Bar Association, may furnish some basis for arguing that such violation is similar to violation of a positive statutory duty.

*What is an infamous crime?*

There are no reported Pennsylvania cases in which a judge was removed from office on account of conviction for an infamous crime. The term "infamous crime" has been construed, however, in a few cases, mostly old ones, dealing with other public officials. In 1842 the Supreme Court in the case of *Commonwealth v. Shaver*<sup>37</sup> held that bribery of a voter by a sheriff was not an infamous crime; that the term "infamous crime" referred to crimes which rendered the convicted person incapable of being a witness or

juror. The court went on to say: "The offenses which disqualify a person to give evidence, when convicted of the same, are treason, felony, and every species of the *crimen falsi*—such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offenses of the like description, which involve the charge of *falsehood*, and affect the public administration of justice."<sup>38</sup> This construction of the term "infamous crime" appears not to have been expressly overruled in Pennsylvania. Nevertheless, the modern view in most jurisdictions is that a crime punishable by imprisonment in the state prison or penitentiary is an infamous crime.<sup>39</sup> Whether Pennsylvania would adopt the modern view in a proper case is a matter for the judiciary. Meanwhile, if the Constitutional Convention wishes to retain the provision for removal of officers on conviction of misbehavior in office or of any infamous crime, it may wish to spell out more clearly which offenses or crimes are intended.

*Arguments for and against automatic removal of judges on conviction of misbehavior in office or of infamous crime.*

This method of removal has elicited little comment in the legal journals either for or against. Few would contend, it seems, that judges who are convicted of a crime should remain on the bench. On the other hand, few could maintain that this method is a complete and sufficient system for removing judges. This procedure is limited to criminal offenses, which comprise only a small portion of judicial misconduct and incapacity. The infrequent removal of judges by this method illustrates this point. Furthermore, even in the case of criminal offenses there may be an understandable reluctance to prosecute on the part of the district attorney or the Attorney General because of the fear of reprisal. For this reason and others, this removal procedure probably would be most effective with respect to the minor judiciary.

### **§3. Inherent Power of Supreme Court to Remove or Discipline Judges**

An untried and untested method for removing and disciplining judges may be available in Pennsylvania; namely, the inherent power of the Supreme Court to supervise the judicial system. The Supreme Court has affirmed the existence of its general supervisory power over inferior courts on a number of occasions, but has never, so far as the research staff has been able to discover, applied this power to remove or discipline lower court judges. At least one attempt was made to invoke the Court's King's Bench powers to remove a judge, but no action was taken because the judge in question voluntarily agreed to stay off the bench until the end of his term.<sup>40</sup>

*Nature, derivation, and extent of Supreme Court's inherent supervisory powers.*

One of the best and most comprehensive statements of the nature and derivation of the Supreme Court's supervisory powers can be found in the case of *Carpentertown Coal & Coke Co. v. Laird*.<sup>41</sup> In that case the Court's

power to issue writs of prohibition to inferior tribunals was challenged on the ground that Article V, §3 of the Constitution limits the Court's jurisdiction to the proceedings named therein and prohibition is not one of them. Justice Stearn delivered the Court's opinion:

\* \* \* the justification for the Court's exercise of such power is to be found in the Act of May 22, 1722, 1 Sm. L. 131, 140, Section XIII, which vested in the Supreme Court all the jurisdictions and powers of the three superior courts at Westminster, namely, the King's Bench, the Common Pleas and the Exchequer. Inherent in the Court of the King's Bench was the power of general superintendency over inferior tribunals, a power which was of ancient inception and recognized by the common law from its very beginnings. \* \* \* \* By the Act of 1722 the Supreme Court of Pennsylvania was placed in the same relation to all inferior jurisdictions that the King's Bench in England occupied, and thus the power of superintendency over inferior tribunals became vested in this Court from the time of its creation: *Commonwealth v. Ickhoff*, 33 Pa. 80, 81; *Chase v. Miller*, 41 Pa. 403, 411. In the exercise of its supervisory powers over subordinate tribunals the Court of King's Bench employed the writ of prohibition and such right and practice accordingly passed to the Supreme Court; *First Congressional District Election*, 295 Pa. 1, 13, 144 A. 735, 739; *McNair's Petition*, 324 Pa. 48, 64, 187 A. 798, 505. The provision of the Constitution limiting the original jurisdiction of the Court did not affect the existence of this right; the Constitution did not remove from the Court its supervisory functions over lower courts and therefore, of necessity, did not forbid its use of the writ of prohibition in the performance of such functions. \* \* \* \* The power of controlling the action of inferior courts is so general and comprehensive that it has never been limited by prescribed forms of or by the particular nature of the writs employed for its exercise.<sup>42</sup>

If the Supreme Court means what it says, then the next question is whether the Court of King's Bench possessed, as part of its general supervisory powers over inferior courts, the power to remove or discipline lower court judges. There appears to be general agreement among legal writers that King's Bench possessed and exercised the power to remove judges and still has such power over inferior judgeships, but there is some dispute concerning the extent of that power after the Act of Settlement (1700) with respect to superior judgeships.<sup>43</sup> King's Bench employed the writ of *scire facias* and an action in the nature of *quo warranto* to remove judges from office, or, strictly speaking, to declare forfeiture of the office. Judges were removable for misconduct in office, neglect of duties, and conviction of a crime. With respect to *quo warranto*, it should be pointed out that Article V, §3 of the Constitution expressly grants to the Supreme Court original jurisdiction in *quo warranto* "as to all officers of the Commonwealth whose jurisdiction extends over the State". The Court has held that its jurisdiction under this provision extends to lower court judges.<sup>44</sup> In addition to issuing writs of prohibition, the Court has already exercised extensive supervisory powers over inferior tribunals through its mandamus jurisdiction, its contempt power, and its removal and revisory powers.

The major difficulties standing in the way of an assertion by the Supreme Court of the power to remove, suspend and discipline judges are the Court's historical inaction in this area and the Court's own holdings that the express constitutional procedures for removing judges, i.e., impeachment, address, and conviction of a crime, are exclusive. The Court so held in *Commonwealth v. Gamble*<sup>45</sup> in 1869 and again in *Bowman's Case*<sup>46</sup> in 1909. In both cases the Court held as unconstitutional legislative acts which resulted in the removal of a judge from office. In the *Gamble* case the legislative act would have abolished a judicial district, thereby indirectly removing the judge from office. In *Bowman's Case* the legislative act would have authorized courts of common pleas to declare vacant the office of an alderman or justice of the peace who failed for a period of six months to reside and maintain an office in the district for which he was elected.

The inherent power of the Supreme Court to remove and discipline judges, however, might be distinguishable from the removal acts in the *Gamble* and *Bowman* cases for the following reasons. The removal procedures in those cases were legislative enactments which violated the fundamental doctrine of separation of powers between the legislative and judicial branches of government. The opinion in the *Gamble* decision stressed that the impeachment, address and other provisions in the Constitution were designed explicitly to preserve the independence of the judiciary. Removal or discipline by the Supreme Court, on the other hand, would be an act of the supreme judicial authority itself, and, therefore, it is contended, would not violate the separation of powers principle. This distinction is less maintainable with regard to the *Bowman* case because the legislative act in question authorized the courts of common pleas to declare vacant the offices of alderman or justice of the peace. However, lower courts do not have the kind of supervisory power over inferior tribunals which the Supreme Court possesses.<sup>49</sup>

One of the cases in which the Supreme Court restrained a lower court from exercising supervisory powers over subordinate judicial officers is *McNair's Petition*<sup>48</sup> decided in 1936. In that case the Court issued a writ of prohibition directing a court of quarter sessions to cease a grand jury investigation of police magistrates. The Court declared that "Neither courts of common pleas nor quarter sessions can directly supervise magistrates in the exercise of their powers."<sup>47</sup> The case contains further broad language which might be interpreted to restrict the disciplinary powers of the Supreme Court itself, unless the Court intended that such language be applicable only to similar facts, that is, to lower or intermediate courts. The language in question is as follows: "Superior tribunals cannot arrogate the power to publicly reprimand or censure these subordinate judicial officers with whose judg-

ment or discretion they may differ. Nor do they have the power of direct regulation or control over them."<sup>50</sup>

*Experience in other jurisdictions.*

Within the last decade or two the highest courts of several other states have proceeded to entertain disciplinary proceedings against lower court judges as part of their general supervisory powers over the bench and the bar. The high courts of some of these states acted pursuant to express constitutional provisions either granting the high courts supreme judicial power or general supervisory powers over the lower courts.<sup>51</sup> Other high courts acted, however, even in the absence of such constitutional provisions on the basis of their inherent powers.<sup>52</sup> The Pennsylvania Constitution contains no similar provisions. It merely provides that the judicial power shall be vested in a Supreme Court and various other named courts (Article V, §1), and that the Supreme Court shall have certain specified kinds of original and appellate jurisdiction (Article V, §3). Nevertheless, if the Court's general supervisory powers are inherent, separate from, and unaffected by, the Constitution as the Court declared in *Carpentertown Coal & Coke Co. v. Laird*, *supra*, then constitutional grants of supreme judicial power or supervisory power are merely declaratory of the common law.

*Disbarment proceedings against judges.*

One method which has been used by the highest courts in several of the above jurisdictions to assert disciplinary authority over lower court judges is the exercise of their power to disbar, suspend, or discipline members of the bar.<sup>53</sup> Usually the exercise of such power has been preceded by formal adoption of the Canons of Judicial Ethics promulgated by the American Bar Association, either as actual rules of court or as standards of conduct governing the behavior of the judiciary much as the Canons of Professional Ethics govern the conduct of attorneys generally. When a violation of the Canons of Judicial Ethics occurs, a proceeding to disbar, suspend, or discipline the judge *as an attorney* is instituted by the bar association, the high court itself, or whichever other body is authorized to do so. Where judges are required to be lawyers, their disbarment or suspension would result in automatic removal from office. Some courts have held, however, that judges cannot be disbarred as attorneys for misconduct which is peculiar to their judicial office and to which ordinary attorneys are not subject.<sup>54</sup> Other courts have stopped short of removal from office on the ground that the constitutional procedures such as impeachment and address are exclusive, and the high court's disciplinary authority is restricted to suspension, censure, reprimand and the like.<sup>55</sup> Still other courts have held that adoption of the Canons of Judicial Ethics is merely hortatory [advisory], and does not set up binding rules of conduct.<sup>56</sup> Some critics have assailed the indirect removal of judges through their disbarment or suspension as attorneys.<sup>57</sup>

These critics maintain that judges should be removed directly, if at all, rather than by the roundabout and dubious method of disbarment.

#### *Conclusion.*

The Pennsylvania Supreme Court's recent adoption of the Canons of Judicial Ethics may have laid the groundwork for the Court's assertion of disciplinary authority over lower court judges, either by means of disbarment proceedings or by exercise of its inherent supervisory powers over inferior tribunals. It does not appear whether the Court intended the Canons to be mandatory or binding rules of conduct, or to be merely hortatory or persuasive guidelines.

In conclusion, it should be noted that the constitutional objection that the removal procedures of impeachment, address, and conviction of a crime exclude any other removal procedures applies only to removal itself and not to disciplinary action short of removal, since the Constitution makes no provision for discipline short of removal. This may account for the popularity of disbarment proceedings in other jurisdictions as a method of disciplining judges.

#### **§4. Recall**

Recall is a method of removing judges by means of a special election called after a required number of voters sign a recall petition. The Pennsylvania Constitution makes no provision for the recall of judges. Recall was adopted around 1910 by a number of midwestern and far western states when the progressive and reform movements swept that part of the country.<sup>58</sup> Most people remember the sacred threesome of the reform movement—initiative, referendum, and recall—intended to restore democracy to the people. Recall was supposed to make it possible for the people to remove with dispatch a corrupt or incompetent judge. In practice, however, recall has seldom been used, largely because of the expense and difficulty of obtaining the requisite number of signatures on recall petitions. Some states having recall require the judge to run alone and to obtain a majority of the votes. Other states allow opposition candidates to run also.

Recall is subject to most of the same complaints made against the election of judges generally, which are discussed in Part III, *supra*.<sup>59</sup> Among the complaints are the following:

the citizenry is uninformed on the qualifications of a judge. It is impossible for the average citizen to know whether a judge is doing a good job, especially in a large metropolitan area where there are hundreds of judges. Besides, the persons best able to inform the public, i.e., lawyers and other judges, are often reluctant to do so or are personally interested in the outcome.

political partisanship. Recall elections, like other judicial elections may be dominated by political considerations rather than the judge's qualifications.

A related defect is that judges must remain politicians, which may inhibit their judicial independence. Moreover, persons who make good judges are not necessarily adept politicians.

Additional complaints which are peculiar to or aggravated by the special nature of recall elections are the following:

the difficulty and expense of obtaining the requisite number of signatures on recall petitions. Most states having recall require a certain number or percentage of voters in the judicial district in question to sign the petitions. Sometimes the number required is formidable. The task is not made any simpler by the fact that many prominent citizens often fail to participate, for reasons already indicated.

harmful publicity. Recall campaigns are seldom successful except in flagrant and notorious cases. Such cases inevitably generate undue publicity which harms the judiciary and the legal profession generally.

The principal argument in favor of recall as a method of removing judges is the one already mentioned as having given rise to the recall movement around the turn of the century; namely, it furnishes the electorate a direct and immediate way to get rid of a corrupt or incompetent judge.

#### **§5. Various Recent Proposed Plans for Removal and Discipline of Judges.**

The current, strong judiciary reform movement in this country is evident also in the area of removing and disciplining unfit judges. Within the past few decades a number of proposals have been put forward to deal with the problem of the relatively few unfit judges without at the same time endangering judicial independence. There are three major types of plans, and most proposals fit into one of these three categories or consist of a combination of two or more of them. These three plans are as follows: (1) creation of a special *ad hoc* court or body to hear and decide disciplinary charges against judges when such complaints arise. This type of plan is perhaps best exemplified by New York with its Court on the Judiciary. (2) creation of a special commission with a continuing existence and a permanent staff to receive and investigate complaints against judges, and to recommend removal or discipline to the state's highest court, which makes such final decision. This plan is often referred to as the "California plan" because that state was the first to create such a commission, the Commission on Judicial Qualifications. (3) grant to the highest court in the state the power to receive, investigate, prosecute, and decide charges against judges, either through its own administrative office, or by such means as the constitution, the high court itself, or the legislature provides. A good example of this type of disciplinary plan can be found in New Jersey. These plans and others, plus modifications and variations, will be discussed in this section.

§5.1. *Basic considerations in drafting plans for the removal and discipline of judges.* In drafting a plan for the removal and discipline of unfit

judges, several basic considerations need to be kept in mind. Some of these problems will be raised briefly in this subsection, mostly in the form of questions, in order to shed some light on the details of the various plans discussed in subsequent subsections. These basic considerations are as follows:

(1) *Should the constitutional provisions be general or specific?*

This problem, of course, is basic to the whole question of constitutional revision, and is not unique to the subject at hand. In the present context this problem will arise in numerous forms. For example: Should the grounds for removal or discipline be stated generally or specifically? If a special commission or body is created, should its structure and administrative functions be detailed? Closely related to the question of specificity is the question of how much to include in the Constitution and how much to leave to the legislature or to the rule-making powers of the Supreme Court, for example.

(2) *Which governmental body should have ultimate responsibility?*

There are several possible answers. At present Pennsylvania and most other jurisdictions place ultimate responsibility for the removal of judges in the hands of the legislature through its impeachment and address procedures, although the Supreme Court may also have certain inherent powers to remove and discipline judges. The California plan places ultimate responsibility in the Supreme Court despite the interposition of a special Commission on Judicial Qualifications. New Jersey places final responsibility directly in the Supreme Court through its administrative staff. The New York plan, on the other hand, places ultimate responsibility in a special Court on the Judiciary composed of senior appellate judges. In many, perhaps most, states, including some already mentioned, where legislative and judicial removal procedures coexist, the legislature and judiciary share final responsibility. The main question depends on many subsidiary questions, such as: Which body is best qualified to discipline the judiciary? Which body would best protect the interests of litigants, the general public, and the accused judges? Should final responsibility be centralized or dispersed? The main question is also closely related, of course, to the larger question whether the whole judicial system should be unified under a single central administration.

(3) *How should the grounds for removal or discipline of judges be stated?*

Should the grounds be stated in general language or be specifically enumerated? Should the Supreme Court or another disciplinary body be granted wide rule-making powers to fix the standards of conduct and other grounds for removal and discipline? Should the same standards apply at all levels of the judiciary?



(4) *Should all judges be subject to the same removal and disciplinary procedures?*

Or should the Supreme Court be governed by a different procedure, as the American Bar Association proposes in its Model State Judicial Article? The A.B.A. therein proposes that Supreme Court justices be subject to impeachment, but that all other judges should be subject to removal by the Supreme Court for cause. Oklahoma's recent constitutional amendment distinguishes between the trial and appellate benches by setting up a separate special Court on the Judiciary for each. New York's special Court on the Judiciary has the power to remove the judges of most major trial and appellate courts, but the judges of lower courts may be removed by the intermediate appellate court, the Appellate Division, in the department concerned. It is generally assumed that in Pennsylvania, the justices of the Supreme Court are removable only by impeachment. All other judges may be removed by impeachment or address.

(5) *Should complainants' and judges' names and current investigations remain confidential?*

The California plan maintains confidentiality of complaints and investigations until the matters are referred to the state's highest court. Apparently investigations in New York also remain confidential until the special Court on the Judiciary is convened, although there has been some criticism of this aspect of the New York system. Legislative removal proceedings such as impeachment and address, on the other hand, are the very antithesis of confidential. Defenders of confidentiality argue that it is necessary to protect the accused judges and to overcome the natural reluctance of lawyers and others to file complaints. Opponents claim that confidentiality leads to secretive "Star Chamber" proceedings and to undue informal pressures upon judges to retire or resign.

(6) *Should the disciplinary sanctions be stated generally or specifically?*

Or should the Supreme Court or another disciplinary body be granted wide rule-making authority to establish the sanctions? Should the sanctions include removal from office as well as disciplinary measures such as suspension, censure, reprimand, and the like? Should judges be removable from office indirectly by means of disbarment proceedings?

(7) *Should a special commission or court be created?*

One of the basic choices to be made is whether the task of administering a disciplinary plan should be done by an existing body such as the Supreme Court or legislature, or by a newly-created body such as California's Commission on Judicial Qualifications or New York's Court on the Judiciary. If the Convention decides that a special body should be created, then the delegates must decide whether to create a continuing body with a permanent staff such as California's Commission or an *ad hoc* body such as New York's Court on the Judiciary which in practice is convened only to hear

serious disciplinary matters. If a special body is created, the Convention also will have to decide whether to set forth the composition of the body, and the methods of selection and tenure of its members, or whether to leave such matters up to some existing body such as the Supreme Court, the Governor, or the legislature.

(8) *Are retirement pensions adequate to justify the removal and forced retirement of elderly judges?*

A number of jurisdictions have found it difficult to retire disabled judges because of the inadequacy of their retirement plans. Should removal and retirement of disabled judges take precedence over the adequacy of retirement plans?

§5.2. *The New York Plan.*<sup>60</sup> New York was the first state to accomplish substantial reform in its traditional method of removing judges from office. This was done in 1948 by the adoption of a constitutional amendment creating a special court, the Court on the Judiciary.<sup>61</sup> The Court on the Judiciary is composed of six members when convened: the chief judge and the senior associate judge of the Court of Appeals, New York's highest court, and one justice from each of the four geographical departments of the intermediate appellate court, the Appellate Division, selected by a majority of the justices in each department whenever the Court on the Judiciary is convened. This special court has the power to remove the judges of most major trial and appellate courts in the state for cause or to retire them for mental or physical disability which prevents the proper performance of their judicial duties. The power to remove or retire other lower court judges was retained by the intermediate appellate court, the Appellate Division, in each of the four departments under a preexisting administrative and disciplinary structure. So in reality the new system was superimposed on a preexisting scheme and New York has two coexistent systems of removal, one for the major courts and another for the lower courts within each department.

*Operation of Court on the Judiciary.*

The Court on the Judiciary is not a continuing body and has no permanent staff. It can be called into session only by the Governor, the chief judge of the Court of Appeals, the presiding justice of each of the four departments of the Appellate Division, or the executive committee of the state bar association. Complaints about the conduct of a judge ordinarily are investigated by the Appellate Division, the Administrative Board of the Judicial Conference, or the chief judge of the Court of Appeals. If the complaints are found to be justified, the judge may in appropriate cases be advised, warned, or reprimanded informally.

The Court on the Judiciary is called into session only in serious cases which might warrant removal or involuntary retirement. Before commencing its hearings the court is required to notify the Governor and legislature, and the court may lose jurisdiction of the case if the legislature commences re-

removal proceedings against the judge within 30 days following notification. The court has power to retain lawyers, subpoena witnesses and documents, grant immunity from prosecution, and "make its own rules and procedures for the investigation and trial".<sup>62</sup> The court is empowered to take appropriate action which may include dismissal of the charges, censure, involuntary retirement, or removal. The decision of the court is final and is not subject to appeal.

#### *Experience of Court on the Judiciary.*

The Court on the Judiciary has been convened only three times since its creation in 1948, and all three instances occurred in the 1960's.<sup>63</sup> In the first case the offending judge was removed for obstructing a court inquiry involving his brother's law practice.<sup>64</sup> In the second case a judge was removed for refusing to sign a waiver of immunity in an investigation of the New York State Liquor Authority.<sup>65</sup> And in the third case two judges were "rebuked and reprimanded" for engagement in a notorious public feud, but were not removed because they did not wilfully disregard the law.<sup>66</sup>

#### *Variations of New York plan.*

The states of Illinois, Oklahoma, and Ohio have plans which resemble the New York plan. In 1964 Illinois adopted a constitutional amendment which established a five-judge commission composed of one judge of the Supreme Court selected by that court, two judges of the Appellate Court selected by that court, and two circuit judges selected by the Supreme Court.<sup>67</sup> The commission was granted the authority to remove or discipline any judge. The commission is convened only upon call by the Chief Justice on the order of the Supreme Court or at the request of the Senate. Similarly, Oklahoma in 1966 adopted a constitutional amendment establishing a removal and disciplinary system resembling the New York plan, except that it provided for two Courts on the Judiciary, one for the appellate courts and one for the trial courts.<sup>68</sup> Ohio accomplished a comparable reform recently by statutory enactment, which set up a commission composed of five judges all appointed by the Supreme Court from among judges of the courts of record.<sup>69</sup> The commission acts only upon receipt of a report from the Supreme Court's Board of Commissioners on Grievance and Discipline that the board has received a written complaint and its investigation has proved there is substantiating evidence in support of the complaint.

#### *Arguments for and against the New York plan.*

The following arguments against the New York plan have been made by critics of the system (the replies of defenders of the system are included when appropriate):

A unified court system such as New York has had since 1961 should have single removal procedure rather than the dual system which exists. A single procedure, the argument goes, would promote uniform standards of judicial conduct and would centralize administration.

*Reply: The disciplinary authority exercised by the intermediate appellate courts, the Appellate Division, over the lower courts within their departments is a logical extension of the long-standing administrative supervision exercised by such courts, and is more efficient and effective, particularly with regard to less serious offenses, than the complex procedure required to convene the Court on the Judiciary.*

*Comment: New York's dual system seems quite inappropriate for the present Pennsylvania court structure because of the absence of a departmentalized intermediate appellate court system. If the Convention elects, however, to establish such a court structure, New York's dual system of disciplinary controls furnishes a model which is a compromise between complete centralization, as is found in the California plan, and no system at all. Of course, the counter argument is that dispersal of disciplinary supervision among several geographically determined intermediate appellate courts will lead to an unfortunate regionalism, which already plagues Pennsylvania to too great an extent.*

*An ad hoc special court which needs to be specially convened is less effective than a continuing body with permanent staff, such as the California Commission on Judicial Qualifications. This argument has many ramifications, only some of which will be considered at this point. The argument is that a single continuing agency with a permanent staff is far better situated to receive and process complaints than an ad hoc court whose preliminary investigations are carried out by any one of several agencies. It is maintained that lawyers, judges, and other citizens are more likely to file complaints with a permanent agency of whose existence they are aware than with an ad hoc type of agency.*

*Reply: Defenders of the New York plan admit that several different persons or agencies may handle complaints, but contend that in practice these persons and agencies have considerable experience in receiving and processing complaints and in working together within the new unified court system, and that complaints seldom get lost or mishandled. Further, they contend, the argument in favor of a single permanent agency does not require the creation of a special commission such as in California, but could also apply to a state court administrator or administrative staff associated with the state's highest court.*

*The New York plan fails to guarantee confidentiality of complainants' and accused judges' names and of investigations. Again the New York plan is compared unfavorably with the California plan in this respect. The California Constitution requires the confidentiality of proceedings, but the New York Constitution is silent on the matter.*

*Reply: In actual practice, New York maintains confidentiality of an investigation until the Court on the Judiciary is convened.*

*The New York plan is useful only for serious offenses, and not for the commonest complaints such as neglect of duty, incompetence, and less serious forms of misconduct in office. The Court on the Judiciary has been convened only 3 times in nearly 20 years of existence which illustrates its impracticability for the usual run of misconduct or disability.*

*Reply: It is unfair to look at the record of the Court of the Judiciary alone out of the context of the entire disciplinary system. Many complaints are handled on an informal basis, particularly at the Appellate Division level, and have resulted in voluntary retirements, reprimands, and promises of better behavior.*

The basic rules of fair procedure are not observed because the Court on the Judiciary is both prosecutor and judge and its decision is not appealable. An impartial decision is difficult because the court both appoints the staff which investigates and prosecutes the case, and decides the case. Also, the very judge who prefers charges sometimes sits on the court.

*Reply: A disciplinary proceeding to determine a person's suitability to hold an important public office is of a different character from an ordinary criminal proceeding, in which the prosecution is formally separated from the court and there is a formal appeal. The proceeding should protect the accused judge's rights, but should also protect the public from unfit judges. To insist upon separate prosecuting, adjudicating, and appellate bodies would necessarily reduce the participation of senior appellate judges, the persons best qualified to determine suitability for judicial office. Decisions to remove judges from office are not usually appealable, as witness impeachment proceedings or removal by a state's highest court.*

The principals involved are subject to political pressures. The system is controlled by New York judges who are elected to office. Although their personal integrity may be irreproachable, the system itself does not insulate them from political pressures. By contrast, the California disciplinary machinery is largely in the hands of an independent executive secretary and his staff, who are relatively free of political entanglements.

Many of the arguments in favor of the New York plan were inserted as replies to the criticisms stated above. A few additional favorable arguments are as follows:

Senior appellate judges are persons best qualified by training and experience to rule upon culpability or disability of fellow judges. In contrast to the California commission which includes laymen and attorneys, the Court on the Judiciary is composed entirely of senior appellate judges. In reply, it might be argued that a body made up entirely of judges would be too one-sided in outlook and would be too inclined to be lenient toward one of their fellows. Furthermore, a panel of judges alone should include trial judges as well.

An *ad hoc* special court like New York's is less expensive than a permanent continuing body. Critics would have to concede that an impermanent agency would cost less than a continuing body like California's commission. But the total cost of New York's disciplinary system is misleading if one looks only at the Court on the Judiciary without considering the administrative staffs of the chief judge of the Court of Appeals, each of the four departments of the Appellate Division, and the Administrative Board of the Judicial Conference.

A convention to revise the New York Constitution is currently in progress. In a recent address before the Pennsylvania Bar Association at Bedford Springs, Pennsylvania, Mr. Glenn R. Winters, the executive director of the American Judicature Society reported that there is considerable sentiment in the New York system for a California-type commission plan, and listed New York among the states currently moving in that direction.

§5.3. *The California Plan.*<sup>70</sup> The California plan is the one currently attracting the most attention and apparently gaining the most favor. Adoption

of the plan has been strongly recommended by the American Judicature Society.<sup>71</sup> At the July, 1967 meetings of the Pennsylvania Bar Association at Bedford Springs, Pennsylvania the Association voted to replace old Section 12 of their proposed judiciary article with a plan closely following the California model.<sup>72</sup> In an address to that same meeting, Glenn R. Winters, the executive director of the aforementioned American Judicature Society, reported that seven states have already adopted the California plan and from fifteen to twenty states, including Pennsylvania, are moving in that direction.<sup>73</sup> Whether he was being overoptimistic remains to be seen.

*Composition and functions of Commission on Judicial Qualifications.*

The distinctive feature of the California plan is a special commission called the "Commission on Judicial Qualifications" which was created by constitutional amendment in 1960.<sup>74</sup> The constitutional provisions in question were amended in November, 1966 with a view to improving the plan. These latest changes will be mentioned in their proper context. The Commission is composed of nine members, five of whom are judges appointed by the Supreme Court: two from the district courts of appeal, which are geographically delineated, intermediate appellate courts; two from the superior court, the court of general trial jurisdiction; and one from the municipal court. The other four members of the Commission are two lawyers appointed by the governing body of the State Bar, and two laymen—called "public members"—appointed by the Governor. Notice that judges have a five to four majority. The Commission members choose an Executive Secretary, who maintains a permanent staff, and who oversees the Commission's day to day operation from a San Francisco office.<sup>75</sup> The Commission itself holds regular meetings approximately every two months and whenever immediate action is warranted. The Commission has statewide jurisdiction over all California courts.

The original constitutional amendment creating the Commission set forth the functions and procedures of the Commission in considerably greater detail than the present constitutional provisions adopted in November, 1966.<sup>76</sup> The present section authorizes the Commission to recommend to the Supreme Court the removal or retirement of a judge for the following grounds specified in the constitution: retirement of a judge "for disability that seriously interferes with the performance of his duties and is or is likely to become permanent;" censure or removal of a judge "for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."<sup>77</sup> The grounds for removal or retirement are the same as in the original section, except for the addition of the final clause relating to "conduct prejudicial to the administration of justice". The 1966 amendment authorized the Com-

mission to recommend censure as well as removal or retirement in order to provide some sanction for offenses not justifying the most severe punishment. It should be repeated that the Commission only has the power to *recommend* removal, retirement, or censure; the Supreme Court alone has the power to *decide*. With respect to the rules and procedures of the Commission, the present constitutional section simply states that the Judicial Council shall make rules implementing the section and providing for confidentiality of proceedings.<sup>78</sup> The original section specifically preserved confidentiality of the proceedings until the Commission filed a recommendation with the Supreme Court.

The 1966 amendment also added the following provisions: automatic disqualification, without loss of salary, of a judge charged with a felony or recommended for removal or retirement while the charge is pending;<sup>79</sup> removed judge ineligible for judicial office.<sup>80</sup>

### *Experience of Commission*

The Commission staff receives and investigates complaints against judges. Confidentiality is maintained until the matter is referred to the Supreme Court for a decision. Preliminary investigations are kept as informal and inoffensive as possible. Initial contacts, if any, with the judge probably are by letter. If the investigation reveals that there is substance to the complaint, a formal hearing may be held followed by a recommendation to the Supreme Court for censure, removal or retirement. Most complaints are disposed of without the necessity of formal proceedings, some because of the groundlessness of the claim, others by a single letter to the judge, and still others by the voluntary retirement of the judge.

Persons who have been associated with the Commission, and others, often point to the number of problem judges who have been induced to retire or resign as an indication of the Commission's success. In a five-year period about thirty judges did so, most of whom were eligible for pension benefits for disability or service.<sup>81</sup> Illustrative statistics for the years 1964 and 1965 are as follows: 152 complaints, 70 inquiries (matters in which some additional check was made), 47 judges contacted by letter or personal interview, and 10 judges who resigned or retired.<sup>82</sup>

### *Comparison of Pennsylvania Bar Association proposal with California model.*

The California-type plan adopted by the Pennsylvania Bar Association as part of its proposed judiciary article at its July, 1967 meeting at Bedford Springs, Pennsylvania closely resembles the *original amendment* creating the California Commission; that is, it contains more detail than the 1966 *California amendment*, particularly concerning the rules and procedures governing the "Judicial Qualifications Commission," as it is called, and the Supreme Court.<sup>83</sup> The Pennsylvania Bar Association plan sets up a Commission composed of nine members, five of whom are judges: two judges of the Superior Court, and three judges of the proposed new District Courts

from different districts, to be selected by the Supreme Court; two members of the bar to be selected by the members of the bar; and two laymen to be selected by the Governor.<sup>84</sup>

The only substantial differences between the Pennsylvania plan and the original California section appears to be in the statement of the grounds for removal or discipline of judges. The Pennsylvania plan provides that "any justice or judge may be removed from office or otherwise disciplined for misconduct in office, neglect of duty, failure to perform his duties, violation of any canon of legal or judicial ethics adopted by the Supreme Court, or other conduct which prejudices the proper administration of justice." It is worth noting that the Pennsylvania Supreme Court has already formally adopted the Canons of Judicial Ethics promulgated by the American Bar Association. The grounds for retirement in the Pennsylvania plan is almost identical to that in the California plan.

#### *Other variations of the California Plan.*

Like the Pennsylvania Bar Association's proposed plan, discussed above, the plans of other jurisdictions following the California model are patterned closely on the California plan. Perhaps the greatest variation is that in Maryland, which has its special commission report to the legislature rather than to the highest court.<sup>85</sup> The legislature, then, makes the final decision whether to retire, remove, or discipline the accused judge.

#### *Arguments for and against the California plan.<sup>86</sup>*

Some of the arguments which have been made against the California plan are as follows:

An independent agency with permanent staff having power to conduct confidential investigations has potential for great abuse.

*Reply: Defenders concede that any system allowing confidential investigation presents the possibility of abuse, but they maintain that almost everyone agrees that investigations of charges against judges should be kept confidential until it can be established that there is some basis for the charges. Moreover, they claim that there are several safeguards against abuse such as the diversity of the members of the Commission, their relative freedom from political pressures, and the Executive Secretary's direct responsibility to the Commission.*

A permanent agency, like any bureaucratic organization, develops internal pressures to produce results, that is, to show that a certain number of unfit judges have been forced from the bench. Critics point to the fact that the Commission periodically publishes the number of judges it has induced to resign or retire.

The fear that the Commission's staff would evolve into a large and expensive bureaucracy. Experience during the first six years did not bear this out. The entire yearly budget of the Commission, including the Executive Secretary's salary, averaged only about \$35,000 per year.<sup>87</sup> Members of the Commission are unsalaried, but receive compensation for their travel and other expenses. The Pennsylvania Bar Association plan contains this feature also.



Senior appellate judges, the persons best qualified to decide questions of judicial misconduct and disability, are in a minority on the Commission, and almost half of the members are not judges.

*Reply: Judges constitute a majority of the Commission, and their views undoubtedly command great respect from the other members. On a matter of such great public importance, it is desirable to have some diversity of representation.*

The Commission acts both as prosecutor and adjudicator. This criticism is made against practically every administrative agency.

*Reply: To fragment responsibility might lead to paralysis. Besides, the Supreme Court makes the final decision which serves as a check upon the Commission. In contrast, New York's Court on the Judiciary makes the final decision itself.*

Following are some of the arguments made in support of the California plan:

A single, independent agency such as the Commission, with its permanent staff, is able to develop and apply uniform statewide standards of conduct and disability, and to serve as single focus of responsibility. New York's system of divided responsibility is too diffuse and inefficient, and makes it difficult to pinpoint responsibility.

confidentiality of investigations. Confidentiality is assured by the constitution itself.

relative freedom from political pressures. Only the five judges on the Commission are elected officials, and their election is nonpartisan.

§5.4. *The New Jersey Plan.*<sup>88</sup> The third major plan for removing and disciplining judges is to authorize the state's highest court, through its administrative office or a state court administrator, to remove and discipline judges. This type of plan is exemplified *in part* by the State of New Jersey. The New Jersey Constitution provides that certain lower court judges are subject to removal from office by the Supreme Court "for such causes and in such manner as shall be provided by law."<sup>89</sup> However, the New Jersey legislature has never implemented this provision by specifying the causes and manner of removal. Hence, it has been held that the Supreme Court does not have the power to remove judges.<sup>90</sup>

Nonetheless, the Supreme Court has developed a mechanism whereby it indirectly causes the removal of judges from office or disciplines judges for misconduct. Under the Court's constitutional "jurisdiction over the admission to the practice of law and the discipline of persons admitted", and its constitutional power to "make rules governing the administration of all courts in the State",<sup>91</sup> the Court has held that judges may be disbarred or disciplined *as members of the bar* for judicial misconduct.<sup>92</sup> To implement these powers, the Supreme Court has formally adopted the Canons of Professional Ethics and the Canons of Judicial Ethics promulgated by the American Bar Association to govern the conduct of judges and members of

the bar.<sup>93</sup> In addition, the Supreme Court has adopted strict administrative rules to govern the court system, such as setting specific working hours<sup>94</sup> and requiring the filing of weekly reports.<sup>95</sup> The enforcement of these rules is directed by the State Court Administrator acting under the authority of the Chief Justice.<sup>96</sup>

The disbarment or suspension of a judge as a member of the bar may, of course, result in his removal from office because of failure to satisfy one of the continuing qualifications for judicial office, i.e., membership in the bar. The New Jersey Supreme Court held that the constitutional provision for impeachment of judges, and the Court's lack of power to remove judges directly because of legislative inaction, did not preclude disbarment of judges.<sup>97</sup> Some jurisdictions have adopted disbarment as a means of removing judges, but others have rejected it.<sup>98</sup>

It is *arguable* that the Supreme Court of Pennsylvania and other high courts have inherent power to remove and discipline lower court judges as part of their inherent supervisory powers over the court system.<sup>99</sup> There is authority so holding.<sup>100</sup> Nevertheless, in approaching constitutional revision, obviously it is preferable to set forth expressly such power if that is the type of plan desired. Also, in such instance, it is probably wiser, based on the New Jersey experience, either to make the constitutional provision self-executing or to grant the rule-making powers to the court itself rather than to the legislature. Implementation by the legislature, as in New Jersey, may not occur. A number of state constitutions do expressly empower the highest court to remove and discipline judges. Some grant rule-making powers to the high court, others to the legislature.

A plan placing primary responsibility for the removal and discipline of judges upon the high court depends for its effectiveness upon forceful leadership by the court or its chief justice and a well-organized and efficient administrative office connected with the court. The New Jersey court system received such impetus from the forceful leadership of former Chief Justice Arthur T. Vanderbilt whose activities to reform the administration of justice are well known. Despite its shortcomings, the New Jersey plan is a passably good disciplinary system because of strong leadership at the top and tight court administration. It is contended that such a plan functions best in a small, compact state, and that it would be inappropriate and ineffective in large, diversified states such as New York, California, or Pennsylvania.

#### *The Wisconsin plan.*<sup>1</sup>

Experience in Wisconsin appears to substantiate the claim that an effective disciplinary system run by the high court depends heavily upon tradition, spirit, and the men on the court. Of course, it can be argued that any effective disciplinary system depends upon these factors. Nevertheless, theoretically the Wisconsin and New Jersey systems are similar, but in Wisconsin there seems to be far less of a tradition of Supreme Court in-

TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES\*

| <i>State</i> | <i>How Removed</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <i>Vacancies, How Filled</i>                                                                                                                                                                                                                  |
|--------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ALABAMA      | All judges subject to impeachment. All except justices of supreme court may be removed by supreme court.                                                                                                                                                                                                                                                                                                                                                                                                                                                         | By Governor, until the next general election, when judge is elected to fill unexpired term. Ad interim appointees customarily elected for a full term.                                                                                        |
| ALASKA       | All justices and judges subject to impeachment for malfeasance or misfeasance. Impeachment by $\frac{2}{3}$ vote of senate; trial in house, with a supreme court justice, designated by the court, presiding. Concurrence of $\frac{2}{3}$ vote of house required for removal. Removal of members of supreme court by retirement for disability by Governor, upon recommendation of a board of three, after hearing. Removal of members of superior court by retirement for disability by supreme court, upon recommendation of judicial council, after hearing. | Filled by Governor from nominations by judicial council.                                                                                                                                                                                      |
| ARIZONA      | Every public officer subject to recall. Electors, equal to 25% of votes cast at last preceding general election, may petition for recall.<br>All judges except justices of courts not of record, subject to impeachment by $\frac{2}{3}$ vote of senate.                                                                                                                                                                                                                                                                                                         | By Governor, until the next general election when judge is elected to fill unexpired term.                                                                                                                                                    |
| ARKANSAS     | Judges of the supreme and circuit courts and chancellors are subject to removal by impeachment or by the Governor upon the joint address of $\frac{2}{3}$ of the members elected to each house of the general assembly.                                                                                                                                                                                                                                                                                                                                          | By Governor until next general election. Ad interim appointees ineligible for election.                                                                                                                                                       |
| CALIFORNIA   | Judges of the supreme court, the district courts of appeal, and of the superior courts subject to impeachment; may also be removed by a $\frac{2}{3}$ vote of each house. All judges subject to recall or removal by supreme court upon conviction of a crime involving moral turpitude.                                                                                                                                                                                                                                                                         | Supreme and district court of appeal judges, by Governor with approval of Commission on Judicial Appointments, until next election. If elected, fills unexpired term of predecessor. Superior court judges, by Governor, until next election. |

|             |                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                     |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|             | <i>Municipal and possibly justice court judges may be removed by senate on recommendation of the Governor.</i>                                                                                                                                                                                                                                                                                      | Municipal court judges, by Governor, until next election. Judge then elected serves unexpired term. Justice court judges, by board of supervisors of county. Election and terms same as for municipal court judges. |
|             | On recommendation of Commission on Judicial Qualifications, supreme court may remove judges from all courts for willful misconduct in office, willful and persistent failure to perform duties, habitual intemperance, or may retire them for disability seriously interfering with performance of duties which is, or is likely to become, of a permanent character.                               |                                                                                                                                                                                                                     |
| COLORADO    | Judges of supreme and district courts, by impeachment or by action of the Attorney General before the supreme court for permanent mental or physical disability. All other judges so far as provided by statute, by removal. Judges of all courts, by recall.                                                                                                                                       | By the Governor, except board of county commissioners for judges of county courts.                                                                                                                                  |
| CONNECTICUT | Judges of the supreme and superior courts may be removed by impeachment. Governor shall also remove them on the address of $\frac{2}{3}$ of each house of the general assembly.<br>All judicial officers may be removed by impeachment; tried by the senate, $\frac{2}{3}$ vote.<br>Judges of supreme, superior, common pleas, circuit and juvenile courts may retire or be retired for disability. | By Governor until the next general assembly or until a successor shall be elected or appointed.                                                                                                                     |
| DELAWARE    | By the Governor upon the address of $\frac{2}{3}$ of all the members elected to each house of the general assembly.<br>All civil officers may be impeached.                                                                                                                                                                                                                                         | As in case of original appointment.                                                                                                                                                                                 |
| FLORIDA     | Justices of the supreme court, and judges of the district courts of appeal and circuit courts may be impeached by $\frac{2}{3}$ vote of those present in the house. Conviction upon trial in the                                                                                                                                                                                                    | By the Governor until the next general election.                                                                                                                                                                    |

\* From: The statistical summary of State Constitutional Systems (July, 1966) prepared by The Council of State Governments.

TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES (continued)

| <i>State</i>           | <i>How Removed</i>                                                                                                                                                                                                                                                                                                                                                                               | <i>Vacancies, How Filled</i>                                                                                                                                                                                                                                     |
|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| FLORIDA<br>(Continued) | senate requires a $\frac{2}{3}$ vote of those present. All other judges may be removed for specified causes by the Governor with consent of the senate.                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                  |
| GEORGIA                | Judges are subject to impeachment for cause, and removed from office. Trial by senate, $\frac{2}{3}$ vote. Superior court judges may be removed by legislative resolution.                                                                                                                                                                                                                       | By the Governor, until the next general election.                                                                                                                                                                                                                |
| HAWAII                 | Supreme court justices and circuit court judges may be removed by a $\frac{2}{3}$ vote of a joint session of the legislature.<br>Any justice or judge may be retired by the Governor upon certification of disability by an especially appointed board.                                                                                                                                          | By Governor, by and with advice and consent of senate. Pending official appointment, chief justice may assign circuit judge to serve temporarily on supreme court or on any vacant circuit court bench. District court vacancies may be filled by chief justice. |
| IDAHO                  | Judges are subject to impeachment for cause, and removed from office. Impeachment trial by senate, $\frac{2}{3}$ vote.<br><br>Probate judge subject to trial by jury and, upon conviction, to be removed by court. Right of appeal to supreme court.<br><br>Justices of the peace may be removed at discretion of county commissioners and probate judge with approval of senior district judge. | By the Governor until the next general election.<br><br>By the county commissioners in the case of a probate judge.<br><br>By county commissioners and probate judge with approval of senior district judge in the case of a justice of the peace.               |
| ILLINOIS               | After notice and hearing, any judge may be removed for cause by a commission composed of one judge of the supreme court selected by that court, two judges of the appellate court selected by that court, and two circuit judges selected by the supreme court. Such commission shall be convened by the chief justice upon order of the supreme court or at request of the senate. All          | By election at the next general election.                                                                                                                                                                                                                        |

|           |                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                    |
|-----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| INDIANA   | Any judge, convicted of corruption or other high crime, may be removed by the supreme court.<br>Any state officer may be removed by impeachment. Trial by senate, $\frac{2}{3}$ vote for conviction.                                                                                                                                                         | All vacancies filled by Governor until the next general election.                                                                                                                                                                                                                                                                                                                  |
| IOWA      | Judges of supreme, district and superior courts subject to impeachment. Supreme and district court judges also may be removed for permanent disability or loss of qualifications required of the office by a three-judge special court appointed by the Chief Justice.<br><br>Elected judges of all other courts may be removed by action in district court. | Vacancies in supreme and district courts by Governor, from lists submitted by non-partisan nominating commissions. Appointees serve for one year and until January 1, following the next judicial election after expiration of such year.<br><br>Vacancies in superior and municipal courts filled by Governor; in justice of peace courts, by board of supervisors of the county. |
| KANSAS    | Judges of the supreme and district courts may be removed from office by resolution of both houses, if $\frac{2}{3}$ of the members of each house concur.<br>All officers under constitution subject to impeachment.                                                                                                                                          | For supreme court, by Governor from list submitted by nominating commission, until next general election, when appointee runs on his record. For district courts, by Governor until the next general election.                                                                                                                                                                     |
| KENTUCKY  | Removal by Governor on the address of $\frac{2}{3}$ of each house of the general assembly. All civil officers subject to impeachment.                                                                                                                                                                                                                        | By the Governor, until the next annual election.                                                                                                                                                                                                                                                                                                                                   |
| LOUISIANA | For cause, a judge of the supreme court may be removed by a court of not less than 7 judges of the supreme court and courts of appeal.<br>Judges of courts of record may be removed by the supreme court.                                                                                                                                                    | Supreme court vacancy filled by one of the courts of appeal from a supreme court district other than that in which the vacancy occurs. If 2 years or more of unexpired term remain, it is filled by special election. Courts of appeal vacancies filled by supreme court by selection of a district judge, until next congressional election.                                      |

TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES (Continued)

| <i>State</i>             | <i>How Removed</i>                                                                                                                                                                                                                                                                                            | <i>Vacancies, How Filled</i>                                                                                                                                                                                                                                                                                   |
|--------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| LOUISIANA<br>(Continued) | All state and district officers may be impeached.                                                                                                                                                                                                                                                             | Vacancy in district court filled by Governor until next congressional election.                                                                                                                                                                                                                                |
| MAINE                    | Judges may be impeached by the house; removal upon $\frac{2}{3}$ vote at trial by senate. Judges also may be removed by the Governor with the advice of the Council on the address of both branches of the legislature.                                                                                       | Vacancies filled as in case of original appointment, except that vacancies in office of judges of probate are filled by the Governor, with the advice and consent of the Council, until January 1 after the next November election.                                                                            |
| MARYLAND                 | Judges of court of appeals and trial courts of general jurisdiction, by the Governor, on conviction in a court of law or on impeachment; or on the address of the general assembly, $\frac{2}{3}$ of each house concurring in such address.<br>Impeachment trial by senate, conviction on $\frac{2}{3}$ vote. | By the Governor until first biennial election for congressional representative after the expiration of the term or the first general election one year after the occurrence of the vacancy. Appointees customarily elected to full term.                                                                       |
| MASSACHUSETTS            | The Governor, with the consent of the Executive Council, may remove judges upon the address of both houses of the legislature.<br>All officers may be removed by impeachment.                                                                                                                                 | As in the case of an original appointment.                                                                                                                                                                                                                                                                     |
| MICHIGAN                 | House of representatives directs impeachment by a majority vote. Impeachment trial by senate, $\frac{2}{3}$ vote for conviction.<br>Governor may remove judge for reasonable cause insufficient for impeachment with concurrence of $\frac{2}{3}$ of the members of each house of the legislature.            | Supreme court makes appointments to fill vacancies on supreme, circuit and probate courts from among retired judges; person appointed holds office until successor is elected and qualified. Successor fills unexpired term. <b>Appointee is not eligible to run for the office to which he was appointed.</b> |

|             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                          |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| MISSISSIPPI | <p>Presentment, indictment by a grand jury and conviction of a high crime or misdemeanor in office.</p> <p>All civil officers may be impeached by <math>\frac{2}{3}</math> of members present of the house, and removed after trial by the senate. Also, for reasonable cause which shall not be sufficient grounds of impeachment, the Governor shall, on the joint address of <math>\frac{2}{3}</math> of each branch of the legislature, remove from office the judges of the supreme and inferior courts.</p> | <p>By Governor during recess of senate, with confirmation by senate when it meets.</p> <p>Filled at next congressional election if there is one prior to the expiration of the term.</p>                                                                                                                                                                                                 |
| MISSOURI    | <p>Judges of the supreme court, courts of appeals and circuit courts are removed by impeachment. Other judges and magistrates are removed by conviction of misconduct in office such as drunkenness, fraud and oppression.</p> <p>All judges and magistrates subject to removal by committee of 9 judges for physical and mental disability.</p>                                                                                                                                                                  | <p>By Governor until next general election except that vacancies in the supreme court, courts of appeals, circuit and probate courts of City of St. Louis and Jackson County and the St. Louis Court of Criminal Correction are filled by Governor from nominations by a non-partisan commission until the next general election after the judge has been in office at least a year.</p> |
| MONTANA     | <p>All judicial officers except justices of peace subject to impeachment. Impeachment by <math>\frac{2}{3}</math> vote of senators.</p>                                                                                                                                                                                                                                                                                                                                                                           | <p>Justice of supreme court and district court judges by Governor; justices of peace by boards of county commissioners. Judge so appointed holds office until next general election.</p>                                                                                                                                                                                                 |
| NEBRASKA    | <p>Impeachment by joint convention of legislature — majority vote.</p> <p>Trial of judges of supreme court by judges of the district court sitting as a court — conviction by <math>\frac{2}{3}</math> vote of such court.</p> <p>Trial of all other judges by the supreme court.</p>                                                                                                                                                                                                                             | <p>By Governor.</p>                                                                                                                                                                                                                                                                                                                                                                      |
| NEVADA      | <p>All judicial officers except justices of peace subject to impeachment. Impeachment by <math>\frac{2}{3}</math> vote of each branch of legislature, provided that no member of either branch shall be eligible to fill the vacancy so created.</p>                                                                                                                                                                                                                                                              | <p>By Governor.</p>                                                                                                                                                                                                                                                                                                                                                                      |



TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES (Continued)

| <i>State</i>          | <i>How Removed</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <i>Vacancies, How Filled</i>                                                                                                                                            |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| NEVADA<br>(Continued) | Trial by senate, $\frac{2}{3}$ vote. Also subject to removal by legislative resolution and by recall.                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                         |
| NEW HAMPSHIRE         | Governor with consent of Council may remove judges upon the address of both houses of the legislature. Any officer of the state may be impeached.                                                                                                                                                                                                                                                                                                                                                                                                      | Vacancies filled by Governor with consent of Council.                                                                                                                   |
| NEW JERSEY            | Justices of supreme court, judges of superior court and county courts subject to impeachment. Because of prerequisite of bar membership, they also may lose qualifications for judicial office by disciplinary proceedings resulting in disbarment.<br>On certification of supreme court, Governor may appoint 3-man commission to inquire into incapacity of supreme court, superior court, or county court judge. On its recommendation, Governor may retire judge from office.                                                                      | By Governor, with advice and consent of senate.                                                                                                                         |
| NEW MEXICO            | All state officers and judges of the district courts may be impeached.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Governor appoints to fill vacancy until next general election.                                                                                                          |
| NEW YORK              | Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if $\frac{2}{3}$ concur. Judges of certain specified courts may be removed by a $\frac{2}{3}$ vote of the senate, on recommendation of the Governor.<br>All judges, except those of inferior courts, subject to removal by a special judicial court for cause or disability. Any judge may be removed by impeachment.<br>Some judges and justices of inferior courts may be removed by appellate division. | Vacancies filled at next general election for full term; until the election the Governor makes the appointment, with the concurrence of the senate if it is in session. |

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|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| NORTH<br>CAROLINA | For mental and physical incapacity by joint resolution of $\frac{2}{3}$ of both houses of the general assembly. All judges may be impeached.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | By Governor until next general election. Ad interim appointees customarily elected for remainder of unexpired term.                      |
| NORTH DAKOTA      | Supreme court and district court judges by impeachment for habitual drunkenness, crimes, corrupt conduct, malfeasance or misdemeanor in office.<br>County judges by Governor after a hearing.<br>Impeachment trial by senate, conviction $\frac{2}{3}$ vote. All judges may be recalled.                                                                                                                                                                                                                                                                                                                                                                                   | Supreme court judges by Governor until next general election.<br><br>District court judges appointed by Governor to fill unexpired term. |
| OHIO              | By concurrent resolution of $\frac{2}{3}$ of members of both houses of the general assembly.<br>All judges may be removed by impeachment. Trial by senate, conviction on $\frac{2}{3}$ vote.<br>By disqualification as a result of disciplinary action as provided in Rule 18, supreme court.<br>Removal for cause upon filing of a petition signed by at least 15% of the electors in the preceding gubernatorial election; trial by court or jury.<br>Removal, retirement or suspension without pay for cause following complaint filed in the supreme court; hearing before a commission of judges named by the supreme court. Appeal from commission to supreme court. | By Governor until next election, when judge is elected to fill unexpired term.                                                           |
| OKLAHOMA          | By impeachment for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude.<br>Trial by senate, $\frac{2}{3}$ vote.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | By Governor until next general election, when judge is elected to fill unexpired term.                                                   |
| OREGON            | Supreme court justices by Governor upon the joint resolution of the legislative assembly in which $\frac{2}{3}$ of the members concur, for incompetency, corruption, malfeasance, or delinquency in office and by recall.                                                                                                                                                                                                                                                                                                                                                                                                                                                  | By Governor until next general election, at which time a judge is elected to fill the unexpired term.                                    |

TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES (Continued)

| State                 | How Removed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Vacancies, How Filled                                                                                                                                                                                                                                                                                                                                    |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| OREGON<br>(Continued) | All other judges may be removed for cause after trial.<br>Any judge may be involuntarily retired for mental or physical disability after certification by a special commission; he may appeal to supreme court.                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                          |
| PENNSYLVANIA          | All judges as all civil officers, may be impeached for any misdemeanor in office. Trial by senate, $\frac{2}{3}$ vote for conviction. Judges of courts of record other than the supreme court for any reasonable cause, by Governor, on the address of $\frac{2}{3}$ of each house of the general assembly.                                                                                                                                                                                            | By Governor, to continue until the 1st Monday of January next succeeding the first general election which shall occur 3 or more months after the happening of such vacancy. Subject to the provisions of the election code as to certification of primary elections.                                                                                     |
| 192                   | PUERTO RICO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | By Governor as in case of original appointment.                                                                                                                                                                                                                                                                                                          |
|                       | Supreme court justices by impeachment, for treason, bribery, other felonies, and misdemeanors involving moral turpitude. Indictment by $\frac{2}{3}$ of total number of house members and trial by senate. Conviction by $\frac{3}{4}$ of total number of senators.<br>All other judges may be removed by supreme court for causes as provided by Judiciary Act, after hearing upon complaint on charges brought by order of the Chief Justice, who shall disqualify himself in the final proceedings. |                                                                                                                                                                                                                                                                                                                                                          |
|                       | RHODE ISLAND                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | In case of vacancy on supreme court, the office may be filled by the grand committee of the legislature until the next annual election. In case of impeachment, inability or temporary absence, Governor appoints person to fill vacancy. Vacancies on superior, family and district courts may be filled by Governor with advice and consent of senate. |
|                       | Supreme court judges, by a resolution of the general assembly voted by a majority in each house at the annual session for the election of public officers.<br>All judicial officers may be impeached. Trial by senate, $\frac{2}{3}$ vote of all members elected thereto for conviction.                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                          |

|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                          |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| SOUTH<br>CAROLINA | By impeachment or by Governor on address of $\frac{2}{3}$ of each house of general assembly.                                                                                                                                                                                                                                                                                                                                                                          | By Governor if unexpired term does not exceed one year, otherwise by general assembly, to fill unexpired term.                                                           |
| SOUTH DAKOTA      | Supreme court judges and circuit court judges may be removed by impeachment.<br>Trial by senate, $\frac{2}{3}$ vote for conviction.                                                                                                                                                                                                                                                                                                                                   | Supreme court, circuit court and county court judges by the Governor until next general election.                                                                        |
| TENNESSEE         | By impeachment for misfeasance or malfeasance in office; by concurrent resolution of $\frac{2}{3}$ of each house of the legislature where the judge is physically or mentally unable to perform his duties.                                                                                                                                                                                                                                                           | By Governor until next general election. County judge by county court; but if they do not elect to fill vacancy, Governor may do so. Judge elected fills unexpired term. |
| TEXAS             | Supreme court, appeals and district judges may be removed by impeachment, senate, $\frac{2}{3}$ vote, or by joint address, $\frac{2}{3}$ vote of both houses. District judges may be removed also by the supreme court.<br>County judge may be removed by district judges.<br>Upon recommendation by a Judicial Qualifications Commission, district and appellate judges may be involuntarily retired for disability, or removed for misconduct by the supreme court. | By Governor, until next general election.<br><br>County judges by commissioner's court. Judge elected fills unexpired term.                                              |
| UTAH              | By concurrent vote of $\frac{2}{3}$ of the members of each house of the legislature.<br>All judicial officers except justices of peace may be impeached, trial by senate, conviction on $\frac{2}{3}$ vote.<br>Also upon mental or physical disability, upon hearing and determination by committee, as provided by statute.                                                                                                                                          | By Governor until next general election. Judge elected fills unexpired term.                                                                                             |
| VERMONT           | All judicial officers impeachable. Trial by senate, conviction on $\frac{2}{3}$ vote.<br>Supreme court has disciplinary control over all judicial officers not inconsistent with constitutional powers of the general as-                                                                                                                                                                                                                                             | By Governor; if in session, by election by legislature.                                                                                                                  |

TABLE 1. METHODS FOR REMOVAL OF JUDGES AND FILLING OF VACANCIES (Continued)

| State                  | How Removed                                                                                                                                                                                                                                                                                                              | Vacancies, How Filled                                                                                                                                                                                                                                       |
|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| VERMONT<br>(Continued) | sembly; it has power to impose sanctions, including suspension from judicial duties for the balance of the term of the judicial officer charged.                                                                                                                                                                         |                                                                                                                                                                                                                                                             |
| VIRGINIA               | By concurrent vote of majority of elected members of both houses of general assembly.<br>All judges may be impeached by house. Trial by senate. Conviction on $\frac{2}{3}$ vote of members present.                                                                                                                     | A successor shall be elected for the unexpired term by the general assembly. If general assembly is not in session, Governor makes appointment to expire 30 days after commencement of next session. Ad interim appointee customarily elected to full term. |
| WASHINGTON             | By joint resolution of the legislature in which $\frac{3}{4}$ of the members of each house concur.<br>Any judge of any court of record may be impeached. Trial by senate. Conviction on $\frac{2}{3}$ vote.                                                                                                              | By Governor until next general election, when judge is elected to fill the unexpired term.                                                                                                                                                                  |
| WEST VIRGINIA          | By concurrent resolution of the legislature in which $\frac{2}{3}$ of the members of each house concur.<br>By impeachment by house of delegates, trial by senate, $\frac{2}{3}$ necessary to convict.                                                                                                                    | By Governor if unexpired term is less than two years; if more than two years, Governor may appoint judge until next general election when a judge is elected to fill the unexpired term.                                                                    |
| WISCONSIN              | Supreme and circuit court judges by the address of both houses of the legislature, $\frac{2}{3}$ of all members of each house concurring and hearing. All civil officers by impeachment, by $\frac{2}{3}$ members of house of representatives; trial by senate, $\frac{2}{3}$ vote for conviction. All judges by recall. | By Governor until next regular judicial election is held, when judge is elected for a full term. At any election only one supreme court justice may be elected, so that appointee holds until next available election.                                      |
| WYOMING                | All judicial officers, except justices of peace, by impeachment.                                                                                                                                                                                                                                                         | By Governor until next general election.                                                                                                                                                                                                                    |

volvement in questions of judicial behavior than in New Jersey. The Wisconsin Constitution, like New Jersey's, grants the Supreme Court general supervisory power over the state's judiciary.<sup>2</sup> Similarly the state Court Administrator is charged with investigating allegations of judicial misconduct. Yet there is far less confrontation between the Supreme Court and offending judges than there is in New Jersey. Possible explanation for the difference is that New Jersey judges may achieve life tenure whereas Wisconsin judges may not. Wisconsin Supreme Court judges are more likely, therefore, to be influenced by political considerations or the natural tendency to let the electorate get rid of unfit judges. A second possible explanation is that the Wisconsin Chief Justice becomes so solely by reason of seniority, which means, of course, that he usually is elderly and does not remain in the office for long.

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### *Notes to Part V*

1. *Bowman's Case*, 225 Pa. 364 (1909), 74 A. 203; *Com. v. Gamble*, 62 Pa. 343 (1869).
2. "The President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, §4.
3. Eastman, Frank M., "Courts and Lawyers of Pennsylvania," (The American Historical Society, Inc., New York, 1922), Vol. II, Ch. 32.
4. Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," (University of Pennsylvania The Law School Institute of Legal Research, Philadelphia, 1962) p. 81, n. 21.
5. See Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. 448, 455 (1967) for this and succeeding information.
6. Pa. Const. Art. VI, §4.
7. Pa. Const. Art. VI, §5.
8. *Ibid.*
9. *In re Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345 (1938), 22d 802.
10. Pa. Const. Art. VI, §6.
11. *Ibid.*
12. *Ibid.*
13. *In re Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345 (1938), 22d 802.
14. *Com. v. Green*, 205 Pa. Superior Ct., 539, 546 (1965), 211 A2d 5. See also: *Com. v. Peoples*, 345 Pa. 576, 579 (1942), 28 A2d 792; *Com. v. Evans*, 190 Superior Ct., 179, 225 (1959), 154 A2d 57.
15. See e.g., Frankel, Jack E., "Removal of Judges — Federal and State," 36 Pa. B.A. Quarterly (1965), p. 284 (reprinted from 48 Jour. Am. Jud. Soc. (1965), p. 177); Shurtel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. (1936), p. 133, 144 6; Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. (1967), p. 448, 455-7.
16. Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. (1967), p. 448, 455.
17. Pa. Const. Art. VI, §5.
18. See Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. (1967), p. 448, 456.
19. *Ibid.*

20. The following arguments were gleaned from the Report of the Temporary State Commission on the Constitutional Convention for the State of New York, (March, 1967) "The Judiciary", No. 12, pp. 46-7.
21. Shartel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. (1936), p. 133, 146 n. 57.
22. See Buckalew, Charles Rollin, "An Examination of the Constitution of Pennsylvania," (Kay and Brother, Philadelphia, 1883) p. 126; White, Thomas Raeburn, "Commentaries on the Constitution of Pennsylvania," (T. & J. W. Johnson Co., Philadelphia, 1907), p. 325.
23. See Buckalew, *supra*, Note 22, p. 158; White, *supra*, Note 22, p. 325.
24. See Buckalew, *supra*, Note 22, p. 126; Shartel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. (1936), p. 133, 146 n. 61.
25. Buckalew, *supra*, Note 22 assumes without discussion that Supreme Court judges are excepted from removal by address, but White, *supra*, Note 22 states that the section is not altogether clear.
26. Buckalew, *supra*, Note 22, p. 126 reports the occasion of a legislative address in which Governor McKean declared, "I will let the Legislature know, that *may* means *I won't!*"
27. See Shartel, *supra*, Note 24, p. 146 n. 61.
28. Much of the historical and other information in the paragraph in the text is extracted from the article by Shartel, *supra*, Note 24, pp. 146-7.
29. See Shartel, *supra*, Note 24, p. 146 n. 61; Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. 448, 451 n. 28; A Statistical Summary of State Court Systems prepared by The Council of State Governments, Chicago, July, 1966 — Table IX, Methods for Removal of Judges and Filling of Vacancies, pp. 46-56.
30. See Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," (University of Pennsylvania The Law School Institute of Legal Research, Philadelphia, 1962) p. 81 n. 21.
31. Com. ex rel. Duff v. Keenan, 347 Pa. 574, 583 (1943), 33 A2d 244.
32. The entire section appears near the beginning of §2.2 *supra*.
33. Com. v. Knox, 172 Pa. Superior Ct., 510 (1953), 94 A2d 138, affirmed 374 Pa. 343, 97 A2d 782.
34. Com. v. Rudman, 56 D. & C. 393, 94 Pitts. L.J. 217 (1946).
35. Note 33 *supra*.
36. *Ibid.* at p. 523.
37. 3 Watts & S. 338 (1842).
38. *Ibid.* at p. 342.
39. See Note, "What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office," 52 A.L.R. 2d, 1314 (1957).
40. See Matter of the Alleged Incapacity of Hon. Miles B. Kitts, No. 1323 Misc. Docket-W.D.; No. 217 Misc. Docket No. 8, E.D., Pa. Supreme Court.
41. 360 Pa. 94 (1948), 61 A2d 426.
42. *Ibid.*, pp. 99-100.
43. See, e.g., Shartel, Burke, "Federal Judges - Appointment, Supervision, and Removal - Some Possibilities Under the Constitution," 28 Mich. L. Rev. 485, 723, 870 (series of articles, 1930), especially pp. 729-732, 881-887. Much of the information and reasoning in this section was derived from this excellent series of articles relating to the federal judiciary, particularly pp. 730-738, 880-888. See also Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. (1967), p. 448.
44. Com. v. Glass, 295 Pa. 291 (1929), 145 A. 278 (Municipal Court Judges of Philadelphia); Com. v. Dumbauld, 97 Pa. 293 (1881) (common pleas judges).
45. 62 Pa. 343 (1869).
46. 225 Pa. 364 (1909), 74 A. 203.
47. See Pennsylvania Labor Relations Board v. Butz, 411 Pa. 360, 363-5 (1963), 192 A2d 707 (common pleas court lacks power to issue writ of prohibition).
48. 324 Pa. 48 (1936), 187 A. 498.
49. *Ibid.*, p. 55.
50. *Ibid.*, p. 56.
51. See, e.g., *In re* Judges of Municipal Court of Cedar Rapids, 256, Iowa 1135 (1964), 130 N.W. 2d 553; Ransford v. Graham, 374 Mich. 104 (1964), 131 N.W. 2d 201; *In re* Graham,

- 366 Mich. 268 (1962), 114 N.W. 2d 333; *In re Matter*, 34 N.J. 259 (1961), 168 A. 2d 38.
52. See, e.g., *Mahoning County Bar Association v. Franko*, 168 Ohio St. 17 (1958), 151 N.E. 2d 17.
53. See, e.g., *In re Matter*, *supra*, Note 51; *Mahoning County Bar Association v. Franko*, *supra*, Note 52; *Jenkins v. Oregon State Bar*, 241 Ore. 283 (1965), 405 P. 2d 525. The cases are collected in a Note, "Misconduct in an official capacity as judicial officer as basis for disbarment, suspension, or other disciplinary action against attorney," 53 A.L.R. 2d 305 (1957).
54. See, e.g., *Petition of Colorado Bar Association*, 137 Colo. 357 (1958), 325 P. 2d 932.
55. See, e.g., *Jenkins v. Oregon State Bar*, *supra*, Note 53.
56. See, e.g., *Petition of Colorado Bar Association*, *supra*, Note 54; *Nix v. Standing Committee on Judicial Performance of Oklahoma Bar Association*, Okla. (1966), 422 P. 2d 203.
57. See Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," University of Pennsylvania The Law School Institute of Legal Research, Philadelphia, 1962, p. 82.
58. The following eight states have recall provisions: Arizona, California, Colorado, Kansas, Nevada, North Dakota, Oregon, and Wisconsin. See Note, "The Chandler Incident and Problems of Judicial Removal," 19 Stan. L. Rev. (1967), p. 448, 452 n. 52; A Statistical Summary of State Court Systems prepared by The Council of State Governments, Chicago, July, 1966, Table IX, Methods for Removal of Judges and Filling of Vacancies, pp. 46-56.
59. See also Shartel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. (1936), pp. 148-153; Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," 41 N.Y.U.L. Rev. (March, 1966), p. 149, 164-5.
60. See generally Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," 41 N.Y.U.L. Rev. 149, 185-191 (March, 1966); Report of New York Temporary State Commission on the Constitutional Convention, No. 12, "The Judiciary" (March, 1967). Much of the information and many of the arguments in this subsection were obtained from these excellent articles.
61. N.Y. Const. Art. VI, §22.
62. The rules of the court are stated in *Matter of Osterman*, 13 N.Y. 2d (a) at (c)-(f) (Ct. on the Judiciary 1963), cert. denied, 376 U.S. 914 (1964).
63. See N.Y.U.L. Rev. Note, *supra*, Note 60, pp. 185-6 for this information, including case citation.
64. *Matter of Friedman*, 12 N.Y. 2d (a) (Ct. on the Judiciary 1963).
65. *Matter of Osterman*, *supra*, Note 62.
66. *Matter of Sobel*, 8 N.Y. 2d (a) (Ct. on the Judiciary 1960).
67. Art. VI, §18. See Frankel, Jack E., "Judicial Discipline and Removal," 44 Texas L. Rev. 1117, 1127-8 (June, 1966).
68. Art. VII-A, §§1-7. See Kline, Fannie J. and Harris, Allen, "Judicial Administration," 1965, Annual Survey of American Law, p. 601 (New York University School of Law, 1966).
69. Ohio Rev. Code, 2701.11-12 (1966 Supp.). See 1965 Annual Survey of American Law, *supra*, Note 68, pp. 600-1.
70. See generally Burke, Louis H., "Judicial Discipline and Removal ... The California Story," 48 Jour. Am. Jud. Soc. (Feb., 1965), p. 167; Frankel, Jack E., "Judicial Discipline and Removal," 44 Texas L. Rev. 1117 (June, 1966), pp. 1128-1130; Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," 41 N.Y.U.L. Rev. 149 (March, 1966), pp. 175-184; Report by the New York Temporary State Commission on the Constitutional Convention, No. 12, "The Judiciary", pp. 52-53 (March, 1967).
71. See editorial, "New Ways to Deal with Judicial Misconduct," 48 Jour. Am. Jud. Soc. (Feb., 1965), p. 163.
72. Annex Number 5B.
73. Winters stated that the following states have adopted the California plan: Texas, Florida, Nebraska, Maryland, Ohio, Utah and Vermont. Actually the Ohio plan appears to resemble more closely the N.Y. Plan. Georgia, Hawaii, Idaho, Indiana, Kentucky, Minnesota, Missouri, New Mexico, New York, North Dakota, Tennessee, Washington, West Virginia and Wyoming.



74. Cal. Const. Art. VI §§8, 18 (formerly §§1b, 10a and 10b prior to amendment of November, 1966).
75. See Cal. Gov't Code 68702 which empowers the Commission to "employ such officers, assistants, and other employees as it deems necessary".
76. See former §10b of Art. VI of Cal. Const. prior to amendment of November, 1966.
77. Cal Const. Art. VI, §18 (c).
78. Cal. Const. Art. VI, §18 (e).
79. Cal. Const. Art. VI, §18 (a).
80. Cal. Const. Art. VI, §18 (d).
81. Frankel, *supra*, Note 67, p. 1128.
82. *Ibid.*, pp. 1128-9.
83. Annex Number 5B, §12(c).
84. *Ibid.*, §12 (a).
85. Md. Const. Art. IV, §§4A, 4B, adopted by vote in 1966 general election. See Klein, Fannie J. and Harris, Allen, "Judicial Administration", 1965 Annual Survey of American Law, pp. 599-600 (New York University School of Law, 1966).
86. See also the arguments for and against the New York plan discussed in §5.2 *supra*. Many of the same arguments pro and con are presented more fully there.
87. See Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline Judges," 41 N.Y.U.L. Rev. 149 (March, 1966), p. 184.
88. See generally, Frankel, Jack E., "Judicial Discipline and Removal," 44 Texas L. Rev. 1117 (June, 1966), pp. 1124-1125; Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," 41 N.Y.U.L. Rev. 149 (March, 1966), pp. 191-193.
89. Art. VI, §VI, ¶4.
90. See *In re Mattera*, 34 N.J. 259 (1961), 168 A2d 38.
91. N.J. Const. Art. VI, §11, 3.
92. *In re Pagliughi*, 39 N.J. 517 (1963), A2d 218 (magistrate reprimanded for violating Canon 28 of the Canons of Judicial Ethics, which prohibits a judge from engaging in political activities; in deciding upon punishment, court noted that this was first case concerning a violation of Canon 28 and lightened the punishment accordingly); *In re Mattera*, *supra*, Note 90 (rule stated, but evidence held insufficient to sustain charge against magistrate).
93. Rule 1:25.
94. Rule 1:28.
95. Rule 1:30-5.
96. N.J. Const. Art. VI, §VII, §1.
97. *In re Mattera*, *supra*, Note 90.
98. See §3 *supra* for discussion of this topic. The cases are collected in a Note, "Misconduct in an official capacity as judicial officer as basis for disbarment, suspension, or other disciplinary action against attorney," 53 A.L.R. 2d 305 (1957).
99. See discussion in §3 *supra*.
100. *Ibid.*
  1. See generally Note, N.Y.U.L. Rev., *supra*, Note 88, pp. 193-194.
  2. Wis. Const. Art. VII, §3.

## *Retirement of Judges and Post-Retirement Service of Judges*

### §1. Introduction

Closely related to the problem of the removal, suspension, and discipline of unfit judges discussed in Part V *supra* is the problem of retiring judges who are mentally or physically unable to perform their duties either by reason of old age or by reason of some mental or physical ailment. Most modern comprehensive plans for the removal and discipline of judges, such as the New York and California plans discussed in Part V, include provisions for the involuntary retirement of disabled judges. The constitutions of some jurisdictions, though, deal separately with the matter of retirement.

The problem of judges whose faculties have become impaired by senility or some mental or physical disability is a sensitive and delicate matter. Practically all lawyers and judges are familiar with the problem, but prefer to keep it in the legal family. Too often the disabled judges choose to remain on the bench despite their failing powers. Why do aged and disabled judges refuse to retire? There probably are many reasons, some personal and others objective. Some prefer the active life of a judge to the withdrawal of retirement. Others are not financially independent, and may find retirement and disability pensions inadequate. A prominent retired federal judge, J. Earl Major, Senior Judge of the United States Court of Appeals for the Seventh Circuit, writing recently in the American Bar Association Journal about federal judges who have liberal opportunities for post-retirement service, said the following: "I have never heard a valid reason why a judge should not voluntarily retire when eligible, but many excuses are offered, usually based on self-interest, with little regard for the courts' welfare. In my younger and bolder days, I often asked a judge, 'Why don't you retire?' One judge, more than eighty years old, stated that he was holding on in order to protect his long-time law clerk, who at sixty was too old to get another job; another stated that he would not retire because he enjoyed the prestige of being a

judge; one told me it was rumored that so-and-so would be appointed to his place and he did not intend to permit that; and another refused to retire because his wife's position in society would be jeopardized.

"Some stay because of the unfounded fear that 'good men' will not be found to take their places, and others refuse to retire until their own political party comes to power. The excuse perhaps most often heard and the most feeble is, 'I don't know what I would do if I retired.' A better excuse would be, 'I am afraid to retire lest I be called upon to do too much work.'"<sup>1</sup> Remember that Judge Major was writing about judges who can be assigned to cases after retirement if they wish. Pennsylvania recently instituted by constitutional amendment a plan for voluntary post-retirement service.<sup>2</sup>

In spite of the sensitivities surrounding the presence of senile and disabled judges on the bench, the problem is obviously a real and serious one. The decisions of an incapacitated judge can seriously affect the lives and welfare of many people.

Four main reforms have been put forward to deal with this problem;

- (1) substantial improvement of retirement and disability pensions and benefits;
- (2) mandatory retirement at fixed age;
- (3) involuntary retirement for mental and physical incapacity; and
- (4) post-retirement service for able and willing judges.

The question arises whether these reforms are matters for statutory enactment or for constitutional amendment. Reform (1) usually is dealt with by statute, but the constitution might contain broad minimum standards. The basic standards or outlines of reforms (2) - (4) usually are set forth in the constitution with the specifics left up to the legislature, high court, or another body. Pennsylvania has already accomplished reform (4), post-retirement service, by constitutional amendment and legislative implementation.<sup>3</sup> The merits and demerits of these reforms will be discussed in subsequent sections after a brief review of the present Pennsylvania provisions, constitutional and statutory, concerning the retirement of judges.

## **§2. Present Pennsylvania Provisions Concerning Retirement of Judges**

The only provision in the Pennsylvania Constitution directly related to the retirement of judges is the second paragraph of Article V, §15, which enables retired judges, who are willing, to be assigned to hear cases.<sup>4</sup> This provision was added by amendment of November 2, 1965. The Constitution contains no express provisions for involuntary retirement of judges at a fixed age or for disability. The tenure provision for Supreme Court judges is, in effect, an indirect form of mandatory retirement since they are limited to a single twenty-one year term.<sup>5</sup> Disabled judges *may* be removable from office by the legislature under the address provisions in the Constitution.<sup>6</sup>

but apparently the courts have never decided whether disability is a "reasonable cause" for removal within the meaning of those provisions. The address provisions appear not to be applicable to Supreme Court judges.

Pennsylvania judges by statute are part of the General State Employees' Retirement Fund.<sup>7</sup> Under this retirement system judges paid by the state who have served one full elective term or ten years in the aggregate may retire at the age of 60 with a maximum retirement allowance of 80% of final salary under a contributory plan.<sup>8</sup> The amount of retirement benefits depends upon several factors including length of service, average annual salary, and whether a contributory or a non-contributory plan is chosen. Most judges select a contributory plan because of the optional plans for dependents and survivors. A judge would have to serve 23½ years to achieve the maximum retirement allowance since the pension is based on 4% of final salary for the first 10 years and 3% for each additional year. On the non-contributory basis judges accrue only 2% of final salary for each year of service. Judges are entitled also to receive disability benefits under the state retirement system. Such benefits amount to a minimum of 30% of final pay, plus the member's annuity calculated on an actuarial basis. Having judges lumped together with other state employees in the same retirement system makes it difficult, of course, to increase retirement benefits for judges without at the same time increasing benefits for all state employees. An overall increase naturally is much more costly.

### **§3. Voluntary Retirement of Judges**

Voluntary retirement of aged and disabled judges would be the preferable method of replacing such judges. Experience has shown, however, in the federal system and in some states, that many aged and disabled judges do not retire voluntarily even when retirement and disability pensions are substantial.<sup>9</sup> Naturally, attempts to persuade disabled judges to retire when retirement benefits are inadequate are even less successful. Fellow judges and lawyers may be reluctant even to suggest to a disabled judge that he retire if retirement benefits are inadequate.

For the foregoing reasons, among others, advocates of a plan for the involuntary removal or retirement of judges assert that voluntary retirement is effective only in conjunction with all of the following conditions:

adequate retirement and disability benefits. It is unfair to expect, much less to require, aged and disabled judges to retire when retirement benefits are insufficient to enable the judge and his family to maintain a decent standard of living. On the basis of experience, there seems to be little danger that liberal pensions will induce judges to retire too early. Any danger of this kind could be met by establishing conditions for retirement such as approval of retirement by a superior officer, minimum age and minimum service requirements, and the like.

an effective system for the involuntary removal or retirement of judges.<sup>10</sup>  
Experience under the California plan and other plans for the compulsory re-

removal or retirement of judges shows that the very existence of a compulsory removal plan induces judges to retire voluntarily rather than undergo a removal proceeding. The number of judges induced to retire voluntarily under the California plan is often cited to illustrate the plan's effectiveness.

availability of part-time post-retirement service for judges who are able and willing.<sup>11</sup> The opportunity for retired judges to perform part-time judicial service should overcome the unwillingness of many judges to withdraw from an active public life. As already stated, Pennsylvania recently instituted, by constitutional amendment, a plan for voluntary post-retirement service of judges.

It is maintained that all of these conditions are necessary to induce aged and disabled judges to retire voluntarily, and to insure an influx of "new blood" onto the bench. It may be impossible, however, to assure the existence of all three conditions by constitutional revision, since the first condition, adequate retirement benefits, usually is provided by statutory enactment. One way to remedy this would be to set a minimum pension standard in the constitution, as the American Bar Association proposes in Section 7, Paragraph 2 of its Model State Judicial Article,<sup>12</sup> in which the A.B.A. recommends a pension of not less than 50% of the salary received at the time of retirement or death of a judge who has served 10 years or more.

Voluntary retirement of judges would become less important, of course, if a plan of mandatory retirement at a fixed age were adopted. But even under such a plan it would be desirable to encourage the voluntary retirement of disabled judges who had not yet reached the age of mandatory retirement.

#### **§4. Mandatory Retirement of Judges at a Fixed Age**

One of the principal proposals for removing aged and disabled judges from the bench is the mandatory retirement of all judges at a fixed age. About one-half of the states require judges to retire at a fixed age, with seventy years being the most common.<sup>13</sup> Pennsylvania has no provision for the mandatory retirement of judges, although Supreme Court judges are limited to one twenty-one year term.<sup>14</sup> Most mandatory retirement provisions simply require judges to retire at a certain age, but some provisions are variations or modifications of this basic requirement. For example, some jurisdictions require judges to retire at the end of the term in which the mandatory retirement age is reached; others provide for the forfeiture of part or all of a judge's retirement benefits if he does not retire before reaching a certain age; others make retirement mandatory at a certain age upon completion of a stated number of years of service; and a few jurisdictions fix a higher retirement age for judges sitting at the time mandatory retirement goes into effect than for judges taking office after that time. Besides these statutory differences and age variations, mandatory retirement provisions may vary with respect to the judges included. The details of most

mandatory retirement provisions are contained in the statutes, but many state constitutions establish the basic principle or fix a minimum mandatory retirement age.

A number of bar groups pressing for judicial reform advocate mandatory retirement of judges at a fixed age. For example, the American Bar Association in its Model State Judicial Article<sup>15</sup> proposes that judges be required to retire at an age fixed by statute, but not less than sixty-five years of age. The Bar Association committee appended the following comment to the proposed section: "Most States have a fixed retirement age. The Committee is of the opinion that the legislature should be free to fix a retirement age, so long as it does not reduce it below sixty-five. The Committee has reluctantly chosen a fixed retirement age rather than indefinite tenure because it is of the view that the interests of sound administration of justice will be better served by the possibility of retiring competent judges than by risking the continuance in office of judges with truly limited capacities."

The Pennsylvania Bar Association also advocates mandatory retirement at such age as the General Assembly shall provide, but not less than seventy-two years for justices of the Supreme Court and judges of the Superior Court, and not less than seventy years for all other judges.<sup>16</sup> It has been argued that the retirement age for trial judges should be lower than that for appellate judges because trial work is more exhausting and demanding.<sup>17</sup> The National Municipal League in the sixth edition (1963) of its Model State Constitution<sup>18</sup> advocates mandatory retirement of judges at the age of seventy. Most groups and individuals supporting mandatory retirement of judges believe that mandatory retirement should be accompanied by plans for adequate retirement benefits for part-time post-retirement service to cushion the blow of forced retirement.

#### ***Arguments for and against mandatory retirement.***

Some of the arguments often made in favor of mandatory retirement of judges are the following:

substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.

eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal; everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.

prevention of harm by few senile judges more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.

corresponds with current trend towards mandatory retirement in other public and private employments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement.

Following are some of the arguments against mandatory retirement:

age is biological, not chronological. Not all men lose their mental and physical powers at the same age. Requiring all judges to retire at the same age, therefore, will remove from the bench many competent judges, some at the height of their powers. Opponents of mandatory retirement often point to such great judges as Justice Holmes, whose judicial careers extended well past the age of seventy. Proponents of mandatory retirement concede that some good judges may be forced to retire, but argue (1) that the services of able judges may be retained through a plan of post-retirement service, and (2) that the loss of competent judges will be offset by the retirement of senile judges.

difficult to fix a suitable retirement age. This follows from the prior criticism that age is biological, not chronological. Moreover, with continuing advances in medical and health technology to be expected, a fixed retirement age may soon become unrealistic. In order to retain flexibility, most jurisdictions having mandatory retirement of judges leave to the legislature the task of fixing the retirement age, although some jurisdictions establish a constitutional minimum. It might be argued also that some judges should have a higher retirement age than other judges. Some maintain, for example, that trial judges should retire sooner than appellate judges because trial work imposes a greater strain upon older persons.

competent judges should not be required to support themselves and their families on inadequate retirement benefits. Most judges do not attain their position until middle age, and, consequently, are unable to earn sufficient retirement benefits. Furthermore, usually they are too old to resume their law practices, and so they are reliant upon the retirement benefits. Advocates of mandatory retirement almost without exception maintain that it should be accompanied by adequate plans for retirement benefits and post-retirement service.

## **§5. Involuntary Retirement of Disabled Judges**

Another method of dealing with the problem of judges who are mentally or physically incapable of performing their duties is a plan for the involuntary retirement of such judges. In some jurisdictions the power to compel the retirement of disabled judges is part of a comprehensive system for removing or disciplining unfit judges, as exemplified by some of the plans discussed in Part V *supra*. Thus, both the New York and California plans discussed in Part V provide for the involuntary retirement of disabled judges in addition to the removal or discipline of judges guilty of misconduct. Under each plan the same agency (in New York, the Court on the Judiciary; in California, the Commission on Judicial Qualifications) administers both the retirement and disciplinary features of the system. The California Consti-

tution provides that judges involuntarily retired for disability shall be considered to have retired voluntarily.<sup>19</sup> The New York Constitution provides that such judges "shall thereafter receive such compensation as may be provided by law."<sup>20</sup> Experience under the California plan in particular has shown that a significant number of judges under investigation by the Commission on Judicial Qualifications for misconduct or disability have retired voluntarily, apparently to avoid public exposure.

In contrast to the jurisdictions just mentioned, a number of jurisdictions have established a separate constitutional or statutory procedure for the involuntary retirement of disabled judges. About half a dozen or more jurisdictions have adopted a procedure whereby the Governor or Supreme Court is authorized to retire a disabled judge on the recommendation of a special commission which is appointed by the Governor in most of these jurisdictions.<sup>21</sup> Some jurisdictions require that the special commission be composed of medical doctors, some require judges, and others apparently impose no restrictions. Usually the involuntary retirement procedure is initiated by the Supreme Court or some other body which certifies apparent incapacity to the Governor who then appoints the special commission to conduct an inquiry. Alaska places the initiative in the judicial council, Oregon in the bar association, and Minnesota by statute authorizes twenty-five or more freeholders to petition the Governor for removal of a judge incapacitated for more than six months. In New Jersey the Supreme Court initiates the procedure by certifying apparent incapacity to the Governor.<sup>22</sup> The Model State Judicial Article of the American Bar Association contains a similar involuntary retirement procedure applicable to disabled justices of the Supreme Court.<sup>23</sup> This procedure is initiated by certification to the Governor by the Judicial Nominating Commission for the Supreme Court. The Bar Association committee's comment is as follows: "This provision follows the Alaska plan to have an independent body make the determination whether a high court judge has become incapacitated while in office. The nomination commission seems to be a logical agency to charge with this responsibility. The difficulties which seem to arise when this power is put in the hands of fellow judges are avoided by this process."

Pennsylvania has no express provision for the involuntary retirement of disabled judges. The address removal procedure discussed in Part V *supra* may be available to remove disabled judges, but the Supreme Court appears not to have decided whether the term "reasonable cause" in the address provisions includes mental or physical incapacity.<sup>24</sup>

A procedure for the involuntary retirement of mentally or physically disabled judges could exist alongside a plan for the mandatory retirement of judges at a fixed age, although involuntary retirements under the former procedure undoubtedly would be greatly reduced by the existence of the latter



plan because most disabled judges are elderly. In such instance the involuntary retirement procedure would apply only to disabled judges who had not reached the age of mandatory retirement.

Many arguments for and against the removal and disciplinary plans discussed in Part V *supra* are relevant also to the involuntary retirement procedures discussed in this section. Among the relevant issues there discussed are the following: who should be authorized to initiate a removal proceeding; relative merits of special commission and an existing agency; composition of special commission or other body; whether investigations should be confidential; where to place ultimate responsibility.

#### **§6. Post-retirement Service of Judges**

Another judicial retirement reform which is rapidly gaining favor is a provision to employ on a part-time basis retired judges who are willing and able to serve. Most jurisdictions in their constitutions or statutes already authorize some form of post-retirement service, which ranges from serving as a master or referee to holding court.<sup>25</sup> Only about a dozen or more jurisdictions still have no specific provision with respect to such service. Most major bar groups and other civic organizations interested in judicial reform advocate post-retirement service, including the American Bar Association,<sup>26</sup> the Pennsylvania Bar Association,<sup>27</sup> and the National Municipal League.<sup>28</sup>

Pennsylvania amended its Constitution on November 2, 1965 to add the following provision authorizing post-retirement service:

The Chief Justice of the Supreme Court may designate and assign former judges, learned in the law, who are willing so to do, who have served at least one term and who have not been defeated for reelection, to the office of judge of any court of record, to temporarily sit in the courts of any judicial district for the disposal of business under such circumstances and subject to such qualifications and conditions as the General Assembly may prescribe.<sup>29</sup>

The legislature implemented this provision during a special session in 1966 by setting forth the procedure to be followed in assigning qualified former judges to hear cases, the requirement of a monthly report by a former judge so assigned, and the compensation to be paid the former judge.<sup>30</sup> The act also provides that the practice of law by a former judge assigned to hear cases shall be subject to the Canons of Judicial Ethics and such rules as may be promulgated by the Supreme Court.<sup>31</sup> The act also preserves the rights of retired judges under the state retirement system.<sup>32</sup>

There is a close relationship between post-retirement service and some of the other retirement proposals discussed in the previous sections. This relationship is evident from the discussions in those sections and from the arguments for and against post-retirement service which follow.

### *Arguments for and against post-retirement service.*

Among the arguments offered in support of the principle of post-retirement service for judges are:

increases judicial manpower to cope with serious problem of court congestion and delay. The employment of willing and able retired judges adds a whole roster of experienced judges to the available judicial manpower. Not only can the vacancies left by retired judges be filled with younger men capable of greater workloads, but the retired judges are available to be assigned wherever congestion temporarily is worst or wherever their particular experience is in demand. Certainly, post-retirement service is an easier and more flexible method for supplying additional judges than the creation and filling of new judgeships.

encourages voluntary retirement of older judges to make way for younger men. The inactivity of retirement and inadequate retirement benefits are two of the prime reasons why many older judges refuse to retire. Remedying these two drawbacks, then, should encourage more judges to retire voluntarily, and thereby avoid much of the difficulty and unpleasantness associated with mandatory retirement at a fixed age or involuntary retirement for disability. Of course, disabled retired judges would not be eligible for post-retirement service, but if more judges could be encouraged to retire voluntarily by the prospect of post-retirement service, then the need to remove them from the bench involuntarily later when they become disabled would be avoided.

takes some of the sting out of mandatory retirement at a fixed age. Post-retirement service helps to rebut two of the main criticisms made against mandatory retirement at a fixed age, namely, (1) that forced retirement of an able judge in full possession of his powers is personally unfair to him, and (2) that the services of many great judges will be lost by setting an arbitrary retirement age. With a plan of post-retirement service in effect, an able retired judge can work when he wishes and can work at his own pace. He should have more time for deliberation and for writing better opinions. Moreover, the judicial administration, through wise use of his talents, should derive from him almost as valuable service as if he were still a regular member of the bench.

Some of the arguments which have been made against post-retirement service are the following:

the Chief Justice of Supreme Court or other individual authorized to assign retired judges is placed in the difficult position of deciding which retired judges are able and which are not. The Chief Justice may have personal relationships with many retired judges which will make it difficult for him to be objective in deciding upon their requests for post-retirement service. In effect, the Chief Justice is put in the position of ruling on judicial capacity, the same position occupied by the person or agency which determines mental or physical disability under a plan of involuntary retirement. On the other hand, perhaps most retired judges who are incapable of performing judicial duties will be wise and honest about themselves and not request post-re-

TABLE 2. RETIREMENT AND PENSION PROVISIONS FOR JUDGES OF STATE  
APPELLATE COURTS AND TRIAL COURTS OF GENERAL JURISDICTION\*

| <i>State</i>             | <i>Min.<br/>Age</i> | <i>Years Min.<br/>Service</i> | <i>Amount<br/>of Annuity</i>                                        | <i>Amount of<br/>Judge's Contribution</i> | <i>Judges to Whom Applicable</i>               |
|--------------------------|---------------------|-------------------------------|---------------------------------------------------------------------|-------------------------------------------|------------------------------------------------|
| Alabama <sup>d</sup>     | 65                  | 15                            | \$7,200 <sup>b</sup>                                                | None                                      | Supreme, appeals                               |
|                          | 65 <sup>s</sup>     | 15                            | 5,200                                                               | None                                      | Circuit                                        |
|                          | Any age             | 25                            | 5,200                                                               | None                                      | Circuit                                        |
| Alaska <sup>d</sup>      | 70                  | 5 <sup>e</sup>                | Up to 1/2 pay <sup>f</sup>                                          | 5%                                        | Supreme, superior                              |
|                          | 65 <sup>g</sup>     | 10 <sup>e,g</sup>             | Up to 1/2 pay <sup>f</sup>                                          | 5%                                        | Supreme, superior                              |
| Arizona <sup>d</sup>     | 65                  | 12 <sup>e</sup>               | Up to 2/3 pay <sup>h</sup>                                          | 5%                                        | Supreme, appeals, superior                     |
| Arkansas <sup>d</sup>    | 65                  | 15 <sup>e</sup>               | 1/2 pay <sup>i,j</sup>                                              | 4%                                        | Supreme, circuit, chancery                     |
| California <sup>d</sup>  | 60 to 70            | 20 <sup>e</sup>               | 3/4 pay <sup>i,j,k</sup>                                            | 8%                                        | Supreme, appeals, superior                     |
|                          | 60 to 70            | 10 <sup>e</sup>               | 65% of pay <sup>i,j,k</sup>                                         | 8%                                        | Supreme, appeals, superior                     |
|                          | Over 70             | (e)                           | 1/2 pay <sup>i,j,k</sup>                                            | 8%                                        | Supreme, appeals, superior                     |
| Colorado <sup>d</sup>    | 65                  | 10                            | \$3,000-5,000 <sup>l</sup>                                          | None                                      | Supreme                                        |
|                          | 75                  | 20                            | 4,000                                                               | None                                      | Supreme                                        |
|                          | 80                  | 30                            | 5,000                                                               | None                                      | Supreme                                        |
|                          | 65                  | 10                            | 2/5 pay <sup>m</sup>                                                | 6%                                        | Supreme, district                              |
|                          | 65                  | 16                            | 1/2 pay <sup>m</sup>                                                | 6%                                        | Supreme, district                              |
| Connecticut <sup>d</sup> | 70                  | 10                            | 2/3 pay <sup>n</sup>                                                | None                                      | Supreme, superior                              |
| Delaware <sup>a</sup>    | Any age             | 24 <sup>o</sup>               | 2% of highest<br>salary times number<br>of years served             | 5% (max. \$375<br>a yr. for 20 yrs.)      | Supreme, superior, chancery                    |
| Florida <sup>d</sup>     | 65                  | 10 <sup>e</sup>               | 3-1 3/8% of aver.<br>comp. for each year<br>of service <sup>p</sup> | 8%                                        | Supreme, district courts of appeal,<br>circuit |
|                          | 55                  | 10                            | (p)                                                                 | 8%                                        | Supreme, district courts of appeal,<br>circuit |
| Georgia <sup>a</sup>     | 70                  | 10                            | 2/3 pay                                                             | None                                      | Supreme, appeals                               |
|                          | 65                  | 20                            | 2/3 pay                                                             | None                                      | Supreme                                        |
|                          | Any age             | 19 <sup>e</sup>               | 2/3 pay                                                             | 5%                                        | Superior                                       |
|                          | 70                  | 11 <sup>e</sup>               | 2/3 pay                                                             | 5%                                        | Superior                                       |

|                            |                      |                   |                                        |                     |                                                         |
|----------------------------|----------------------|-------------------|----------------------------------------|---------------------|---------------------------------------------------------|
| Hawaii <sup>d</sup>        | 55                   | 10                | Up to 3/4 pay <sup>h</sup>             | 6%                  | Supreme, circuit                                        |
|                            | Any age              | 25                | Up to 3/4 pay                          | 6%                  | Supreme, circuit                                        |
| Idaho <sup>u</sup>         | 70                   | 10 <sup>q,r</sup> | 1/2 pay <sup>q,r</sup>                 | 4%                  | Supreme, district                                       |
| Illinois <sup>d</sup>      | 60                   | 12 <sup>e</sup>   | 1/4 pay <sup>s</sup>                   | 7-1/2% <sup>t</sup> | Supreme, appellate, circuit                             |
| Indiana <sup>u</sup>       | 65 <sup>e</sup>      | 12 <sup>u</sup>   | Up to \$4,800 <sup>v</sup>             | 5% <sup>w</sup>     | Supreme, appellate, circuit, superior, criminal         |
| Iowa <sup>d</sup>          | 65                   | 6                 | Up to 1/2 of last salary <sup>x</sup>  | 4%                  | Supreme, district                                       |
|                            | Any age              | 25 <sup>e</sup>   | Up to 1/2 of last salary <sup>x</sup>  | 4%                  | Supreme, district                                       |
| Kansas <sup>d</sup>        | 65                   | 10                | 3-1/3% of pay for each year of service | 6%                  | Supreme, district                                       |
|                            | 70                   | 8                 | 3-1/3% of pay for each yr. of service  | 6%                  | Supreme, district                                       |
| Kentucky                   | 65 <sup>e</sup>      | 8                 | (y)                                    | 3%                  | Court of appeals, circuit                               |
|                            | Any age <sup>e</sup> | 8                 | (y,z)                                  | 3%                  | Court of appeals, circuit                               |
| Louisiana                  | 75-80 <sup>e</sup>   | No minimum        | (i,au)                                 | None                | Supreme, appeals, district                              |
|                            | 70 <sup>e</sup>      | 20                | Full pay <sup>i</sup>                  | None                | Supreme, appeals, district                              |
|                            | 65 <sup>e</sup>      | 25 <sup>ab</sup>  | Full pay <sup>i</sup>                  | None                | Supreme, appeals                                        |
|                            | 65 <sup>e</sup>      | 20                | 2/3 pay <sup>i</sup>                   | None                | Supreme, appeals, district                              |
|                            | Any age <sup>e</sup> | 23                | 2/3 pay <sup>i</sup>                   | None                | Supreme, appeals, district                              |
| Maine <sup>d</sup>         | 70 <sup>e</sup>      | 7                 | 3/4 pay <sup>i</sup>                   | None                | Supreme, superior                                       |
| Maryland <sup>d</sup>      | 60                   | No minimum        | Up to \$12,000                         | None                | Court of appeals, circuit, Supreme Bench of Balto. City |
| Massachusetts <sup>d</sup> | 70                   | 10                | 3/4 pay                                | None                | Supreme, superior                                       |
| Michigan                   | 70                   | 12                | 1/2 pay                                | 7%                  | Supreme, appeals, circuit, recorders                    |
|                            | 65                   | 16                | 1/2 pay                                | 7%                  | Supreme, appeals, circuit, recorders                    |
|                            | 60                   | 20                | 1/2 pay                                | 7%                  | Supreme, appeals, circuit, recorders                    |
|                            | Any age              | 30                | 1/2 pay                                | 7%                  | Supreme, appeals, circuit, recorders                    |
| Minnesota                  | 65                   | 16 <sup>e</sup>   | 1/2 pay <sup>ad</sup>                  | None <sup>ae</sup>  | Supreme                                                 |
|                            | 70 <sup>a</sup>      | 12 <sup>e</sup>   | 1/2 pay <sup>ad</sup>                  | None <sup>ae</sup>  | Supreme                                                 |
|                            | 70 <sup>d</sup>      | 12 <sup>e</sup>   | 1/2 pay                                | None <sup>ae</sup>  | District                                                |

\* From the statistical summary of state constitutional systems (July, 1966) prepared by the Council of State Governments.

TABLE 2. RETIREMENT AND PENSION PROVISIONS FOR JUDGES OF STATE  
APPELLATE COURTS AND TRIAL COURTS OF GENERAL JURISDICTION (Continued)

| State                       | Min. Age         | Years Min. Service   | Amount of Annuity                     | Amount of Judge's Contribution | Judges to Whom Applicable                    |
|-----------------------------|------------------|----------------------|---------------------------------------|--------------------------------|----------------------------------------------|
| Mississippi <sup>a</sup>    | 65               | 15                   | (af,k)                                | 1.65%                          | Supreme, chancery, circuit                   |
|                             | Any age          | 30                   | 1/2 pay <sup>k,ac</sup>               | 1.65%                          | Supreme, chancery, circuit                   |
| Missouri <sup>d</sup>       | 65               | 12                   | 1/3 pay <sup>i</sup>                  | None                           | Supreme, appellate, circuit                  |
| Montana <sup>a</sup>        | 60               | 10                   | (af)                                  | Varies <sup>ah</sup>           | Supreme, district                            |
| Nebraska <sup>d</sup>       | 65 <sup>ak</sup> | 10                   | 3-1/3% of pay for each yr. of service | 4%                             | Supreme, district                            |
|                             |                  |                      |                                       |                                |                                              |
| Nevada <sup>a</sup>         | 60               | 20                   | 2/3 pay                               | None                           | Supreme, district                            |
|                             | 60               | 12                   | 1/3 pay                               | None                           | Supreme, district                            |
|                             |                  |                      |                                       |                                |                                              |
| New Hampshire <sup>d</sup>  | 62               | No min. <sup>e</sup> | Up to 1/2 pay <sup>af</sup>           | (aj)                           | Supreme, superior                            |
| New Jersey <sup>d</sup>     | 60               | 25 <sup>e</sup>      | 3/4 pay                               | 10% of \$5,000                 | Supreme, superior                            |
|                             | 65               | 10 <sup>e</sup>      | 3/4 pay                               | 10% of 5,000                   | Supreme, superior                            |
|                             | 70               | 15 <sup>e</sup>      | 3/4 pay                               | 10% of 5,000                   | Supreme, superior                            |
|                             | 70               | 10                   | 1/2 pay <sup>i</sup>                  | None                           | County                                       |
| New Mexico <sup>d</sup>     | 64               | 10                   | 1/2 av. ann. salary of last 3 years   | 6%                             | Supreme, appeals, district                   |
|                             | 60               | 16                   | 1/2 av. ann. salary of last 3 years   | 6%                             | Supreme, appeals, district                   |
|                             |                  |                      |                                       |                                |                                              |
| New York <sup>d</sup>       | 60               | No min.              | Up to 1/2 pay <sup>af</sup>           | Varies <sup>ah</sup>           | Court of appeals, appellate, supreme, county |
|                             |                  |                      |                                       |                                |                                              |
| North Carolina <sup>a</sup> | 75               | 8                    | 2/3 pay <sup>i</sup>                  | None                           | Supreme                                      |
|                             | 65               | 12 <sup>e</sup>      | 2/3 pay <sup>i</sup>                  | None                           | Supreme                                      |
|                             | 65               | 15 <sup>e</sup>      | 2/3 pay <sup>i</sup>                  | None                           | Superior                                     |
|                             | Any age          | 24                   | 2/3 pay <sup>i</sup>                  | None                           | Supreme, superior                            |
| North Dakota <sup>d</sup>   | 70 <sup>ak</sup> | 10 <sup>ak</sup>     | 1/2 pay <sup>i,k,k,ak</sup>           | 5%                             | Supreme, district                            |
|                             | 65 <sup>ak</sup> | 20 <sup>ak</sup>     | 1/2 pay <sup>i,k,k,ak</sup>           | 5%                             | Supreme, district                            |
|                             |                  |                      |                                       |                                |                                              |
| Ohio <sup>a</sup>           | 60               | 5                    | (af)                                  | 7%                             | Supreme, appeals, common pleas               |
|                             | 55               | 25 <sup>al</sup>     | (af)                                  | 7%                             | Supreme, appeals, common pleas               |
|                             | Any age          | 35                   | (af)                                  | 7%                             | Supreme, appeals, common pleas               |

|                             |         |                  |                          |                 |                                                                                           |
|-----------------------------|---------|------------------|--------------------------|-----------------|-------------------------------------------------------------------------------------------|
| Oklahoma                    | 65      | 10               | 3/4 pay <sup>b</sup>     | None            | Supreme, district, superior                                                               |
|                             | Any age | 20               | 3/4 pay <sup>b</sup>     | None            | Supreme, district, superior,<br>criminal appeals                                          |
| Oregon <sup>d</sup>         | 70      | 12 <sup>c</sup>  | 1/2 pay                  | 7% of salary    | Supreme, circuit                                                                          |
|                             | 65      | 16               | 1/2 pay                  | 7% of salary    | Supreme, circuit                                                                          |
| Pennsylvania                | Any age | 10               | Varies <sup>ab,k</sup>   | Varies          | Supreme, superior, common pleas                                                           |
|                             | 60      | No min.          | Varies <sup>ab,k</sup>   | Varies          | Supreme, superior, common pleas                                                           |
| Puerto Rico <sup>d</sup>    | 60      | 10 <sup>am</sup> | (a,c,k)                  | 7-1/2%          | Supreme, superior, district                                                               |
| Rhode Island <sup>a</sup>   | 70      | 15 <sup>ap</sup> | 3/4 pay                  | None            | Supreme, superior                                                                         |
|                             | 65      | 20 <sup>ap</sup> | 3/4 pay                  | None            | Supreme, superior                                                                         |
| South Carolina <sup>d</sup> | 72      | No min.          | 2/3 pay <sup>j</sup>     | 4%              | Supreme, circuit                                                                          |
|                             | 70      | 15 <sup>c</sup>  | 2/3 pay <sup>j</sup>     | 4%              | Supreme, circuit                                                                          |
|                             | 65      | 20 <sup>c</sup>  | 2/3 pay <sup>j</sup>     | 4%              | Supreme, circuit                                                                          |
|                             | Any age | 25 <sup>c</sup>  | 2/3 pay <sup>j</sup>     | 4%              | Supreme, circuit                                                                          |
| South Dakota <sup>a</sup>   | 65      | 15 <sup>c</sup>  | 1/2 pay                  | 4%              | Supreme, circuit                                                                          |
| Tennessee                   | 65      | 24               | 3/4 of last pay          | 8%              | Supreme, appeals, circuit, criminal,<br>law-equity                                        |
|                             | 54      | 12               | Varies                   | 8%              | Supreme, appeals, circuit, criminal,<br>law-equity                                        |
| Texas                       | 65      | 10               |                          | 5%              | Supreme, appeals, district                                                                |
|                             | Any age | 24               | 1/2 pay                  | 5%              | Supreme, appeals, district                                                                |
| Utah                        | 70      | 10               | 1/2 pay up to<br>\$6,000 | 7% (max. \$420) | Supreme, district                                                                         |
|                             | Any age | 20               | 1/2 pay up to<br>6,000   | 7% (max. \$420) | Supreme, district                                                                         |
| Vermont                     | 65      | 12               | 2/5 pay                  | Up to 10.21%    | Supreme, superior                                                                         |
| Virginia                    | 65      | 10               | 3/4 pay                  | Up to 3%        | Supreme, chancery, circuit,<br>corporation, law and equity,<br>law and chancery, hustings |
|                             | 60      | 25               | 3/4 pay                  | Up to 3%        | Chancery, circuit, corporation                                                            |
| Washington                  | 70      | 10               | 1/2 pay                  | 6-1/2%          | Supreme, superior                                                                         |
|                             | Any age | 18               | 1/2 pay                  | 6-1/2%          | Supreme, superior                                                                         |
|                             | Any age | 12               | (au)                     | 6-1/2%          | Supreme, superior                                                                         |

TABLE 2. RETIREMENT AND PENSION PROVISIONS FOR JUDGES OF STATE  
APPELLATE COURTS AND TRIAL COURTS OF GENERAL JURISDICTION (Continued)

| <i>State</i>  | <i>Min.<br/>Age</i> | <i>Years Min.<br/>Service</i> | <i>Amount<br/>of Annuity</i> | <i>Amount of<br/>Judge's Contribution</i> | <i>Judges to Whom Applicable</i> |
|---------------|---------------------|-------------------------------|------------------------------|-------------------------------------------|----------------------------------|
| West Virginia | 65                  | 16                            | 3/4 pay                      | 6%                                        | Supreme, circuit                 |
|               | 73                  | 8                             | 3/4 pay                      | 6%                                        | Supreme, circuit                 |
| Wisconsin     | 72                  | No minimum                    | (af,ai)                      | (av)                                      | Supreme, circuit                 |
| Wyoming       | 65                  | 18                            | 40% of salary                | None                                      | Supreme, district                |

- a) No compulsory retirement age.
- b) Because the Alabama and Oklahoma constitutions prohibit payment of pensions, retired judges serve as supernumerary judges and are subject to call to assist judges in their respective states.
- c) At age 60 if permanently and totally disabled.
- d) Failure of judges to retire at 70 causes them to lose all pension benefits in Arkansas and Minnesota, and at 73 in North Dakota. If retiring after age 70, judge's and widow's benefits are reduced in California. In New Mexico, a judge who does not retire at age 70 forfeits widow's benefits. In Maine, retirement must occur before 71st birthday, with 7 years service; in Massachusetts, within 30 days after reaching 70. Retirement compulsory at age 70 in Alaska, Connecticut, Florida, Hawaii, Illinois, Kansas, Maryland, Michigan, Nebraska, New Hampshire, New Jersey, New York, Puerto Rico, Vermont, Virginia (judges of courts of record) and Wisconsin, except that in Kansas and Michigan a judge may complete a term started before reaching 70. Retirement compulsory at age 72 in Iowa and South Carolina, and at age 75 in Missouri (judges of Supreme Court and courts of appeals), Oregon, Texas, Virginia (Supreme Court judges), and Washington. Temporary provisions for incumbents exist in Arkansas, Connecticut, Florida, Illinois, Iowa, Massachusetts and Texas. Retirement is optional at 65 in Nebraska and Vermont, at 55 in Wisconsin.
- e) Disabled judges in these states may retire on pensions at any age if they have completed the following number of years of service: Arizona, 5; Iowa and Oregon, 6; South Carolina and Virginia (when certified by Supreme Court, at 2/3 pay), 7; North Carolina, 8; Florida, New Hampshire, South Dakota, Tennessee and Washington, 10; Illinois, Minnesota (Supreme), and Utah, 12; Minnesota (District), 15. In Alaska, 2 years if forced to retire, 5 years in case of voluntary retirement; in Georgia disabled Superior Court judges may retire at 62 after 10 years' service; in Louisiana, at full pay after 20 years; if less, in proportion that years of service bear to 20, but 2/3 minimum. Retirement pension allowed regardless of length of service in Arkansas, California (at 65% of pay), Indiana, Kentucky, Maine, New Jersey (for Supreme and Superior Court judges, at full annuities), and Puerto Rico.
- f) Annuity is 4% of salary received per year of service; if payments start before age 65 for reasons other than incapacity, computed on actuarial basis.
- g) Or when age plus years of service equal 75.
- h) Two-thirds of salary after 20 years' service. If fewer years, proportion that years of service bear to 20.
- i) Retired judges, with their consent, may be assigned to any court in Arkansas, California and Louisiana; to the court from which they retired, in North Dakota; they may be called to serve as referees or commissioners in Missouri, and as emergency judges in North Caro-

lina. In North Dakota, they also are eligible to serve as referees in civil cases or judicial proceedings, if requested, they may serve as legal counsel in the office of the Attorney General, in any executive department, commission or bureau of the state, or for any committee of the Legislative Assembly.

- j) Pension is listed portion of salary being paid to sitting justices. Amount of pension changes with changes in salary, except that in Arkansas pension cannot be more than half of salary fixed by law on July 1, 1965.
- k) Options available for reduced annuities, with continuing annuities for surviving spouse and benefits to other named beneficiaries.
- l) Justices may elect to come under Public Employees Retirement System in lieu of above pension.
- m) Based on highest average salary during 5 consecutive years of last 10 years of service.
- n) In case of retirement after less than 10 years' service, retirement pay reduced proportionately.
- o) If not reappointed at end of 12-year term, eligible for pension upon reaching age 65.
- p) Judges between ages 55 and 60 with minimum of 10 years' service may retire and receive reduced benefits—the actuarial equivalent of retirement at 60 with 10 years' service.
- q) Judges retiring at age 70 or because of disability, who have served less than 10 years, are entitled to pension bearing the same relationship to full pension as their years of service bear to 10 years.
- r) Judges retiring voluntarily or by expiration of their terms prior to age 70 are entitled, after reaching 65, to pension bearing the same relationship to full pension as their years of service bear to 15 years.
- s) Plus 2-1/2% for each year in excess of 12 years' service, with a maximum of 60% of pay.
- t) During the first 18 years, 7-1/2% (plus 2-1/2% if married); thereafter, 2-1/2% if married.
- u) Judges must contribute to pension system for 16 years. Can retire after 12 years by paying up for remaining 4 years.
- v) Pension is 50% of average salary received from state but not more than \$4,800.
- w) State pays 5% of salary but not to exceed \$500 annually nor payable for more than 16 years.
- x) Annuity is 3% of average basic salary for last 3 years multiplied by years of service in one or more of the courts covered.
- y) Annuity is 5% of average compensation during last 5 years of service multiplied by number of years of service, not to exceed 100% of final compensation.
- z) Equal to annuity upon retirement at age 65 if judge elects to have payments commence at age 65; if earlier, reduced actuarially.
- aa) Proportion of salary which years of service bear to 20.
- ab) Service need not have been on court of record.
- ac) For each year of service, \$750. Judges of Court of Appeals allowed \$100 additional for each year of service up to \$13,600.
- ad) Plus 2-1/2% of annual salary for each year in excess of minimum service, but not exceeding 75% of salary.
- ae) Contribution of 4% to widows' pension fund.
- af) Mississippi, Montana, New Hampshire, New York, Ohio and Wisconsin—based on length of service. In Mississippi, top retirement pay of 50% of salary after 30 years of state or local public service.
- ag) Based on average salary for the 5 years preceding retirement.
- ah) Depending on age. In Pennsylvania, also on other factors, including length of service as judge, previous nonjudicial state employment, average of salary of best 5 years and retirement plan selected.
- ai) Also under Social Security.



- aj) Integrated state retirement system and O.A.S.I. Judges contribute to retirement system 2.81-5.49% on salary of \$1,200-\$4,200; 5.62-10.98% on salary in excess of \$4,200.
- ak) For each year between 65 and 70, required years of service reduced by 2. If upon retirement required minimum years not completed, annuity reduced in proportion that years of service bear to required years of service.
- al) On a commuted basis.
- am) Judges who cease to hold office before attaining age 65 and who have served for an aggregate of 16 years may receive pension at 65.
- an) No minimum age required for pension if retirement is for reason of disability, or after 22 years of creditable government services, if last 8 years were as judge.
- ao) Annuity is 25% of average salary plus 25/72 of 1% of said average salary for each month of creditable service in excess of 10 years. Creditable service includes services rendered as judge or to the government of Puerto Rico in any capacity if last 8 years were as judge.
- ap) Any person who, on January 16, 1956, was a justice of the Supreme or Superior Court and has served as a justice on either or both courts for 25 years, or for 15 years and has reached 70, may receive a sum equal to salary at time of resignation.
- aq) Actuarially determined.
- ar) In addition to Social Security. Plus 3-1/3% of salary for each additional year of service above 12, up to full pay after 30 or more years of service.
- as) Depending on age upon taking office; Virginia, under 40, 2%, to 55, 2-1/2%, over 55, 3%.
- at) For additional years of service, 1/18 of full salary allowed per year, up to 75% of salary at time of retirement.
- au) In proportion that years of service bear to 18.
- av) Annuity is 5% of compensation under \$6,000, 7% in excess of that amount. In addition, judges may contribute up to \$2,000 in 1 year.
- aw) Reduced by 1 year for each full year by which judge exceeds age 70 at time of retirement (minimum 6 years).
- ax) If less than 18 years' service, pension reduced in proportion number of years of service bears to 18, with adjustment for situation described in preceding footnote.

tiement duty. The problem could be relieved considerably by granting the power to assign retired judges to a group of persons, such as the entire Supreme Court, rather than to a single individual.

intermittent judicial service by a highly competent retired judge is less satisfactory than having full and regular use of his services. This argument is directed more against mandatory retirement at a fixed age than against post-retirement service as such. Nonetheless, it might be argued that the skills and talents of the most able judge will soon become diminished when exercised irregularly. The adage that practice makes perfect applies to judicial skill as well as to other arts.

post-retirement service should be limited to judicial tasks less demanding than regular trial work. This argument is a corollary of the preceding argument that judicial skills will diminish when employed intermittently. Some jurisdictions authorize retired judges to serve only as masters, referees, or arbitrators.

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### Notes to Part VI

1. Major, J. Earl, "Why Not Mandatory Retirement for Federal Judges?," 52 Am. Bar Ass'n. Jour. 29 (Jan. 1966), p. 30.
2. See §6 *infra*.
3. *Ibid*.
4. *Ibid*.
5. Pa. Const. Art. V, §2.
6. See Part V, §2.2 *supra*.
7. 71 P.S.
8. 71 P.S. §§1725-101 - 1725-809.
9. See Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," (Institute of Legal Research, University of Pennsylvania Law School, Philadelphia, 1962), pp. 76-9 for the information contained in the textual paragraph.
10. See Major, J. Earl, *supra*, Note 1; Shartel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. 133 (December, 1936), p. 136.
11. See Part V *supra*. See also 5 *infra*.
12. See 6 *infra*.
13. See Annex Number 6.
14. See "Summaries of Judicial Salaries and Retirement Plans," 49 Jour. Am. Jud. Soc. 168 (Feb., 1966) for information in textual paragraph concerning other jurisdictions.
15. Pa. Const. Art. V, §2.
16. Section 6, Par. 2. See Annex Number 6.
17. Proposed Judiciary Article, §11(b). See Annex Number 5. See also Report of the Governor's Commission on Constitutional Revision (1964), §9 (b) found in Annex Number 9.
18. Shartel, Burke, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. 133, 138 (December, 1936).
19. Section 6.04(c). See Annex Number 7.
20. Art. VI, §18 (d).
21. Art. VI, §22 (c).
22. See Table I—Methods for Removal of Judges and Filling of Vacancies, which is part of Statistical Summary of State Court Systems (July, 1966) prepared by the Council of State Governments. See also Schulman, Sidney, "Toward Judicial Reform in Pennsylvania," p. 79 n. (University of Pennsylvania Law School, Institute of Legal Research, Philadel-

phia, 1962). Among the jurisdictions which appear to have a procedure similar to the one described are the following: Alaska, Hawaii, Minnesota, New Jersey, and Oregon.

22. N.J. Const. Art. VI, §6, ¶5.
23. Section 6, Par. 3. See Annex Number 6.
24. See Part V., §2.2 *supra*.
25. See "Summaries of Judicial Salaries and Retirement Plans," 49 Jour. Am. Jud. Soc. 168 (Feb., 1966).
26. Model State Judicial Article (1962), Section 6, Par. 2. See Annex Number 6.
27. Proposed Judiciary Article, Section 11(b). See Annex Number 5. See also Report of the Governor's Commission on Constitutional Revision (1964), Section 9(b), Annex Number 9.
28. Model State Constitution (1963), Section 6.04(c), Annex Number 7.
29. Art. V, §15.
30. Act of Aug. 31, 1966, P.L., 17 P.S. §§790.101 – 790.106.
31. 17 P.S. §§790.107.
32. 17 P.S. §§790.108.

## *Judicial Administration*

### §1. Court Congestion and Delay

The reasons behind our present "law explosion" have been well stated by former Mr. Justice Tom Clark:

*A widening of our horizons in science, medicine, transportation and communication—coupled with a modern interpretation of old rights—has brought out a rash of new disputes among and between men as well as with and between governments. . . . This explosion has bombarded the courts with an unprecedented increase in litigation . . . As a result, the dockets of our metropolitan courts are now congested to the saturation point . . . Murmurings of dissatisfaction sometimes break into the open resulting in spasmodic demands for modernization . . . and increasingly the accusing finger is pointed at the court itself and the judge who presides over it.*

The courts, being one of the keystones of the social edifice, have been affected deeply by the revolutionary changes of this century. The world is now a very small planet; familiarity breeds friction as well as contempt. The rising expectations of minority groups, accompanied by renewed realization of their rights, is another example of the new social pressures upon the courts.

The courts themselves, by broadening their interpretations of constitutional rights, have opened the gates to a flood of appeals. The consequence of *Gideon v. Wainwright*<sup>2</sup> (involving indigent defendants' right-to-counsel in all criminal prosecutions) will be felt for many years. The recent Supreme Court decision<sup>3</sup> extending right-to-counsel to juvenile court hearings will be a further demand upon judge and lawyer time.

The practical effect of crowded court calendars is dramatic. One report on the status of personal injury cases in trial courts of general jurisdiction showed that the time lapse from service of answer until trial may be as high as thirty months in one court and sixty months in another.<sup>4</sup>

In 1965, the Eastern District of Pennsylvania had a backlog of 6,000 cases and a median trial delay of forty-one months.

The concrete impetus toward New York court reform began when the numerical rise in litigation (primarily highway accident claims) succeeded in strangling court proceedings. It was apparent that the courts were unable to cope or to invent new ways to deal with common lawsuits. One New York study revealed that out of 193,000 accident victims seeking recovery each year, only 2,500 received a verdict.<sup>5</sup> New York State Judicial Conference figures show that in the Court year 1963-64 there were 228,684 "retainer statements" filed in negligence cases but only 3,437 jury verdicts.<sup>6</sup> In New York city only about two percent of the personal injury claims are ever reduced to judgment by any court.<sup>7</sup>

Other statistics are equally telling. The backlog in Texas is over 212,000 cases while litigants in the circuit court, Cook County, Illinois, wait almost 6 years from filing to trial. In Ohio, pending civil cases totaled 46,741 in 1962; two years previously the total was 'only' 2,700.

The total backlog in all federal courts from 1962 to 1965 increased from 64,000 to over 74,000 cases.

No one questions that the backlog situation is indeed crucial. The problem is how to resolve the dilemma in an equitable and efficient fashion. Various remedies have been proposed and acted upon, with the usual varying results.

## §2. Present Operating Remedies for the Delay Problem

§2.1. *Additional judges.* At first glance it would seem that simply increasing the number of judges would solve the problem of court congestion. However, Federal court experience indicates that adding more judges often is not the answer. In 1959 the federal district courts terminated 62,000 civil cases. Sixty-three judgeships were added in 1961. In 1964, however, the total number of cases handled was only 64,000. This represents a 25% increase in manpower with a 3% return on case disposal.<sup>8</sup>

The federal courts, by applying the remedy of more judgeships, has been unable to handle the avalanche of judicial business.<sup>9</sup> The 1965 Judicial Conference of the United States recommended to Congress the creation of forty-two new judgeships but Chief Justice Warren and others have commented that experience has shown that more judges alone will not solve the problem.<sup>11</sup>

The quick solution of adding judges to the courts to hear the increasing number of cases and thus avert delay in both appellate and state courts has been resorted to in many states. In 1965 twelve states created additional permanent appellate judgeships.<sup>12</sup> Connecticut increased its superior court judges from twenty-seven to thirty-six.<sup>13</sup>

New York now has one-hundred and seventy-two Supreme Court [trial court of original jurisdiction] trial judges, an increase of twenty-five judges since 1960.<sup>14</sup> The 1964 Administrative Board of the New York Ju-

dicial Conference report had requested sixteen additional supreme court judges. Forty-five new Trial Judges had already been provided between 1954 and 1965. In addition, twenty-one New York City County Court judges became Supreme Court (Appellate Division) judges.

The Pennsylvania Bar Association's proposed judiciary article, Section 3 (a) would add two Superior Court judges to the present seven. The proposal makes no recommendations concerning additional trial court judges, presumably because several recent Acts provided for additional judges in those judicial districts where common pleas courts were in need of additional manpower.

Observers differ on the sufficiency of adding either appellate or trial judges as a remedy to minimize delay.<sup>15</sup>

§2.2. *Assignment of Judges.* A prime virtue of empowering the Chief Justice to assign judges, it is claimed, is that reorganization of the entire court system is unnecessary to an effective program of assigning judges. A popular plan involves the transfer of judges from underworked to over-busy courts. This is often impractical and difficult for judges when they are transferred across the state from rural to urban areas. In New Jersey<sup>16</sup> many judges are assigned for service outside their respective counties of residence in addition to judges transferred from court to court within the same geographical area.

An attractive and sensible method of reinforcing the ranks of the judiciary has been found in the reinstatement of former judges. It would certainly seem wasteful not to utilize the services of those retired judges still competent and eager to serve.

Until 1966,<sup>17</sup> Pennsylvania had provided only for the assignment of common pleas judges from one court to another upon request by the president judge or by a majority of a common pleas court in need of services. The Pennsylvania Chief Justice is now empowered by the Constitution<sup>19</sup> to assign retired judges<sup>18</sup> learned in the law to sit in the courts of any judicial district. The President judge of any court of record may request the chief justice to assign a former judge to his court.

The Pennsylvania Bar Association proposed Judiciary Article V, Section 14 (a) would give the Supreme Court the authority to temporarily assign Judges from one court or district to another, but in those districts having populations over a half a million a Judge of the district, estates or community courts shall not be assigned without the consent of the President Judge of his court.

§2.3. *Division of Appellate Courts.* Provisions for members of a court to sit in divisions (in conjunction with adding judges) has proved to be effective in many jurisdictions. According to a 1957 study,<sup>20</sup> twelve states authorize their Supreme Court to sit in divisions; only ten actually use the auth-

orization. All ten divide the court into two divisions—some for all cases (except rehearings for the entire court)—and some<sup>21</sup> for all cases with the exception of those cases deemed worthy of full court consideration.

The Pennsylvania Bar Association's Proposed Judiciary Article, Section 3 (a) adopts the concept of divisions in recommending that the Superior Court act in panels of three or more judges.

Dean Roscoe Pound argued strongly in favor of appellate courts of no more than three judges.<sup>22</sup> His theory holds that a trio of judges would maximize the use of available time and would avoid the tendency toward one-man decisions.

The divisional system has drawbacks, however. There is a real chance for inconsistent opinions from different divisions of the court—though Missouri's experience<sup>23</sup> has been that such occurrences are minimal. Also, the division system may tend to increase the number of applications for rehearings since provision is made for rehearing before the entire court. An added danger is that this system can result in the creation of two appellate courts instead of one. The latter problem can be avoided, however, by rotating the judges between the two divisions.

The most devastating argument against the division system seems to be as set forth by former Chief Justice Dethmers of Michigan.<sup>24</sup> His thesis is that matters of transcendent importance to the people, presented to courts of last resort, should receive the composite judgment of more than just a division of such a court.

§2.4. *Arbitration.* Arbitration is a procedure for settlement of controversies by which the parties to a dispute may, by contract, submit their differences for determination to a tribunal of their own choosing or by statute, or rule, be forced to submit their differences to a statutorily designated body. The tribunal may include a law court if the law allows it.

Prior to 1952 arbitration in Pennsylvania was governed basically by an 1836 statute<sup>25</sup> which provided for both voluntary and compulsory submission to reference of any question without limitation as to jurisdictional amount. The Act was found to be a way of discovering evidence in that a party could find the weaknesses and strength of his opponent's cause. As a result the Act was repealed in 1861<sup>26</sup> in so far as applicable to Philadelphia County and fell into disuse throughout the state.

A 1951 amendment<sup>27</sup> to the Act provides that the courts of common pleas and the County Court of Philadelphia can adopt court rules to establish both compulsory and voluntary arbitration (except in cases involving title to real estate) where the amount in controversy is under two thousand dollars. The County Court of Allegheny County was covered in 1959.<sup>28</sup> Usually, the arbitrators are three members of the bar of the court in which the case is pending—appointed by the prothonotary from a list of attorneys who are qualified to act as arbitrators.

The operation of the 1951 Act appears to have been successful. In nineteen of the thirty counties which have enacted local rules for putting the statute into effect from July 1 to December 1954 there were 585 cases tried by arbitrators under its provisions. Of this number only thirty, or five per cent, were appealed to the common pleas courts.

Philadelphia County Court adopted local operating rules in 1958 and one commentator<sup>29</sup> reports that of the 48,045 cases processed from February 17, 1958 through December, 1965 only 3,055 cases, or seven per cent, were appealed to the county court. In reviewing 804 appeal cases, the court upheld 275 decisions by the arbitrators, modified 42 cases, settled 279 cases, reversed 139 and non-suited nine cases.

One Pennsylvania Judge who is ardently in favor of increasing the use of arbitration has proposed a plan (The Diggins Plan) for *all negligence litigation* to be heard *initially* by a board of three arbitrators, one lawyer and two "blue ribbon" laymen in a manner similar to a board of view in an eminent domain proceeding. The right to appeal and a hearing *de novo* before a jury would be preserved. Judge Diggin's plan favors no jurisdictional limits inasmuch as personal injury litigation involves unliquidated damages.

The constitutional problem under the 1951 Act, of whether compulsory arbitration deprives litigants of the right to trial by jury, was resolved in favor of the act by the Supreme Court in *Smith's Case*.<sup>31</sup> The *Smith Case* held there was no denial of right to trial by jury where each party is allowed an appeal from the decision of the arbitrators or other tribunal. In that case, Chief Justice Stern<sup>32</sup> explained that the reasoning behind the Act of 1951 was to enlarge the scope of the 1836 Act by innovating a new procedure for the adjudication of minor claims and in so doing presented a number of arguments in support of compulsory arbitration:

- it meets the situation where jury lists are clogged and trials delayed for long periods.
- it removes smaller claims from lists and speeds up trial of actions involving larger amounts.
- it makes for immediate disposition of smaller claims.
- it frees the court for speedier performance of functions.
- it saves claimants time and expense through greater flexibility in meeting with arbitrators.

Detractors from compulsory arbitration systems make several critical observations:

- arbitration proceedings may be an admission of defeat on the problem of judicial administration and the use of courts as a peaceful forum.
- they are a retreat from the jury system in the first instance in spite of the preservation of the right to appeal from the arbitration board's decision.



it can be argued that the denial to regular court proceedings, in certain instances, is a denial of due process.

Some observers wonder if we haven't opened the door to "street-corner" justice since arbitrators are the final judges of both law and fact. Unless their decisions are plainly and grossly against the law, or clearly erroneous, they will not be reviewed or set aside.

### §3. The Need for Autonomous Court Administration.

Since the rapid rise in interest in improving court operations as a partial means of resolving the dilemma of court congestion and delay, there has been increasing support of autonomy in court administration. Quite naturally, most judiciary officials are in agreement that the job of administering the court's budget, routines and personnel functions should lie solely in the hands of the courts themselves. On the other hand, the state Legislatures, concerned primarily with court appropriations tend to automatically commit fiscal control to the customary branch of government charged with that function—the executive branch. Organizations concerned with protecting the rights and interests of the judiciary have begun to double their efforts, at thwarting non-judicial control of judicial administration.

At the 1966 Conference of Chief Justices a resolution was adopted<sup>34</sup> setting forth a number of principles which, if followed, would insure judicial administrative independence from the executive branch. This guaranty is thought to be absolutely essential to effective judicial services. The Conference resolution set forth the primary principle that courts should be entrusted to regulate the expenditure of all funds allocated to them, subject to general legal controls, but free of executive branch administrative direction. This resolution also proposed that the courts full responsibility for supervising their employees, and authority to hire and fire employees, should also vest in the courts.

The problem will continue to arise wherever there is a conflict between the state constitution providing that the judicial branch of government is to be independent, and a state statute authorizing executive control of the court system's budget and administrative matters.<sup>35</sup> United States Supreme Court Associate Justice Wm. J. Brennan, Jr., has urged that the responsibility for establishing necessary policies and procedures for processing cases should be in the judicial branch. He analogizes the operation of courts to the job of running a business, and therefore only the courts themselves can knowledgeably establish policy and procedures.<sup>36</sup>

The basic structure for complete self-administration of the courts is already established in the rule-making powers of the Pennsylvania Supreme Court,<sup>37</sup> though they may be overruled by legislative enactment. The Rule-Making Power proposal of the Maryland Constitutional Convention Commission<sup>38</sup> would probably obviate future squabbles between the judiciary and the legislative and executive branches. It provides:

1. the Supreme Court and the General Assembly are to have concurrent power to prescribe regulations governing administration of the courts.
2. in the event of conflict between a law and a Supreme Court rule, the latter is to prevail as to the conflict if the rule is readopted after the law.

#### **§4. The Role of a State Court Administrator**

Many states have vested administrative control of the state court system in the court of last resort or in its chief justice, with the power to appoint an administrative assistant,<sup>39</sup> commonly known as the court administrator or administrative director. His role in managing court business was the subject of a 1948 Model Court Administration Act [See Annex No. 12] and varies according to court needs, but primarily consists of:

- collecting and interpreting statistical data from all courts of the state system.
- preparing court budgets.
- acting as purchasing agent for the courts.
- assigning judges.
- acting as liaison between the courts and the legislature and the public.
- planning and improving court procedure.

Pennsylvania has no integrated court system, in spite of divided fiscal responsibility for the courts between the state and local political subdivisions, no judicial council and mainly statutory judicial record keeping. A state court administrator would be hard-pressed, without extensive statutory changes to fulfill his functions.

#### **§5. Four Systems of Court Administration**

Four systems for using the practical office of court administration have been developed. In the order of their appearance below, these:

- (1) vest the Chief Justice of the highest state court with administrative responsibility and have him appoint an Administrative Director to operate an office for the benefit of all the courts in the system.
- (2) vest the Chief Justice with administrative responsibility and have him appoint one judge of each court in the system to be the Administrative Judge for that court, ultimately responsible to the Chief Justice.
- (3) have each trial court appoint a trial court administrator.
- (4) use any combination of the three methods.

The Pennsylvania Bar Association proposed Judiciary Article V, Section 14 (a) would give the Supreme Court the authority to temporarily assign Judges from one court or district to another, but in those districts having populations over a half a million a Judge of the district, estates or community courts shall not be assigned without the consent of the President Judge of his court.

§5.1. *State Court Administrator.* Pennsylvania's court system has no administrative head and no administrative officer. In twenty-nine states,<sup>40</sup> and for the federal courts,<sup>41</sup> an administrative director has been appointed as staff assistant to the chief justice. The average salary paid to a state court administrative director in 1966 was \$16,741. [See Annex No. 11] for a comparative state salary chart for this office.

The American Bar Association model state Judicial Article, Section 8<sup>42</sup> envisions the Chief Justice as executive head of the judicial system, vested with the power to appoint an administrator responsible for court budgets, personnel supervision, scheduling cases and related matters. In New Jersey, the Constitution<sup>43</sup> so provides.

The Model Act to Provide an Administrator for the State Courts<sup>44</sup> set out in [Annex No. 12] is based upon federal court experience. It provides for the creation and operation of a State Office of Administrator of Courts with a head administrative director appointed by the highest court to act full time for a fixed salary. The director, acting under the supervision of the Supreme Court, appoints necessary assistants and makes recommendations for improvement of the judicial system. Generally, the latter will include revising court business methods, compiling statistical data, preparing budget estimates and consultation with court officials. Judges and other officers are explicitly to comply with the director on all requests for information and statistical data relative to the courts.

§5.2. *The Administrative Judge.* The designated judge already on the bench is responsible for exercising administrative supervision over assignment of individual judges as to case and courtroom, maintaining motion, jury and non-jury trial lists and establishing necessary procedures for the court. In Pennsylvania in counties having more than one Court of Common Pleas the Chief Justice may appoint one of the judges as Administrative Judge of the criminal courts. This is applicable only to Philadelphia since that county is the only one having more than one Court of Common Pleas. In the other counties the presiding judge is the administrative judge of the criminal courts subject to the administrative direction of the Chief Justice.<sup>45</sup> Itemized Supreme Court rules of administrative responsibility pertain in Philadelphia Common Pleas Courts, the first judicial district, and will pertain in any judicial district which in the future has more than one court of common pleas.<sup>46</sup>

In the larger counties, the administrative judge has little time to devote to the purely non-judicial business of the court, and in the absence of a state court administrator or a trial court administrator, it is he, along with the clerk of courts, the prothonotary, the register of wills and the politically elected or appointed clerks who manage the court's business. The administrative judge in each county may appoint one or more administrative directors<sup>47</sup> to assist him and to serve at his pleasure. The Pennsylvania Bar Association

Article V, Section 4(a) provides that the President Judge of each judicial district would supervise the court's judicial business, under the direction of the Chief Justice or his deputy Associate Justice. The latter provision is in keeping with those states which envision the Chief Justice as head of the system, with administrative judges already on the benches as the drones.

The Maryland Constitutional Convention Commission<sup>48</sup> proposal (Article V, Section 5.26 and 5.27) adopts the practice of making the Chief Justice of the Supreme Court the sole administrative head of the judicial system, but the Superior Court chief judge is the chief administrative judge. There is no provision for an administrative director; rather, one appellate court judge, one Superior court judge and one District Court judge are to be appointed chief judges (administrative only, and not to be confused with any chief justice) of their respective courts for the purpose of assisting the Chief Justice, as follows:

appellate Court chief judge assists the chief justice in administering the Appellate Court.

superior Court chief judge assists the chief justice in administering the judicial system as a whole and performs any duties assigned to him.

district Court chief judge assists the chief Judge of the Superior Court in the administration of the District Court.

Maryland is considering a unified court plan which would convert the present county circuit courts and orphans courts, comparable to Pennsylvania Common Pleas courts and Orphans courts, into superior courts.

§5.3. *The Trial Court Administrator.* A recent study<sup>49</sup> of 95 trial courts (defined as four or more judges for purposes of the study) disclosed that sixteen had established a position of Trial Court Administrator.<sup>50</sup> The best definition of this position available may be the job description by the National Association of Trial Court Administrators, which has established the following standards for membership:

the officer must serve a trial court and be the principal administrator appointed by the court.

the officer should be able to provide administrative personnel, financial, physical plant, information, intergovernmental relations, statistical systems and procedures analysis, case calendar management services and jury administrative services

The position may be created either by statute, a local trial court rule or order, or by the local governing body. The first Pennsylvania trial court administrator was appointed for the Court of Common Pleas of Delaware County<sup>51</sup> in 1950. Since 1965, the Pennsylvania administrative judges have been empowered to appoint an administrative director for their courts of common pleas.

§5.4. *Combined Court Administration.* New York's Administrative Board plan, in practice since 1962, seems an attempt to draw from all possible court administrator systems. It vests the responsibility for administrative supervision of its unified court system in the Administrative Board of the Judicial Conference. The board, by constitutional prescription, consists of the chief judge of the Court of Appeals as Chairman, and the presiding justice of each of the four Appellate Divisions. The Court of Appeals is the court of last resort in New York; the appellate divisions are intermediate appellate courts. The Board has a state administrator and sets the standards and administrative policies for the courts of the state, while the four Appellate Divisions have directors of administration who help supervise the operation of the courts in their departments.<sup>53</sup> The Appellate Divisions have the power to transfer cases, judges and non-judicial personnel from one court to another. A noteworthy fact, however, is that the Appellate Division may also designate an administrative judge to supervise those courts and delegate their administrative powers to him. The New York Administrative Board is empowered to set state-wide standards and policies governing the qualifications, appointment, promotion and removal of non-judicial personnel within the court system.<sup>54</sup>

There is a rather divided body of opinion on the use of the New York Administrative Board.

*Pro Comments.*

the plan strikes the right balance between central direction and local adjustment needed there.

the courts are too numerous and the state too diverse to permit completely centralized administration, so the plan avoids local discretion and non-uniformity concerning the courts and lessens inefficient use of resources.<sup>55</sup>

the plan is superior to a centralized administrative board, no matter what drawbacks are encountered.

*Con Comments.*

the board is deficient in practice as the contemplated reductions in judicial delay have not materialized. Some of the Appellate Divisions have not mobilized their resources to aid the others.

this administrative system intrudes on the "judicial time" which should be free of administrative burden.

the division of the board's power to set standards and the Appellate Divisions' power to supervise is unworkable as it defeats efficiency and uniformity of practice.

the state administrator has no authority or control over any of the deputy administrators.

Any number of changes in responsibility and delegation of supervision obtain: concentration of administrative authority in the Administrative Board or in the Chief Judges is one problem. More basic consideration fac-

ing New York is whether or not the administrative provisions should be in the constitution, as any future changes might better be left outside a constitutional referendum in order to facilitate administrative change. Opponents argue that the judiciary needs immunity from legislative domination.<sup>57</sup>

The Institute of Judicial Administration Proposed Judiciary Article, Section 10,<sup>58</sup> reverses New York's present system by making the Chief Judge of the Court of Appeals the head authority over the Board for administration of the judicial system with complete power of appointment of the administrative director and places the Judicial Conference, of which he is a member, in an advisory capacity. The Institute's reasoning centers around the impossibility of handling day-to-day court business pending a meeting of the Administrative Board of the Judicial Conference which meets only periodically.<sup>59</sup>

#### **§6. Views Concerning Judicial Administration**

It is argued that deep rooted causes for the roadblocks to court reform must be laid in the first instance to outmoded constitutional and statutory provisions creating overlapping court jurisdictions which draw out proceedings and frustrate justice. Insistence on unification of all courts into a simplified and unified structure of a few courts has been asserted to be a condition precedent to effective judicial administration.<sup>60</sup> The adoption of court administrators with or without court reorganization is viewed by some as a practical stopgap against a further backlog of cases. Many judges oppose any creation of a court administrator or office of court administration fearing that it would mean:

- loss of judicial independence,

- a demeaning status of the judge in having to report on his judicial activities,
- a state administrator would be informing judges on local needs of which they think they are already aware,

- an additional administrative hierarchy is created when a state administrator is appointed,

- statewide supervisory assistance to small local courts which do not need it.<sup>61</sup>

Sidney Schulman has outlined eight contributions<sup>62</sup> a state administrator could make to the Pennsylvania court system:

- obtain the necessary operational statistics in order to determine the extent to which judicial manpower is not being fully utilized;

- aid in determining the need for the continual demand for more judges;

- evaluate and suggest improvements in the internal procedures and administration of the courts;

- examine and channel to the courts the newest techniques in combating delay and congestion;

as executive secretary of a proposed judicial conference, breathe new vitality into that body and give it continuity throughout the year;

through monthly information bulletins, break down the parochialism of the separate judicial districts, and give the judges a sense of kinship so necessary to an integrated system;

supervise and improve the administration of Justice of the Peace courts, if they are retained;

act as spokesman for the courts on the need for improvement in judicial administration.

Not spelled out in this list is the need for one office to oversee county judicial budgets and requests for appropriations to the court system as a whole.

The Pennsylvania Bar Association is strongly in favor of a state court administrator and administrative judges under the Chief Justice as covered in Sections 5.1 and 5.2 *supra*. Judge Biggs of the third circuit Court of Appeals has stated that on the federal level "The answer to an ever increasing number of federal judges is an improvement in administrative techniques, both in the handling of cases in court when they are before the judges and in the business . . . of getting cases before the judges." <sup>63</sup>

The first recommendation of the 1965 American Assembly was that states adopt a statewide unified court system, "with effective administrative management to coordinate and supervise judicial business and all related aspects of law administration. Centralized authority and responsibility should be established. . . ." <sup>64</sup>

## **§7. Electronic Data Processing as an Aid to Court Administration**

Almost all solutions operating to thwart court delay are based either upon "more of the same" (judges or courts) or shortcuts which may be said to bypass the judicial process (conciliation conferences or arbitration boards). If these efforts have not been particularly successful to date, the reason may lie in the need for new technology in conjunction with them. Advocates of the use of electronic data processing in the courts point out that the problem has not been attacked at its source and that the crux of the administration problem is not manpower, time or money, but communication.

Ordinarily courts do not have detailed facts about their day to day court business readily available. Judicial records are still hand-posted in bound ledgers. Docket information is not organized in such a way that one can get a handle on a particular case. The judge has difficulty in quickly locating those cases bogged down by lawyer inspired delay or those that might be settled quickly with a little nudging.

The present method of record-keeping lends itself readily to automation. In civil courts, all documents relating to an action are filed in one place,

usually with the Clerk of Court. Almost all of the records in the office are filed or internally arranged by case number; therefore, a Plaintiff's or Defendant's Index that links parties' names to case numbers is maintained. Short of computer assistance, some courts have consolidated their civil, jury and non-jury trial lists. Philadelphia Common Pleas courts <sup>65</sup> use a criminal case list with major cases denominated as such. A simple computer could make differentiations in priorities automatically.

The civil docket, rather than being posted by hand *seriatim* in a ledger, can be prepared for computer storage and subsequent retrieval. All significant events of a case and its status as of the moment can be coded and key-punched on data cards which could then be fed into the computer under a case number. They would also be stored there, relieving the overcrowded courthouse storage area. Daily and monthly cumulative docket summaries can be printed.

For administrative purposes, a computer can produce statistical reports from the docket, indicating dead cases for dismissal on motion, abuse of continuance requests, flagrant delay of cases, and the sheer quantity of cases pending before the court. Allegheny Court of Common Pleas uses data processing procedures and punchcard system by which all relevant information about each personal injury case is transcribed onto a card. The status of the case and statistical use are immediately available once the card is placed in an indexed card sorter. <sup>66</sup> One county probate court in Missouri uses prepunched cards to prepare court minutes and to do clerical recording of three-hundred items pertaining to estate cases. The same court did a detailed computer analysis from information already on hand as to the effect of any statutory change on the court fee structure. <sup>67</sup>

In spite of backlogs, courts often stand empty because of manual assignment of judges and the reference of cases to courtrooms which may or may not be used because of conflicting lawyers schedules. Proponents maintain the use of a computer could help construct daily calendars free of conflicts. The status of current trials, courtroom utilization and settlements can be matched against attorneys' commitments and readiness in order to compose a workable schedule.

The criminal calendar, in greatest need of non-obstruction, is most difficult to maintain as documents are filed in various departments: police, district attorney, jail, hearing magistrate, etc. The Superior Court of Los Angeles County has used automation to assist clerks in keeping criminal records and to enable the jury division to operate more efficiently in the selection of jurors. <sup>68</sup>

#### §8. Judiciary Costs.

The cost of justice to the American public is four to five billion dollars per year, sixty percent of that goes for police protection and prosecution,



twenty per cent for court support, and, twenty per cent for correction. State governments spent one hundred forty million on their judiciary in 1964. Under ten per cent of all county and municipal expenditures goes to support the judiciary. Much of the revenue for court support comes in the form of litigants' fees, established fees and fines. All state governments received a combined forty-nine million dollars from fines and bail forfeitures in 1964.<sup>69</sup>

In Pennsylvania, as in most states, there is divided fiscal responsibility for courts between the state and local political subdivisions. Three methods of paying judicial costs are:

- (a) direct payments by the State,
- (b) payments by the State which are charged back against the State aid allocated to the local governments; and
- (c) payments by counties and localities through local taxation.

As a result, it is extremely difficult to determine the total cost of the court system, difficult to allocate financial responsibility and to plan budgets. Because many appropriations are in part local, uniform services in the courts are difficult to achieve.

The absence of good budgeting for the Judiciary and by the Judiciary is, in fact, a basic hindrance to judicial reform. With judges concerned with their own courts there is no time for them to evaluate the needs of the entire judicial system. As a result inadequate courthouses, court systems and libraries obtain. Some observers considering unification of court systems are convinced that for the courts to work efficiently as a whole there must be a single, state-wide budget unified and centralized under a state court administrator or administration board<sup>70</sup> with *all* costs borne by the state.

Many believe that the quality of justice the public receives ought not to depend directly upon how much it costs the government to administer the court system. It is a fact of life, however, that the amount of available funds does impose some limitation upon the manner in which justice is administered—the number of judges to be employed, their salaries; how many bailiffs, court reporters, clerks, and secretaries will be hired.

All citizens support the court system through taxes. Once the taxpayer becomes a litigant he is often required to pay again.

Cost is a primary consideration. Salaries of the judiciary, appointed and elected officials, and the expenses of the county in administering the system are known, but the real allocation of funds from state and county to court expenses is difficult to determine.

§8.1. *Judicial Salaries.* There are seven judges each for both the Pennsylvania Supreme and Superior Courts and two-hundred forty-seven lower court judges. In Pennsylvania all salaries of judges learned in the law are set by statute and paid by the state. Effective January<sup>71</sup>, 1967, the sal-

aries of all appellate and general trial court judges in Pennsylvania were established as follows:

|                                           |                      |
|-------------------------------------------|----------------------|
| Supreme Court                             |                      |
| Chief Justice.....                        | \$38,000             |
| Associates.....                           | 37,500               |
| Superior Court                            |                      |
| President Judge.....                      | 36,000               |
| Associates.....                           | 35,500               |
| Court of Common Pleas.....                | \$26,500 to \$32,500 |
| County Court (Philadelphia and Allegheny) |                      |
| President Judge.....                      | 28,000               |
| Associates.....                           | 27,500               |
| Orphans' Courts.....                      | 26,500 to 30,000     |
| Orphans' Courts in Dauphin County.....    | 32,500               |
| Juvenile Court (Allegheny County).....    | 27,500               |

Associate Judges not learned in the law receive nine dollars per day for days so employed. By law no associate judge's salary shall be less than one thousand eight hundred dollars annually.<sup>72</sup> All president judges of each court receive an additional five hundred dollars per year.<sup>73</sup> Whenever a judge learned in the law is assigned to assist in another judicial district he receives fifty dollars per day and traveling expenses.<sup>74</sup> Aside from that of New York, the Pennsylvania judicial salary scale is now the highest in the country. From the table<sup>75</sup> below it is evident that Pennsylvania is a leader among the high paying states in this obvious method of attracting able men for judicial positions.

|              | <i>Highest Appellate</i> | <i>Intermediate Appellate</i> | <i>General Trial</i> |
|--------------|--------------------------|-------------------------------|----------------------|
|              | <i>1965</i>              | <i>1965</i>                   | <i>1965</i>          |
|              | <i>Salary Survey</i>     | <i>Salary Survey</i>          | <i>Salary Survey</i> |
| California   | \$32,000                 | \$30,000                      | \$25,000             |
| Florida      | 24,000                   | 23,000                        | 19,000 to<br>22,000  |
| Illinois     | 37,500                   | 25,000 to<br>34,500           | 20,000 to<br>29,000  |
| Michigan     | 25,500                   | 23,000                        | 15,000 to<br>29,000  |
| New Jersey   | 31,000                   | 27,000                        | 27,000               |
| New York     | 39,500                   | 33,500 to<br>41,500           | 31,500 to<br>37,000  |
| Ohio         | 24,000                   | 21,000                        | 9,500 to<br>20,500   |
| Pennsylvania | 37,500                   | 35,500                        | 26,500 to<br>32,500  |
| Texas        | 24,000                   | 20,000                        | 16,000 to<br>24,000  |

New York's Appellate Division (Intermediate) Judges receive \$33,500 to \$41,500, a higher top compensation than even that of the New York

Court of Appeals justices. As the state court of last resort, the latter have the most responsible position in the judicial structure and it is the natural practice to set judicial compensation highest at that point. New York's salary range would indicate the recognition that the greater work burden may well be in the intermediate appellate courts and judges there should be compensated accordingly.

§8.2. *County Judicial Costs.* As in most states, the great variety of fiscal years and budgets and financing systems in Pennsylvania boroughs, townships and counties make it difficult to report on amounts expended. The financial report forms themselves do not break down expenditures sufficiently to appraise finance reports in a definite manner. In effect, each court makes up its own budget and consideration is given only to local needs without regard to the needs of the other branches of the Judiciary.

The judicial budget request is included within the County Budget sent to the State Department of Internal Affairs. Many Pennsylvania county offices are partially fee offices with expenditures chargeable against both the county and the litigant.<sup>76</sup> Budgeting is at best projected guess work and no coordination occurs between counties.

A random sampling<sup>77</sup> of large and small counties shows that a small percent of county income is spent on Judicial costs and related services.

| <i>County</i> | <i>Total Revenues</i> | <i>Judicial Expenditures</i> |
|---------------|-----------------------|------------------------------|
| Allegheny     | \$59,545,361          | \$7,738,926                  |
| Bucks         | 9,155,054             | 872,314                      |
| Cumberland    | 2,469,948             | 227,141                      |
| Delaware      | 13,719,708            | 2,416,187                    |
| Erie          | 5,302,922             | 559,651                      |
| Lehigh        | 4,457,526             | 502,260                      |
| Perry         | 828,117               | 44,773                       |
| York          | 4,465,402             | 484,159                      |

## §9. The Judicial Council as an Aid to Court Administration

State judicial councils were originally conceived of as small continuous survey and study groups—"think tanks" in contemporary jargon. Their purpose was to make recommendations for the improvement of the administration of justice, the organization and administration of the courts and to collect statistical and other information concerning the courts.<sup>78</sup>

A 1959 survey<sup>79</sup> revealed that thirty-five states had judicial councils or conferences but twelve made no appropriation to them. Under constitutional direction, California's Judicial Council<sup>80</sup> supervises the administration of the courts by making suggestions and recommendations to the legislature. Relying heavily on the Administrative Office of the Courts it can also promulgate rules of practice and procedure consistent with statutory law. Two thirds of its membership are judges, four are lawyers and two are

legislators. California's experience with this combined-type of membership has been reported <sup>81</sup>as promoting constructive proposals with bar and legislative assistance on their adoption.

The California legislature delegates the rule-making power to the Council and in 1944 it formulated a set of rules that created new appellate procedure.<sup>82</sup> It also cooperated on substantive law projects with the California Law Revision Commission.

State judicial conferences are comprised of all state judges who meet annually to discuss trial court problems. In 1929, the Pennsylvania legislature passed a bill creating a judicial council but it was vetoed since the state judicial conference was already considering court problems.<sup>83</sup> The conference, however, elected to confine its consideration to practice and procedure and then did not meet between 1939 and 1955.<sup>84</sup>

In 1961 the Pennsylvania Judicial Conference met to discuss the problem of congestion and delay in the courts. It did not then, and has not ever functioned as a judicial council with bar members participating and with staff assistance for effective organization.<sup>85</sup>

The 1960 amended Model Court Administration Act [See Annex No. 12] provides for a judicial conference with the assignment of a court administrator as secretary of the conference. A Senate bill so providing, was introduced in the 1961 session of the Pennsylvania legislature <sup>86</sup>but was not enacted into law.

Pennsylvania is not entirely without coordinated guidance. The Joint State Government Commission <sup>87</sup>makes studies from time to time concerning the improvement of judicial administration and the Procedural Rules Committees of the Supreme Court perform some of the functions of a judicial council.

Under the proposed Pennsylvania Bar Association Article V, Section 16 (a), the Supreme Court would prescribe the membership of a Judicial Council which would conduct studies for the improvement of the administration of justice and for law reform. Reports and recommendations would be submitted to the Supreme Court and to the General Assembly. By Section 16 (b), the Supreme Court would also be empowered to assign additional duties to the Council, presumably without constitutional amendment. The Institute of Judicial Administrators' New York Model Judiciary Article, Section 8 charges the Judicial Conference with the duty of submitting a consolidated budget to the legislature, and such powers as are vested in it by law.

The National Municipal League's Judiciary Article VI, Section 606 and 607 would establish a ten-man judicial council which would have powers to make rules relating to pleading, practice and procedure in addition to administrative regulations in the General Court of Justice and its depart-

ments. Membership would include judges, lawyers and laymen. By Section 610, the council would have the power to establish or alter fees to be collected in the several state court departments.

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### *Notes to Part VII*

1. Clark, J. Citizens, Courts and the Effective Administration of Justice, 49 J. Am. Jud. Soc. 6 (1965).
2. 372 U.S. 335 (1963).
3. Application of Gault, 387 U.S. 1 (1967).
4. Institute of Judicial Administration, Calendar Status Study—1965.
5. Franklin, Chanin & Mark. Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1, 10 (1961).
6. New York Sen. Judiciary Comm., Recommendations Respecting Court Delay, Lawyers Registration, Condemnation and Appropriation, Leg. Doc. No. 44, at 18 (1964) hereinafter cited as New York Senate Report.
7. Franklin, *supra*, note 5.
8. Tydings, A Fresh Approach to Judicial Administration, 50 J. Am. Jud. Soc. No. 2 (1966) pp. 44-46.
9. Warren, The Chief Justice Reports, 37 N.Y. State B.J. 309,310 (1965). In substance, he reported that 74,552 civil cases were left pending at the end of fiscal year March 31, 1965; See also, Biggs, J. Some observations on Judicial Administration, 29 F.R.D. 464 (1961).
10. Report of the Judicial Conference of the United States 48, 49 (March, 1965).
11. Warren, *supra* note 9, at 311; Tydings, J. 50 J. Am. Jud. Soc. (April, 1967) p. 258.
12. Arkansas, California, Connecticut, Georgia, Indiana, Kansas, Maryland, Missouri, Nebraska, New York, North Carolina, Oregon.
13. Conn. Pub. Acts. (Special Sess.) 1965, No. 331, §16.
14. Institute of Judicial Administration, Guide to Court Systems, 1966, p. 31.
15. Tydings, *Supra*, note 11.
16. 1962 New Jersey Administrative Director of the Court, Annual Report, Supp. Table 12.
17. Act of 1911, April 27, P.L. 101, §3, amended, 17 P.S. §228 (1933).
18. Article V, §15, Amendment of November 2, 1965.
19. Act of 1966, Special Sess. No. 1, August 31, No. 3, §4, 17 P.S. §790.14: "Any former judge learned in the law of any court of record who is willing so to do, and who has served at least one term and has not been defeated for reelection, shall file with the prothonotary of the Supreme Court . . . a statement of the ensuing weeks or months during which he is willing to assigned to sit in the courts of any judicial district for the disposal of business, Act of 1966, Special Sess. No. 1, August, 31, P.L. . . . No. 3, §2, 17 P.S. §790.101.
20. Institute of Judicial Administration, Appellate Courts: Internal Operating Procedures, Preliminary Report, New York (1957).
21. Mississippi, divisional since 1891, hears all cases in divisions except capital and felony cases; Missouri requires the whole court where a case is up on writ issued by the court and all cases transferred from intermediate appellate court by order of that court and where there is a dissent in the division.
22. Pound, Appellate Procedure in the United States, Boston, Little, Brown, (1941), pp. 383-385.
23. Hyde, Court Organization, 4 Mo. L. Rev., 345 (1939).
24. Dethmers, Delay in State Appellate Courts, Lagging Justice, The Annals of the American Academy of Political and Social Science (March, 1960).
25. Act of June 16, 1836, P.L. 715, 5 P.S. §§21 et seq.
26. Act of May 1, 1861, P.L. 521, §1, 5 P.S. §146. See also, Laub, Penna. Trial Guide §258 (1959).
27. Act of June 14, 1951, P.L. (1952) 2087, §1, 5 P.S. §30.

28. Act of June 24, 1959, P.L. 477, §1, 5 P.S. §30.
29. Zal, Frank, Commissioner, Compulsory Arbitration, County Court of Philadelphia reviewed the Philadelphia experience in depth, 3 Trial No. 3 (1967) pp. 52-53.
30. Diggins, J., "The Back-log: A Suggested Remedy," Vol. XXXVII, Pennsylvania Bar Association Quarterly No. 3, (March, 1966), p. 272.
31. 381 Pennsylvania 223, 112 A. 2d 625 (1955).
32. *Id.*, at pp. 229-30.
33. 50 J. Am. Jud. Soc. No. 4 (Dec. 1966) p. 125; Walker, R., "Compulsory Arbitration Revisited," Vol. XXXVIII, Pennsylvania Bar Association Quarterly No. 1, (October 1966) p. 36.
34. Proceedings of the 18th Annual Meeting of the Conference of Chief Justices, Montreal, Aug. 3-6, 1966, pp. 99-100.
35. The Alaska court administrative director has recently filed suit against that state's Department of Administration claiming unconstitutional interference by the executive branch for attempting to regulate and control the internal administration of the Alaska Court system, i.e., budget and personnel. Judicial Administration Newsletter, From the State Capitals, July 17, 1967.
36. 48 J. Am. Jud. Soc. (1964) 148.
37. Act of 1937, June 21, P.L. 982, as amended, 17 P.S. §§61 et seq.; Act of 1957, July 11, P.L. 819, 17 P.S. §2084.
38. Interim Report of the Maryland Constitutional Convention Commission, (1967) p. 138.
39. The position is not new. Connecticut established a judicial department in 1937 and North Dakota a Judicial Council Secretary in 1927 to perform substantially the same task.
40. e.g., Alaska, Ariz., Ark., Cal., Colo., Conn., Delaware, Hawaii, Ill., Ia., Kansas, La., Md., Mass., Mich., Minn., Mo., N.J., N.Y., N.M., N.C., Okla., Ore., Puerto Rico, R.I., Tenn., Va., Wash., & Wisc. State Court Systems, A Statistical Summary, Council of State Governments, Chicago, July 1966, p. 62.
41. The origins of administrative offices lie in the establishment of the Conference of Senior Circuit judges in the federal court system in 1922. The conference was to make a comprehensive survey of the condition of business in the United States Courts and was severely hampered by lack of administrative personnel until 1939 when the Administrative Office of the United States Courts was established. Act of August 7, 1939, ch. 501, §1, 53 Stat. 1223.
42. This was an outgrowth of the A.B.A.'s 1938 study of effective judicial machinery recommending that some judge be charged with the responsibility of the efficiency of the system in each state as a whole, and recommending an administrative director and staff, 63 A.B.A. Reports 532.
43. N.J. Const., Article VI, §VII, Par. 1-3, 1947.
44. National Conference of Commissioners on Uniform State Laws, 1948, as revised 1960.
45. Pa. R. Cr. P. 300 (a) adopted June 30, 1964, effective Jan. 1, 1965.
46. Pa. Special Rules Nos. I to X, adopted July 1, 1963, effective October 1, 1963.
47. Pa. R. Cr. P. 300(b); Edward J. Blake is the Court Administrator for the Philadelphia Courts of Common Pleas.
48. *Supra*, note 38, at pp. 134-37.
49. Conducted by the Institute of Judicial Administration and the National Association of Trial Court Administrators (1966) and discussed by Klein, F. J., The Position of the Trial Court Administrator in the State, 50 Jour. Am. Jud. Soc. 278 (1967).
50. Salaries range from \$6,000 to \$19,000 depending on size and difficulty of operations.
51. Miss Rita Prescott currently serves in that capacity.
52. *Supra*, note 47.
53. Report of the Temporary State Commission on the Constitutional Convention for the State of New York, "The Judiciary," No. 12, p. 79.
54. Ch. 684, Laws of 1962, §1, Art. 7A, Judiciary Law.
55. Joint Legis. Comm. on Court Reorganization, Report on Judicial Administration: Organization of the Unified Court System of the State of New York, p. 3 (1962).
56. Report of the Temporary State Commission on the Constitutional Convention for the State of New York, "The Judiciary," No. 12, p. 82; The New York City Bar Ass'n pro-

- posed that both supervision and operation of the system be vested in the Board with power to delegate to the Appellate Divisions. Report of the Special Committee on the Constitutional Convention (March 1967), p. 9.
57. *Id.*, at 83.
  58. Institute of Judicial Administration, A Model Judiciary Article for the State of New York, p. 7.
  59. *Id.*, at 18.
  60. Brennan, J. 'The Citizens' Responsibility, 48 J. Am. Jud. Soc. 145, at 147 (Dec. 1964).
  61. Schulman, S. "Toward Judicial Reform in Pennsylvania," University of Pennsylvania Law School, Institute of Legal Research, 1962, p. 192.
  62. *Id.*, at 197.
  63. Biggs, *supra*, note 9, at 465.
  64. Jones, Harry, ed., The Courts, the Public and the Law Explosion, Columbia Univ. Press (1965).
  65. Philadelphia County Report to the Citizens of Philadelphia on the Activities of the Courts, 1964.
  66. Ellenbogen, Automation in the Courts, 50 A.B.A.J. 655 (1964).
  67. Hensley, Punched Cards produce progress in probate court, 48 A.B.A.J. 138 (1962).
  68. Adams, EDP Aid to the courts, in Proceedings of the Conference on EDP Systems for State and Local Governments, 18 (1964); An IBM system is now being used by the Criminal Court of the City of New York to aid the Traffic Summons Control Bureau, Harris, A. *Judicial Decision Making and Computers*, 12 Vill. L.R. 272, at 273 (1967).
  69. Saari, D.J. An overview of financing justice in America, 50 Jour. Am. Jud. Soc. (1967) p. 296.
  70. Report of the Special Comm. on the Const. Conv., Court Structure and Management, Assoc. of the Bar of the City of New York (March 1967), p. 10.
  71. Act of Jan. 26, 1966, P.L. (1965), No. 565, §1, 17 P.S. §§830.23 et. seq.
  72. Act of June 1, 1956, P.L. (1955) 1959, 11, 17 P.S. §830.33.
  73. Act 1956, June 1, P.L. (1955) 1959, §9.1, added 1966, Jan. 26, P.L. No. 565§5, 17 PS §830.31a.
  74. Act of June 1, 1956, P.L. (1955) 1959, §10, 17 P.S. §830.32.
  75. A Survey of Judicial Salaries and Retirement Plans in the United States, 49 Jour. Am. Jud. Soc. No. 9 (Feb. 1966) Appendix IV.
  76. The Allegheny Clerk of Court official fees from Dec. 1965 to Dec. 1966 were \$69,811 from litigants and \$244,791 paid by the county, a total of \$314,602. The clerk's salary for the same period was \$15,500 and his clerks' salaries amounted to \$215,439, thus a total expenditure of \$230,939. The County gain was \$83,663. Comptroller's 106th Annual Report of Fiscal Affairs of Allegheny County (1966).
  77. Selected from Local Government Financial Statistics, Release #1. Dept. of Internal Affairs (August, 1966).
  78. Persig, Maynard, Proposed Model Act, 1941, Handbook of National Conference on Judicial Councils, p. 47.
  79. Survey by Stevens and Gallagher, 43 J. Am. Jud. Soc. 137 (December, 1959).
  80. California Constitution, Art. VI, §§10, 4d, 7 and 10b, (1926).
  81. Honorable Roger S. Traynor, Rising Standards of Courts and Judges: The California Experience, Address delivered at the Summer meeting of the Pennsylvania Bar Association at Bedford, Pennsylvania on June 24, 1965, p. 6.
  82. California Judicial Council Tenth Biennial Rep. Part 1, at 6 (1944).
  83. Minutes of the 4th Judicial Conference, 1932, 323 Pa. XXXIII.
  84. *Supra*, note 61, at 187.
  85. *Supra*, note 61, at 188.
  86. S.B. 441, 1961 session.
  87. Created by the Act of July 1, 1937, P.L. 2460, §1, 46 P.S. §65, as amended.

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## *Submissions to and Oral Testimony Before the Preparatory Committee*

*EXPLANATORY NOTE:* The Preparatory Committee felt that in addition to the search for ideas and information from published articles, books, pamphlets and other written materials, individuals, organizations and interested groups should be afforded an opportunity to present their views on constitutional revision and that these should be submitted to the delegates without comment or recommendation. In consequence, a series of public hearings were held and a number of interested individuals and organizations appeared and testified. These submitted written documents embodying their ideas and testimony. In some instances, the Preparatory Committee allowed the submission of written proposals without requiring a personal or oral presentation.

This portion of the research report is reserved for reproducing the material submitted as noted in the above paragraph. For the purpose of ready reference, the following table and summary of each submission has been devised. Written proposals are reproduced verbatim in the numbered submissions contained in the text. Note that where the submission is an endorsement of a well-known plan which has been discussed elsewhere in the report, no summary is entered in the table.

### APPELLATE COURTS

*Summary.* Appellate review in Pennsylvania is presently satisfactory; there are no appellate backlogs; the division of court appeals between the Supreme and Superior Courts on the basis of the amount involved in the suit is unsound and should be discontinued; increasing the size of the Superior Court and having it operate in panels of three judges is undesirable; judges are poor administrators and they should not be saddled with administrative chores; the administrative plan of the Pennsylvania Bar Association does not take the Supreme Court judges out of politics—it puts them in

politics; the Supreme Court should remain a court with purely judicial duties.

Submission of Hon. *Robert E. Woodside*, former Attorney General of the Commonwealth and former judge of the Superior Court of Pennsylvania given July 27, 1967. *Submission No. 11.*

### THE PENNSYLVANIA BAR ASSOCIATION PROPOSALS

Except as noted, the following individuals and organizations support the proposals of the Pennsylvania Bar Association discussed thoroughly throughout the research report:

Submission of *Bernard G. Segal*, Esquire of Philadelphia, speaking on behalf of the Pennsylvania Bar Association. *Submission No. 5*

Submission of the Pennsylvania League of Women Voters, presented by *Mrs. Robert Farlow*, July 27, 1967. *Submission No. 7.*

Submission of *Robert Sidman*, Esquire, Executive Director of *A Modern Constitution for Pennsylvania, Inc.*, given July 27, 1967. *Submission No. 9.*

Submission of *Pennsylvania State Chamber of Commerce*, submitted by mail July 31, 1967. *Submission No. 10.*

Submission of *Philip P. Kalodner*, Esquire of Philadelphia on behalf of the State Affairs Committee Southeastern Pennsylvania Chapter Americans For Democratic Action, given July 27, 1967. (The Americans For Democratic Action disagree with the P.B.A. in some particulars, thus: gubernatorial appointment of judges should be for life and by and with the consent of the Senate; there is no merit in the P.B.A. plan for a ratification vote of the people following appointment). *Submission No. 14.*

### THE MINOR JUDICIARY

*Summary.* There should be a more formal local court; comprehensive training of justices of the peace; courtrooms should be supplied; the fee system should be abolished; the jurisdiction of justices should be increased; justices should be removed from politics; there should be a central administration.

Submission of *George H. Knoell, Jr.*, Justice of the Peace Whitpain Township, Blue Bell, Pennsylvania, given July 20, 1967. *Submission No. 1.*

*Summary.* A formula should be established for creating justices' courts; the informality of neighborhood courts should be retained; the image of justices of the peace can be increased by increasing qualification requirements; the costs of minor courts should be placed upon those making such courts necessary; the jurisdiction of justices of the peace should be increased; there should be a schedule of adequate compensation for justices; there should be a minor court administrator.

Submission of *Edward E. Carlits, Jr.*, Justice of the Peace, Yardley, Bucks County, Pennsylvania and a "Systems Specialist."

*Submission No. 3.*

*Summary.* There should be representative district courts; controls should be established for such courts; the selection, qualifications, salaries, restrictions on and benefits for the judges should be as suggested; the qualifications, duties, salaries, restrictions upon constables should be as suggested; there should be clerks provided and their salaries and terms should be established as suggested; justices of the peace should be provided as suggested in some political subdivisions and their duties, terms, salaries etc., should be established.

Submission of *Robert R. Williams*, Alderman, Allentown, Pennsylvania, for the replacement of present Sections 11 & 12 of Article V, submitted by mail May 25, 1967.

*Submission No. 4.*

*Summary.* The submission makes observations on the current system which should not be discarded; the number of justices of the peace for each district should be determined by the Court of Common Pleas; the election of justices should be as at present; their jurisdiction in criminal matters should be increased; the Canons of Judicial Ethics should be made to apply to justices; a minimum salary of \$10,000 should be established; courtrooms should be furnished at public expense; clerks should be furnished at County expense; vacancies should be filled by gubernatorial appointment.

Submission of *Raymond Pearlstine, Esquire*, Solicitor for the Pennsylvania Magistrates Association. The submission was made on July 27, 1967 on behalf of the Association.

*Submission No. 6.*

*Summary.* Uniform standards should be established for the minor judiciary; salaries should be paid to justices; the number of justices should be reduced; constitutional action regarding justices is preferable to remedies by legislation.

Submission of *Harry Boyer*, President of the Pennsylvania AFL-CIO, giving the organization's position on the judiciary as presented July 27, 1967.

*Submission No. 12.*

### PROPOSALS IN GENERAL

*Summary.* There should be a unified court system of inferior courts; there should be centralized administration of the courts; there should be a merit system for the selection of judges. The submission contains some general observations on the subject of the judiciary.

Submission of *Robert F. Steadman*, Director of the *Committee for Economic Development*, given on behalf of the Committee July 20, 1967.

*Submission No. 2.*

*Summary.* There should be a lifetime appointment of judges; the three-judge courts of common pleas should be abolished; judges should be mandatorily retired at age 70; the Philadelphia Magistrates Courts should be abolished.

Submission of *Arlen Specter, Esquire*, District Attorney for Philadelphia, given July 27, 1967.

*Submission No. 8.*

*Summary.* All courts should be consolidated in a unified system; specific proposals made for revision of certain sections of Article V, establishing the jurisdiction and composition of the courts; there should be a single statewide judicial nominating commission; the disbarment of judges should be used as a disciplinary measure but impeachment should be retained in some instances; there should be provisions made as suggested for the retirement of judges for disability; the Canons of Ethics are urged as standards of judicial conduct; the rule-making power should be in the Supreme Court; clerks and court officers should be appointed by the courts.

Submission of the *Board of Common Pleas Judges of Philadelphia*, approved March 11, 1966, and submitted by mail July 13, 1967.

*Submission No. 13.*



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## SUBMISSION NO. 1

*Submission of George H. Knoell Jr.,  
Justice of the Peace,  
Whitpain Township, Blue Bell, Pa.  
(Given July 20, 1967)*

The commentary attached hereto was written and published by the author in December 1965 in order to dispel a great deal of misunderstanding which resulted from an investigation of Magistrates in Philadelphia and in the sure knowledge that, by one means or another, change in ALL the Minor Courts of Pennsylvania was imminent.

The first eight pages deal with the author's views in editorial format, explaining the impracticality of a lawyer plan and stating that there are really three (3) areas with which reform must deal and perhaps in different ways: The City of Philadelphia, rural Pennsylvania and the growing urban periphery moving out from all our cities.

The last two pages consist of broadly drawn proposals which answer the Minor Courts system's critics with concrete, obtainable reforms which answer objections keeping in mind that there is a great deal of good in the present system:

1. Mandates a more formal local Court.
2. Calls for rigorous, comprehensive training but not a law degree.
3. Eliminates a large number (over half) of Justice Courts by requiring only one in a Second Class Township (which now has two) with a population of 10,000 or less and using the same formula in cities and boroughs which now have one per ward. Norristown, for instance, with 14 wards has 14 Justices of the Peace. Its population of 40,000 would reduce this to four.
4. Courtrooms furnished by the Municipality, County or the Commonwealth would solve the problems of the Minor Court's poor physical image.
5. Abolishes the fee system except in rural areas.
6. Increases jurisdiction.
7. Removes the Minor Court Judge from politics.
8. Provides for a central administrator of all Minor Courts.

## *A Plan for Revision of the Minor Courts of Pennsylvania*

### FOREWORD

The Minor Courts of Pennsylvania have come under fire in recent years as the result of social and political pressures which have been building up for long periods of time. The office is so closely woven into the fabric of our community life that to tamper with it out of desire for transitory reform is tantamount to a corruption of judicial administration. This is bad enough, but for the reformers to treat the subject without objectivity, without knowledge of or feeling for the primary function of the office, while at the same time suggesting that it be abolished, is, to say the least, a sad commentary upon the state of our knowledge of and our interest in local government. Sadder still, it comes at a time when individual freedoms are considered by many to be in jeopardy as "big government" takes over much of the work formerly left to local agencies.

Archaic as the present system has been made to appear, it must be remembered that this is true of much of our federal, state, and local governmental structure and no one has suggested that we do away with such other bastions of democracy as the supreme court, the congress, or the county courts though all have from time to time been tainted by scandal, inept administration, or outright corruption. Ponderous, slow moving change is sometimes to be desired. The gradual change in the rules by which modern man governs himself contrasts with the swift changes wrought by revolution, force and violence which characterize the sudden birth or death of unpopular rule. However, since we in twentieth century America hold dear the Anglo Saxon precept of self determination which deals with orderly modification of law, this comment is dedicated to the principle that OBJECTIVE examination of socio-legal problems should be placed before all other considerations.

The case for a "go slow" policy with regard to constitutional revision of Pennsylvania's Minor Courts might well be supported by the knowledge that it has served its purpose for longer than any one can accurately estimate. Man is a gregarious but loving creature, capable of both hostility and affection and thus he gets into trouble with his fellow while at the same time, by his very nature, he must be with him. That he has progressed as far as he has is evidence in itself that he has been able to compromise the complexities of his nature.

Over inestimable periods of time, trial and error have taught him that communal life could endure only if the majority ruled. Enforcement of majority rule and adjudication of offenses against that majority at the local level has produced an enduring, workable system.

If it is true that the sophisticated electorate of the mid 1900's wants a more formal local court, then, by all means, it is entitled to it. But let those

who would alter the system to serve their own ends take notice that they tread upon a sacred right. It has served free men for almost a thousand years. Recorded history of local courts in England goes back to 1066, A.D.

To the end that justice be served we have set forth our thoughts concerning the Minor Court of Pennsylvania as it exists today and our recommendations for what it might become in the near future if the will of the majority prevails.

### ***A Comment Based Upon Experience, Evaluation of All the Facts and Statistical Analysis***

Who knows the minor court judge? Who understands the most elemental functions of his office? For the record, the office is a constitutional one which has jurisdiction over: (1) initiation of proceedings of a serious nature (misdemeanors and felonies) and a first or "prima facie" finding. In the performance of this duty, the minor court officer is known as a "Committing Magistrate", and (2) the adjudication of summary offenses both civil and criminal. In the absence of reliable figures it is nevertheless safe to state that many minor court judges in Pennsylvania preside over more cases than do the judges of the courts of record. In some cases the ratio could be as high as ten to one (including motor vehicle cases).

It is interesting to note, however, that in all of the present controversy, though thousands of words have been written on the subject, not once have we seen this elementary description. We point this out to illustrate our contention that *objectivity* is totally absent from all the current controversy. On the other hand, passages which refer to "Neighborhood Solomon" and "Poor Peoples Court" and other colorful, sometimes inflammatory statements run on and on. In a word, most of what has been said is irrelevant or immaterial. Then there is the matter of accuracy. Foes of the present magisterial system constantly refer to the pressure exercised by the state's "powerful minor court lobby in Harrisburg." *It does not exist!* It never did! Its chief advocates in Harrisburg are a very fine Alderman in his sixties and one of his retired friends. Yet we have seen numerous references to this "powerful lobby."

The lobby, if there is one, consists of personal supporters of each magistrate, alderman and justice of the peace. If there are 5,000 minor court judges in the Commonwealth (which there are not) and each was able to turn out 100 of his supporters on the average, that represents a half million votes. This is the force which was able to effect passage of resolution 6A on the November 1966 ballot calling for mandatory training of newly elected minor court officials in spite of overwhelming opposition from the press, Pennsylvania Bar Association, League of Women Voters, and other groups. That is a grass roots lobby, the finest kind.

The Pennsylvania Statistical Abstract for 1960 lists a total of 4193 minor court judges in Pennsylvania and notes 11 vacancies. The propensity of the

system's adversaries for using that "5000" figure further points up a willingness to shoot from the hip without respect to the facts.

One more illustration of the inaccuracy of comment on the system is the reference to minor courts as "Poor Peoples Court". This phrase and the syntax in which it is used are without meaning. The minor courts are closely regulated. The regulations fill volumes. Jurisdiction is over the person (regardless of who he is) by reason of what he is accused of having done in criminal cases. In civil cases jurisdiction is determined by the amount in controversy (\$100.00 in Philadelphia—\$500.00 elsewhere). In no event is the defendant's income a factor. It might be fair to note that (especially in metropolitan areas) those most often in trouble before ANY COURT come from the lower strata of wage earners, but this is a comment on a sociological problem and the reference to "Poor Peoples Court" then is meaningless. In serious matters before any court, counsel is provided by recently strengthened statutes governing a public defenders organization. In summary cases, those over which the minor court has final jurisdiction, an attorney often complicates the proceeding to the prejudice of his client by trying a traffic case or local ordinance violation as though it were a murder trial.

We read daily of the 5000 minor court judges in the Commonwealth. This is at least half true. As noted later, less than half that number are regularly reporting collection of fines to the State and so the "5000 powerful members of the minor judiciary" includes several thousand rural justices of the peace who have so few cases that they are able to maintain all the records of their office in a kitchen drawer. The Pennsylvania Statistical Abstract for 1966 lists 11 cases for Forest County Court during 1964. Sullivan County had 6 and Wayne County 21. These figures are not for the minor courts but the Criminal courts of record of these counties (minor court figures not available). We mention these figures to illustrate the fact that Pennsylvania is two-thirds mountainous, sparsely populated and not of major concern when viewing the problems in the urban centers. To suggest vast changes in the minor court system of these areas is impractical, financially impossible and not workable when you come right down to it.

Following the last national census it was pointed out that 75% of Pennsylvania's population lived upon 2% of its land area. The Pennsylvania Statistical Abstract referred to above lists a total of 41,400 criminal cases disposed of in the State in 1964. Of this total, over half, (22,000 cases) were handled in 9 of our 67 counties. Thus we are able to examine some facts, which while they are not exciting, shed some important light on the problem at hand. There are as few as two attorneys in practice in at least one of the State's counties (Fulton: 1963 Penna. Statistical Abstract). There are five in Cameron County, three in Forest and 4 in Juniata. They might be compared to the old time country doctor who treated every kind of illness in the area of his practice. Surely no one would suggest that community courts of

record be set up in these areas as there is virtually no business to come before the court. The cost of administering such an office would bankrupt the rural counties where the preponderance of tax revenue comes from hunting camps and farms. And so an objective view of most of the state's 67 counties would inform any thoughtful person that the idea of vast change is economically unfeasible, practically not workable and unnecessary.

Those who opposed Constitutional Revision which now mandates a training course for newly elected justices of the peace are now finding that they were in error in the view that the amendment was without merit. The legislature had been urged to prepare bills which will implement the mandate and to make the training comprehensive and to require that a passing grade be attained. This urging is coming from members of the minor judiciary. And so, with well trained justices in rural Pennsylvania, much of the "legal knowledge" problem will be solved in those areas.

### ***The Pressure is on the Metropolitan Counties***

Let us consider now the eight or ten counties which contain most of Pennsylvania's population. Surely this is where the pressure is greatest for reform. No one disputes the fact that Philadelphia wants to and should establish Community Courts. If they want to staff them with attorneys, certainly they should proceed on that basis. It won't take the people of the metropolis long to learn that attorneys are not necessarily more honest than laymen. The term "Philadelphia Lawyer" has cast a stigma upon the legal profession of that city for generations. A great deal more of unbiased, objective planning should go into revamping Philadelphia's magistrate courts. There is considerable doubt that this will happen, however, since the movement for reform there resembles more a stampede than an effort at responsible, knowledgeable legislation. The crusade we fear, is not so much the will of a majority of that city's people as it is a platform upon which self seeking political figures seek to ascend the throne of power.

Speaking for the vast majority of justices of the peace and aldermen throughout the Commonwealth, there is no question that they do not oppose a mandatory lawyer requirement as proposed for Philadelphia. For the rest of the state, however, *they oppose it with all their strength*. To those who are dedicated to thoughtful, objective examination of the issue, they extend the hand of friendship and help. They welcome calmer heads than those which have spoken out to date to view some important facts which have been overlooked by every agency which has so far, made a public pronouncement.

In the paragraphs which follow, we have set forth in numerical sequence the views of the writer. They are not necessarily the views of The Pennsylvania Magistrates Association but they are shared by many of its most distinguished members.

(1) Though some changes are no doubt in order, those we have seen proposed do not begin to reach the heart of the problem, let alone solve it. It makes little sense, for instance to suggest that an attorney will make better justice of the peace *just because he is an attorney*. The popular notion that *all lawyers* are intimately familiar with the workings of our courts and the legal questions with which they deal is a complete fallacy. It should be set aside once and for all. No attempt is made to impugn the legal profession or any of its members, many of whom agree with this text in part or in its entirety. As a matter of fact, it has been reviewed by several lawyers prior to publication.

It has been commented upon privately by judges, legislators and other public officials interested in the administration of our courts. We therefore wish to take this opportunity to repeat that no part of this subject matter is intended by direct or indirect reference to offend members of the legal profession.

We know that we live in an age of specialization. Specialization is practiced in the legal profession much as it is in the medical field. Most laymen do not realize (and opponents of the present magisterial system never point out) that a large percentage of lawyers *rarely see the inside of a courtroom*. There are almost as many fields of specialization in law as in medicine. Who would care to undergo brain surgery with a skin specialist in attendance? Does it therefore make sense that ANY lawyer will make a better minor court judge than a *trained, dedicated layman*?

Opponents of the existing system either do not know or do not want the public to know that the staff, facilities and knowledge of the office of every district attorney is available to every minor court officer. A member of the district attorney's staff is available 24 hours a day in virtually every county in the State and most magistrates consult on a regular basis. The district attorney, as a matter of fact, is a major formulator of procedure and policy for all minor courts. Additionally, the Pennsylvania Magistrates Assn. and the various county affiliates employ as solicitors some of the top trial lawyers in the Commonwealth who are able to keep them up to date on all matters of interest. The county units meet regularly and training sessions are scheduled as required. When the new Rules of Criminal Procedure were promulgated by the Supreme and Superior Courts in January of 1965 a team of experts including several attorneys who helped write the Rules conducted training sessions for justices of the peace. At their inception, few attorneys understood the Rules as well as members of the minor judiciary.

A competent lawyer recently used a phrase in our presence which many attorneys have used. He stated that he knew more law when fresh out of law school than he does today, many years later. When challenged to take the same test which is given to all graduates of the Pennsylvania Justice of the Peace School, administered under auspices of the Pennsylvania Depart-

ment of Public Instruction, he declined. It should be noted here that a school for members of the minor judiciary has been in existence for *almost thirty years*, a fact which has been kept hidden from the public through all the present controversy. In any event, our attorney acquaintance was more than willing to concede that we would outscore him in the test mentioned above. This man is not a trial lawyer. He specializes in another field at which he is expert and therefore has no interest in appearing in any court. It is fair to say, however, that if he chose, he could familiarize himself with courtroom procedure and the points of law arising therein with greater ease than someone without a legal background. *We should not, however, conclude that on this single point, all the minor courts in Pennsylvania should be turned over to attorneys!!!* This would appear to be the only leg upon which advocates of the lawyer plan have built their opposition.

(2) It would be fine if competent trial lawyers (those with day to day contact with courts) could be induced to take over minor court offices throughout the state, but where would they come from? There are something over \*11,000 lawyers in Pennsylvania, though not more than \*9,500 are in private practice. Probably not more than ten percent of these specialize in trial work. They are among the highest paid in the legal field and do not even care to practice BEFORE a minor court judge, let alone be one! And so it becomes evident that exponents of the "lawyer plan" could not find the lawyers to fill the jobs if they did have their way. Governor Scranton himself could not get an attorney to fill a magisterial post in Philadelphia, though he tried diligently several years ago.

To illustrate how implausible, indeed how impossible it would be to institute the "lawyer plan" throughout the Commonwealth it is necessary to play a numbers game. It is said that there are 5000 minor court officers in the State (in reality it is closer to 4000) and it is a known fact that there are, at the most, 10,000 lawyers in private practice.

How can you get four or five thousand minor court judges from 10,000 lawyers??? Where would they come from??? It is impossible, of course to even suggest that more than a handful would be interested, even assuming that that number were qualified without additional training or indoctrination, which they are not.

In refutation of this comment, proponents of the community court system would be quick to point out that they intend to drastically cut the number of courts. At this point they go in two different directions, some say that the community court judge would be allowed to maintain a private practice, thereby supplementing his income and others say he must be a full time judge. The first explanation suggests some problems which would frustrate the whole idea of reform. How could a local judge objectively judge his

\*Pennsylvania Statistical Abstract, 1960 (quoting Martin-Hubbell Law Dir.) to which the author has added 10%.



own clients or the clients of his bar association chums? The conflict of interest in this situation would be so flagrant as to need no further comment. Then too, we are dealing with a part time judge and part time lawyer and with limited hours of operation it is not practical to cut the number of courts.

To those who would make the judge a full time official we ask where they will come from. If the number were cut in half to, say 2,200, it would still be impossible to get anywhere near that number of competent attorneys *and the cost of administering such a number of courts would bankrupt any branch of government which had to pay for them.*

(3) The fact that justices of the peace and aldermen are available at all hours of the day and night and that they perform numerous extrajudicial functions, usually in the evening, has never been mentioned. With the advent of the community court the public would be adversely affected in this regard. It's formal structure (it is referred to as a minor court of record) will directly oppose the doctrine upon which the minor judiciary has been solidly based for a thousand years, that is, that minor differences between individuals be settled at the LOCAL LEVEL!!! This right is deeply imbedded in our sacred freedoms. It's removal in this day of ever larger government "agencyism" should be resisted vigorously by every citizen and legislator.

The present system allows defendants, witnesses and enforcement officials speedy, local service 24 hours a day with a minimum of legalistic processing. The community court system would bog everyone down in red tape and formal legal proceedings causing endless inconvenience, travel and loss of time. New Jersey's Community Court system, a fairly recent innovation, has made judges unavailable to many communities in that state or has placed them so far from the police and the people that, in some instances, the police have actually set and taken bail, a dangerous practice to say the least. Presently, over half the business of Pennsylvania's minor courts (outside Philadelphia) is conducted in the late afternoon and evening.

(4) As mentioned earlier, it is time to put away for all time the popular notion that there are 5000 fully operable justice courts in Pennsylvania. Less than half that number are regularly reporting the collection of fines to the Commonwealth. The office of justice of the peace is perfunctory in many sparsely populated sections of the State. It is possible that the number could be reduced even further, but no so drastically, we hope, that the public is adversely affected. And so it is safe to conclude that in reality there are less than 2500 "active" minor courts and that those outside the urban centers represent the largest number of courts but the smallest volume of cases.

(5) What of the very real problems facing the minor judiciary? Certainly there are problems, but they are not the ones mentioned by those who would replace the present system. For instance, what can be done to provide an adequate salary for minor judges? The most glaring obstacle to a fair system

is the fee bill. Under its provisions police who do not get 100% guilty verdicts from a magistrate can withhold "business" since (except in Philadelphia) income of justices of the peace and aldermen is computed "by the case".

It can only be concluded that few outside the judges themselves have an incisive understanding of the everyday obstacles to effective performance. And yet, NO ONE, NO ONE has thought of approaching those closest to the problems. No one has, to our knowledge, asked the members of the minor judiciary what they thing would best serve the interest of all the people of Pennsylvania! Can they therefore be blamed for feeling that they are being used as "whipping boys" by interests whose motive is self gain?

That distinguished members of the minor judiciary are ready, willing and able to sit down with any agency which is interested in an honest, objective appraisal of its problems is a matter of record. Any changes which are to come about should come as the fruit of an open examination of all the facts, contributed to in large measure by those closest to the problems, *the justices of the peace, magistrates and aldermen of Pennsylvania.*

In the urban counties (outside Philadelphia) a great deal of dissatisfaction with justices courts stems from the fact that the business of the court is transacted in a private residence in most cases. This aspect of the office is an outgrowth of economic necessity and the local nature and purpose of the "neighborhood court". One of the most significant points we could outline in this discussion is the observation, based on a great deal of personal experience, that the sophisticated citizen of Pennsylvania's urban counties *resents having his problem aired in "someone's house!!!"* The most knowledgeable magistrate suffers a poor public image if he conducts hearings in his home, no matter how elaborate his office. We have seen government efficiency manifested in the erection of endless public buildings during the last 30 to 50 years and this has engendered a feeling for a certain amount of formality among us all. Coupled with the higher education level of the average citizen, the worldly demeanor of World War II veterans and the "I am as good as you are" attitude of all twentieth century Americans and you have the elements for resentment by people who are judged at a level they consider beneath their dignity. Fear and awe of authority has lessened considerably in post war America.

It is an absolute certainty that there is an enormous difference in the respect accorded a proceeding which takes place in a township office over one conducted in residence. Most of the disrespect and distrust of the minor judiciary would disappear if all hearings were held in public buildings. In this area, the judges themselves must move into active cooperation with municipal officials to establish their own municipal courts. If they don't the matter will soon be taken out of their hands.

If we as members of the minor judiciary cannot preside over our courts in

dignified, knowledgeable fashion, and in appropriate surroundings, we will see the end of the office as we know it. All of the criticism is not unfounded and it would be ostrich-like to think otherwise. The framework around which our courts not-of-record can be operated as dignified community courts is within the reach of nearly every minor court judge in the State. Sad to say, the minor judiciary itself is not taking full advantage of existing public buildings. Having the ability to perform satisfactorily and operating from a home made office can readily be compared to a fine engine installed in an ugly auto body. No matter how good the motor, no one will buy it.

*A modern, functional minor court system for Pennsylvania could be a reality if the following constitutional or legislative changes were effected, in addition to the changes outlined above.*

### **A Proposal for Legislative and/or Constitutional Changes in the Minor Judiciary**

1. That a level of Judiciary between the Justice of Peace and the Court of Record be established is hereby proposed. Said Court to be established in every municipality in the Commonwealth which desires it, except that establishment of such Court be mandatory in all municipalities in certain counties; those counties to be determined on the basis of population, urbanization, and pressure for its inception. Said Court to be known as Municipal Court.

2. Municipal Court is hereby defined as a Court, not of record, presided over by a judge who satisfies the Commonwealth that he has satisfactorily completed the required course of instruction prior to his election or appointment. A Municipal Court Judge should be required to complete and pass the Course regardless of prior election or appointment as a Justice of the Peace, Magistrate or Alderman.

3. An equitable formula should be found for elimination of a minor court in those municipalities where there is an obvious need to do so. Seniority is not the most equitable solution to this problem since many vigorous young men capable of adapting to a new system are and will be interested in the office. Competitive examination with the highest scorer retaining the office offers a possible answer. In any event, there should only be one Municipal Court Judge in any Second Class Township with a population of ten thousand or less. This formula should apply to Justices of the Peace and Aldermen throughout the Commonwealth. It should also apply to all classes of municipalities, especially those where there is one official to each ward. This is too many. The elimination of offices which handle very few cases in rural areas offers another practical solution to the problem of reduction of the number of minor courts.

4. Municipal Court should only be established in municipalities which

provide an adequate hearing room, suitably furnished for the conduct of such business as shall come before it. No hearing shall be held in the residence of the Municipal Court Judge except in case of arrest on view (immediate hearing) or when late hours or other circumstances make it impractical to use the Municipal Court room. Courts in office building or other suitable locations acceptable.

5. *The Municipal Court Judge Should Be Compensated by a Salary!!!*  
A workable salary formula should be set up which provides adequate salary levels in accordance with the volume of cases handled by the Court. However, since the amount of clerical work involved bears directly on the number of cases handled, it is necessary that an additional amount be paid to the Court in the form of expenses. A base salary with a smaller percentage of fees-per-case would solve the problem. The salary should be paid by the Commonwealth and the fees by the local municipality which receives most of the fines collected by the Court, or by some similar equitable formula.

This proposal will encourage two major reforms: first it overcomes objections of Justices of the Peace to moving their Courts out of private residences for monetary considerations and, second and most important, it returns justice to the minor judiciary by eliminating its dependence on police officers and traffic arrests to provide income.

If nothing else is accomplished, this single reform can do more to promote real equity for every citizen of Pennsylvania than all the inaccurate and erroneous comments we have heard in thirty years.

Additionally, a fixed office expense should be paid by the Commonwealth only to Municipal Courts which meet standards set up under these proposals.

6. In order to clear the dockets of higher courts which seem to be overcrowded, the Municipal Court should have jurisdiction over some misdemeanors such as those in the Vehicle Code (except manslaughter), some juvenile cases and any others which are deemed appropriate.

7. In order to remove the minor judiciary from the pitfalls inherent in the present political selection of its officials, the "Sitting Judge" principle and cross filing should be allowed.

8. In order to implement these proposals and to establish and maintain a modern, well informed minor court system for Pennsylvania we propose that the office of Commissioner of Minor Judiciary be set up at the state level and administered in each county. The office to be charged with responsibility for development and maintenance of the following programs:

Adequate initial and continuing education.

Uniformity of procedure and judicial conduct.

Sound fiscal practice and audits.

Investigatory and disciplinary authority.

In summary, it must be recognized that changes are due and will be forced upon the minor judiciary by uninformed or self seeking agencies and persons unless the minor court officials themselves are able to effect an acceptable, workable program which recognizes that:

1. No one wants to have anything to do with a court proceeding in a private dwelling.
2. The Judge must be knowledgeable, articulate and dignified.
3. He must not be involved financially or politically in any case before him.
4. The conduct of all minor courts must be administrated by an agency which is able to implement sensible changes which are fair to all without allowing them to fall into the hands of persons who would tie them up in legal knots forever.

Failure to recognize what is about to happen combined with resistance to any change or a meaningless proposal by members of the minor judiciary, will defeat present office holders before they know what has happened. More important, if the so-called "Lawyer Plan" is adopted either by legislative, or constitutional avenues, every man, woman and child in Pennsylvania will have abdicated a part of his already fleeting personal freedom, probably for all time.

## SUBMISSION NO. 2

*Submission of the  
Committee for Economic Development,  
Voiced by Robert F. Steadman, Director  
(Given July 20, 1967)*

**SUMMARY.** State court systems should be modernized by adoption of recommendations made repeatedly and consistently by study commissions reflecting the views of the judiciary, bar associations, and qualified citizens. Specifically, all judicial functions now performed by local courts should be brought into a single statewide system. Each legislature should have authority to create new courts and abolish existing ones as the need arises, and to provide for the unified administration of the entire system. Judges should be appointed for long terms. Minimum levels of judicial compensation should be sufficient to command respect.

Orderly and equitable administration of justice, both civil and criminal, is a hallmark of a stable and respected government. Responsibility for this function should not rest upon minor civil divisions. Until statewide unification occurs, the erosion of public confidence in separate state and local judicial systems—resulting from delays and miscarriages of justice—is likely to continue.

### ***Modernizing the Judicial Branch***

The administration of justice in both civil and criminal cases is primarily a responsibility of the states, even though the role of the federal judiciary has been expanded. State-local court systems have been studied intensively for many years by such well-qualified groups as state judicial councils, the American Judicature Society, the American Bar Association, and the National Municipal League.

There is a remarkable degree of agreement in the findings of these studies—from the report of the Wickersham Commission in 1931 to that of the President's Commission on Law Enforcement and Administration of Justice in 1967. The same major reforms to correct the same glaring defects

Editor's Note: These comments are excerpted from *Modernizing State Government*, a statement by the Committee for Economic Development, N.Y., 1967, pages 21 and 62-66, which were referred to by Dr. Steadman in lieu of his submitting a formal written statement.

have been urged on the states again and again, but with slight effect. With a few scattered or piecemeal exceptions, the progress of court reform has been even slower than in the executive and legislative branches of state government.

Poor organization and archaic procedures create delays in civil suits and weaken the administration of criminal justice. The 1967 report of the President's "Crime Commission" supports this conclusion.

While in some States successful court reform has created courts able to meet new demands, in many States the entire court structure continues to reflect an earlier age. There is a multiplicity of trial courts without coherent and centralized administrative management. Jurisdictional lines are unnecessarily complex and confusing. Each court and each judge within the court constitute a distinct administrative unit, moving at its own pace and in its own way. In a number of States courts not responsible to a statewide system nor subject to its management continue to be viewed as a source of local revenue, and criminal justice is seen as a profit-making activity.<sup>1</sup>

We do not propose to set forth a detailed program for state-local judicial reform in this policy statement. We believe, however, that we must call attention to the responsibility of the 50 states for the condition of their judiciaries, since they are coordinate third branches of government. High crime rates and the need for expeditious and equitable administration of civil law prompt us to reiterate basic needs that authorities on the judiciary have uniformly noted.

### ***Court Organization and Administration***

Each state has its own system of courts--with such local bodies as justices of the peace, police courts, magistrates' courts, and municipal courts at the bottom of the structure; general trial courts (e.g., district and superior courts) above them; and one or more higher bodies to hear appeals. Some states also have separate courts for juveniles, domestic relations, and probating wills.

Justice of the peace courts and similar bodies are weak links in the judiciary. They have small geographic jurisdictions, and seldom hold trials or keep detailed records. Their judges commonly have little legal training and usually collect their own fees. Higher state courts may share concurrent jurisdiction with these inferior courts but cannot supervise them, since they are under independent local control—even though most lower courts enforce state laws.

In 1931 the Wickersham Commission urged that such lower courts be abolished, and the Presidential Commission reached a similar conclusion in 1967. We support this recommendation. All nonfederal courts in each state should be combined into a single judicial system, as long advocated by those groups most familiar with the present situation and its consequences. Minor

local courts would be replaced by a state-wide system of inferior courts with original and general jurisdiction, under full-time qualified judges. Administration of the entire state judicial system should also be centralized so that judges and other court personnel may be shifted to meet changing requirements. Colorado, Illinois, and New Jersey — among other states — have taken steps toward unification of their court systems, under central administration.

We recommend that each state create a unified judicial system embracing all nonfederal courts, judges, and other court personnel. Administration of this system should be centralized to insure the best use of manpower and facilities.

### ***Selection, Tenure, and Compensation of Judges***

*Selection.* The administration of justice in any court system cannot rise above the quality of its judges, but procedures to assure the selection of qualified candidates are often lacking. Forty-one states provide for the popular election of all or part of their judges, 28 using partisan ballots. Five states — Connecticut, Rhode Island, South Carolina, Vermont, and Virginia — give their legislature power to elect important judges, which eliminates lengthy and costly campaigns but tends to give disproportionate consideration to political affiliations.

Popular election is not a suitable means for the choice of judges. Judges should not be chosen on the basis of political appeal or party standing. Citizens often cast their ballots for judges blindly, or fail to vote on such positions. A recent opinion survey found that half the citizens who went to the polls in New York City in 1966 failed to vote at all on any judgeships, and that very few of those voting could even remember the name of any judicial candidate only a week or so later.

We support the proposal, almost universally recommended, that all judges at all levels be selected on the basis of merit, along lines used for state judges in Missouri for over 25 years. Eleven other states use comparable plans, at least for some judicial positions. The plan involves a nominating commission — usually composed of the chief justice as chairman, along with an equal number of lawyers elected by the state bar and non-lawyer citizens named by the governor — which submits names of three persons it feels best qualified to fill each vacancy in a court of state-wide jurisdiction. (The same principle is applicable to courts of lesser jurisdiction, with members of the nominating commission drawn from that district.) This commission can give informed consideration to such important factors as integrity, legal training, professional ability, emotional stability, and physical stamina for each prospective judge. The governor then selects one individual from this list. Subsequent terms are based on reappointment or noncompetitive reelection.



*Tenure.* Long tenure helps to protect judges from political influence. Appendix Table 5 (Terms and Salaries of Judges) shows that Vermont limits judicial terms to two years for all its judges, and that 17 other states have six-year terms for judges of their highest courts. Many judges of lower courts are selected for terms of four years or less.

Short terms discourage able men from serving on court benches, especially when they must compete in partisan elections. The Presidential Commission of 1967 has recommended that terms of all major trial court judges be "for 10 years or more." With the creation of a unified and restructured state court system along lines proposed above, this recommendation logically is extended to include all judges. A strong case may be made for life tenure of judges, subject to mandatory retirement at age 70, if suitable arrangements are made to permit removal for cause. Life tenure in one form or another is widely used in Massachusetts and Rhode Island, as well as for the national judiciary.

Regardless of the length of terms, provision should be made for a more dignified, fair, and effective procedure to discipline or remove judges. The cumbersome method of impeachment, however useful as a potential check on governors, has not worked well in the state judiciaries. California's Commission on Judicial Qualifications, established in 1960, has proved successful for this purpose and is being widely copied in other states.

*Compensation.* Efforts have been made in recent years to raise judicial salaries, but many states continue to pay their judges far less than they would receive in private practice. (See Appendix Table 5.) A 1964 survey of Boston lawyers with at least ten years of experience showed that their incomes were \$1,000 to \$10,000 higher than trial court judges; surveys in Michigan and Oklahoma have produced similar findings.<sup>2</sup>

In our view, no justice of the state's highest court should be paid a salary less than that of a federal district court judge, currently \$30,000 per year. Populous states should establish substantially higher levels, following the example of New York with a base salary of \$39,500. Chief justices should receive additional amounts commensurate with their extra responsibilities. The pay of lesser judges should be raised correspondingly. Judicial positions not important enough to command a respected salary for a competent full-time judge should be abolished, with their functions absorbed by other courts.

We recommend that each judge be appointed by the governor from a list of nominees submitted by an independent selection committee. Judges should have a tenure of no less than 10 years—with the right to be reappointed or to stand for noncompetitive re-election. We further recommend that each state pay the justices of its highest court salaries no less than those of federal district court judges (currently \$30,000), and that larger states

set proportionately higher salaries. Corresponding pay scales should be established for all lesser judicial positions.

No society can claim a high level of civilization without equitable and prompt adjudication of civil disputes. Certainty and celerity in the administration of criminal justice are equally vital. These matters should be of deep concern to every citizen. State-local court systems belong to the people of this country. They should not be permitted to stagnate, in the mistaken belief that reform must await the initiatives of a specialized profession viewing them as a private preserve.

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### *Notes to Submission No. 2*

1. *The Challenge of Crime in a Free Society*, a report by the President's Commission on Law Enforcement and Administration of Justice (Washington, D.C.: U.S. Government Printing Office, 1967), p. 157.
2. Glenn R. Winters and Robert A. Allard, "Judicial Selection and Tenure in the United States," in *The Courts, the Public, and the Law Explosion*, Harry W. Jones, ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965), p. 154.

## SUBMISSION NO. 3

*Submission of Edward E. Garlits, Jr.,  
Justice of the Peace,  
Yardley, Bucks County, Pennsylvania*

### **Introduction**

For more than a quarter of a century, elements both within and outside the minor judiciary of the Commonwealth, have been active in sponsoring changes in the character and function of our minor courts. Millions of words have been written, by both critics and defenders. Generally, the authors speak from a limited personal exposure to the realities of this complex problem and often have been disposed to make their judgments as a result of isolated experiences.

Modernizing our minor judicial system will not be as simple as it may appear to the casual observer. As an example, before the advent of 20th century mobility and communications, our forefather's judgment of having a justice of the peace or alderman on an *average* of one for every 8 square miles, had obvious merit. In those days, travelling to a point 5 miles away and return, took the best part of a long day. Likewise, the day-to-day problems of community life in those days can hardly be compared to conditions today . . . and they are not going to become less complicated in the decades to come.

The present opportunity of the Constitutional Convention to modernize our minor judiciary, should not be limited to correcting the shortcomings of the past. The Convention should also address itself to the need of preparing for the future.

There is also the fortunate circumstance of the Convention being able to profit from the experience of other states who have modernized their minor courts in recent years. Soliciting the opinions of the court administrators of these other states and carefully examining the results of their court modernizing, should illuminate the mistakes and excesses others have experienced.

Those who have a genuine and unbiased concern over the long awaited tampering of our present system, should hope this Constitutional Convention will act as a 'doctor' looking for professional diagnosis and treatment of

a "sore finger" rather than act as a "surgeon" who would "cut off the whole hand".

Our present system, with all its alleged faults, has so much to recommend it, that it is neither feasible or practical to make a wholesale substitution. Yet, there is preponderant evidence that the objectives of modernization, should fall within these guidelines:

1. to establish a new formulae for determining the number and location of an adequate number of minor courts in relation to population density, geographical area and service to the public,
2. to retain, insofar as feasible, the character of informality in our neighborhood courts combined with the dignity and prestige that in so many instances, is now absent,
3. to elevate the public's image of our minor courts by establishing minimum standards of court facility and judge's qualifications,
4. to continue to place the major portion of the cost of maintaining and staffing our minor courts, principally upon those who make our courts necessary,
5. to raise the jurisdiction of a segment of our minor courts to lessen the burden of our county courts in adjudicating some types of minor cases,
6. to provide an equitable schedule of compensation that would be more attractive to pre-qualified and dedicated personnel,
7. (and of supreme importance) to establish a new office of Minor Court Administrator, charged with the responsibility of developing and enforcing rules of conduct, appearance, accountability, performance and continuing in-service education.

I am confident the delegates to the Constitutional Convention can and will embrace each of these objectives. And, from their research, evaluation and unbiased application, will present a workable and feasible plan for minor court modernization.

### ***The Following is Submitted for the Record***

#### ***How Many and Where?***

Perhaps the most complex facet of minor court modernization will be the determination of where our minor courts are to be located and the number of magistrates required to serve the needs of our Commonwealth.

If the population of the Commonwealth were evenly distributed over our 45,333 square miles or there were approximately an equal number of inhabitants in each political sub-division or municipality, the formula used in

our present Constitutional requirement, could appropriately be applied. But, this is not so, Evidence of the inadequacy of any across-the-board formula, will be found in this fact: As of July 1960, the provision of two justices for each municipality or an alderman for each ward, provided for a total of 5,471 offices. At that time, only about 75% or 4,337 of these offices had been filled. And, of those commissioned, many were inactive.

Thus, in many municipalities, there appears to be no pressing need for two, or even one magistrate.

Any proponent of a uniform assignment or allocation of so many courts or justices per so many thousand inhabitants, township or borough will not be offering a practical solution to the problem either. The cloth must be cut to fit the pattern. That the pattern is irregular, is proved by these facts:

The population of Pennsylvania (1960) was 11,319,366 of which 8,102,051 or 71.6% was classified as urban by the Bureau of Census.

Exclusive of Philadelphia, there are 44 cities with populations of more than 10,000 and 6 cities of less than 10,000.

There are 1555 townships with only 65 having a population of 10,000 or more leaving 1490 townships with less than 10,000.

There are 955 boroughs with only 64 having more than 10,000 population. 369 boroughs have less than 1000 inhabitants.

Although the population of each legislative district is fairly well proportioned, distribution of inhabitants is by no means uniform.

Two other interesting statistics, not included above and which may provide some clues for areas of service, are: 511 State Liquor Stores (exclusive of the 103 in Philadelphia) and 1638 School Districts (the numbers of which are being gradually reduced through consolidation). It is interesting to note that Elk and Union Counties do not have a State Liquor Store, 8 counties have only 1, 10 have only 2, 3 have 3 and 8 have 4.

Also overlooked by most proponents of change, is the Pennsylvania Turnpike (469 mi.) and the ever growing network of limited access highways (over 1600 miles built or proposed). These highways frequently traverse vast and sparsely populated areas. Service to motorists who violate the Vehicle Code and who are arrested on view, require, in some instances, even better service than is now provided under our present system.

In anticipation the Judiciary subcommittee will be attentive to the need for a flexible method of establishing how many and where community and district courts will be located, an outline for four different classes of courts follows.

#### **Class "A" Court**

This class court could be reserved for first class townships, cities and boroughs, with populations in excess of an arbitrary figure in the range of

25,000. Exclusive of Philadelphia, and projected on the 1960 censuses, this would include 20 cities, 5 boroughs and 15 townships. If 25,000 was used as a qualifying base and a justice for each 15,000 over 30,000 and a minimum of 2, the projected number of justices would be:

|                                                    |           |
|----------------------------------------------------|-----------|
| Cities (including Pittsburgh but not Philadelphia) | 87        |
| Boroughs of 25,000 or more                         | 10        |
| Townships of 25,000 or more                        | <u>41</u> |
| Total                                              | 138       |

One magistrate or district judge, would be allocated for each 15,000 inhabitants, with a minimum of 2. It is proposed that each magistrate would serve as full time justices and would be obligated to hold office under the Canons of Judicial Ethics. Magistrates would be elected (or appointed to fill a vacancy) as now provided by law. However, additional consideration may be given to the merits of electing candidates on an at-large basis (and possible cross-filing too) in municipalities with more than 50,000 inhabitants.

Additional magistrates for a municipality would be permitted when the population of the municipality reached the next qualifying population unit by applying to the county court and receiving the court's approval.

It is proposed that each magistrate sit as a Police Magistrate for specified periods of weekly or monthly, on a rotating basis, handling all criminal and motor vehicle cases coming before the court. (this would eliminate the much criticised "nearest available" concept of before whom motor vehicle violations are filed) Civil cases and other optional notary work (auto title transfers, marriages, etc.) would be permitted from the magistrate's private office, providing the private office facility met the minimum standards to be established.

Compensation would be in the form of a salary in the range of \$10,000 to \$12,000 (which could be established by the county court in which the municipality is located). All court costs for criminal and motor vehicle work would be returned to the municipality in which the complaint was originally filed. Court costs derived from civil and notary work would not be returned to the municipality. Court costs resulting from prosecutions under municipal ordinances, would be returned to the originating municipality.

Provisions could be made for Class "A" courts to enlarge their jurisdiction to accommodate satellite boroughs and townships (within the same county) with the consent of the satellite municipalities. In this event, the criteria of a judge for each population unit would include the total population of the jurisdiction.

Court facilities would be provided by the municipality that would meet minimum standards to be established by the proposed Court Administrator. The proposed "Court Facility" allowance, described elsewhere, would *not* be paid to municipalities for Class "A" courts.

As in Class "B" courts, all hearings and arraignments would be required to be held in an approved court facility.

### **Class "B" Courts**

Class "B" courts would be reserved for Townships, Boroughs and Cities with populations of less than 25,000, but with more than 10,000. If satellite municipalities were included in the judicial jurisdiction (with the consent of the satellite units) and the combined population exceeded 25,000, the court class would automatically be eligible for a Class "A" classification. Otherwise, a Class "B" court would be allocated two magistrates, who would be elected at large from the municipality or municipalities included in the judicial jurisdiction. These magistrates would *not* be required to hold office under the Canons of Judicial Ethics.

Projected on the 1960 census, the estimated number of magistrates would be:

|              |            |
|--------------|------------|
| 25 cities    | 50         |
| 50 boroughs  | 100        |
| 50 townships | <u>100</u> |
| Total        | 250        |

Magistrates would be elected (or appointed to fill a vacancy) as now provided by law.

Court facilities would be provided by the municipality that would meet the minimum standards to be established by the proposed Court Administrator. The proposed "Court Facility" allowance, described elsewhere, would be paid to the municipality that provided the municipal court facility.

If there were more than one municipality in the judicial jurisdiction, and the municipalities could not agree which would supply the municipal court facility (preferably located in the Municipal Building), its location would then be determined either by the Court Administrator or the county court.

As described elsewhere, a Class "B" municipal court facility could not be part of a dwelling otherwise used as part of a housing accommodation. All arraignments and hearings would be required to be held in the municipal court facility, with the possible exceptions of requirements for an immediate arraignment after regular court or office hours.

Compensation would be in the form of fees and courts costs collected by the magistrate, as presently provided. It is urgently recommended that present court costs for motor vehicle cases be set at \$7.50, regardless if a hearing is demanded or not. The present schedule of \$5.00 costs plus an additional \$5.00 if a hearing is demanded places a penalty on the defendant's right to publicly defend his actions in court.

It is proposed that each magistrate sit as a Police Magistrate for specified periods of weekly or monthly, on a rotating basis, handling all criminal

and motor vehicle cases coming before the court. As specified for a Class "A" court, this would eliminate the "nearest available" concept of before whom motor vehicle violations are filed.

Fines collected and remitted to local government would be paid to the municipality from which the complaint (or information) was filed in event there was more than one municipality in the judicial district.

Civil cases and other optional notary work would be permitted from the magistrate's private office, providing the private office facility met the minimum standards to be established by the Court Administrator.

### ***Class "C" Courts***

Class "C" courts would be reserved for Boroughs and Townships with populations of less than 10,000. The estimated number of justices of the peace would be a maximum of 2022 with a probable number of about 1000.

It is our considered opinion, after having visited approximately 300 magistrate's "court" facilities, that this is where the major portion of the criticism of both the quality of the court facility and the qualifications of the magistrate originates.

While there are many notable exceptions, it is understandable why these court facilities and magistrates too often do not measure up to what the public thinks they have a right to expect. The reasons why this group has been the target for reform or outright elimination would include:

(a) too many magistrates for the number of inhabitants to be serviced.

There are approximately 532 boroughs and 1496 townships with populations of less than 10,000. By the provisions of our present Constitution, each borough and township is allowed two justices of the peace or a total allocation of over 4,000 magistrates. It is largely from this group there are an estimated 1300 vacancies.

Using a median figure of 5,000 inhabitants for each of the 2,022 municipalities, would multiply out to over 10,000,000. (the median or average population is probably closer to 2,500) Divide the 10 million by the 4000 squires allowed and we have a squire for each 2500 men, women and children.

(b) the available court costs and fees received by these justices of the peace, are inadequate.

Here again, there are some exceptions but, the exceptions are very few. For the most part, whatever court costs are available within the jurisdiction served by two magistrates, must be divided, although not equally, between the two squires. While a squire may be a dedicated public servant, there is just not enough revenue in the spasmodic performance of the duties of the office to "take the court out of the living room or back porch" to a place of dignity and prestige it so urgently deserves.

(c) the absence of reasonable and equitable compensation too often



results in the failure of local committeemen to lure better qualified citizens to be nominated for election to the office of justice of the peace.

It is also true that the minor judiciary has been derelict in successfully communicating with the public that the duties and responsibilities of the office. Duties that often require hours of patient listening, for an example, in settling minor domestic matters for which the justice receives absolutely no compensation! Nor, does the public in general know that when a case is heard before a justice that the justice's court costs are paid by the county, if the defendant is found not guilty!

Guidelines toward a solution for reducing the number of magistrates and increasing the compensation would be in the direction of:

1. limiting the number of justices of the peace to no more than one per municipality, if the population of the municipality is more than 5,000 but less than 10,000 or,
2. if the population of the municipality is less than 5,000, that the judicial jurisdiction be enlarged to include surrounding municipalities that will qualify the court to become a Class "C" or "B" court and,
3. apply a new schedule of fees and court costs, to be levied against the guilty defendants, that is more closely related to the present costs of doing business.

Class "C" courts would otherwise be operated in the same manner as outlined for Class "B" courts.

#### **Class "D" Courts**

Class "D" courts would be reserved for serving the Pennsylvania Turnpike and the growing network of limited access and interstate highways where the proximity of other class courts was not convenient to the established interchanges of these highways.

Using the 469 miles of the Pennsylvania Turnpike as an example, there are about 125 justices of the peace serving this major highway. In 1965, there were approximately 53,000 violations of the Vehicle Code. There are no statistics collected to determine the number of the violations that were "arrests on view". "Arrest on view" is where the defendant is immediately taken before "the nearest available magistrate to the nearest exit within the county to where the offense occurred". This technique is usually reserved for out of state motorists. Again, there are no accurated records compiled on the number of "arrests on view" although most troopers of the Pennsylvania State Police estimate it as high as 75%.

Proximity of the "nearest available" today varies from trailers set up by the side of the Turnpike, to a squire's court sometimes as far as 5 miles from the nearest exit (which also includes emergency exits). Descriptions of some of these "courts" and the attire and qualifications of a few of these "repre-

sentatives of Pennsylvania justice" has been discreetly eliminated from our Commonwealth's invitations to tourists. And, there are often similar situations along other of our tourist travelled highways.

### ***Court Facility***

It is proposed that minimum standards be established by the Court Administrator, for all public courtrooms where arraignments and hearings may be held. In municipalities qualifying for a Class "A" court, it would be required for the court facility to be provided by the municipality, without subsidy.

Municipalities qualifying for a Class "B", "C" or "D" court, would be encouraged to provide a municipal facility to add dignity and prestige to our minor judiciary system. Where a municipality cannot, or will not, furnish a municipal court facility that will meet minimum standards, the magistrate(s) would be permitted to maintain a private court facility. Magistrates who were compelled to operate private court facilities in the absence of a municipality providing the facility, would be subsidized by the county at an amount of not less than \$600 per annum, providing the court facility met the minimum requirements.

Municipalities providing municipal court facilities, in all but Class "A" courts, could be eligible for a subsidy, providing they met the minimum requirements to be established.

In any event, where a private court facility would be located in or connected to a dwelling, adequate provision would be made to separate the court room from the housing accommodation when court is in session (to keep the kids from wandering in and out, when the court is doing business).

It is anticipated that the Court Administrator will establish reasonable standards for area, accessibility, lighting and general appearance and appropriate magistrate's attire.

The location of these proposed Class "D" courts need not be available from emergency exits of the Turnpike. The frequency of interchange exits on the Turnpike, averages less than 13 miles with one (Bedford-Somerset) at 45.6 miles and another (Blue Mountain-Carlisle) at 25 miles. All other interchanges are less than 20 miles apart.

Where there is not another Class "A", "B" or "C" court within a reasonable distance from an interchange of the Turnpike, the Turnpike Commission could furnish a suitable court facility on Turnpike property. The location of these courts could be at the interchange exit, maintenance station, Pennsylvania State Police station or at selected service areas.

Magistrates for serving these Turnpike courts would be elected from the municipality in which the court is located, one magistrate per court, and would be governed by the Canons of Judicial Ethics. Compensation would be the same as specified for Class "A" courts.

Class "D" courts would be permitted, upon application of the municipality to the county court where there is a demonstrated need for a court, to serve a section of any designated limited access or interstate highway when there is otherwise not another class court within a specified distance from an interchange. A reasonable distance would be from 3 to 5 miles.

Magistrates for this type of Class "D" court, would be elected from the municipality in which the interchange was located, one magistrate per court. Compensation would be from fees and courts costs. Court facility must conform to minimum standards to be established by the proposed court administrator. Magistrates for Class "D" courts serving highways other than the Pennsylvania Turnpike, would *not* be required to serve under the Canons of Judicial Ethics.

Estimated number of magistrates required for servicing the Turnpike would be about 20, exclusive of other class courts that would be within convenient service distance from an interchange. The number of "D" courts for serving limited access and interstate highways, cannot be fairly estimated without further research.

### ***Educational Requirements***

It is proposed that through the office of the contemplated Court Administrator and the Department of Public Instruction, a special course of instruction and orientation be provided for all newly elected (or appointed) magistrates.

It is further proposed that an examination be held at the same date and time, at the County seat of all counties, for all registered aspirants to the office of magistrate and be proctored by the President Judge of the County. Those who earn a passing grade from this examination would then be permitted to perform summary judicial acts until the time when the magistrate has completed and passed additional courses of instruction attesting to the qualifications of the magistrate to exercise increased jurisdiction. There should be no exceptions to this rule.

### ***Enlarged Jurisdiction***

This may be the appropriate time to consider the merits of enlarging the jurisdiction of qualified magistrates to relieve the congestion of the county courts in less serious matters. Opinions on this subject should be solicited from county judges and district attorneys and evaluated for further consideration.

### ***Court Administrator***

Whatever wisdom is exercised by the Constitutional Convention, immediate recognition should be given to the long over due need for establish-

ing a Minor Court Administrator, supported by an advisory board of judges, district attorneys, magistrates and laymen.

It is proposed that the Court Administrator have the authority to establish and enforce (a) a Code of Ethics and Conduct, (b) minimum requirements for court facilities, (c) uniform accounting, processing and reporting procedures and (d) provide initial and in-service education.

## SUBMISSION NO. 4

*Proposed Amendment to Article V of the Constitution of Pennsylvania,  
by Robert R. Williams (Alderman, Allentown, Pennsylvania)*

*Submitted by mail May 25, 1967, Replacing  
Present Sections 11 and 12*

### ***Establishment of Representative District Courts***

The Judges of the Courts of Common Pleas shall establish in each Legislative Representative District within the geographical boundaries of their Judicial District, at least one, and as many as they may deem necessary to properly serve the citizens of that District. Representative District Courts. They shall determine the geographical location of the Representative District Courts established by them. In the event that a Legislative Representative District lies within the geographical boundaries of the jurisdiction of one or more Courts of Common Pleas, that Court which has jurisdiction of the largest number of registered voters in the Legislative Representative District shall have authority over all the Courts within its District. When the Courts of Common Pleas have determined the number and location of the Representative District Courts to be established, they shall so notify the County Commissioners in their own Judicial District, and shall furnish the County Commissioners with complete plans for the layout, furnishing and equipping of said Representative District Courts. When the County Commissioners have complied with these instructions, the Courts of Common Pleas shall arrange for the opening of said Representative District Courts to function as per this amendment.

### ***Control and Maintenance of Representative District Courts***

The control of said Representative District Courts in all matters pertaining to judicial operation, ethical conduct and proficiency of service to the public shall remain with the Court of Common Pleas.

The conduct of the financial business of the Court, bookkeeping and report systems, handling of fines and costs and all other matters pertaining to the efficient handling of the Court's business, shall be under the control of the County Commissioners, who shall set up systems for the operation of each Court within the Judicial District. In the event one or more Representative District Courts lie within the geographical boundaries of another

Judicial District, the County Commissioners shall either reimburse or surcharge the foreign county on the basis of fair allocation of costs and receipts, or the Judges of the Courts of Common Pleas may by agreement waive the rights of the Judicial District having the largest number of registered voters in the Representative Legislative District, and the Court of Common Pleas and Commissioners of the County in which the Representative District Court is located may assume all rights and liabilities under the amendment. The Judges of the Court of Common Pleas may assign numbers to the Representative District Courts for the purpose of identification, with the numbers of the Legislative Representative District to be followed by alphabetical identification of each Court.

#### *Representative District Court Personnel*

Each Representative District Court is to be served by

- (1) A Judge of Representative District Court
- (2) A constable
- (3) A Court Clerk

#### ***Judge of Representative District Court***

The Judge of each Representative District Court shall be elected on a non-partisan basis by the qualified electors within the geographical district which the Court of Common Pleas has designated as the jurisdiction of the Court, at the municipal election, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of 6 years, beginning the First Monday of January following the election. In the event of a vacancy in office, the Court of Common Pleas may either declare the office vacant until the next municipal election, and allocate the business of the Court to the adjoining Courts within the Legislative Representative District, or appoint an interim Judge of Representative District Court to serve until a judge has been elected.

#### **QUALIFICATIONS**

Any registered voter of the Legislative Representative District, who resides within the geographical boundary of the jurisdiction of the Representative District Court, may apply to the Election Board of the County in which the Representative District Court is located, before a certain deadline to be set by the Election Board of said County and properly advertised according to the law of the Commonwealth, by presenting to said Election Board a certification from the Department of Public Instruction of the Commonwealth of Pennsylvania that he has

- (1) become learned in the law and passed the examination to become a member of the Bar, or

(2) served as an active Alderman and Justice of the Peace for at least two full terms of six years, and has taken and passed a course set up by the Department of Public Instruction on Court Procedure and Conduct, or

(3) has taken and passed satisfactorily a course in basic law, Court Procedure and Conduct, set up by the Department of Public Instruction of the Commonwealth, and made available to all applicants. The Department of Public Instruction, together with a committee of 2 members of the Pennsylvania Bar Association, a representative of the Attorney General's office and 2 members of the Pennsylvania Magistrates' Association, shall compile such a course in two parts, Basic Law, and Court Procedure and Conduct. This course is to be printed and furnished to all applicants at their own expense at a cost based upon the cost of printing and preparing the course, and furnishing the examination. When any candidate for the office of Judge of Representative District Court applies for said Examination, the Department of Public Instruction shall arrange for an examination to be held for all applicants at the State Capitol on a date prior to the Spring Primary of that year. All applicants are to be notified of said examination by certified mail at least 30 days prior to the examination, and the date, time and place of said examination is to be advertised in all Counties in which a Law Journal is published for at least four weeks preceeding the examination. All applicants for office who are members of the Bar of Pennsylvania, or who qualify under (2) as active Aldermen or Justices of the Peace, shall be certified upon completion of the examination on Court Procedure and Conduct only, while all others are to be certified upon completion of the examination on the complete course. The Department of Public Instruction, after such examination, shall issue a certification to all those who have completed it satisfactorily, in time for filing with the County Election Board where the candidate intends to run for election.

#### **RE-ELECTION**

A candidate for re-election as Judge of Representative District Court must present an application for place on the ballot, to the Election of Board of the county in which he serves, before the deadline set by that board. This application must be endorsed by the Judges of the Court of Common Pleas under which he serves, stipulating that he has conducted his office satisfactorily during his previous term.

#### **SALARY AND BENEFITS**

The Judges of the Representative District Courts shall receive a salary of not less than \$10,000.00 a year, or a greater amount if so determined by the Judges of the Court of Common Pleas for that District. The Judges of the Representative District Courts shall have all rights and privileges extended to all other employees of the County in which they serve, including paid vacations and Holidays.

## **RESTRICTIONS**

No Judge of the Representative District Court is to engage in the practice of law, conduct a business of any nature, or accept any other gainful employment while in office, EXCEPT

that he may serve as Magistrate of Police Court or Traffic Court within the municipal corporation in which his Court is located, at a salary to be determined by the proper authorities of the municipal corporation, providing, however, that such service does not interfere with the proper functioning of the Representative District Court. No Judge of the Representative District Court is to engage in any political activity or service while in office.

## **Constable**

Each Representative District Court is to be served by a constable. He shall be elected by the duly qualified electors in the geographical boundaries of the District he represents, on a non-partisan basis, at the municipal election, in such manner as shall be directed by law, and shall be commissioned by the Governor for a period of 6 years commencing the First Monday in January following his election. In the event of vacancy in office, the Court of Common Pleas shall appoint a Constable until the next municipal election.

## **QUALIFICATIONS**

A candidate for constable must be a resident and qualified elector of the District from which he is elected, must be without a criminal record, and must satisfactorily take and pass an examination on a course to be furnished by the Department of Public Instruction on Duties of a Constable, said course to be compiled in like manner as the Course to be furnished applicants for the position of Judge of Representative District Courts. Each applicant for the course must pay the Department of Public Instruction a sum set by them as the cost of compiling such course, printing it and furnishing the examination. Each applicant who satisfactorily completes said examination will be furnished a certificate of attainment by the Department of Public Instruction in time to file said certificate with his application for position on the ballot, with the County Board of Elections.

## **DUTIES OF CONSTABLE**

He shall faithfully serve and execute all papers transmitted to him by any of the Judges of Representative District Courts, addressed to persons or firms within his jurisdiction.

He shall faithfully serve all warrants transmitted to him by Police for persons arrested by them on sight in his jurisdiction.

He shall serve as tipstaff during trials in the Representative District Court which he represents.



He shall see that the peace is kept at all polling places within his District at all regular and special elections, and shall deputize reliable persons who reside within the jurisdiction to serve at all elections at each polling place in addition to the one at which he chooses to serve. The salary of these Deputy Constables is to be determined by the Court of Common Pleas.

#### **SALARY AND PRIVILEGES**

Each Constable shall be paid a salary of not less than \$6,000 per year, or a greater amount if so decided by the Judges of the Court of Common Pleas in whose District he has been elected. Each Constable shall receive an automobile use allowance of \$1,000 per year, or a greater amount if so decided by the Judges of the Court of Common Pleas in which District he is serving.

He shall be entitled to all privileges furnished other employees of the same County, including paid vacations.

#### **RESTRICTIONS**

No duly elected Constable shall engage in any business or accept any employment for which he is reimbursed, during his term of office.

No duly elected Constable shall engage in any type of political activity. Before assuming office, each duly elected Constable must furnish proof of paid up insurance on any vehicle he may use in his duties, indemnifying the Commissioners of the County in which he is elected, and any and all other persons who may be subjected to suit because of his use of his vehicle in connection with his duties, to an amount to be determined by the Court of Common Pleas of the District from which he has been elected.

Each Constable shall furnish a bond for performance of his duties in an amount to be determined by the Judges of the Court of Common Pleas of the county in which he serves.

#### **Court Clerk**

Each Representative District Court shall be served by a Clerk-typist who shall be appointed by the Commissioners of the County in which said Court is located. The Clerk shall attend and make notes on all cases tried before the Court, but shall not be compelled to take notes of testimony unless so ordered by the Judge. The clerk shall keep all Court records, shall handle all fines and costs, take care of all records, and so handle the business of the Court as instructed by the County Commissioners. It shall not be necessary that the clerk reside within the jurisdiction of the immediate Court being served, but within the county which is being served by the Court. Each clerk shall be assigned by the County Commissioners after taking an examination set up by the Commissioners, the order of selection being determined by the grade of each applicant in that examination.

### **SALARY**

The salary of the Court Clerk shall be at least \$6,000 per year, or more if so determined by the Judges of the Court of Common Pleas. Each Court Clerk shall be entitled to paid vacations and other benefits as granted by the County to any other County employees.

### **TERM**

The term of each Court Clerk shall be determined by the Judges of the Courts of Common Pleas, and can be terminated for cause upon application of the County Commissioners.

Each Court Clerk shall be bonded to the extent determined necessary by the Judges of the Court of Common Pleas.

No Court Clerk shall engage in any political activity or any other gainful employment.

### ***Jurisdiction of Representative District Courts***

The jurisdiction of all Representative District Courts shall be limited to such jurisdiction as may be conferred upon them by the Legislature.

Note: I would suggest that the Courts be given jurisdiction over all summary convictions, over surety of peace and assault and battery (simple) and also be given the jurisdiction of sentencing upon guilty pleas of misdemeanors under the Motor Vehicle Code and certain other minor misdemeanors to be determined by the Legislature. I would also suggest that the Courts be given the same jurisdiction as at present on all civil cases, including trespass cases involving trespass on the case, and on all landlord and tenant matters as at present.

### ***Justices of the Peace***

In each township or other sub-division of the Commonwealth which has no established Central Traffic Court, at least one, and as many as the Judges of Common Pleas of the County may deem necessary, Justices of the Peace shall be elected in the same manner as Judges of the Representative District Courts.

In order to qualify for election as a Justice of the Peace, the candidate must take and pass a course to be set up by the Department of Public Instruction for Justices of the Peace and Issuing Authorities, and after satisfactorily passing such course may make application to the County Commissioners to have his or her name placed on the ballot, as provided in the section pertaining to election of Judge of the Representative District Court.

Upon election, each Justice of the Peace must be bonded to such extent as to satisfy the Judges of the Court of Common Pleas.

## **DUTIES**

The Justice of the Peace shall have jurisdiction over all summary convictions under the Motor Vehicle Code and under the local ordinances.

He shall set up and maintain an office which is satisfactory to the Judges of the Court of Common Pleas and the County Commissioners.

He shall act as Issuing Authority upon the request of any officer of the law or any citizen who desires to press a charge.

## **TERM**

The Justice of the Peace shall serve a term of six years, and can be certified for re-election in the same manner as the Judges of the Representative District Courts.

## **SALARY**

The Justice of the Peace shall receive a salary of not less than \$5,000 per year, or more if so determined by the Judges of the Court of Common Pleas. He shall not be restricted to employment as Justice of the Peace, providing that he shall be available to furnish the services of his office for a reasonable amount of time each week. The office may be vacated, upon application by the County Commissioners to the Judge of the Court of Common Pleas, for cause. He shall engage in no political activities while in office. He shall keep all records and handle all monies in such manner as instructed by the County Commissioners.

The Justice of the Peace shall have no civil jurisdiction. In addition to his salary he shall receive reimbursement from the County Commissioners for monies expended upon certified notices sent out by him under the Motor Vehicle Code. The Justice of the Peace shall furnish such bond for performance as required by the Court of Common Pleas.

## **Constables**

The Constables of the Justices of the Peace shall be elected in the same manner as the Constables of the Representative District Courts, and shall have the same qualifications in every respect. Their terms shall be of similar length, they shall furnish similar bonds. Constables serving a Justice of the Peace shall have the same duties as Constables serving the Representative District Courts. They shall engage in no political activities while in office.

## **SALARY**

The Constable in each Justice of the Peace Jurisdiction shall receive a salary of not less than \$2,500 a year and motor vehicle allowance of \$1,000 per year. He shall be entitled to a paid vacation and all other benefits of other employees in the same County.

Constables serving the Justices of the Peace shall not engage in an employment on Election days, but may pursue gainful employment at all other times, provided that they are available to pursue their functions as constable for a reasonable time each week. They may be removed for cause by complaint made to the Court of Common Pleas by the County Commissioners.

### ***Issuing Authorities***

All elected Justices of the Peace are to act as issuing authorities, and in all such corporate divisions of the County in which no Justice of the Peace is elected, there shall be elected Issuing Authorities, so that the public shall at all times be served. The number of Issuing Authorities shall be determined by the Judges of the Court of Common Pleas, according to the needs of each community.

### **DUTIES**

Issuing Authorities shall be empowered to:

Accept criminal complaints in misdemeanors and felonies

Issue Warrants in misdemeanors and felonies

Take bail in misdemeanors and felonies

Commit Defendants in misdemeanors and felonies

Discharge committed prisoners to bail in misdemeanors and felonies

Arraign Defendants in misdemeanors and felonies according to the instructions of the Judges of the Courts of Common Pleas.

They shall arrange between themselves so that there shall always be an Issuing Authority available.

Issuing Authorities may be given permission by the Judges of the Court of Common Pleas under whom they serve, to act as Magistrates in Police Court or Traffic Court in the Representative Districts from which they are elected, at a salary to be determined by the corporate body for whom they are serving.

### **TERM**

An Issuing Authority shall be elected in the same manner as a Justice of the Peace, for a full term of 6 years, starting the first Monday of the year next following the election at which he is elected. Each Issuing Authority shall be elected from the Representative District in which he resides and must maintain his office in the District.

Issuing Authorities may be removed from office for cause upon presentation of a complaint made by any interested person to the Judges of the Court of Common Pleas under which he serves.

Issuing Authorities shall apply for re-election in like manner as the Judges of the Representative District Court.

## **QUALIFICATIONS**

The Issuing Authority must meet the same qualification standards as the Justice of the Peace.

## **SALARY**

Issuing Authorities shall receive a salary of not less than \$5,000 per year, or more if so determined by the Judges of the Court of Common Pleas under which they serve.

Issuing Authorities shall set up and maintain an office which is satisfactory to the Court of Common Pleas under which he serves.

They shall engage in no political activity, and shall act as Issuing Authority upon the request of any officer of the law or any citizen who desires to press a charge.

They shall be eligible to receive the usual vacation and any other benefits enjoyed by other employees of the same County.

An Issuing Authority may engage in any business activity which shall not interfere with the service of his position, and shall receive the same notarial seal as formerly issued to Aldermen and Justices of the Peace.

Each Issuing Authority shall issue all papers in triplicate, and shall have a transcript of his proceedings, together with the originals of all papers accompanying any proceeding, to the Representative District Court to which he is assigned, within 48 hours, and shall keep a copy of all such proceedings as his docket.

All forms, and necessary reports and office supplies, shall be furnished to the Issuing Authority and Justice of the Peace by the County Commissioners. Issuing Authorities are to be bonded as demanded by the Judges of the Court of Common Pleas under which they serve.

## **COSTS**

All Acts of Assembly pertaining to Costs shall be repealed.

All costs and fines are to be favored to the County Commissioners for distribution to the proper parties. The amount of costs to be levied upon Defendants shall be determined by each Court of Common Pleas and the County Commissioners, and shall be determined by the experience of the Courts of each County as regards the cost of prosecution.

The Court of Common Pleas shall determine the amount to be advanced as costs in each civil and landlord and tenant matter brought before a Court, and the amount to be advanced in costs by each private prosecutor in a criminal matter.

## **FINES**

All fines shall be paid by the County Commissioners as follows:

To the Secretary of Revenue of the Commonwealth in all cases prosecuted by State Police or State Employees.

To the corporate Borough, Township or City in all cases where the prosecutor is a local officer of the law or officer of the corporate body, such as zoning officer, plumbing inspector, etc.

To the County Commissioners in all cases where the prosecutor is a private citizen.

## SUBMISSION NO. 5

*Statement of Bernard G. Segal  
on the Proposed Judiciary Article  
Before the Preparatory Committee  
for the  
Pennsylvania Constitutional Convention*

I welcome this opportunity to speak on the proposal of the Pennsylvania Bar Association relative to judicial administration, organization, selection and tenure. While time limitation will permit me to touch only upon the high spots of this suggested Amendment to the Constitution of Pennsylvania, the proposed Article in its entirety is before this Preparatory Committee and, of course, I shall be glad to answer questions as to any of its provisions.

Pennsylvania has no more pressing need than the modernization of its antiquated judicial system. Our courts are operating today under constitutional provisions adopted 94 years ago, which were designed to meet the leisurely pace of that 19th century period. The automobile, the airplane, radio, television, even electricity, were unknown. The population of Pennsylvania was only three and a half million. The number of motor vehicles registered in Pennsylvania today exceeds by more than 50% the total population of Pennsylvania at the time our present Constitution was adopted.

This population explosion, the growing complexity of our industrial and commercial life, the advent of the automobile and the resulting litigation arising out of the evermounting number of accidents on the highways, have combined to create immensely increased volume and wholly different kinds of litigation from those known in 1873. The judicial setup approved then simply cannot cope with modern conditions.

Starting approximately a quarter of a century ago, there was a surge of judicial reform at both Federal and State levels. Since then 30 States have adopted important reforms in judicial organization, administration, and selection, and more latterly, in removal, discipline and compulsory retirement as well. Few States have had no Constitutional changes in the past decade in the field of the judiciary, let alone in almost a century as in Pennsylvania. While Pennsylvania Judges and lawyers have worked together to reduce to a minimum the evils existing under the present Constitutional

provisions, the simple fact is that these measures, large as they have been, cannot begin to meet modern conditions. What is needed is a complete revision of Article V of our present Constitution, which stamps us as one of the most backward States in the Nation insofar as its judicial system is concerned.

If I were asked to summarize in a single sentence the objectives and the provisions of the proposed Article, I would say that it creates a modern, integrated, unified judicial system, in which the Judges will be freed of political involvement and will be enabled to conduct their judicial duties with a maximum of independence and efficiency. In all essential respects, the provisions in the Article are no longer in the experimental stage. None of them is hypothetical. Every one has been tried and proven to be sound in other States.

The provisions in the proposed Judiciary Article may be subdivided into four classifications, as follows:

1. Judicial Administration.
2. Judicial Organization.
3. Judicial Selection and Tenure.
4. Judicial Removal, Discipline and Compulsory Retirement.

I consider first the subject of Judicial Administration.

### ***Judicial Administration***

At present, there is no Statewide administrative supervision or control of any kind over the Courts in Pennsylvania's 59 judicial districts. Each local court operates completely independent of the others and virtually independent of the Supreme Court as well, insofar as administration is concerned. There are 90 President Judges and approximately 225 other Judges in the 59 judicial districts. Each of these districts is virtually an independent principality. Philadelphia alone has 12 President Judges, 10 in the Courts of Common Pleas, 1 in the Orphans Court, and 1 in the County Court.

The proposed Judiciary Article provides that the judicial power of the Commonwealth shall be vested in a unified judicial system, and gives the Supreme Court general supervisory and administrative authority over all the Courts of the Commonwealth, including the power to assign Judges temporarily from one court or one district to another. However, in any judicial district having a population in excess of 500,000, i.e., the districts containing Philadelphia, Allegheny, Delaware, and Montgomery Counties, no Judge may be assigned to a district other than his own without the consent of the President Judge of his Court.

The powers of administration vested in the Supreme Court would, of course, be exercised by the Chief Justice, or by an Associate Justice deputized by him, in accordance with rules prescribed by the Court. There



will be an Administrative Director and staff to assist in supervising the administration and operations of the judicial system.

The reason for centralized administration of our Courts is apparent. No one would think of operating a Statewide business with 90 Vice Presidents, each in charge of this own branch, each a completely autonomous authority without direction and supervision by a President and a Board of Directors. Neither would anyone suggest that each head of the more than 20 departments in our State Government and of the more than 100 Boards and Commissions, should be autonomous, free of supervision and direction by the Governor.

Although adapted to the needs of Pennsylvania, incorporating suggestions made during discussions over the last five years, these provisions derive primarily from the Model Judicial Article for State Constitutions promulgated by the American Bar Association in 1962 after a unanimous vote of its House of Delegates.

Provisions for the centralized assignment of Judges by the Supreme Court, similar to those in the proposed Article exist in every State bordering Pennsylvania, except perhaps Delaware where they are more limited. They prevail in Alaska, Arkansas, California, Colorado, Connecticut, Florida, Kansas, Louisiana, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, South Dakota, and in Illinois where, however, since there are only five judicial districts, all of them very large, the provision is the same as is proposed for our four largest districts, i.e., that assignment must have the consent of the Chief Judge of the District.

I have heard it argued that the unified judicial system is needed in some counties of the Commonwealth, but not in others. Frankly, I cannot understand that argument at all. The Courts of Common Pleas and the Orphans' Court of Pennsylvania are not local or county courts. They are State courts; the salaries of their Judges are paid out of the State treasury; and like other State employees, Judges are members of the State Employees Retirement Fund. In some small judicial districts there are too many Judges; in others there would seem to be too few. Above all, what hurts one county in Pennsylvania judicially, hurts every county in Pennsylvania. Each is inextricably interwoven with the others.

It would seem to be almost axiomatic that a great State like Pennsylvania should not have as loose and inefficient a system of administration of its courts as exists anywhere, one which has been abandoned by the large number of States which I have listed.

### ***Judicial Organization***

Important and greatly needed changes are proposed as to virtually all of the Courts, including the jurisdiction of the Supreme Court and enlargement of the permissible basic procedural changes in the operation of the Superior Court.

In each judicial district, there will be only one trial court. In Philadelphia, this will replace the present 11 trial courts, and in Allegheny County the present 3 trial courts. However, where a separate Orphans' Court presently exists, it will continue, although as indicated earlier, the Chief Justice will have the power to assign Orphans' Court Judges to sit in other courts.

This brings me to the subject of Magistrates in Philadelphia, Aldermen in other cities, and Justices of the Peace in boroughs and townships.

There are approximately 4000 Aldermen and Justices of the Peace in Pennsylvania. In 1962, a Committee of the Pennsylvania Bar Association sent questionnaires to the Justices of the Peace of the State. Of the 1,213 Justices of the Peace who replied, only 422 had completed high school, 183 had attended but had never completed their high school work, 121 had gone to grade school only, and 7 had not even completed grade school. Only 7 were lawyers. The highest number were skilled laborers. Next in order came real estate or insurance agents, and then housewives. Approximately 80% of the Justices of the Peace held "court" in their homes.

I shall not describe conditions involving Philadelphia Magistrates since I understand that District Attorney Arlen Specter, who has played so large a role in investigating this situation, has given you the details of the abysmal conditions existing in the magisterial courts in Philadelphia and the resulting conviction of several Magistrates for criminal offenses resulting in jail sentences.

As to Justices of the Peace, there is the vicious fee system under which they retain as their own, the costs imposed upon persons brought before them. This means that a Justice of the Peace who carries the favor of the police in his vicinity will take in as much as \$20,000 or \$30,000 a year as compensation for his part-time services.

Like the Magistrates, Justices of the Peace are an anachronism in our judicial system.

Last week I sat for two days in Leningrad in the Peoples Court, the trial court of general jurisdiction provided for by the Constitution of the Union of Soviet Socialist Republics. Three Judges presided. Only one of them was a lawyer. The other two were lay representatives of various segments of the public—labor unions, government employe unions, various social organizations. The two lay members could outvote the one professional Judge in the course of the trial or on the final decision. As far as I know, the Socialist countries are the only ones which, like Pennsylvania and the dwindling number of States in this Country, have lay Judges deciding legal questions and presiding in the courts of the land.

The simple fact is that in a modern court system, there is no room for individuals to preside in courts of justice who have neither the training nor the experience to enable them to read and understand, let alone interpret and enforce, the laws involved in the cases which come before them. Alder-

men, Justices of the Peace, and Magistrates are part of a system which was outworn before this century began. Unless the entire system is scrapped, no amount of house cleaning will have any lasting effect.

Under the proposed Judiciary Article, Magistrates, Aldermen, and Justices of the Peace will be abolished, and full-fledged courts called Community Courts will be created in their place. There will be part of Pennsylvania's statewide judicial system and will be conducted by Judges selected in the same way and required to have the same qualifications as Judges in other trial courts.

I have been told by Judges whose opinions I respect, of the beneficial neighborhood chores which some Justices of the Peace perform. They are said to be close to the people. I suggest that laudable though this may be these are not the functions of judicial officers. Commissioners, for whom the proposed Article provides and who will be permitted to accept bail, issue warrants, or otherwise assist the Judges of the Community Courts, should be able, more appropriately and with better supervision, to perform whatever beneficial acts such Justices of the Peace presently perform.

The substitution of courts for Magistrates, Aldermen, and Justices of the Peace started in this Country more than a quarter of a century ago, but there has been a virtual explosion in the number of States which have taken this action during the past few years, and the additional number which are scheduled to do so within the next year or two. Such offices have already been abolished in every State bordering Pennsylvania, except Delaware, and even in Delaware, the system was completely overhauled in 1965, the Justice of the Peace being placed under the supervision of the Chief Justice of the Supreme Court and required to be governed by rules promulgated by the Supreme Court. The minor judiciary has been eliminated in Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Virginia, Washington, and Wisconsin. It is significant that the Constitutions of our two newest States—Hawaii and Alaska—do not even make reference to Magistrates, Aldermen, or Justices of the Peace.

So much for the organization of the courts.

### *Judicial Selection and Tenure*

I consider next the subject of the non-partisan selection of Judges.

Admittedly, Pennsylvania's present system of judicial selection is practically entirely a political one. We are one of the 9 States—only one of them a large industrial, agricultural, and commercial State like ours, i.e., Texas—which still elect all of their Judges and require them to run for office on a partisan political ballot. Indeed, only 6 others have this system for any of

their Judges. The overwhelming majority of States have abandoned entirely partisan, political election of their Judges.

I should like to dispose of the notion that the election of Judges is traditional in this Country. That is not the fact. In the first place, the Constitution of the United States has never provided for election of Judges. Moreover, appointment of Judges and tenure during good behavior were provided in the Constitutions of every one of the original States, even before the adoption of the Constitution of the United States in 1787. It was not until more than 60 years later that popular election and limited tenure for Judges temporarily became the vogue.

I should also like to correct the popular misconception that the election of Judges is a democratic institution in use in democratic nations around the world. Entirely to the contrary, the arresting fact is that the only places in the world, outside of the minority of remaining States in this Country, where Judges are still elected is the Soviet Union and its satellite nations. And does this sound familiar? In the Soviet Union, in actual practice Judges must be approved by the political party leaders in each nominating group before they can run for the office of Judge.

Another generally held notion is that it is the voters who make the selection. This is wholly unrealistic. Actual statistics demonstrate that more than one-half of the Judges now sitting in the courts of Pennsylvania began their judicial careers by appointment of the Governor, not election. Even where judicial vacancies are filled initially by election, everyone knows that the selection of the candidates is made either by the Chairman of the prevailing political party or by the political committee or committees of the judicial district.

And, in any event, can anyone doubt that the average voter who goes to the polls knows nothing about the candidates for Judge and when he leaves the polls, cannot even remember the names of the persons who ran for this high office. Voters generally are interested in the candidates for United States Senator or Governor or Mayor. The Judges on the ballot simply follow the tide.

This has been demonstrated by actual polls of voters. Thus, one of the best known of the professional agencies conducting such polls found some years ago that ten days after the election, in New York City not more than 1% of the voters polled could remember the name of the Judge whom they had just elected to the highest judicial post in the State, and in the City of Buffalo, not a single voter polled could remember the name. In a rural county, only 1% of those polled could name the Chief Judge in question, and only 4% could name even one of the several judicial candidates who had run in the election.

Last fall, I had occasion to speak in Oklahoma City just before the general election, in which several Supreme Court Justices and Trial Judges

were to be elected. A poll was taken which demonstrated that 74% of the voters questioned could not name a single candidate for the office of Judge; 11% could name just one of the 7 candidates; and only 8% could name half of the candidates. Out of 456 persons interviewed at random, only 1 person could name all 7 candidates.

In any event, how is the average voter to appraise such large questions as legal training, trial practice, and judicial temperament? One might as well submit to the general electorate, the selection of the Medical Director or Chief Surgeon or Senior Psychiatrist of a State or municipal hospital.

It is time for Pennsylvania to follow the lead of most of the States of the Country and abolish the political election of Judges. It is an incongruity for a Judge, who can have no political platform, to be required every 10 years to conduct a political campaign. His place is in the courtroom not at a street corner rally. And unless he is a man of large wealth, where is the money for judicial campaigns to come from? Obviously, campaign funds must be given to the Judge by political party leaders, or, as is usually the case, by lawyers who practice before him in his court.

As Mayor Lindsay of New York recently said in a blistering attack on the popular election of Judges:

"The tawdriness of the whole exercise  
demeans the man and the court of justice he  
serves."

The simple fact is that far from being effectuated or enhanced, the democratic process is subverted by the spectre of political campaigns for Judges.

Little wonder then, that 34 States have abandoned or rejected the system of political election of Judges entirely and, as I have indicated, in only 9 States in the entire Country, including Pennsylvania, are all the Judges still selected in this way.

The proposed Judicial Article proposes a nonpartisan plan for the selection and tenure of Judges. The plan has been tried and tested. It was originally advanced by the American Judicature Society a half century ago, and it has been approved and sponsored by the American Bar Association since 1939. Starting with its adoption for the appellate courts and certain large city courts in Missouri in 1940, it has operated successfully in various states, and is emerging as the modern answer to the yearning of citizens to take and keep their Judges out of politics and at the same time to retain some power on a merit basis to determine whether a Judge shall be returned to the Bench upon completion of his term.

Under this Article, all Justices or Judges of the Appellate and Trial Courts in Pennsylvania will be appointed by the Governor from panels submitted by the Nominating Commissions—a single panel of 6 for the Supreme and the Superior Courts, and a panel of 3 for other courts with a second panel if the Governor requests. If the Governor does not make the

appointment within certain fixed time limits, the Chief Justice will be empowered to make the appointment from the names on the panel or panels which had been submitted to the Governor.

After a Justice or a Judge has been appointed, he remains in office for not less than two years, after which time, his name is submitted to the electors at the next municipal election on a separate nonpartisan judicial ballot, or in a separate column on voting machines, without party designations. The only question to be voted upon is whether the Judge shall be retained in office.

Ten years later, the Judge comes before the voters again in the same manner.

Each Judicial Nominating Commission will consist of one Justice or Judge, three members of the Bar selected by the Bar, and three lay citizens appointed by the Governor.

It was my privilege to serve as Chairman of the Judicial Nominating Commission established by Governor Scranton by Executive action when 5 new judgeships were created for Philadelphia by the General Assembly in 1963. The Commission consisted of 3 laymen, 3 lawyers, and a Judge. I can report to you that the Judge and the lawyers on the Commission considered the 3 laymen to be of substantial help in the Commission's deliberations and determinations. Another significant circumstance was that lawyers who theretofore and subsequently had been unwilling to have their names considered for appointment or election consented to have the Judicial Nominating Commission submit their names on the panel which went to the Governor. The 5 appointments which Governor Scranton made from the panel submitted by the Commission were greeted with uniform praise by Judges, lawyers and the mass media.

The first State to adopt the merit plan for selection and tenure of Judges was Missouri in 1940. By Constitutional amendment, it inaugurated this new system to apply to its two appellate courts of statewide jurisdiction and also to the courts in its largest city, St. Louis, and its largest county which includes the other large city in the State, Kansas City. A Constitutional amendment is now pending to make the system mandatory in the selection of the other Judges in the State.

The plan has operated extremely successfully in Missouri during the past 26 years.

There are now 15 States which have merit plans for selection or tenure, or both, for some or all of their Judges (Alabama, Alaska, California, Colorado, Florida, Illinois, Iowa, Kansas, Minnesota (by executive action of the Governor), Missouri, Nebraska, New York (as to New York City by executive action of the Mayor), Oklahoma, Utah, and Vermont) and 8 in which the plan applies to both selection and tenure (Alaska, Colorado, Florida, Iowa, Kansas, Missouri, Nebraska, and Oklahoma). In addition, by Executive Action of the Governor, Puerto Rico has a nonpartisan merit plan for judicial selection.

I should like to make one thing clear. It is true elsewhere, as it is here, that despite the shortcomings of the system of political election of Judges, by and large we get good Judges in Pennsylvania, many of them learned, conscientious and hard-working. But, by the same token, it is true that not all of our Judges in Pennsylvania are working hard, and not all of them are of the quality or exhibit the zeal in the practice of their official duties which the effective administration of justice requires and to which the public is entitled. And, unfortunately, the shortcomings of the few lead to dragnet criticism of the judiciary as an institution and of Judges generally.

One further point.

The provisions as to the merit plan of selection and tenure in the proposed Judicial Article which we have submitted apply to all the judicial districts in the State. However, we have submitted an alternate provision limiting this method of selection to the Supreme and the Superior Courts and to the local courts in Philadelphia and Allegheny Counties, with local option in each Judicial District to adopt the Judicial Nominating Commission plan, or having adopted it, thereafter to discontinue it. Of course, our preference is for the Statewide application of the plan.

### ***Judicial Removal, Discipline and Compulsory Retirement***

I have already spoken of the general level of competence and diligence of the Judges in our State. However, especially in view of the unprecedented demands which modern conditions make upon the Judge, the adverse reaction which lawyers receive from their clients, which the mass media reflect, and which the public feels towards the Judge who continues to preside in the courtroom after he is so feeble that he can scarcely travel alone, or the Judge who for other reasons simply cannot or will not perform the functions of his office, is beyond my powers of description. It is regrettable, but grimly true, that one bad Judge can undo the efforts of a hundred excellent Judges, and this is greatly accentuated during these days when factors beyond the control of any Judge, like those causing delays of four or five years in the trial of a case in Philadelphia, create general dissatisfaction with our judicial system. In summary, even a very few unfit Judges constitute a serious impediment to the efficient administration of justice.

In Pennsylvania today, we have a single method of removal, i.e., impeachment.

One need not delve very deeply into the virtually complete nonuse of the impeachment process for the removal of members of the judiciary, or of the problems which would be created for the General Assembly if it had to sit, first as an impeaching body in the House, and second as a convicting body in the Senate, to realize that this vehicle is virtually worthless to meet the problems created by the aged, the infirm, or even the corrupt Judge. That the impeachment process has proved inadequate, inequitable, impracticable,

and ineffective insofar as the judiciary is concerned is now too well established to require debate. Nevertheless, since it has been in the Federal Constitution and most of the State Constitutions from the beginning—impeachment is now provided for in 48 of the 50 States—it is retained in the proposed Judiciary Article.

I have not heard anyone argue that additional provisions are not required. The real question is not whether there should be a change, but rather what the change should be and how it should be accomplished.

Section 12 of the proposed Judiciary Article adopts what I believe has emerged as the most effective method and the one which I think represents the call of the future.

Under this plan, a continuing Commission, the Judicial Qualifications Commission, is created, consisting of five Judges, two from the Superior Court and three from the District Courts of different Judicial Districts, to be selected by the Supreme Court; two members of the bar to be selected by the members of the Bar; and two lay citizens to be selected by the Governor. Thus, a majority of the Commission will consist of Judges.

The Commission is charged with the responsibility of keeping itself fully informed of facts and circumstances relating to members of the judiciary, insofar as the same may relate to misconduct in office, neglect of duty, failure to perform their duties, violation of any canon of legal or judicial ethics adopted by the Supreme Court, or other conduct prejudicing the proper administration of justice, or disability seriously interfering with the performance of their duties, which is, or is likely to become, of a permanent character; and to receive complaints or reports, formal or informal, from any source, pertaining to such matters.

The Article further provides that any Justice or Judge who becomes a candidate for an non-judicial office shall be removed as Judge, and any Justice or Judge who is convicted of misbehavior in office, or disbarred as a member of the Bar of the Supreme Court, automatically forfeits his judicial office.

The fact that a complaint has been filed with the Commission, and the Commission's investigation, deliberation, and conclusions on the case, are completely secret, except, of course, if the Commission's decision is appealed to the Supreme Court.

If after investigation the Commission deems it necessary, it may order a hearing to be held before it, or may request the Supreme Court to appoint three Justices or Judges of the Courts of Record as Special Masters to hear and take evidence in the matter and report thereon to the Commission. If after the hearing and considering the Record and Report of the Masters, the Commission finds good cause therefor, it must recommend to the Supreme Court the removal, discipline, or compulsory retirement of the Judge.

The Supreme Court is required to review the Record, may permit the



introduction of additional evidence, and may either order removal, discipline, or compulsory retirement, or wholly reject the recommendation.

The Commission Plan was first adopted in California by Constitutional Amendment in 1960, at the behest of the Chief Justice, the State Judicial Council, the Legislature, the State Bar, and the State Conference of Judges. By agreement of Judges, lawyers, lay leaders, and the mass media, unanimous as far as I have been able to discover and as far as the written material discloses, the plan has been eminently successful during the past 6 years in that State, which has the largest judicial system in America. California has more than 1000 judges. By the end of 1964, the Commission had received 344 complaints against Judges, only 118 of which required investigation. Of special significance is the fact that during the 4 year period, 26 Judges voluntarily resigned or retired while under investigation. In 1966, 9 Judges retired or resigned while complaints against them were being investigated by the California Commission.

The California Plan has also had salutary and highly beneficial side effects. The very existence of a continuing Commission has acted as a deterrent to the occasional arbitrary or recalcitrant Judge, has minimized absences from judicial duties for extended periods, has provided a medium through which the disgruntled litigant might air his grievances however unmerited, and has enabled the Commission, by discreet suggestion, to achieve the discontinuance of practices not serious enough to warrant removal or suspension but significant enough to effect adversely the administration of justice in the courts.

The surge toward the Commission Plan is apparent from the fact that during the past year and a half the voters of 4 states (Texas, Colorado, Florida and Nebraska) have followed the California lead and have adopted such a plan. Moreover, the Commission plan is currently under active consideration in 19 other states.

Mr. Chairman, in concluding I wish to reiterate the gratification of the Pennsylvania Bar Association at the work of this Preliminary Committee and of its distinguished Chairman, who is doing as much as any man in the Commonwealth to effect the vital changes needed in our present Constitution and whose leadership has been a heartening stimulus to us all.

Thank you.

## SUBMISSION NO. 6

*Testimony and Specific Proposals for an Amendment of  
Section 11 of Article V of the Constitution of the Com-  
monwealth of Pennsylvania, Presented to the Judiciary  
Sub-Committee of the Preparatory Committee of the  
Constitutional Convention, Thursday, July 27, 1967,  
by Raymond Pearlstine, Esquire, Solicitor to the  
Pennsylvania Magistrates' Association*

The Pennsylvania Magistrates' Association, in its 69th Convention assembled in the City of Pittsburgh, adopted the following Resolution:

WHEREAS, the Judiciary Article has been the subject of debate and study for several years; and

WHEREAS, the Constitutional Convention will convene on December 1st, 1967 and the Preparatory Committee of the Constitutional Convention proposes to hold hearings beginning this month on the Judiciary Article; and

WHEREAS, this Association should have a responsible Committee appointed to appear before the Preparatory Committee and the Constitutional Convention to present material which it has studied and which it will recommend for inclusion in any proposed Amendment to Article V;

NOW, THEREFORE, BE IT RESOLVED that the President, with the advice and consent of the Board of Directors appoint a special Committee of five (5) persons to present to the Preparatory Committee which is now functioning and to the Constitutional Convention which will convene on December 1st, 1967, the recommendations of this Convention with respect to Article V on the Judiciary;

BE IT FURTHER RESOLVED that if during the deliberations of the Preparatory Committee or the Constitutional Convention it should seem advisable for the Committee on Judiciary to consent to certain modifications of the provisions which it has presented, the Committee is hereby authorized to give such consent.

Pursuant to such resolution, the following Committee was appointed by Squire Joseph E. Comer, President of the Association, viz:

Raymond Pearlstine, Esquire, 515 Swede St., Norristown, Pa.  
(Montgomery County) Ex-Officio, Chairman

Alderman Donald W. Ladner, 286 Chestnut St., Meadville, Pa. 16335  
(Crawford County)

Alderman Edward D. Warg, 722 N. New St., Bethlehem, Pa. 18018  
(Northampton County)

Squire Thomas R. Plummer, 35 West Circular Ave., Paoli, Pa. 19301  
(Chester County)

Squire Sebastian Bodanza, R.D.#3, Wernersville, Pa.  
(Berks County)

Alderman Roland B. Downing, 646 North 8th St., Allentown, Pa. 18102  
(Lehigh County)

The Pennsylvania Magistrates Association shares with other concerned Pennsylvanians an interest in improving Judicial Administration, Organization, Selection and Tenure in this Commonwealth. The request for an opportunity to appear and testify before this sub-committee of Preparatory Committee springs from this interest.

Representing the majority of Magistrates, Justices of the Peace and Aldermen in the State, the Association offers the viewpoint of these most likely to be directly affected by the deliberations and recommendations of this sub-committee. It is no secret that the Electorate expects recommendations designed to improve the operation of the minor judiciary to come out of The Constitutional Convention. The Pennsylvania Magistrate Association feels it has an obligation to offer a definitive program free from bias, prejudice and personal interest.

The views and proposals which the Pennsylvania Magistrate Association will advance are rooted in the centuries-old tradition of peoples' courts, distilled by the day-to-day practical experience of its members. Swedish, Dutch and English settlers of the area which later became Pennsylvania brought with them the concept of local Magistrates. Following the English law and custom which predominated after 1664, the office of Justice of the Peace became an established institution in the Commonwealth perpetuated by charter, constitution and statute and always manned by laymen.

More than any other group, the Justices of the Peace and Aldermen who administer the minor judiciary system are aware of the pros and cons of its operation under the present Constitution. Their awareness stems from the basic fact of their existence—they are elected by, and, in the great majority of cases, deal with the people from their own bailiwick.

Fortified by the experience of its members, the Pennsylvania Magistrates Association believes that a local court system best implements the ideal of self-government basic to our democratic system. The Association believes that a system of People's Courts, manned by residents of the area, provides strong, liberal and flexible administration of justice.

As members of this Preparatory Committee know, these local courts

hear a great variety of cases, which involve relatively small amounts of money, but which are of relatively great importance to the parties. They prevent courts of record at the County Seat from becoming overburdened and provide forums where these cases can be tried simply, inexpensively and quickly.

The old saying goes "Justice delayed is Justice denied". The office of Justice of the Peace goes a long way towards seeing to it that justice is not long delayed.

The local Peoples' Court renders substantial aid in the prevention and punishment of crime. As a committing Magistrate, the Justice of the Peace is equipped by his knowledge of the area and its people to handle criminal cases not only justly but humanely.

He knows the background of a local defendant, facts which may mitigate the offense, and by virtue of his own local origin, is more inclined to see that they are brought out at the hearing than a stranger would.

Since the Magistrate is the local link in the chain of justice, he acts as a stabilizing influence upon the actions of the community. Settling disputes before they reach the stage of law suits, patching up marriages about to come apart at the seams, straightening out young people before they get into serious trouble, are activities only partly legal in nature.

There is no forty-hour week, no regular trial week for the Justice of the Peace. He is expected to be available at all times to handle not only judicial but administrative duties, among them taking affidavits and acknowledgements and performing marriages. Many times his court is the living room of his home and he conducts the business of his office in the late afternoon, evenings and Saturdays. This is necessary because the Magistrate, except for the Magistrates in Philadelphia who are forbidden by law to engage in a business or other profession, usually has a part or full-time job.

The Justices of the Peace are aware of the areas where the system could be improved. In an attempt to determine the structure and characteristics of the Justice of the Peace system, the Institute of Public Administration of the Pennsylvania State University in 1962 sent questionnaires to all commissioned Justices in townships, boroughs, third class cities and Scranton who remitted fines and forfeits to the Commonwealth of Pennsylvania through the Department of Revenue. Of the 4484 questionnaires sent out, 1,236 Justices responded.

The Institute published a report based on the results of the questionnaires, and certain public records and made comparisons with the results of a 1942 survey also conducted by the Institution.

This report and recommendations of judicial reform since then have been disseminated to Pennsylvania Magistrates Association members and have figured in their discussion in and out of Convention.

The Justices of the Peace have little cause to believe that the situation

has changed since the questionnaires returned to the Institution indicated the following: <sup>1</sup>

1. *Changing characteristics of justices.* The characteristics of justices have changed somewhat since 1940. They are a bit younger. More of them are women. Substantially, more have attended or completed high school. More have also graduated from college. Nearly 30% of the magistrates had previously held office at the local level. Most magistrates spend only part of their time fulfilling the functions of their offices. Over 80% of the magistrates indicated that their offices were located in their homes. Approximately 25% of the magistrates reported that they had taken in-service training courses. Justices are now serving shorter terms than in 1940 and the turnover is high and increasing. <sup>2</sup>

2. *More magistrates than necessary.* From the records available, there are many more magistrates authorized than necessary. A minimum total of 5,471 was authorized as of July 1960 but only approximately 4,134 were commissioned. Approximately 35% of the magistrates who returned questionnaires thought the number of justices should be reduced. Questionnaires were also sent to president judges of the various counties and also to the district attorneys. Of these responses, 93% of the presiding judges and 72% of the district attorneys thought the number of minor justices should be reduced.

3. *Work load of magistrates.* The judicial work of magistrates consists of hearing criminal and civil cases. Docketed criminal cases greatly outnumbered the civil cases. The ratio indicated for 1961 is approximately 9 criminal cases to 1 civil case. The overwhelming majority of criminal cases were summary in character. <sup>3</sup>

4. *Costs paid to magistrates.* Total costs paid by counties to magistrates in 1960 exceeded those paid in 1940 by only approximately \$10,000.00. This modest increase is surprisingly low in view of the many changes that occurred during the twenty year period. Total costs paid for dismissed and summary cases declined substantially during the same span of time. <sup>4</sup>

5. *Concentration of work load.* The 1962 study seemed to confirm the findings of the 1940 survey showing that a few justices in each county did most of the work and collected most of the costs paid by the county. However, the concentration appears to be slightly less extreme in 1960. <sup>5</sup>

The majority of Justices of the Peace feel that training is necessary for their position, preferably on a state-wide level. They are aware of the situation, expressed in the Woodside Commission's words that "the present fee system providing for compensation contingent on litigation presents the Justice of the Peace with the temptation to entertain and adjudicate matters frivolously or worse, solely for financial gain. That so few of them have succumbed to the temptation speaks well for the minor judiciary generally." <sup>6</sup>

These are areas where both the Justices of the Peace and the Electorate they serve will benefit from revisions.

In addition, their jurisdiction could be increased to include such matters as the hearing examinations presently conducted by the Bureau of Traffic Safety in handling certain misdemeanors, such as operating under the influence of alcohol and failing to stop and render assistance. Increasing the jurisdictional amount in civil cases would amplify the assistance the minor judiciary renders in lightening the case load of the County Courts.

In our more sophisticated day, the informality and economy inherent in the present operations of the minor judiciary should be weighed against the advantages to be gained by having a full-time, salaried magistrate presiding in an office provided by the County in a public building. Just as seals and formal language invest a legal document with authority and impressiveness, so a more formal locale and an official solely occupied with the duties of his office will enhance the local image of justice.

Both salary and setting should attract applicants of broad business and educational backgrounds and ultimately produce a minor judiciary of lengthening experience. The training envisioned by Resolution 60a adopted by the voters at the general election in November, 1966, should be implemented by an Act of the Assembly.

Nor should the Justices be content with the bare minimum in education for their position. As county associations have done in the past, they should continue to offer specialized courses in Magistrates' schools to keep their members current on changes in the law.

To summarize, the present Justice of the Peace system should not be discarded. It renders substantial service both to justice and efficiency. Justice profits from the personal knowledge the local arbiter brings to a case and from the latitude he has in seeking solutions to disputes extra-judicially.

In a day where increasing population brings with it increasing demands for every kind of service and goods, the forum of justice has not escaped the demand. Backlogs of cases are headlined in newspapers and litigants fume at delays. The Magistrates' courts siphon off the cases which can most efficiently be handled simply, inexpensively and quickly.

There is room for change for the better in the present system. Specifically, as recognized in past proposals and surveys, the number, educational qualifications and remuneration of Magistrates should be revised. Other steps to increase its prestige and the service the Justice of the Peace system now renders can be taken.

To this end, the Pennsylvania Magistrates Association makes nine specific proposals:

1. The number of the members of the minor judiciary should be determined by the Court of Common Pleas in each judicial district. In no event should there be less than 15 magistrates for each judicial district. In the alternative, the legislative representative district may be selected as a definitive area in which case there should be not less than 4 magistrates for each such legislative district.

2. Members of the Minor Judiciary shall be elected by the vote of the people at the regular election as Justices of the Peace and Aldermen are now elected and for a term of six years.

3. No educational requirements shall be required of members of the Minor Judiciary who have completed at least two six-year terms as Justices of the Peace or Aldermen and have obtained certificates of attainment from the Department of Public Instruction. Those elected who have not served at least two six-year terms as Justices of the Peace or Aldermen, shall be required to successfully complete a course of instruction as prescribed by the Act of Assembly.

4. Jurisdiction shall include all jurisdiction now conferred by the present constitution and Acts of Assembly, and further, the jurisdiction in criminal matters shall be extended to include taking of pleas of guilty and imposing sentence for certain misdemeanors under both the Vehicle Code and Criminal Code. By virtue of his office he shall be empowered to take oaths. Jurisdiction in civil matters shall extend to all cases of assumpsit and all types of trespass where the demand shall not exceed \$2,000.00. Criminal jurisdiction shall extend to all cases arising in the county or the judicial district, whichever is the greater, and shall extend to include domestic relations.

5. Members of the Minor Judiciary shall be governed by the Canons of Judicial Ethics.

6. Salaries shall be set by the Court of Common Pleas with minimum of \$10,000.00, said salary to be paid by the County. Costs imposed and collected by the members of the Minor Judiciary shall be returned to the County.

7. The County Commissioners shall properly furnish court rooms in any public building or other place approved by the Court of Common Pleas, and all preliminary arraignments, preliminary hearings, hearings and trials shall be held in said office.

8. Each member of the Minor Judiciary shall have at least one Clerk who shall be paid by the County. The County shall furnish, maintain and pay all expenses of the Court.

9. Vacancies shall be filled by appointment by the Governor of the Commonwealth. Appointees shall be governed by the educational requirements as hereinbefore stated.

The foregoing proposals should be implemented by appropriate amendment to the Constitution and statutory enactment as may be required.

**The Following Is a Draft of the Precise Language to Revise Section  
11 of Article V of the Constitution of the Commonwealth of  
Pennsylvania**

That Section 11 of Article V of the Constitution of the Commonwealth of Pennsylvania be deleted and in lieu thereof enact a new Section to read:

Section 11  
**JUSTICES OF THE PEACE**

A. All existing Courts not of record are abolished and in all judicial districts, except the judicial districts embodying Philadelphia County, the qualified electors thereof, at the municipal election, in such manner as shall be directed by law, shall elect for a term of six (6) years the number of Justices of the Peace, not less than fifteen (15) in number, as shall be determined for each judicial district by rule of the Court of Common Pleas thereof.

**Qualifications of Justice of the Peace**

B. Justices of the Peace shall be citizens of the Commonwealth of Pennsylvania and shall be residents of the judicial district for which they shall be selected and shall reside in the district in which they serve.

The General Assembly, may, by general law, provide that a course of training and education be completed by Justices of the Peace hereafter selected who are not members of the Bar of the Supreme Court. They shall be subject to such restrictions as to activities outside their official duties as the Court of Common Pleas of each judicial district shall by rule prescribe.

*Notes to Submission No. 6*

1. Minor Courts in Pennsylvania, Chapter 7. Observations
2. Ibid. Tables 3, 4, 5, 6, 7, 8 attached hereto.
3. Minor Courts in Pennsylvania, Chapter 7. Observations, Tables 12 and 13 attached hereto.
4. Ibid. Tables 34 and 35 attached hereto.
5. Ibid. Table 14 attached hereto.
6. Pennsylvania Commission on Constitutional Revision: Report of the Commission on Constitutional Revision (Harrisburg, 1959).
7. Senator William Lentz introduced a Bill to implement Resolution 6(a), July 18, 1967, Bill #1,000.

TABLE 3    Ages of Minor Justices — 1940 and 1962

| <i>Age<br/>Group</i> | 1940          |                              | 1962          |                              |
|----------------------|---------------|------------------------------|---------------|------------------------------|
|                      | <i>Number</i> | <i>Per Cent<br/>of Total</i> | <i>Number</i> | <i>Per Cent<br/>of Total</i> |
| 21-30                | 37            | 7                            | 64            | 5.2                          |
| 31-40                | 98            | 18                           | 265           | 21.8                         |
| 41-50                | 138           | 25                           | 313           | 25.7                         |
| 51-60                | 104           | 19                           | 297           | 24.4                         |
| 61-70                | 107           | 20                           | 180           | 14.8                         |
| 71-80                | 51            | 9                            | 86            | 7.1                          |
| Over 80              | 10            | 2                            | 12            | 1.0                          |
| Total                | 545           | 100                          | 1217          | 100.0                        |



TABLE 4 Educational Background of Minor Justices—1940 and 1962

| <i>Level</i>                            | <i>1940</i>   |                 | <i>1962</i>   |                 |
|-----------------------------------------|---------------|-----------------|---------------|-----------------|
|                                         | <i>Number</i> | <i>Per Cent</i> | <i>Number</i> | <i>Per Cent</i> |
| None completed                          | 17            | 5.7             | 7             | 0.6             |
| Grade school completed                  | 123           | 41.5            | 121           | 10.0            |
| Attended high school                    | 14            | 4.7             | 183           | 15.1            |
| Completed high school                   | 74            | 24.9            | 422           | 34.8            |
| Attended college                        | 15            | 5.0             | 82            | 6.8             |
| Completed college                       | 43            | 14.5            | 169           | 13.9            |
| Attended post-graduate school           | —             | —               | 38            | 3.1             |
| Attended business and vocational school | 11            | 3.7             | 191           | 15.7            |
| Total                                   | 297           | 100.0           | 1213          | 100.0           |

TABLE 5 Occupations of Minor Justices—1940 and 1962

| <i>Occupation</i>                      | <i>1940</i>   |                 | <i>1962</i>   |                 |
|----------------------------------------|---------------|-----------------|---------------|-----------------|
|                                        | <i>Number</i> | <i>Per Cent</i> | <i>Number</i> | <i>Per Cent</i> |
| Justice of the Peace                   | 669           | 21              | —             | —               |
| Skilled Laborer                        | 358           | 11              | 117           | 9.6             |
| Farmer                                 | 375           | 12              | 38            | 3.1             |
| Laborer                                | 552           | 17              | 26            | 2.1             |
| Clerk                                  | 226           | 7               | 44            | 3.6             |
| Real estate or Insurance Agent         | 178           | 6               | 94            | 7.7             |
| Merchant                               | 242           | 8               | 39            | 3.2             |
| Government Employee                    | 45            | 1               | 29            | 2.4             |
| Salesman                               | 54            | 2               | 52            | 4.3             |
| Housewife                              | 50            | 2               | 81            | 6.7             |
| Manufacturer and Producer              | 13            | —               | 14            | 1.2             |
| Foreman                                | 44            | 1               | 32            | 2.6             |
| Contractor                             | 13            | —               | 20            | 1.6             |
| Lawyer                                 | —             | —               | 7             | 0.6             |
| Teacher                                | —             | —               | 46            | 3.8             |
| Unemployed                             | 10            | —               | 21            | 1.7             |
| Retired                                | 138           | 4               | 41            | 3.4             |
| Professional Worker                    | 163           | 5               | —             | —               |
| Other                                  | 95            | 3               | 217           | 13.0            |
| More than one of the above occupations | —             | —               | 297           | 24.4            |
| Total                                  | 3225          | 100             | 1215          | 100.0           |

TABLE 6 Location of Minor Justices' Offices — 1962

| <i>Office Location</i>    | <i>Total</i> | <i>Per Cent</i> |
|---------------------------|--------------|-----------------|
| Home                      | 990          | 81.1            |
| Away from home            | 140          | 11.4            |
| Office shared with others | 50           | 4.1             |
| Public building           | 42           | 3.4             |

TABLE 7 In-Service Courses Taken by Justices — 1962

| <i>Training Course Subject</i> | <i>Number of Justices</i> | <i>Per Cent of Justices Answering</i> |
|--------------------------------|---------------------------|---------------------------------------|
| Criminal Law                   | 761                       | 67.3                                  |
| Civil law                      | 699                       | 61.8                                  |
| Procedures                     | 471                       | 41.6                                  |
| Forms                          | 387                       | 34.2                                  |
| Others                         | 130                       | 11.5                                  |
| None                           | 248                       | 21.9                                  |
| No answer                      | 99                        |                                       |

TABLE 8 Length of Service of Minor Justices — 1940 and 1962

| <i>Length of Service (years)</i> | <i>1940</i>   |                 | <i>1962</i>   |                 |
|----------------------------------|---------------|-----------------|---------------|-----------------|
|                                  | <i>Number</i> | <i>Per Cent</i> | <i>Number</i> | <i>Per Cent</i> |
| 0-4                              | 1761          | 44              | 607           | 50.0            |
| 5-9                              | 801           | 20              | 230           | 18.9            |
| 10-14                            | 580           | 15              | 159           | 13.1            |
| 15-19                            | 284           | 7               | 66            | 5.4             |
| 20-24                            | 216           | 5.4             | 79            | 6.5             |
| 25-29                            | 159           | 4               | 29            | 2.4             |
| 30-34                            | 93            | 2.2             | 24            | 2.0             |
| 35-39                            | 43            | 1               | 10            | 0.8             |
| 40-44                            | 28            | 0.7             | 6             | 0.5             |
| 45-49                            | 18            | 0.45            | 5             | 0.4             |
| 50 or more                       | 10            | 0.25            | 0             | 0.0             |
| Totals                           | 3993          | 100             | 1215          | 100.0           |

TABLE 12  
Number and Disposition of Civil Cases Reported by Minor Justices, 1961

| <i>Total</i> | <i>Judgment for Plaintiff—<br/>No Affidavit<br/>of Defense</i> | <i>Judgment for Plaintiff<br/>After<br/>Hearing</i> | <i>Judgment for Defendant<br/>After<br/>Hearing</i> | <i>Non-suit<br/>of<br/>Plaintiff</i> | <i>Appeals<br/>to Court</i> |
|--------------|----------------------------------------------------------------|-----------------------------------------------------|-----------------------------------------------------|--------------------------------------|-----------------------------|
| Number       | Number                                                         | Number                                              | Number                                              | Number                               | Number                      |
| 20,438       | 11,362                                                         | 6,554                                               | 871                                                 | 819                                  | 832                         |
|              | Per Cent                                                       | Per Cent                                            | Per Cent                                            | Per Cent                             | Per Cent                    |
|              | 56%                                                            | 32%                                                 | 4%                                                  | 4%                                   | 4%                          |

TABLE 13  
Number and Types of Criminal Cases Reported by Minor Justices, 1961

| <i>Total Cases</i> | <i>Summary Convictions</i> |                 | <i>Dismissed Cases</i> |                 | <i>Returned to Court</i> |                 |
|--------------------|----------------------------|-----------------|------------------------|-----------------|--------------------------|-----------------|
|                    | <i>Number</i>              | <i>Per Cent</i> | <i>Number</i>          | <i>Per Cent</i> | <i>Number</i>            | <i>Per Cent</i> |
| 63,040             | 51,997                     | 83%             | 4,668                  | 7%              | 6,375                    | 10%             |

Source: Returned questionnaires from 1230 minor justices.

TABLE 14 Distribution of All Cases Among Minor Justices

| <i>Number of cases, 1961</i> | <i>Number of<br/>Justices</i> | <i>Per Cent<br/>of Total</i> |
|------------------------------|-------------------------------|------------------------------|
| None                         | 191                           | 16                           |
| 1 to 19                      | 168                           | 14                           |
| 20 to 49                     | 150                           | 12                           |
| 50 to 99                     | 125                           | 10                           |
| 100 to 299                   | 163                           | 13                           |
| Over 300                     | 77                            | 6                            |
| No answer                    | 356                           | 29                           |
| Total                        | 1230                          | 100                          |

Source: Returned questionnaires from 1230 minor justices.

TABLE 34 Costs Paid by Counties to Minor Judiciary<sup>1</sup> in 1960

| Counties       | Dismissed<br>Cases | Summers<br>Convictions | Court<br>Cases | Other<br>Costs | Total<br>Costs |
|----------------|--------------------|------------------------|----------------|----------------|----------------|
| Adams          | \$ ---             | \$ ---                 | \$ 3,143.37    | \$ ---         | \$ 3,143.37    |
| Allegheny      | 17,686.10          | ---                    | ---            | ---            | 17,686.10      |
| Armstrong      | 147.00             | 472.00                 | 2,727.00       | ---            | 3,346.00       |
| Beaver         | 257.00             | 358.00                 | 5,828.45       | ---            | 6,443.45       |
| Bedford        | 667.70             | ---                    | 55.50          | 23.50          | 746.70         |
| Berks          | 778.00             | 813.00                 | 9,129.95       | ---            | 10,720.95      |
| Blair          | 656.25             | ---                    | 4,164.05       | ---            | 4,729.30       |
| Bradford       | 163.75             | 1,166.50               | 798.00         | ---            | 2,128.25       |
| Bucks          | 700.00             | 691.10                 | 11,772.50      | ---            | 13,163.60      |
| Butler         | 643.00             | 404.00                 | 4,382.20       | ---            | 5,429.20       |
| Cambria        | 414.00             | ---                    | 8,491.00       | ---            | 8,905.00       |
| Cameron        | ---                | ---                    | 297.00         | ---            | 297.00         |
| Carbon         | 169.00             | 202.00                 | 1,261.00       | ---            | 1,632.00       |
| Centre         | ---                | ---                    | 3,625.38       | ---            | 3,625.38       |
| Chester        | 1,134.50           | 493.00                 | 10,140.00      | ---            | 11,767.50      |
| Clarion        | ---                | ---                    | ---            | ---            | ---            |
| Clearfield     | ---                | ---                    | 3,708.35       | ---            | 3,708.35       |
| Clinton        | 269.00             | ---                    | 1,149.30       | ---            | 1,418.30       |
| Columbia       | 286.00             | ---                    | 1,673.00       | ---            | 1,959.00       |
| Crawford       | ---                | ---                    | ---            | 3,689.01       | 3,689.01       |
| Cumberland     | 592.00             | 431.00                 | 5,163.25       | ---            | 6,186.25       |
| Dauphin        | 949.50             | 477.50                 | 16,684.00      | ---            | 18,111.00      |
| Delaware       | 162.70             | 270.50                 | 17,238.85      | ---            | 17,672.05      |
| Elk            | 39.50              | ---                    | 1,052.10       | 1.25           | 1,092.85       |
| Erie           | 2,834.00           | 5,804.20               | 14,976.15      | ---            | 23,614.35      |
| Fayette        | 269.00             | 574.00                 | 8,068.75       | 167.00         | 9,078.75       |
| Forest         | ---                | ---                    | ---            | 90.50          | 90.50          |
| Franklin       | 78.50              | 962.00                 | 2,952.00       | ---            | 3,992.50       |
| Fulton         | 10.00              | 43.00                  | ---            | ---            | 53.00          |
| Greene         | 134.00             | 211.00                 | 1,109.00       | ---            | 1,454.00       |
| Huntingdon     | ---                | 273.00                 | 2,848.60       | ---            | 3,121.60       |
| Indiana        | 159.00             | ---                    | 2,547.00       | ---            | 2,706.00       |
| Jefferson      | 219.00             | ---                    | 1,375.30       | ---            | 1,594.30       |
| Juniata        | ---                | 52.00                  | 11.00          | ---            | 63.00          |
| Lackawanna     | 112.00             | 374.70                 | 7,007.45       | ---            | 7,494.15       |
| Lancaster      | 1,629.75           | ---                    | 9,166.80       | ---            | 10,796.55      |
| Lawrence       | 347.00             | 637.00                 | 5,550.35       | ---            | 6,534.35       |
| Lebanon        | 559.50             | 148.00                 | 3,711.70       | ---            | 4,419.20       |
| Lehigh         | 5,636.25           | ---                    | 13,961.75      | ---            | 19,598.00      |
| Luzerne        | 1,357.20           | ---                    | 17,294.30      | ---            | 18,651.50      |
| Lycoming       | \$ 1,131.30        | \$ 451.00              | \$ 3,955.28    | \$ ---         | \$ 5,537.58    |
| McKean         | 253.00             | ---                    | 1,708.00       | ---            | 1,961.00       |
| Mercer         | 293.00             | ---                    | 4,543.36       | ---            | 4,836.36       |
| Mifflin        | 106.00             | 366.50                 | 2,166.00       | ---            | 2,638.50       |
| Monroe         | 108.85             | 202.00                 | 1,760.50       | ---            | 2,071.35       |
| Montgomery     | 1,023.35           | 442.65                 | 20,960.75      | ---            | 22,426.75      |
| Montour        | ---                | ---                    | 828.90         | ---            | 828.90         |
| Northampton    | 2,788.60           | ---                    | 7,707.25       | 389.05         | 10,884.90      |
| Northumberland | 2,167.00           | 3,167.20               | 5,938.00       | ---            | 11,272.20      |
| Perry          | 27.70              | 95.70                  | ---            | ---            | 123.40         |
| Pike           | ---                | ---                    | 506.30         | ---            | 506.30         |
| Potter         | ---                | 169.00                 | 516.00         | ---            | 685.00         |
| Schuylkill     | 1,624.00           | 2,467.30               | 8,123.17       | ---            | 12,214.47      |
| Snyder         | ---                | ---                    | 485.90         | ---            | 485.90         |
| Somerset       | ---                | ---                    | 200.00         | ---            | 200.00         |
| Sullivan       | ---                | ---                    | ---            | ---            | ---            |
| Susquehanna    | ---                | 77.00                  | 1,206.65       | ---            | 1,283.65       |
| Tioga          | 2,166.70           | ---                    | ---            | ---            | 2,166.70       |
| Union          | 99.50              | 130.80                 | 585.00         | 33.00          | 848.30         |
| Venango        | 16.00              | 182.00                 | 2,229.50       | ---            | 2,427.50       |
| Warren         | ---                | ---                    | ---            | ---            | ---            |
| Washington     | 4,254.50           | 2,557.10               | 13,356.35      | ---            | 20,167.95      |
| Wayne          | ---                | ---                    | ---            | ---            | ---            |
| Westmoreland   | 1,296.00           | ---                    | 17,361.15      | ---            | 18,657.15      |
| Wyoming        | 45.00              | ---                    | 1,184.90       | ---            | 1,229.90       |
| York           | 1,686.00           | 1,154.00               | 12,071.00      | 2.25           | 14,913.25      |
| Totals         | \$58,146.70        | \$26,319.75            | \$310,458.36   | \$ 4,395.56    | \$399,229.37   |

1. Source: Annual financial reports of counties submitted to the Department of Internal Affairs, Commonwealth of Pennsylvania.

TABLE 35 Costs Paid by Counties to Minor Judiciary in 1940

| County         | Dismissed<br>Cases | Summary<br>Convictions | Court<br>Cases | Other<br>Costs | Total<br>Costs |
|----------------|--------------------|------------------------|----------------|----------------|----------------|
| Adams          | \$ 463.30          | \$                     | \$ 862.78      | \$             | \$ 1,326.08    |
| Allegheny      | —                  | —                      | —              | —              | —              |
| Armstrong      | 2,277.04           | —                      | 2,102.49       | —              | 4,379.53       |
| Beaver         | —                  | 454.49                 | 4,427.79       | —              | 4,881.97       |
| Bedford        | —                  | —                      | —              | —              | 864.61         |
| Berks          | 908.77             | 1,294.99               | 6,706.41       | —              | 8,910.17       |
| Blair          | 2,971.27           | —                      | 2,826.26       | 41.53          | 5,839.06       |
| Bradford       | 389.01             | —                      | 303.10         | 549.45         | 1,250.56       |
| Bucks          | —                  | —                      | —              | —              | 3,430.66       |
| Butler         | 744.75             | 1,123.96               | 1,600.45       | 2,715.54       | 6,184.60       |
| Cambria        | —                  | 1,146.107              | 4,323.45       | —              | 5,469.55       |
| Cameron        | 2.45               | —                      | 77.53          | —              | 79.98          |
| Carbon         | —                  | —                      | —              | —              | 668.10         |
| Centre         | —                  | —                      | —              | —              | 2,015.98       |
| Chester        | 590.50             | —                      | 3,418.40       | 1,079.30       | 5,033.20       |
| Clarion        | 49.10              | 117.00                 | 505.06         | —              | 671.16         |
| Clearfield     | 947.02             | —                      | 1,677.96       | —              | 2,624.98       |
| Cinton         | 1,208.43           | —                      | 900.50         | —              | 2,108.93       |
| Columbia       | —                  | 2,396.55               | 794.60         | —              | 3,191.15       |
| Crawford       | —                  | —                      | —              | —              | 1,776.40       |
| Cumberland     | 189.50             | —                      | 2,972.81       | —              | 3,162.31       |
| Dauphin        | 6,910.40           | 6,008.50               | 8,085.45       | —              | 21,004.35      |
| Delaware       | 958.91             | 9,868.95               | 6,548.55       | —              | 17,376.41      |
| Elk            | 410.85             | —                      | 415.65         | —              | 826.10         |
| Erie           | 5,022.25           | 5,270.49               | 4,406.28       | —              | 14,699.02      |
| Fayette        | 1,467.10           | 534.24                 | 5,136.04       | 368.25         | 7,505.63       |
| Forest         | 193.65             | —                      | —              | —              | 193.65         |
| Franklin       | 445.37             | 1,452.80               | 1,520.20       | 4.00           | 3,422.37       |
| Fulton         | —                  | —                      | —              | —              | 287.83         |
| Greene         | 478.11             | —                      | 1,318.89       | 285.40         | 2,082.40       |
| Huntingdon     | 172.78             | —                      | 724.60         | —              | 897.38         |
| Indiana        | 760.01             | —                      | 1,043.00       | —              | 1,803.01       |
| Jefferson      | 200.85             | —                      | 552.15         | —              | 753.00         |
| Juniata        | —                  | —                      | —              | —              | 511.53         |
| Lackawanna     | 14,989.72          | 7,597.81               | 7,145.11       | —              | 29,532.64      |
| Lancaster      | —                  | 2,590.457              | 2,935.00       | —              | 5,325.45       |
| Lawrence       | —                  | 1,328.287              | 2,302.53       | —              | 3,630.81       |
| Lebanon        | 327.30             | —                      | 2,139.10       | —              | 2,466.40       |
| Lehigh         | 5,734.70           | —                      | 4,688.44       | —              | 10,423.14      |
| Luzerne        | 1,735.50           | 1,675.53               | 13,946.35      | —              | 17,357.48      |
| Lycoming       | \$ 2,028.85        | \$ 288.00              | \$ 2,271.88    | \$             | \$ 4,588.73    |
| McKean         | —                  | 338.947                | 1,105.50       | —              | 1,444.44       |
| Mercer         | 1,574.35           | —                      | 1,143.64       | —              | 2,717.99       |
| Mifflin        | 45.95              | 339.15                 | 934.17         | —              | 1,319.27       |
| Monroe         | 346.70             | —                      | 514.45         | —              | 861.15         |
| Montgomery     | 191.90             | 589.10                 | 5,044.40       | —              | 5,825.40       |
| Montour        | —                  | 157.68                 | —              | —              | 157.68         |
| Northampton    | —                  | 2,573.847              | 3,454.20       | 1.44           | 6,029.48       |
| Northumberland | 16,063.56          | —                      | 2,326.07       | —              | 18,389.63      |
| Perry          | —                  | —                      | —              | —              | 336.00         |
| Pike           | 78.55              | 113.45                 | 229.30         | —              | 421.30         |
| Potter         | 14.60              | 257.55                 | 437.25         | 17.75          | 727.15         |
| Schuylkill     | 719.75             | 4,690.16               | 7,266.12       | —              | 12,676.03      |
| Snyder         | 218.24             | —                      | —              | 5.00           | 223.24         |
| Somerset       | —                  | —                      | —              | —              | 2,429.22       |
| Sullivan       | —                  | —                      | —              | —              | —              |
| Susquehanna    | 200.75             | —                      | 1,081.50       | —              | 1,282.25       |
| Tioga          | —                  | —                      | —              | —              | 247.65         |
| Union          | —                  | —                      | —              | —              | 347.32         |
| Venango        | 282.35             | 676.85                 | 1,424.15       | —              | 2,383.35       |
| Warren         | —                  | 968.39                 | —              | —              | 968.39         |
| Washington     | 4,804.60           | 3,558.19               | 7,898.13       | —              | 16,260.92      |
| Wayne          | 74.75              | 105.39                 | 103.90         | —              | 284.04         |
| Westmoreland   | —                  | 5,372.347              | 8,335.93       | 78.65          | 13,711.92      |
| Wyoming        | 453.05             | —                      | 267.00         | —              | 720.05         |
| York           | 1,879.10           | 94.50                  | 4,866.85       | 28.18          | 6,948.63       |
| Totals         | \$79,614.29        | \$62,385.58            | \$145,269.15   | \$ 5,169.49    | \$332,800.67   |

Dismissed cases and summary convictions not separated.

## SUBMISSION NO. 7

*Submission to The Pennsylvania Constitutional Convention  
Preparatory Committee, Task Force Hearing on the  
Judiciary Article, July 1967, by The League of  
Women Voters of Pennsylvania*

*(Presented by Mrs. Robert Farlow)*

I am speaking for the League of Women Voters of Pennsylvania. The League of Women Voters has nearly 7000 Pennsylvania members in 56 local Leagues. Our interest in constitutional revision in our state dates from 1953 when our members first undertook a study of this topic.

The late Mr. Justice Frankfurter observed that justice must not only be done, it must appear to be done. His observation applies equally to the specific trial of a specific case and to the entire system of administration of justice. The preservation of citizen respect for the judicial system is necessary to the continuation of democracy. If the overall operation of the system is faulty, it is not enough that justice is both done and seems through fair trial to have been done.

There is an old saying: "Justice delayed is justice denied." The truth of this is daily demonstrated in those areas of the Commonwealth, most notably Philadelphia, where it takes almost five years to proceed from complaint to judgment in a negligence case tried by a jury. By way of contrast, in some counties it is possible to proceed from complaint to judgment in the same type of case in six months. Consolidation of the court system in the Commonwealth is badly needed, we believe, to rectify this situation of uneven dispensation of justice.

The appearance of the doing of justice is also marred by the known fact that there are some judges who are not capable of performing their functions, but who nevertheless continue to sit. We feel that some provision must be made whereby such members of the judiciary could and would be relieved of their functions either for disability or for malfeasance without the necessity of the cumbersome process of impeachment.

A third problem exists with respect to the creation and maintenance of a judicial system which not only will do justice but also will give all appearance of being fair and impartial. Judicial office is now elective and therefore those seeking it must indulge to a greater or lesser extent in partisan politics if they wish to attain and to keep judicial office. The League of Women Voters believes that a plan for the impartial selection of judges based on merit and calling for approval of the nominee by the electorate on a nonpartisan basis would help to keep the courts out of politics and politics out of the courts. Such a system is, of course, not new. A prototype of it—the Missouri plan—has been in operation for almost thirty years with excellent results. The Pennsylvania or the Missouri plan would serve to prevent the situation, all too common, where nominees are voted into judgeships not because of their qualifications or abilities but because of completely extraneous considerations. One fine mid-western judge, now long deceased, complained bitterly that he was voted into office in 1916 because “Wilson kept us out of war” and was voted out of office in 1920 because “Wilson didn’t keep us out of war”.

The administration of justice is felt closest to home at the minor court level. This is where most laymen meet the law and where most are disillusioned by it. The reasons are obvious. Our minor judiciary are not only not learned in the law they must administer but they are in all too many cases poorly educated. In addition, the fee system acts as an encouragement to them to find guilty, to impose penalties. It is of paramount importance that the minor courts be reformed.

If the minor courts are not integrated into a unified statewide judicial system, the League of Women Voters recommends that the number of justices of the peace be greatly reduced, that the fee system for compensating Justices of the Peace be abolished, and that education and training requirements be established.

The League believes there should be a rationalization of the court system with administrative control over the system placed in the office of the Chief Justice. He should have the power to assign all judges where they are most needed. An adequately staffed office of judicial administration should be established to standardize and regulate such housekeeping functions as budgeting, compilation of judicial statistics, personnel administration, financial administration. The most serious defect in the structure of Pennsylvania’s present court system is that each court is practically autonomous. In many areas, the results are inequalities of workload, waste of judicial manpower, inefficient administrative and excessive delay for litigants. League positions are familiar to and supported by our many members. The positions are expressed in general statements, as may be seen by the accompanying *1967-69 Position Paper*.

In addition to the integration of the courts of the state into a unified sys-

tem, the reform of the minor judiciary, and the nonpartisan selection of judges already mentioned, the League of Women Voters supports:

1. Ten-year terms for all judges and protection against reduction in salary.
2. Mandatory retirement for judges.
3. Machinery to permit the removal from office of judges because of incapacity, improper behavior, or for becoming a candidate for political office.

We do not have drafts of the precise language to revise the judiciary article of the Pennsylvania Constitution. However, we have examined the proposals of the Pennsylvania Bar Association with respect to the judiciary. We will support the PBA proposals because in our estimation they would accomplish the ends desired by the League of Women Voters of Pennsylvania. The Bar Association drafts are very lengthy and detailed. In general we favor constitutional provisions that are broadly stated grants of power free from legislative detail, but it may be necessary, in order to achieve the sweeping reforms in the court system of the Commonwealth projected in the draft judicial article, to spell out the provisions with sections and subsections. The present court system, encrusted with special interest and the habits of centuries of practice, can be expected to resist new forms and policies. We believe the proposed article will give the residents of this Commonwealth as well as all who come before its courts equal and even-handed justice.



## SUBMISSION NO. 8

*Statement of Arlen Spector, Esq.,  
District Attorney for Philadelphia,  
Before the Preparatory Committee for the  
Pennsylvania Constitutional Convention  
10:00 a.m. Thursday, July 27, 1967*

### **Judicial Reform**

The administration of criminal and civil justice in Philadelphia requires modernization of the judicial system. I suggest that this Committee consider the following proposals for Pennsylvania's new Constitution:

- (1) Lifetime appointments for judges of the Courts of Common Pleas (including County Court judges after consolidation) with the elimination of any non-judicial functions.
- (2) Abolition of the separate three-judge Courts of Common Pleas so that consolidation will be structurally complete.
- (3) Mandatory retirement for judges after age 70 under a program analogous to the Federal Court Senior Judge Bill.
- (4) Replacement of Philadelphia Magistrates' Courts with a minor court of record.

### **Lifetime Appointments**

In my opinion, the most effective way to improve the judicial system of Pennsylvania would be to appoint judges for life or good behavior. This would be the most effective approach to take judges out of politics and to provide the maximum incentive for the best qualified men to become judges.

As long as judges appointed by the governor must run for election soon after being designated, the political leaders of both parties have the power to slate replacements, through agreement. By making the appointments for life or good behavior, that power of the local political parties would be eliminated.

Lifetime appointments would also eliminate, with finality, the potential problem which faces a sitting judge who must run for re-election. Experience in Philadelphia this year demonstrates that even with the sitting judge principle, a judge is not out of politics. As it is well known, one Philadel-

phia judge, who was endorsed by the Bar Association, now faces a contest for his position. His election is vital to buttress the sitting judge principle.

However, so long as the position of the judge can be challenged as it has been this year in Philadelphia, there is no absolute security for a judge to be totally non-partisan and indifferent to the realities of the political facts of life. A change in law to make appointments for life or good behavior would eliminate, once and for all, any concern over re-election.

The federal system for appointing for life or good behavior has worked out very well. The caliber of appointments to the federal bench across the nation constitutes a persuasive argument for such a tenure.

I further suggest that Pennsylvania's judges should be relieved of all non-judicial duties such as the power to make appointments. In Philadelphia, for example, judges have the power to appoint to the Fairmount Park Commission, the Board of Revision of Taxes and many other boards. Such authority and responsibility necessarily involves the court in making political judgments as to those appointments. The non-political position of the judges would be strengthened by eliminating that non-judicial function.

#### ***Abolition of Separate Courts of Common Pleas***

Under the Pennsylvania Constitution, additional judgeships for Philadelphia must take the form of three-judge Courts of Common Pleas. Each of the newly created courts must have a president judge. There has been certain structural consolidation under the direction of the administrative judge with consolidated trial lists. Better administrative controls can be obtained if all of the judges sit in one court with a single chief judge, whether he be known as the administrative judge or the president judge, to administer the entire court.

#### ***Mandatory Retirement At Age 70***

Experience in Philadelphia has shown that judges cannot be reasonably expected to maintain the same heavy workloads in their seventies or eighties which they could sustain when younger. As a practical fact of life, there are a number of judges in the Philadelphia courts today who are not able to carry the full workload.

Legislation has been proposed to give the judge the option of retiring at age 70. This legislation seeks to make it sufficiently attractive so that the judges will be willing to retire on a voluntary basis. A constitutional provision is needed in order to eliminate any doubt on authority to compel retirement at a given age.

The federal system works well where a judge retires at 70 and is then called upon to perform judicial duties in accordance with his ability to serve. In my opinion, it is highly desirable to structure Pennsylvania's new Con-

stitution to provide for mandatory retirement at age 70 with additional service by senior judges on an analogy to the federal system.

### ***Replacement of Philadelphia Magistrates' Courts***

The Attorney General's Investigation of the Magisterial System, conducted in 1964-1965, demonstrated widespread corruption and inefficiency in Philadelphia's Magisterial System. Convictions by Philadelphia juries have further authenticated the findings of that investigation.

The only solution to this problem is constitutional reform to replace Philadelphia Magistrates' Courts with minor courts of record. As an interim measure, the proposed Magistrates' Court Act of 1967 would eliminate some of the evils, but total reform is possible only through constitutional change.

For example, the civil jurisdictional limit of a Magistrate's Court is \$100 under the Constitution. That figure should be substantially expanded. In my view, it would be unwise to set any limit in the Constitution since the legislature should be free to modify it from time to time without changing the fundamental law of the Commonwealth. The key changes needed in the magisterial system are:

- (1) Require that minor court judges be lawyers in view of the complexities of recent decisions of the Supreme Court of the United States.
- (2) In addition to increasing civil jurisdiction, the criminal jurisdiction of the minor court of record should be expanded to lesser criminal offenses to reduce the backlog in the Court of Quarter Sessions.
- (3) The activity of the constable should be completely reformed as it relates to the Magistrates' Courts.
- (4) A revised minor judicial structure should preclude any involvement by minor judges or constables in the collection business.
- (5) The structure of the bail laws should be modified to eliminate the unnecessary posting of bail and the bail bond rackets which were identified in the Report on the Investigation of the Magisterial System.

### ***Local Government***

It would be desirable for the new constitutional provisions on local government to contain a section which would permit an extension of territorial boundaries of local governmental units providing there is agreement. Such a constitutional provision would be permissive only so that agreement by the concerned local governmental units would have to be obtained before any such change would become effective.

In recent years, it has become increasingly apparent that various types of inter-county cooperation are necessary in order to solve problems which overlap county lines. All such current efforts are strictly voluntary on the

inter-county basis. It is apparent that the future will require more joint action on problems such as transportation, air pollution, water pollution, the Philadelphia Airport, the Philadelphia seaport, crime control and many other matters.

In structuring a constitution which should be capable of accommodating the needs of the people for the next century, careful consideration should be given to the structure of government to permit sufficient flexibility for such changing needs. While many are opposed to the concept of regionalism, a new constitution should permit modification of local governmental units at least on a voluntary, cooperative basis. By the time several decades have passed, it may be that the problems of the urban areas will require a broader governmental base than a single county. A new constitution should be sufficiently flexible to allow for such changes in the future.

The 1945 Constitution of Missouri contains a provision which might well serve as a model. Section 30(a) of that constitution provides:

"Powers conferred with respect to inter-governmental relations; procedure for selection of board of freeholders. The people of the city of St. Louis and the people of the county of St. Louis shall have power (1) to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or, (2) to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or, (3) to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or, (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein. The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county . . ."

This provision does not relate to city-county consolidation of St. Louis. The entire city of St. Louis is in a separate county with the adjacent county called St. Louis county. The provisions relating to the extension of territorial bounds, therefore, involved two counties. This constitutional provision was used in 1955 as the basis for organizing a Metropolitan Sewer District by the two governmental units.

Such a provision, which would permit restructuring of local governmental units through agreement of all the units involved, would be in my opinion a desirable feature in the new Pennsylvania Constitution.

## SUBMISSION NO. 9

*Statement on the Provisions on Judiciary  
in the Pennsylvania Constitution,  
by Robert Sidman, Executive Director,  
A Modern Constitution For Pennsylvania,  
Incorporated,  
Harrisburg, Pennsylvania, July 27, 1967*

The Pennsylvania Bar Association's basic and alternative proposals for a new Judiciary Article would replace all of Article V of our existing Pennsylvania Constitution with new provisions. A Modern Constitution for Pennsylvania, Inc., has reviewed them, together with past proposals in Pennsylvania's General Assembly for amending Article V, the Judicial articles of other states, and proposals that have been offered in the New York and Maryland state constitutional conventions. We find them more appropriate to Pennsylvania's needs and traditions than any other.

The system of court administration, as provided in the basic proposal, is long overdue. It will add businesslike efficiency to our courts, and bring economies to their operation.

But, of greater importance, effective court administration will remove barriers to speedy justice.

Other states, including New Jersey and Illinois, which enjoy court administration systems have reported great satisfaction with them. The Bar Association proposal promises no less satisfactory results here.

Another part of their basic proposal urges the selection of all judges in the state on a non-political, merit basis. This, too, we have studied and endorse without qualification. In so doing, we would like to refer to the statement once made by the late Chief Justice of the Supreme Court of New Jersey, Arthur Vanderbilt, on the subject of merit selection of judges. He noted that the only nations in the civilized world where the judges are popularly elected are Soviet Russia, its satellites, and the United States of America.

Even so, the Bar Association would not deprive the voters of their traditional final vote in choosing their judges. It simply does away with the pretense that a man's judicial qualifications are indicated by the column on which his name appears on ballots and voting machines.

The Bar Association proposal is not unique. It was first put into the Missouri constitution in 1940, for the selection of appellate and trial court judges in St. Louis and Kansas City. Next year, the voters will consider an amendment to include the rest of the Missouri judiciary.

Meanwhile, it is the way in which the constitutions of six other states provide that all judges of all major courts be selected—Alaska since 1958, Iowa and Nebraska since 1962, Colorado, Utah and Vermont more recently. In Colorado, merit selection also applies to the minor courts.

With the adoption of this proposal in Pennsylvania, the effect will be to permit all of Pennsylvania's presently sitting judges to run for re-election without opposition and without party designation at the end of their present terms, if they wish to remain on the bench.

If a presently sitting judge should wish to retire at that time, however, or if he should run and the voters reject him, or if his seat should be vacated because of death, resignation, disability or removal, or should a new judgeship be created, the vacancy will be filled by appointment by the Governor from a list of names of qualified attorneys. This list will be prepared and presented to the Governor by a panel of laymen, lawyers and one judge.

Following his appointment, a judge sits for approximately two years, during which time the voters of his jurisdiction have a chance to observe his qualifications. Then, at the appropriate election, if he wishes to continue on the bench, the judge may put his name before the voters without opposition and without political designation. If the voters approve, he serves out his designated term: it should be pointed out that the records thus far show that almost all judges standing for election under this system in other states have been approved by their electorate, indicating that the nominations of the panels and the choices of the governors have been agreeable as well as thoughtful and good.

This proposal seems to us to be an admirable blending of tried and true principles—the sitting judge principle, nomination by one's peers, popular ratification, and as complete a separation of bench and politics as seems possible in our society.

We see no flaws in it. We know of no experience anywhere to indicate that it cannot work. We endorse it.

There is an alternative proposal from the Bar Association to make the merit selection of judges mandatory only for statewide courts, and in Philadelphia and Allegheny counties, and to make it available to other counties only by special county-wide referenda.

We do not believe the majority of Pennsylvanians living beyond Philadelphia and Allegheny county limits prefer party regularity to judicial capability in their judges. Nor do we believe that there are many non-Philadelphia-Allegheny judges who oppose the idea of being judged on their merits and without the support of political machines.

While we approve and endorse the Bar Association's alternate proposal, we do so reluctantly in the hope that this Committee and the coming Convention will share our preference for uniform, statewide merit selection.

Now let us comment on the part of the proposal dealing with the establishment of a Judicial Nominations Committee.

As spelled out in a lengthy section, it will be a permanent commission, with its members serving overlapping terms so that there is both a continuity of experience and a safeguard against rigidity of policy. It will include judges, lawyers and laymen. There will be three different appointing agencies—the Supreme Court, the Governor and the members of the bar—so that no individual or agency will be able to dominate the commission's actions by their appointments.

We in Pennsylvania have been fortunate in our judges. There have been some who have yielded to temptation, it is true, some who outlived their vigor and usefulness, some whose personal conduct became a public embarrassment. But on the whole, we have been among the nation's leaders in exemplary judicial conduct. Nevertheless, we need new safeguards and new procedures in our constitution.

The need to remove or discipline judges may become critical in future times. And as for retirement, a review of the ages of judges listed in the current Pennsylvania Manual will show that more than half are over 60, almost 20% are past 70, and one or two are almost as old as our too-old State Constitution.

The question may be raised as to why the present constitutional provisions on impeachment, or the Governor's authority to remove judges with two-thirds of each House of the Legislature concurring, are not enough. There is a simple answer: the record shows that it is not. The removal, the disciplining, even the involuntary retirement of a judge is a most difficult matter to put in motion. No government official wants to initiate any action which, regardless of its outcome, is certain to cloud the declining years of a man who has held the ultimate position of trust.

Since neither the permissive type of provision which we now have in our constitution, nor the halfway expedient used in some other states of a commission which can be convened on call, has been effective in maintaining high ethical and performance standards on the bench, the Bar Association's proposal seems prudent and desirable.

Let us now look at the part of the proposal dealing with the elimination of all the minor judiciary, and substituting in their place Community Courts.

This is a proposal to eliminate part of our court structure whose roots are in the medieval ages, and which bears the stamp of our revolutionary forefathers' belief that the people should be their own judges as well as their own rulers. The concepts are consistent with a free society, it is true, but their

consciences over the ages -- and particularly during this present century -- have been alarmingly bad.

Throughout the nation, wherever any significant change in court systems has been attempted since World War I, the sad state of affairs in the lowest of the courts has always been an impelling factor. In our Commonwealth, it has been *the* impelling factor.

What are the charges against the minor court system as we know it now in Pennsylvania? They are four:

1. There are more more than 4,000 justices of the peace, aldermen and magistrates. This is many times more than are needed.
2. There are no qualifications for holding these offices, and many serve on a part-time basis.
3. Compensation of the minor judiciary is based on fees, and is not a matter of public record.
4. There is growing public distrust for the entire judicial structure because of the repeated exposure of misconduct among the justices of the peace, aldermen and magistrates.

These are not new complaints. They have been made repeatedly, publicly and without refutation. They are as widely known and accepted as yesterday's baseball scores.

Yes, the 4,000 minor judges have been stubbornly silent. It has remained for the rest of us -- who stand in real jeopardy under such a system -- to propose conditions for the betterment of the lower courts. No one is better qualified to do this than the Pennsylvania Bar Association.

They call for the complete elimination of all minor courts as we now know them in Pennsylvania, replacing them with a system of Community Courts. Each Community Court is to be presided over by a *salaried*, full-time judge who is a lawyer with the same qualifications as a District Court judge.

The number of Community Courts is to be determined by the Supreme Court, and their location within each judicial district will be up to the President Judge of the District Court. By this flexible system, there will be lower courts in the necessary numbers at the places they are most needed.

This is not a unique system. It is quite similar to one in effect in Illinois for some years, and only slightly different from the new county court system in Colorado. Systems like it have also been put into effect in Connecticut, Maine, California, Ohio, Missouri and many other states. And it is an important part of the plans for constitutional revision now being considered in ten other states.

There are no substantial objections to this proposal that have come to our attention. The most frequent question seems to be, "How can we afford



to pay for several hundred new judges, particularly since they will be lawyers who will have to give up practices?"

Conversations with the Deputy Court Administrator of the State of Illinois indicate it might be a self-financing improvement. He said that, in the first year of their program, the fines and costs turned in to the states and county treasuries were about three times as much as had been turned in by the self-employed justices the year before. The difference, he stated, was more than enough to support the costs of the new system, including annual salaries of \$10,000 to the minor court judges, except in Cook County where they are paid \$16,000.

This, in part, also answers the question of whether attorneys would give up private practices to accept Community Court judgeships. We do not have figures on the earnings of Pennsylvania lawyers, but the per capita personal income for all occupations in Pennsylvania is about the same as the national average. So we can assume that the earnings of Pennsylvania attorneys would not differ greatly from the national figures, which show that male attorneys had median earnings of \$10,587 in 1959 (the latest reported year), while female attorneys' median earnings were \$5,199. When one deducts from these figures the overhead that private practice entails, it seems most unlikely that there should be much problem of finding capable and willing attorneys for these minor judgeships, except in the smallest and most scattered counties. And another provision in the Bar Association's proposal states that, in any county where there are fewer than six eligible attorneys willing to be considered for a judicial vacancy, the nominating commission will have the privilege of nominating lawyers in practice elsewhere.

It is our belief that, with the adoption of the Bar Association's proposals, public distrust of the minor courts will soon vanish, and the entire judicial system, which is the real keystone of our democratic institutions, will be restored to highest esteem.

But there are some dangling ends that must still be tucked away. One of them is that of all the J.P.'s, aldermen and magistrates, only a very few are attorneys, and therefore eligible to become Community Court judges. Of the others, despite their lack of legal qualifications, there are undoubtedly many who have served well and faithfully, and whose continued services might still be in the public interest. The Bar Association proposes that the Community Court judges be assisted in the performance of their duties by the appointment of Commissioners. These Commissioners will accept bail, issue warrants and handle other non-judicial matters.

In other words, the Commissioners are to do most of what the justices of the peace, aldermen and magistrates are now doing, except that they will no longer preside at hearings and trials. It is certain that many who are presently in the minor judiciary system will be retained, as appointed Commissioners, to perform much of their present duties.

These constitute the principal provisions of both the basic and the alternate proposals of the Bar Association for amendment of Article V. They have the support of a Modern Constitution for Pennsylvania, Inc., for the reasons we have given.

A Modern Constitution for Pennsylvania, Inc.

Richard C. Bond, *President*

Robert Sidman, *Executive Director*

SUBMISSION NO. 10

*Submission of  
Pennsylvania State Chamber of Commerce,  
July 31, 1967*

July 31, 1967

Mr. John W. Ingram, *Executive Director*  
The Preparatory Committee  
Constitutional Convention  
Commonwealth of Pennsylvania  
P.O. Box 6  
Harrisburg, Pa. 17108

Dear John:

The Pennsylvania State Chamber of Commerce endorses in principle the constitutional revision proposals of the Pennsylvania Bar Association as submitted to the Preparatory Committee on July 14, 1967. These recommendations encompass the four areas that are to be considered by the forthcoming constitutional convention. Our Board of Directors adopted this policy on March 17, 1966.

We would appreciate very much if you would include this letter in the hearing record of the Preparatory Committee.

Thank you.

Yours very truly,

*Robert Hibbard*  
Executive Director

RH:hw

## SUBMISSION NO. 11

*Submission of Hon. Robert E. Woodside,  
Former Attorney General of the Commonwealth  
and Former Judge of the Superior Court of Pennsylvania,  
July, 1967*

### ***In Re: Constitutional Provisions Relative to Appellate Courts***

*To the Honorable, the Members of the Preparatory Committee of the Pennsylvania Constitutional Convention:*

This memorandum relates only to present and proposed constitutional provisions relating to appellate courts and appellate review. I present this as a lawyer and a private citizen deeply concerned with fair and efficient administration of justice. I have had, as you know, some practical experience in the field on both sides of "the bench."

If there is one governmental function that is operating well in Pennsylvania today, and has been for many years, it is appellate review of judicial decisions. Appeals are heard and decided promptly. I am confident that an analysis of the records will show that the time between taking appeals to the appellate courts and final decision by them is shorter today than it was ten, twenty, thirty, or forty years ago.

The Supreme Court and the Superior Courts are busy courts, but the devotion of the Judges on both courts has resulted in promptly disposing of many cases without interference with due reflection, careful consideration and full discussion of important principles.

Not many functions of government operate efficiently. When there is so much in government crying for improvement, it is both foolish and dangerous to tamper with that which for years has been operating as effectively and efficiently as our two appellate courts.

The division of jurisdiction between the courts has been adjusted from time to time to keep it in fair balance. This is easily done. At present, I believe that the Superior Court has more cases appealed to it; the Supreme Court fewer cases which on the average require more time per case. Neither court is falling behind in its work. Judges of both courts find time to prepare a great number of dissenting and concurring opinions, some on relatively unimportant points of law. The Supreme Court continues to grant al-

locaturs from the Superior Court on the request of a single Justice. (This is a legislative provision which should be changed to three.)

Jurisdiction is now divided between the two Courts primarily on the basis of subject matter, permitting the Superior Court to specialize in the law of workmen's and unemployment compensation, public utility, domestic relation and other fields, while the Supreme Court specializes in equity, zoning, estates law, and other important fields. This is an age of specialization. Dividing jurisdiction according to subject matter enables the judges to decide with greater familiarity of the body of law involved in the cases before them. This is easier for the judges because they are already familiar with principles they would otherwise be forced to research. It is better for the litigents because a judge is more likely to decide correctly in a field with which he is familiar. It is good for the lawyers, because a judge's opinions within a field of his special knowledge are clearer, more accurate, and create less conflict with other cases. It promotes more refined and less conflicting principles of law to guide us.

Assumpsit and trespass cases are divided between the two appellate courts on basis of the amount involved. This statutory provision should be changed. This is not now, and should not be made, a constitutional provision.

The Supreme Court is indeed supreme and should remain so. Its right to review the decisions of the Superior Court should remain clear in the constitution. The Supreme Court has shown great respect for the Superior Court and seldom reviews its opinions and rarely reverses it. In the light of the unusually high caliber of the judges of the Superior Court now, and since its creation, its opinions have been viewed and accepted by lawyers and judges with much greater weight and respect than are the opinions of the intermediate courts of appeals of other states. The legal principles stated in its opinions are not viewed with the doubt and uncertainty that is a concomitant of opinions of circuit or district intermediate courts of appeal. This is good and makes our system of appellate jurisdiction the best in the country.

It has been suggested from responsible sources that the Superior Court should be increased from seven to nine judges and that it sit in panels of three. Under existing law approximately half of appellate cases are appealed directly to the Supreme Court. There is one argument, and the case is over, decided by the highest state judicial authority. Under the Bar Association plan all those cases would go to a panel of three judges of the Superior Court. Few losers would be satisfied with that opinion, so the lawyer would petition the Supreme Court to hear the case. The petition is in the nature of an argument; it takes the lawyer's time and it costs the clients money. The Supreme Court, having little or no other jurisdiction, will allow many times the number of appeals that it now allows from the Superior Court. Thus, in approximately half the appellate cases (all those now ap-

pealed directly to the Supreme Court) the litigant gets two or three lawyer's bills instead of one and waits two or three times as long to get a final decision.

That, of course, is the half of the litigants who suffer most, but the fate of the other half worsens, too, under the Bar Association plan. Those whose cases now go to the seven judge Superior Court would go to a three man panel of the Superior Court. There would be more dissatisfaction than with a seven judge court. Petitions to the Supreme Court are provided under present law. However, for the reason stated above, many more allocaturs would be granted, and because the chance of success would be much greater many more petitions would be presented. Thus, many litigants whose cases are now appealed to the Superior Court would find under the proposed plan that their legal fees are higher and the time of their litigation extended. Under the Bar Association plan no litigant would find his case expedited or his costs reduced. Most would suffer greater expense and greater delay. This is change, but not progress.

If appellate judicial decisions are looked upon as something to be decided in the manner of an umpire calling balls and strikes, a panel of three is more efficient than a court of seven — and one would be even better. But an appellate court is more than an umpire: it inevitably must be a maker of law. Not only how it decides, but what it says and how it says it is important. Now, the law comes from one Superior Court. Under the Bar Association plan it would come from three courts of equal standing. One panel of three will decide a case one way, another panel will decide a case with the same facts oppositely. This complicates, delays and confuses. Of course, with time and expense, the Supreme Court eventually settles the principle.

A system which promotes certainty in the law is superior to one which creates doubt and confusion. All judicial systems involving circuit or regional appellate courts contribute to doubt and confusion as to the law. This system of appellate courts is born of necessity; it cannot be advanced as ideal or even satisfactory; it can never be other than a necessary evil. It caused former Attorney General of the United States Katzenbach to observe that the federal system of Court of Appeals created numerous problems and was acceptable only because it was unavoidable. The federal government, and some states because of definite and different reasons, endure it as the only practical manner of disposing of appeals, but in Pennsylvania we have learned through practice and experience a much better system. We should keep it.

Not only opposite holdings by different panels, but the shading of language by different panels adds to the uncertainty and confusion. This happens to a limited extent between different judges on the same court, but it is far less frequent and far less serious than between panels. These shadings of the language should be avoided, not encouraged.

It is proposed to reduce the judicial or court work of the Supreme Court in order to give it time to accept an administrative role. How many good judges are good administrators? A few, to be sure, but relatively few. A good appellate court judge is a thinker, a good administrator is a doer. One must act deliberately—the other positively and immediately. Have a court devote a substantial part of its time to administrative problems outside the operation of its own court and you have neither a good court nor good administration. The more you divert the time and thought of appellate court judges from legal principles and judicial problems to the determination of who of the several hundred judges shall do this and who shall do that, the poorer opinions will emanate from those judges.

Furthermore, the Bar Plan, as it relates to the Supreme Court does not take judges out of politics, it puts the judges into politics. The Justices of the Supreme Court are required to deal with the minutest local, political details. They must deal with appointments of clerk of the courts, prothonotaries, clerks of the Orphans' Court and the employees of these officials; the creation, personnel and operation of a judicial council; the determination of where the Superior Court shall sit; the size, location and make-up of districts and the number of judges in each; the number of community judges in each judicial district and where they shall sit; the qualifications of the commissioners who serve under the community courts; the appointment of president judges in the Superior Court, the District Courts; and the Estate Courts. They must deal with an endless number of legislative functions such as the jurisdiction of each court, the rules of evidence, and numerous other functions now carried on by the legislature. There are at least twenty-three different administrative and legislative functions imposed upon the Supreme Court, many of which are political in nature, and many of which will be difficult to coordinate with new legislation. The appointment of president judges, officers of the court, places where the Superior Court sits, the size, location and number of judicial districts, jurisdiction by the courts, are all matters which can be more satisfactorily dealt with by rules stated in the constitution or by legislative acts.

The Supreme Court has the powers of the King's Bench. It now is restrained only by its own self-restraint, which it recognizes and exercises with discretion. It should and does have general supervisory powers over all courts, but this should not extend to the detailed administration of those courts that is provided in the Bar Association's proposal.

The Supreme Court is a court and should remain a court. The jurisdiction assigned to it should be regulated by the constitution and the legislature. The court itself has always resisted suggestions that it "promulgate rules of evidence," or determine the time for taking appeals. If the twenty-three or more administrative problems are to be dealt with by the seven men who constitute the Supreme Court, they must either ignore or delegate the

administrative problems, or they will cease to be a deliberative judicial body.

If it should develop in the future that the present jurisdiction places an unbearable burden upon all or any of the three Appellate Courts (considering the Commonwealth Court as one), then the best solution would be for the legislature to create a new five or seven judge Commonwealth Court to which could be given some of the jurisdiction now in the Court of Common Pleas of Dauphin County and some of the jurisdiction now in the Superior Court such as appeals involving the Public Utility Commission, the Unemployment Compensation Board, and others from the Commonwealth's departments, boards, commissions and agencies. The Superior Court could then take jurisdiction of all trespass and assumpsit and possibly other cases from the Supreme Court. This would be efficient, would enable courts to specialize and would promote certainty in the law.

Our present appellate review system is working and should not be traded for one that cannot possibly serve the people of this Commonwealth as well. Minor legislative changes could and should be made, but the basic system is far superior to any other that has been suggested. If and when the burden becomes too great for our appellate courts, the legislature can and should create a new and separate Commonwealth Court to solve the problem.

Respectfully submitted,

*Robert E. Woodside*



## SUBMISSION NO. 12

*The Pennsylvania AFL-CIO Position on Judiciary,  
Presented by Harry Boyer, President,  
July 27, 1967,  
Before the Preparatory Committee for the  
Commonwealth of Pennsylvania  
Constitutional Convention*

The Pennsylvania AFL-CIO is deeply concerned with problems involving the minor judiciary not only in Philadelphia County but in all of the 67 counties.

We are disturbed and somewhat irritated by suggestions that correcting problems of the minor judiciary which exist in Philadelphia County would, in effect, suffice to meet the problems involving the entire state. To be sure, we hold no brief for alleged abuses in Philadelphia County by certain members of the minor judiciary, and by the same token have the same feeling with respect to instances of alleged abuses by the minor judiciary in any of the remaining 66 counties.

It is for this reason that we stand in opposition to specific efforts by the General Assembly to legislate remedies for Philadelphia County while not being willing to pass remedial legislation for the minor judiciary in all other parts of the state.

We are impressed by the fact that standards for the county courts are fairly uniform, if not actually so, in all of the counties. In the instance of the county court, the voters of the county elect judges of their choice who, in turn however, are paid by the Commonwealth. This makes it possible for judges of any county to act in the roll of a visiting judge and lend assistance in a county where the docket is heavy and such assistance is necessary.

The Pennsylvania AFL-CIO believes that useful purposes could be served if our state Constitution would provide for uniform standards for all members of the minor judiciary in all of the 67 counties. While it is not our purpose to discuss what these standards should be, we feel certain that others, particularly members of the Bar, could and should suggest reasonable and practical standards by which all members of the minor judiciary and those aspiring to these offices could undertake to qualify.

We believe that the amendment to the Constitution should provide for payment of the members of the minor judiciary in every county by the Commonwealth, and that the same flexibility which now applies to the county court could perhaps apply to the minor judiciary.

Moreover, we firmly believe that it is possible to reduce the total number of members of the minor judiciary without rendering a disservice to the citizens.

Finally, we believe that constitutional action is preferable to legislation so that once having established a satisfactory doctrine governing qualifications for the minor judiciary, the limits and extent of their responsibilities and authority, and the manner of their election, it would be difficult, if not impossible, to alter these requirements to again introduce disparity and differences depending upon the county in which such minor judiciary shall serve.

## SUBMISSION NO. 13

*Submission of the Board of Common Pleas  
Judges of Philadelphia,  
Approved March 11, 1966,  
and Submitted July 13, 1967*

### ***Proposed Substituted Sections of Pennsylvania Bar Association***

#### **Section 1 COURTS**

The judicial power of this Commonwealth shall be vested in a unified judicial system consisting of a Supreme Court, a Court of Appeals, Superior Courts\* and Community Courts. Other courts may be established by the General Assembly but only upon prior certification of the necessity therefor by the Supreme Court.

#### *Comment:*

If there is to be a unified judicial system, all the courts of the Commonwealth should be consolidated into it, and we see no reason for excluding the present Orphans' Court. The various branches of the general trial court could be divided into divisions as set forth below.

We would retain the name, "Supreme Court" for the highest tribunal and we would call the intermediate appellate court "Court of Appeals."

We recommend that the general trial court be called "Superior Court." Fifteen of the other states, including most of the larger ones use this designation. The term "District Court" is opposed because it would cause great confusion in cities such as Philadelphia and Pittsburgh, where there is a U.S. District Court. The Prothonotary of Philadelphia County has stated his opposition to the name "District Court" because of the confusion which such a name would create.

#### **Section 2 THE SUPREME COURT**

(a) The Supreme Court shall consist of seven justices, one of whom shall be Chief Justice of Pennsylvania. In the absence of the Chief Justice, the member of the court senior in length of service on the court shall serve in his place.

(b) The Supreme Court shall be the highest court of the Commonwealth and shall have final appellate jurisdiction. It shall have no original jurisdiction.

\*Fifteen of the larger states use "Superior Courts," fifteen states use "District Court," eighteen states use "Circuit Court" and two states use other designations.

tion. It shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.

(c) The Supreme Court shall have appellate jurisdiction by appeal and certiorari or writ of error in all cases as is now or may hereafter be provided by the General Assembly.

*Comment:*

We would eliminate "except as may be expressly provided in this Constitution," as the same is redundant.

We would eliminate "it may assume jurisdiction of actions pending in any other court at any stage of the proceedings", as such is not consonant with orderly judicial process.

We would eliminate "Appeals from final judgments of the District Court shall lie as of right directly to the Supreme Court only in cases of judgments imposing sentence of death or life imprisonment. In all other cases, appeals permitted by law shall be assigned by the Supreme Court to such court, including the Superior Court, as the Supreme Court shall by rule prescribe," and substitute therefor the following: "The Supreme Court shall have appellate jurisdiction by appeal and certiorari or writ of error in all cases as is now or may hereafter be provided by the General Assembly," as we believe the power to prescribe jurisdiction properly vests in the General Assembly, and should remain there, rather than being the subject of changing rules by the Supreme Court.

### **Section 3 COURT OF APPEALS**

(a) The Court of Appeals shall consist of seven judges, except that the Supreme Court may from time to time assign additional judges from among the judges of the Superior Court to temporary service upon the Court of Appeals as the business of said court may require. The number of judges of the Court of Appeals may be changed by the General Assembly but only upon prior certification of the necessity therefore by the Supreme Court. The Court may act in panels of three or more judges, and shall sit at such place and times as it shall by rule prescribe.

(b) The Court of Appeals shall have no original jurisdiction. It shall exercise such appellate jurisdiction, including such review of the actions of executive or administrative offices, boards, commissions or agencies, as may be assigned by it by the General Assembly.

(c) The judge of the Court of Appeals, senior in service, shall serve as its President Judge. In the absence of the President Judge the next member of the Court of Appeals senior in length of service on the court shall act in his place.

*Comment:*

It is suggested that the name of the intermediate appellate court be changed from Superior Court to Court of Appeals. The change in name will bring Pennsylvania in line with the federal courts and with many of the states which have intermediate courts. To argue that a Pennsylvania Court of Appeals would be confused with the U.S. Circuit Court of Appeals is no more a valid objection than to contend

that the Supreme Court of Pennsylvania might be confused with the Supreme Court of the United States.

Out of 50 jurisdictions surveyed, 35 lack intermediate appellate courts. Of the remaining 15 states, seven designate these courts as Courts of Appeals. Of the remaining eight states, however, all intermediate appellate courts, except our own, have the word "Appeals" or "Appellate" in their title.

Pennsylvania is the only state in the union which presently designates its intermediate appellate court as "Superior Court." On the other hand, no less than 15 States use the title "Superior Court" for their *General Trial Courts*. It is clear, therefore, that there would be less confusion if we call our intermediate appellate court "Court of Appeals."

Section 3(b) of the draft of the Pennsylvania Bar Association provides that the Court of Appeals shall have no original jurisdiction. It further states that this court "shall exercise such appellate jurisdiction, including such review of the actions of executive or administrative offices, or agencies, as may be assigned to it by rule of the Supreme Court." In our opinion, the fixing of the appellate jurisdiction is the province entirely and exclusively of the General Assembly. To further ordain that the Supreme Court under its rule-making powers might extend or limit such appellate jurisdiction, might, in our opinion, be construed as an unlawful delegation of the legislative power. We further believe the provision should encompass "boards" and "commissions" in describing the review powers. The last sentence of (b) should be omitted. Accordingly, we will suggest (b) read as follows:

"Section 3(c) provides that the Judge of the Court of Appeals, senior in service shall be its President Judge. This is a wise and most desirable provision as it would eliminate the political bickering and personal ill feelings between judges which in our opinion would surely occur if seniority were not the test and the election of a President Judge were required."

#### **Section 4 THE SUPERIOR COURT**

(a) The Superior Court shall be the court of general jurisdiction for each judicial district. It may be divided into sub-divisions known as (a) Common Pleas, (b) Quarter Sessions, (c) Estates, and (d) Juvenile and Domestic Relations. There shall be one Superior Court for each judicial district. Initially, the number and boundaries of the judicial districts, and the number of judges to be selected from each district, shall be as at present, but the General Assembly may add such additional judges as it deems advisable. The President Judge of the Superior Court of each judicial district shall, under the direction of the Chief Justice or such associate justice as shall be deputized by him, supervise the court's judicial business, including the assignment of judges, all of whom are hereby authorized to act in all of the Superior Courts' divisions.

(b) Initially, the judges of the Superior Court shall be those presently constituting the Courts of Common Pleas, the Orphans' Courts, the County Court of Philadelphia County, the County Court and the Juvenile Court of Allegheny County.

(c) The Superior Court shall have unlimited original jurisdiction in law and in equity in all cases except such as may be assigned exclusively to the Supreme Court or the Community Courts by law.

(d) The Superior Courts shall have such powers of review of the actions of the Community Courts and of executive or administrative offices, boards, commissions or agencies as may be provided by law.

*Comment:*

(a) As noted above, we believe the most appropriate name for the trial court of general jurisdiction is "Superior Court." We believe that if the court is divided into divisions such as stated above, the present names of the courts could be retained. In other words, the "Common Pleas" divisions would try the civil cases, the "Quarter Sessions" would try the criminal cases, the "Estates" (Orphans) Division would have jurisdiction in all decedents' estate matters and the "Juvenile and Domestic Relations" division would retain the present jurisdiction of the County Courts in Philadelphia and Allegheny County, the Juvenile Court of Allegheny County and the Juvenile and Domestic Relations Courts in all the other counties. The tendency in modern jurisprudence is to have one court with separate divisions, and *not* to have separate courts. In counties where there are no separate Orphans' Courts, there would be no problem in having the judges sit in all divisions as they do at present.

(b) This change is to conform with sub-section (a).

(c) We have added jurisdiction in equity cases because we think this should be specifically mentioned. We would give the General Assembly the right to assign original jurisdiction to the Supreme Court, the Superior Court, or the Community Court.

(d) The general trial court is given powers of review in such cases as may be provided by the General Assembly. This follows the present practice in that many appeals are presently regulated by statutory law.

(e) This is eliminated in our proposal as unnecessary.

## **Section 8 JUDICIAL NOMINATING COMMISSIONS**

(a) There shall be a single state-wide Judicial Nominating Commission for the Supreme and the Superior Courts, and separate Judicial Nominating Commission for each of the districts in which judicial vacancies are to be filled in the manner provided by subsection (a) of the preceding section. Each such Commission shall be composed of one justice or judge, three members of the Bar selected by the members of the Bar and three lay citizens. The justice or judge and the members of the Bar on each Commission shall be selected in the manner and in accordance with rules prescribed by the Supreme Court. The lay citizens on each Judicial Nominating Commission shall be appointed by the Governor.

*Comment:*

(a) We would change the last sentence of (a) to read "Members of the Judicial Nominating Commission for the Supreme and the Court of Appeals shall be chosen from the Commonwealth at large, and members of the Judicial Nominating Commission for a judicial district shall be chosen from persons domiciled in that district, except that where no surviving justice or judge resides in that district, the justice or judge may be chosen from outside that district." Our reason for such change is that we believe a justice or judge residing in the particular district is more familiar with persons under consideration than a justice or judge residing outside the particular district.

## Section 10.

(a) Justices of the Supreme Court shall serve a term of 21 years, and shall not be qualified to succeed themselves, and when the qualified electors of the state-at-large or of the appropriate judicial district have voted to retain them, judges of the Court of Appeals, and of the Superior Courts shall serve for terms of ten years, and judges of the Community Courts shall serve for terms of not more than ten years as the General Assembly shall from time to time prescribe. The tenure of any judge shall not be affected by changes in judicial districts or by the reduction of the number of judges.

(b) The Chief Justice of Pennsylvania shall be the senior justice in service on the Supreme Court; and in the event two or more justices have identical seniority, the Chief Justice shall be determined from between or among them by the drawing of lots, conducted by the Secretary of the Commonwealth and certified to the Governor. A member of the Court may resign the office of Chief Justice without resigning from the Court."

(c) There shall be a President Judge of the Court of Appeals, and President Judges of the various Superior Courts, and Community Courts, who shall be the senior judges in service on each such respective court; and in the event two or more judges of any court have identical seniority, the President Judge shall be determined from between or among them by the drawing of lots, conducted by the Secretary of the Commonwealth and certified to the Governor. A member of any Court may resign the office of President Judge without resigning from the Court.

### *Comment:*

(a) The Judges' proposal is that Justices of the Supreme Court shall serve a term of 21 years and shall not be qualified to succeed themselves. The Judges idea is that once a judge reaches the highest court of our State, he should have assurance of a long career removed from the uncertainties of re-election and one to which he can devote himself without distraction and at its conclusion, if he serves the full term, he should be prepared to step aside and make way for another Justice. The judicial term feature (10 years) of the remainder of sub-section (a) is acceptable to the Committee, however, the Committee has different proposals for the consolidation of courts and names of courts are provided in sub-section (a)—those subjects are discussed in another commentary.

(b) We see no reason why a Judicial Nominating Committee should select a Chief Justice of Pennsylvania for a five year term. There is nothing wrong with the time-honored way that the Commonwealth has followed in the selection of a Chief Justice by seniority, it assures the complete removal of politics—it has worked out well. The Judiciary Article of the Bar Association is proposing change for the sake of change.

(c) The Board of Judges proposes that President Judges of all courts be accorded their positions on the basis of seniority in service. This is to a considerable extent the present system throughout the Commonwealth and there has been no substantial criticism of it. It works. The Committee would also apply this system to the proposed Community Court. Why should the Chief Justice of Pennsylvania be given the power to appoint President Judges of the trial courts? There is no good reason for it.

A good reason against it is that it could bring politics into the Judiciary. We do not believe the Chief Justice is necessarily above politics.

(d) The Board of Judges proposes that sub-section (d) of the Judiciary Article be eliminated. If the Board of Judges' proposals are adopted there would be no need for sub-section (d) because these proposals set forth a comprehensive plan for the tenure of judges and selection of President Judges.

## **Section 11 COMPENSATION AND RETIREMENT OF JUDGES**

(a) Justices and Judges shall receive compensation paid by the Commonwealth as prescribed by law, which shall not be diminished during their terms of office.

### *Comment:*

This section has been approved with deletion of "unless by general law applying to all salaried officers of the Commonwealth."

(b) Justices and judges may be retired at such age, not less than 72 years as shall be provided by the General Assembly. Notwithstanding the expiration of the term for which a justice or a judge was last elected, his retirement, resignation or removal from office for physical or mental disability, he shall receive such compensation as shall be prescribed by the General Assembly. A former judge may, with his consent, be assigned by the Chief Justice to render such judicial service as may be prescribed by rule of the Supreme Court.

### *Comment:*

This section has been approved provided the age is not less than 72 years for *all* judges and justices of the Commonwealth and that "may" be substituted for "shall" in the beginning of this section which shall read:

"(b) Justices and Judges may be retired at such age, not less than 72 years . . ."

There is no reason why any court should be preferred as to the age limit. Member of the appellate court, the court of last resort, should be even more alert than the court of first resort, the trial court. Further, we would give discretionary right to the General Assembly to retire judges at an age not less than 72 years rather than a mandatory direction to retire them at such age. We believe that this should be eliminated as it is not presently in the Constitution and the time honored custom has been to have no decrease in salaries of the judiciary, during their term of office.

## **Section 12. REMOVAL, SUSPENSION AND DISCIPLINE OF JUDGES**

(a) Any justice or judge who shall become a candidate for an elective non-judicial office, or who shall be convicted of misbehavior in office by a court of competent jurisdiction, or who shall be disbarred as a member of the bar of the Supreme Court, shall automatically forfeit his judicial office.

(b) A justice of the Supreme Court may be retired by the Governor upon certification by the statewide Judicial Nominating Commission, after appropriate hearing, that such justice is so physically or mentally incapacitated as substantially to prevent him from performing his duties.



(c) The Supreme Court may, in accordance with rules prescribed by it, after notice and a hearing by such tribunal as it may by rule designate or establish, retire any judge, other than a justice of the Supreme Court, who is so mentally or physically incapacitated as substantially to prevent him from performing his duties.

(d) Justices and judges shall be subject to removal by impeachment. No justice or judge against whom impeachment proceedings are pending shall exercise any of the duties of his office until he has been acquitted.

(e) Any judge may also be removed from office, suspended without pay, or otherwise disciplined for misconduct in office, neglect of duty, violation of any canon of legal or judicial ethics *as approved and promulgated from time to time by the American Bar Association or its successor and adopted by the Supreme Court*, conduct which shall prejudice the proper administration of justice, or such other grounds as the General Assembly may provide. Such removal or discipline shall be by the Supreme Court after notice and a hearing by such tribunal as the Supreme Court may by rule designate or establish. Proceedings for removal, suspension, or discipline may be initiated by the Supreme Court on its own motion or on petition of the Judicial Council or of any bar association.

### **Section 13 NON-JUDICIAL DUTIES AND PROHIBITED ACTIVITIES.**

All justices and judges shall be bound by the canons of legal and judicial ethics as approved and promulgated, from time to time, by the American Bar Association or its successor and adopted by the Supreme Court.

#### *Comment:*

We would have a single statement, as indicated, substituted for the three proposed sub-sections (a), (b), and (c), for the following reasons:

1. At the time the Bar Association's draft was prepared the Supreme Court of Pennsylvania had not adopted for all judges of the state the canons of judicial ethics, which now govern the conduct of all judges.

2. These canons of judicial ethics, as approved and promulgated from time to time, by the American Bar Association or its successor, and adopted by the Supreme Court, tend to make uniform throughout the United States a standard for judicial conduct.

3. We do not believe judges of Pennsylvania should be under different standards than those governing other American judges, but that there should be uniformity.

### **Section 14 ADMINISTRATION OF COURTS**

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts of this Commonwealth, including the temporary assignment of judges from one court or district to another.

(b) The Supreme Court shall have power to prescribe rules in all civil and criminal actions and proceedings for all courts, governing administration, practice and procedure, but excluding rules of evidence and time for appeals, which powers shall remain exclusively with the General Assembly.

and the issuance of all writs necessary or appropriate in aid of the jurisdiction of the respective courts. Such rules shall have the force and effect of law and shall suspend all statutes inconsistent therewith.

*Comment:*

It is proposed that the Supreme Court shall have the power to prescribe rules in all civil and criminal actions and proceedings for all courts governing administration, practice and procedure. However, we disagree with the further provisions in Section 14, sub-section (b) to the effect that the Supreme Court shall prescribe rules of evidence and rules for appeals and appellate jurisdiction, including time for appeals. We believe that these matters are matters for the legislature. They relate to substantive law and substantive rights rather than procedure and although the Supreme Court is the final arbiter of substantive law and substantive rights in litigated cases, it should not establish substantive law and substantive rights by fiat when there is no litigation before it. For example, if the Supreme Court were allowed to promulgate rules of evidence, it would be doing what the legislature has been doing throughout its history by statutory law. It would be usurping the legislative function.

**Section 15 CLERKS OF COURT, COURT PERSONNEL.**

There shall be such Clerks of Court and such other non-judicial personnel as shall be necessary for the effective performance of the judicial work of the Commonwealth. The clerks of the Superior Courts, and of the Community Courts, their assistants and other non-judicial court officers within each judicial district shall be appointed by the judges of the respective courts of that district.

*Comment:*

Clerks of Court and other court officers should be appointed by the respective courts. It would be undesirable to have the Supreme Court involved in minor personnel matters.

## SUBMISSION NO. 14

*Statement of Philip P. Kalodner,  
Vice Chairman and Chairman,  
State Affairs Committee,  
Southeastern Pennsylvania Chapter,  
Americans for Democratic Action,  
Given July 27, 1967.*

Quite obviously any consideration of revision of the Judiciary Article should begin not with the antiquated current Constitutional provisions but with the well and carefully thought out proposal of the Pennsylvania Bar Association for a new Judiciary Article.

It will be our purpose therefore merely to emphasize some of the more urgent aspects of that proposal and to suggest certain additional provisions or changes in the proposal which we believe will be helpful in achieving the desired goal.

First and foremost, the Justices of the Peace Courts and the Magistrate's Courts must be eliminated and must be replaced with courts manned by Judges trained in the law.

It is our view that the number of the members of the minor judiciary should be vastly reduced since the problem of transportation which made it necessary to have a Judge or two in each local community (to insure rapid and convenient justice) no longer exists.

All Judges should be full time officials, including Judges of the Community Courts—and the Constitution should so provide. All Judges, all court employees and all those who serve process should be compensated solely by salary—and should be required to turn in to the state or local government all costs which they collect.

All Judges should be appointed by the Governor from names submitted by Judicial Commissions, proposals for which have been made by the Bar Association.

However, we believe that all Judges should be appointed by the Governor with the advice and consent of the Senate of Pennsylvania and should be appointed not for a term of years but for life. Such a system has produced an excellent Federal Judiciary; and the excellence of that system is no doubt in some substantial part due to the prospect of lifetime tenure which at the

same time makes the Judicial life more attractive to a potential appointee and permits an independence of action on the part of such a Judge which is possible only when all concern about his economic and professional future is removed.

Nor do we believe there is any particular merit in an election to be held subsequent to the appointment to determine whether the public believes the Judge is doing a proper job. If such an election has as its purpose the obtaining of an automatic stamp of approval, then it is a useless gesture which makes a mockery of the election process; and if its purpose is really to obtain the public view of a Judge's conduct, then it requires him to make his decisions with one eye on the problem of public approval, a consideration which is clearly not appropriate.

Adequate provisions for removal and retirement of Judges and for compensation of the Judge upon retirement should provide adequate means to deal with the Judge who should be removed and adequate incentive for the Judge who should retire.

We believe that all employees of the court system should be required to be appointed on a merit plan system, should be removed only for cause and should be prohibited from engaging in political activity.

We agree with the concept of the Pennsylvania Bar Association proposal that the Supreme Court shall be in general charge of the administration of the Court system and should have the necessary power to accomplish such administration efficiently.

We agree also with the Pennsylvania Bar Association that Judges should not be permitted to engage in political activity or to run for office or to engage in any other occupation which either interferes with their fulltime service or creates any potential conflict with the performance of their judicial duties.

And we agree also with the Pennsylvania Bar Association that there should be imposed on Judges none of the non-judicial responsibilities such as appointments to various public bodies which have traditionally been their function.

Finally, we agree with the basic conception of the Superior Court as an intermediate appellate court and the Supreme Court as a court of appellate jurisdiction only and available in general only on application for certiorari.

In short we believe that the Federal Judicial system is in practically every respect an excellent model for the creation of a Pennsylvania Judicial system. Where the Bar Association has so recognized the Federal system in its proposals, we commend them for your consideration; where the Bar Association has stopped short of the Federal system as its model as in the question of the term of Judges and the elimination of any election for Judges, we believe the Federal system is superior to the Bar proposal and should be adopted.

Finally, the method of selection of Judges as well as the constitutional language should make it clear that the ultimate responsibility is the Governor's. Only by imposing such a responsibility and directing the spotlight of public attention on his role can the Governor be made to insist on the best possible appointments. And that, of course, must always be our goal.

The road to Judicial reform is clear and well marked; the roadblocks which politically entrenched minor Judiciary intends to interpose should not and cannot be permitted to prevent obtaining the objective of equal and informed justice for all.

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## ANNEX NUMBER 1

### *The Causes of Popular Dissatisfaction with the Administration of Justice*

*by Roscoe Pound*

Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor,<sup>1</sup> and the king exhorts that the peace be kept better than has been wont,<sup>2</sup> and that "men of every order readily submit . . . each to the law which is appropriate to him."<sup>3</sup> The author of the apocryphal *Mirror of Justice* gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased.<sup>4</sup> Wyclif complains that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law,"<sup>5</sup> Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised."<sup>6</sup> James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges."<sup>7</sup> In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men."<sup>8</sup> In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respects for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review, was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and the executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-

\*Address delivered at annual convention of American Bar Association in 1906. Roscoe Pound is now dean emeritus of the Harvard Law School.



day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, the punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor.<sup>9</sup> It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law

we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellow so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian."<sup>10</sup>

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke down under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than

through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead!<sup>11</sup> The unconscious change of judicial law making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative<sup>12</sup> or judicial law making against *stare decisis*, in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of courts of justice.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchial or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed

justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk."<sup>13</sup> This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law."<sup>14</sup> This man, however, is abstract. The concrete man in the street or the concrete mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us pretty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated of on another occasion.<sup>15</sup> What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers in mandamus or injunction by a tax payer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is *caveat emptor*. In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are ineffi-

cient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights."<sup>16</sup> Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common law guarantees of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people; and the legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet.<sup>17</sup> But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations."<sup>18</sup> It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice.<sup>19</sup> It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived.<sup>20</sup> The inquiry is not, What do substan-

tive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Another source of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon, as attorney general, in arguing a question of prerogative to the judges, "I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Mitchell."<sup>21</sup> King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produced political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of *habeas corpus* which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke,<sup>22</sup> contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the Bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it."<sup>23</sup> Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somewhere* in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdiction, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects.

Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas and Exchequer, all doing the same work, while appellate jurisdiction was divided by King's Bench, Eschequer Chamber and Parliament. In the Fourth Institute, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme

Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof.<sup>24</sup> The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, or transcripts, bills of exceptions, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four percent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Court of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty percent involves points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship: a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Court of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and



five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the form of the petition for removal. In other words, in nineteen and three-tenths percent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven percent of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of demand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, or an average of seventy-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, *five* commissioners have put forth *nine* reports upon

this subject.<sup>25</sup> As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the *record*, not the *case*. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variance. We still reverse them because the recovery is in excess of the prayer, though substantiated by the evidence.<sup>26</sup>

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine percent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five columns of each series of the National Reporter system, runs over forty percent. In the last three volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state<sup>27</sup> an action for personal injuries was tried six times, and one for breach of contract<sup>28</sup> was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three percent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose on the average of fifty-six hundred *contested* cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy percent. England and Wales, with a population in 1900 of 32,000,000, employs for the same civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality."<sup>29</sup> The present is a time of transi-

tion in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. Another strain upon our judicial system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin,<sup>30</sup> breed disrespect for law. Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies.<sup>31</sup> In press accounts of the proceeding, the conspiracy clause of the bill was copied *in extenso* under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts of justice from such data.

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon, as Master of the Rolls, sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions.<sup>32</sup> Dodson and Foggs and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of five hundred and fifty pending writs of error, five hundred and forty three were shams of vexatious contrivances for delay.<sup>33</sup> Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

## Notes to Annex Number I

1. e.g., Secular Ordinance of Edgar, Cap. 1; Secular Ordinance of Cnut; 2; Laws of Ethelred, VI, 1; Laws of Edward, preface.
2. Laws of Athelstan, IV; Laws of Edward, 4.
3. Laws of Ethelred, V, 4.
4. Mirror, chap. 5, sec. 1.
5. See Maitland, *English Law and the Renaissance*, 53.
6. *Id.* 42.
7. Conference between King James I and the Judges of England, 12 Rep. 63.
8. Lord Campbell, *Lives of the Chief Justice* (3 Ed.) IV, 199.
9. Dr. v. Liszt, Professor at Berlin, delivered an address in the Rathaus in Berlin on this very subject recently, if we may credit press accounts.
10. Courtney Kenny, *Bonus Jurista, Malus Christa*, 191 *Law Quart. Rev.* 326.
11. Spencer, *Principles of Sociology*, II, 514.
12. See an instance noted in the address of Mr. Justice Brown, Rep. Am. Bar Assn., 1889, 282.
13. Quoted in Ross, *Foundations of Sociology*, 388.
14. *Leviathan*, chap. 26.
15. Do We Need a Philosophy of Law? 5 *Columbia Law Rev.* 339; *The Spirit of the Common Law*, *Green Bag*, January, 1906.
16. Bl. Comm. 139.
17. Wigmore, *Evidence*, 127.
18. Wigmore, *Evidence*, 1112.
19. *Holland vs. Chicago, B & Q. R. R. Co.*, 52 Neb. 100.
20. *De Graw vs. Elmore*, 50 N.Y. 1.
21. *Collectanea Juridica*, I, 173.
22. Co. Lit. Preface.
23. *Fragment on Government*, XVII.
24. Report of Judicature Commission, 1869, p. 13.
25. Lord Eldon's Commission, 1826; Royal Commission, 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law, 1851, 1853, 1860; Chancery Commissioners, 1852, 1854, 1856; Judicature Commissioners, 1869-1874.
26. *Brought vs. Cherokee Nation* (C. C. A.) 129 Fed. 192.
27. *Omaha St. R. Co. vs. Boesen*, 95 N. W. 617; Cf. *Mutual Life Ins. Co. vs. Hillmon* (C. C. A.), 107 Fed 834 (tried six times).
28. *Wittenberg vs. Molyneux*, 60 Neb. 107.
29. Sidgwick, *Methods of Ethics*, 6 Ed. 456.
30. Bentham, *Theory of Legislation* (tr. by Hildreth), 401.
31. *Niagara Fire Ins. Co. vs. Cornell*, 110 Fed. 816.
32. Lord Campbell, *Lives of the Chief Justices*, (3 Ed) IV, 70-73.
33. *Works*, VII, 214.

## ANNEX NUMBER 2

### *Principles and Outlines of a Modern Unified Court Organization\**

*by Roscoe Pound*

What are the general principles that should govern in the reorganization which will in reality be an organization of our courts? The controlling ideas should be *unification, flexibility, conservation of judicial power, and responsibility*. Unification is called for in order to concentrate the machinery of justice upon its tasks, flexibility in order to enable it to meet speedily and efficiently the continually varying demands made upon it, responsibility in order that some one may always be held, and clearly stand out as the official to be held, if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit. Conservation of judicial power is a *sine qua non* of efficiency under the circumstances of the time. There are so many demands pressing upon the government for expenditure of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods. Moreover, waste of judicial power impairs the ability of courts to give to individual cases the thoroughgoing consideration that every case ought to have at their hands. Administrative organization of the entire system with responsible heads of each branch, department and division, and responsible superintending control of the whole, is quite as important as the reform of procedure upon which the profession and the public have concentrated their attention for a generation. I repeat what I said of procedural reform in 1909. Besides procedural reform there are a number of "other problems connected with the administration of justice in America which are equal, or even possibly of greater importance. Three of these problems have a direct and immediate relation to procedural reform, namely, the organization of courts, and, in consequence, the personnel, mode of choice and tenure of judges, and the organization, training and traditions of the bar. The importance of organization of the courts, of unification of the judicial system in order to obviate waste of judicial power, and of organization of the administrative business of courts, is something we are only beginning to perceive."

As has been said in other connections, instead of setting up a new court for every new task we should provide an organization flexible enough to take care of new tasks when those to which they were assigned cease to require them. The principle must be not *specialized courts* but *specialized judges*, dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it. For two generations, at least, we

\*23 Join Am. Jud. Soc., pp. 225-233 (April, 1940)

have not fully utilized the judges of our courts, although we have often made them work very hard. Before adding more judges or more courts, we should be sure we are making the best and fullest use of those whom we have.

At the outset a caution is needed. Experience shows that even with the best of plans it is important not to go into much detail in authorizing or requiring certain courts. Recent constitutional amendments in some states have too much detail even for statutes. Continual legislative amendment of the statutes governing the organization and administration of the courts was the bane of judicial administration of justice in America in the last century. Certainly a constitution is not the place for details which, if they work badly, can only be removed or improved by the slow and sometimes painful process of constitutional amendment. Authority to set up a modern organization and responsibility for doing it and doing it effectively are the main points to be attended to.

With these general principles, let us turn to the general plan of organization. The whole judicial power should be concentrated in one court, which I would suggest might be called the Court of Justice of this or that state. Professor Walter F. Dodd proposed to call it the General Court of Justice. This court should be set up in three chief branches. To begin at the top, there should be a single ultimate court of appeal, which might be given the name which is most generally in use in this country, the supreme court. Second, there should be a superior court of general jurisdiction of first instance for all cases, civil and criminal, above the grade of small causes and petty offenses and violations of municipal ordinances. It should have numerous local offices where papers may be filed, and rules of court should arrange that these local offices, being offices for the whole court, may function for all branches or for one or more, as the exigencies of business demand. It is arguable whether this court should be organized in divisions, one for actions at law and other matters requiring a jury, or of that type, one for equity causes, and one for probate, administration, guardianship, and the like. My own feeling would be that this would depend on the traditions of the state, the amount of business of each sort, and the conditions in localities, and should be left to rules of court to be determined in accord with experience. Divorce would be regarded in many jurisdictions as so serious a matter that it should be committed to this branch. On the other hand, there might be sound reason for committing it to the third branch where a family court division, in large cities, might be better adapted to deal with all the incidents of difficulties in family relations. I should prefer to call this branch the superior court. . . . It is important that this branch be thought of and treated as one court for the whole state rather than a congeries of local separate courts. The term district court is too suggestive of a type of organization from which we must seek to get away.

At any rate, however this branch is organized, all the judges should be judges of the whole court. If they are chosen primarily for one or the other branch, and assigned to this or that division in some appropriate way by the administrative head, yet they should be eligible to sit in any other branch or division or locality, when called upon to do so, and it should be the duty of the appropriate administrative head to call upon them to go where work awaits to be done whenever the general state of business of the whole court makes that course advisable.

No doubt opinions will differ as to the proposal to include the tribunals for the disposition of causes of lesser magnitude in a plan for unification of the judicial

system. But no tribunals are more in need of precisely this treatment. The amount of money involved has a direct relation to the amount of expense to which the law may reasonably subject litigants and thus may well determine to which branch of the court a case should be assigned. But it does not necessarily determine the difficulty of the case or the amount of learning and skill and experience which should be applied to determine it. Even small causes call for a high type of judge if they are to be determined justly as well as expeditiously. A judge dignified with the position and title of Judge of the Court of Justice of the State, assigned to the county courts, is none too good for cases which are of enough importance to the parties to bring to the court and hence ought to be important to a state seeking to do justice to all. It was the original plan of those who drew the judicature act in England to include the county courts in their scheme; but this part of the plan was not adopted. None the less, when one notes the extensive jurisdiction which is committed to the district courts in Massachusetts and very generally to municipal courts, he must feel that the tribunals which would be included in the third branch have shown themselves worthy of inclusion.

As I said in the report of the American Bar Association in 1909, these courts have shown (if in view of the English county courts, it needed showing) that it is perfectly feasible to administer a much higher grade of justice in small causes than that formerly dispensed by justices of the peace, without resorting to the more expensive methods of the superior courts. The judges who are assigned to small causes should be of such caliber that they could be trusted and would command the respect and confidence of the public, so that there would be no need of retrial on appeal but review could be confined to ascertaining that the law was properly found and interpreted and applied. The further we can get away from the old justice of the peace idea for small causes the better.

### *Organization of Supreme Court*

As to the first branch, the supreme court, while the head of the judicial system might well sit there, it should have its own head, immediately charged with responsibility for its proper functioning, since the chief justice, as I assume the head of the whole court will be called, will have much to do in exercising a superintending control over the entire system. According to rules of court and under his authority, perhaps in conference with the heads of the two branches, judges may be called from the superior court to sit in the supreme court, or vice versa, as the state of the dockets may require. It should be possible for the supreme court to sit in divisions if necessary to the prompt despatch of business. When dockets are swollen, three judges ought to be enough for all but the most difficult and important cases. Thus there would be more time for oral argument, which with lawyers of the caliber of those who alone should appear in the highest court on cases of any consequence, is of the greatest assistance to the bench. Also there would be more time and opportunity for consultation and consideration of the merits of cases.

Administrative appeals are likely to become a large part of the work of our courts, if a simple, speedy, expeditious appellate procedure can be devised which will insure adherence to law and due process of law in hearings and determinations without substituting the discretion of the court for that of the administrative agency. As this type of work increases, it may be advisable to set up a division to deal with it.

and there should be a flexible organization and rule-making power adequate to find how to meet such situations as they arise.

### *The Statistical System*

One of the functions of the head of the judicial system, but not necessarily of the head of the supreme court, should be to insure and direct the compilation of reliable and intelligently organized statistics of the administration of justice in the jurisdiction, and embody them in recommendations which with those of the judicial council might well make an annual report of much value for furthering the work of the courts both in their own state and in others. Certainly the earlier reports of the municipal court of Chicago, under the leadership of Chief Justice Olson, were of great use throughout the land in the formative period of such courts in the first three decades of the present century. Some of the judicial councils have been giving us well compiled and useful statistics. But there is much to be done in the way of working out a system of gathering, compiling and reporting them which will insure that they tell what needs to be told and give an accurate picture both as the basis of criticism and as the basis of legislation, of rulemaking, and of administrative regulations. To be of value they must be made upon a system which can be required of each and every tribunal and its clerks and administrative officers in the state. Only a unified judicial system with a responsible head and responsible heads of branches and divisions under him, can insure that this work is well done, and unless well done it is not worth doing at all.

### *The Superior Court*

The second branch, the superior court, should be given complete jurisdiction of first instance, civil and criminal, the civil jurisdiction, for reasons set forth in preceding chapters, to include law, equity, and probate. Certainly there should be no mandatory setting off of these types of cases to separate divisions. But the organization of this branch should be so flexible that if experience showed good reason for setting off some or all of them in that way, it could be done by rule of court, or more simply by assigning cases to judges in such a way as to effect a practical segregation, which, however, could be changed or revoked later if experience or changed conditions made such actions advisable.

This branch should be organized under a chief justice and in some states it might well be advisable to have regional subdivisions, each under a presiding judge, responsible to the chief justice of the superior court, as he would be responsible to the chief justice of the state. Rules of court would determine the times and places of sittings in the several counties, and all the judges, being judges of the one court, would be subject to be assigned where the demands of judicial business might make it advisable. Rules should provide for regional or local appellate terms according to the requirements of the court's business. Thus there would be no need of intermediate tribunals of any sort. As has been suggested in other connections, the procedure at these terms could be as simple as at the old hearings in the bank at Westminster after a trial at circuit. Three judges assigned to hold the term would pass on a motion for a new trial or judgment on or notwithstanding a verdict, or for modification



or setting aside of findings and judgment accordingly (as at common law upon a special verdict). If, as I assume would be true, it proved necessary to limit the cases which could go thence to the supreme court, rules could restrict review to those taken by the highest court on certiorari. Even then, there need be nothing more in the nature of a double appeal than there is now in states where a motion for a new trial in the trial court is a necessary preliminary to review in the higher court. But heard before three judges at an appellate term it would not be a mere perfunctory step in review but a real hearing of the questions raised which should enable the case to stop there unless the points of law were serious enough to warrant certiorari.

### *Effective Reviewing*

By hearing motions for new trials to set aside findings, or to render judgment notwithstanding verdicts or findings, or for modification or setting aside of decrees and orders, at such appellate terms, with no more formal or technical procedure than is involved in such motions made in a trial court today, not only would there be a simple and speedy means of reviewing the great bulk of the litigation in the court of general jurisdiction of first instance, but the plan would help rid us of the burdensome multiplication of reports which has come with the setting up of intermediate appellate courts. It is felt that an appellate court, if only as a matter of dignity, must write opinions, and that its filed opinions must be published. There is no doubt a real function of an opinion is a check upon the bench, even if the decision adds nothing to the law. But that purpose and the further purpose of advising the court of review, if the case goes to the supreme court, would be served sufficiently by a *memorandum of the questions decided* and the *grounds of decision*.

Much time and energy are wasted in writing opinions in cases which involve no new questions or new phases of old questions. A brief statement of points and reasons will suffice both as a check and as an aid to the court above. Some such publication as the New York Miscellaneous Reports, under a qualified and responsible reporter, having no interest except to make the reports useful to the public and the profession, could select occasional memoranda worth reporting. It might well be at times that at county court appellate terms questions may come up and be decided which will deserve publication of the memoranda of grounds of decision. An energetic chief justice at the head of the judicial system, and energetic chiefs in the superior court and the county courts, with the aid of a judicial council, could devise rules to govern these things and if the courts or the bar, especially an integrated bar, were given control of reporting, one of the hard problems of the law and of the profession in America might be solved.

It would seem clear that three judges should be enough to sit at these terms. Benches of three have proved satisfactory in intermediate appellate courts in many states. If, however, it were felt that more should sit, either as a general practice or in some cases or classes of cases, the matter should be left open to be settled by rules of court in the light of experience.

Where, as in some jurisdictions, there are heavy criminal dockets, rules could set up criminal appellate terms for felony cases or county court appellate terms for misdemeanors with a flexible make-up, as in the English court of criminal appeal.

From these appellate term cases should go directly to the supreme court by certiorari. There should be no retrial in the superior court of what has been tried in the county courts except as rules might provide for removal of exceptional cases by certiorari.

### *The County Court Branch*

As to the county court branch, this, too, should be organized under the headship of a chief justice and perhaps in states of wide territorial extent, such as California and Texas, with regional presiding judges under him. Rules could set up municipal courts in large cities as branches of the county court, with power by rules to provide for juvenile and family and domestic relations and small cause courts as divisions, as they are needed. There should be appellate terms and causes could go from these terms to the Supreme Court by certiorari. Large metropolitan cities have peculiar needs which may make such divisional courts advisable. But while each municipal court should have an administrative head subject to the superintendence of the chief justice of the county court, there should be such complete flexibility of organization that judges could be taken from a municipal court to a rural county court or vice versa, or from these to the superior court or from the superior court to relieve congestion in the county court, as the state of work in the respective courts may require. It might be that in the municipal court in cities, rules could work out appellate terms for small causes with a simple inexpensive procedure so that the public could be persuaded that causes too small to justify retaining a lawyer were not for that reason neglected, and such terms might even have to be allowed by rule to review the whole case.

### *Powers of Chief Justice*

Supervision of the judicial-business administration of the whole court should be committed to the chief justice, who should be made responsible for effective use of the whole judicial power of the state. Under rules of court he should have authority to make reassignments or temporary assignments of judges to particular branches or divisions or localities according to the amount of work to be done, and the judges at hand to do it. Disqualification, disability or illness of particular judges, or vacancies in office could be speedily provided for in this way. He should have authority also, under rules of court, to assign or transfer cases from one locality or court or division to another for hearing and disposition, as circumstances may require, so that judicial work may be equalized so far as may be and clogging up of particular dockets and accumulation of arrears prevented at the outset. He may require assistance in this work of superintendence of the working of the court as a whole, and there should be authority to provide it. As has been said, each of the branches, and where conditions require them, each division or regional organization within a branch, should have a responsible head, charged with the duty of immediate superintendence. Just as the chief justice should be held to see to it that the energies of the judiciary are fully and efficiently employed upon its tasks, so these heads of branches and divisions should each be responsible for efficient dispatch of the work of his organization. These are not matters for clerks, although clerks under proper direction and control may do much. They call for strong men with clear responsibility laid upon them to

preclude their falling into perfunctory routine or allowing abuses to grow up through their inertia.

It is but little less important to organize thoroughly the incidental non-judicial business of the court and all its branches and divisions. Legislation should not lay down details for this side of the administration of justice. As is now beginning to be done, competent business direction should be provided and the clerical and stenographic force be put under control and supervision of a responsible director. There very likely may have to be a like officer in each branch and major division or, if regional organization becomes necessary, each region. But it would be a mistake for legislation to go into much detail upon this subject. It is enough to settle the general principles and leave details to rules of court to be drawn up, altered and improved, with the aid of judicial councils, as experience shows defects and abuses and indicates the best way of dealing with them.

Emancipating the clerical work of the courts from politics and patronage and putting control of it where it ought to be, namely, in the courts themselves, must be an important item in any program of improving the administration of justice. To specify but one item, the system, or rather want of system, which prevails generally is a prolific source of needless expense in the courts.

### ***Control of Clerical Force***

Decentralization of courts was carried so far in the last century that the clerks were made independent functionaries, not merely beyond effective judicial control, but independent of any administrative supervision and guided only by legislative provisions and limitations. No one was charged with supervision of this part of the work of the courts. It was no one's business to look at it as a whole, seek to find how to make it more effective and to obviate waste and expense, and promote improvement. There is much unnecessary duplication, copying and recopying, and general prolixity of records in the great majority of our courts. In the clerical no less than on the judicial side most of our courts are like Artemus Ward's proposed military company in which every man was to be an officer and the superior of every other. The judiciary is the only great agency of government which is habitually given no control of its clerical force. Even the pettiest agency has much more control than the average state court. But scientific management is needed in a modern court no less than in a modern factory. With no one responsible there is no incentive to progress in the clerk's office. Much that could be done to reduce costs in litigation and the expense of operating the courts remains undone because it is no one's business to see it done. . . . The established institutions of the past can maintain their claims to appropriations, in the face of this competition, only if they use to the best advantage the money appropriated to them. . . . Organization of the non-judicial administrative business of the courts calls for complete and efficient supervision, under rules of court, which is best to be obtained by unification of the judiciary as a whole, with responsible headship, charged with supervision of the subordinate supervising and superintending officers.

Some of the things of which I could make just complaint twenty-five years ago, in a statement of what would be done away with by the kind of organization I am urging, have been remedied in the progress toward unification which has been going on. The bad practice of throwing cases out of court, to be begun over again in case

they were brought in the wrong court, has been generally given up, or at least much modified. Yet transfer from one court to another at the cost of the appellant who has guessed wrong, after argument very likely, and perhaps construction of an indefinite or ambiguous statute, and it may be a difference of opinion between the court making the transfer and the one to which it is made, while an improvement, is not all that may be done in a program of reform. There ought to be no questions of jurisdiction under rigid constitutional or statutory provisions. Rules of court may deal with such situations fully and satisfactorily if they arise between branch and branch of the same court and are subject to superintending control of one official.

### *Principles of Administration*

Moreover, enough obvious advantages remain to make full measure. For one thing, unification would result in a real judicial department as a department of government . . . In the states there are courts but there is no true judicial department. Again, unification of the judicial system would do away with the waste of judicial power involved in the organization of separate courts with constitutionally or legislatively defined jurisdictions and fixed personnel. Moreover, it would make it the business of a responsible official to see to it that such waste did not recur and that judges were at hand whenever and wherever work was at hand to be done. It would greatly simplify appeals to the great saving not only of the time and energy of appellate courts, but to the saving of time and money of litigants as well. An appeal could be merely a motion for a new trial, or for modification or vacation of the judgment, before another branch of the one court, and would call for no greater formality of procedure than any other motion. It would obviate conflicts between judges and courts of coordinate jurisdiction such as unhappily have too often taken place in many localities under a completely decentralized system which depends upon the good taste and sense of propriety of individual judges, or appeal after some final order, when as like as not the mischief has been done, to prevent such occurrences. It would allow judges to become specialists in the disposition of particular classes of litigation without requiring the setting up for them of special courts.

In a unified court judges can be assigned permanently to the work for which they prove most fit without being drawn permanently from the judicial force so that they cannot be used elsewhere when needed. This is likely to be increasingly important. Specialization will probably become increasingly desirable in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forms and venue at the expense of the merits, and judges who can do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to promote efficient specialization. As cases of some class become numerous and require that a specialist pass upon them, judges or a judge would be designated for that purpose from the staff of the whole court, and the cases would be assigned to them in the one court in which all causes would be pending, even if in different branches or divisions, by some responsible functionary whose duty it would be to see to it that the whole judicial power of the state was fully utilized to the best advantage. When judges make assignments among themselves the tendency to perfunctory routine and to follow the line of least resistance will keep up the practice of rapid periodical rotation which has been a bad feature of many courts.

### *Specialist Judges*

Again, from time to time exceptional causes come before the courts in which it is desirable to assign the best talent for that sort of case that the staff of the court affords instead of leaving the case to the chance of what judge happens to be at hand at the time and place. This is especially true in certain homicide cases of special difficulty which do not always arise in places to which the best specialists for the trial of such cases must habitually be assigned. Power to assign and duty of assigning the most experienced and skillful judge for such cases to the trial of the particular case may save much delay and expense and prevent miscarriage of justice. If it be said that there is danger of abuse of this power of assignment of a particular case, the answer must be that jockeying to get such cases before a particular judge in a rapidly rotating bench of judges is not unknown today, and that the power of assignment will be exercised by a functionary definitely pointed out as responsible and subject to responsible control by a superior of conspicuous position. Divided responsibility is no responsibility. Concentration of responsibility in a chief justice with corresponding power will correct, indeed will compel correction of, many abuses which have grown up because no one had the responsibility for preventing or removing them. Unless responsible headship for the whole judicial system is provided and given power to meet the exigencies of the responsibility, there is real danger that an administrative superintending control of the courts will be set up from without. This would not merely infringe the constitutional separation of powers. It would be a dangerous subjection of the courts to the executive at a time when executive hegemony has become a conspicuous feature of our policy.

### *The Judicial Council*

There are two checks which may be relied upon to secure against abuse of the power which must be accorded the responsible head of a unified court. One is his clearly defined responsibility both for what he does and lets his subordinates do and for what he omits to do. The other is the institution of the judicial council . . . Such councils exist now in an increasing number of states and are doing much for the improvement of the administration of justice in all parts of the land. Especially valuable reports have come from them in New York, Michigan, California, Massachusetts, New Jersey, and Kansas. The history, achievements and possibilities of judicial councils are not germane to the subject, however, and need not be pursued. It is enough in the present connection to point out that these councils, commonly made up of representatives of the bench, the bar, and representative lay citizens, consulting with the judges and advising and assisting them in the exercise of their rulemaking power, are certain to prove not only a stimulus to effective rising by the courts to their responsibilities, but also an effective and intelligent check upon abuses, which will be palpable to such men in their close contact with the work of the judges. It might be suggested, however, that with the unification of courts there might well come local councils for county and municipal courts, and that in states with an exceptionally large and diversified domain there might even be subordinate regional judicial councils. Moreover, a further check which will prove most effective is to be seen in the unified or integrated bar. With responsible organization of the lawyers,

nothing could go very wrong without producing immediate action by the profession. . . .

### *Courts Need Power*

It should not be forgotten that where not hampered by legislative prescribing of details of organization and procedure, our courts have, on the whole, the best constructive record of any of our institutions. It was no mean task to develop an American law, a body of judicially found and judicially declared precepts suitable to America, out of the old English cases and old English statutes with the help of such books as Coke's Institutes and the more orderly but less detailed and thorough-going exposition by Blackstone. The task was well done in about three quarters of a century, so well, indeed, that the newer states as they became settled and admitted to the Union found their body of law substantially made for them. No other judicial achievement, and no legislative or administrative achievement in the English-speaking world, will compare with this.

From the beginning of American law, however, the courts have been hampered by minute prescribing of detail in legislation. Control of their administrative agencies has been taken away from them. Their organization has been prescribed in extreme detail. Courts have been set up with rigid but ill-defined jurisdictional lines. Constitutions and statutes have prescribed successive or double appeals. In Indiana, the legislature even tried to take away from the Supreme Court the superintending control over the lower courts conferred upon it by the constitution. After the middle of the last century, the legislature in many states prescribed the minutiae of legal procedure, so that as Mr. Hornblower used to say of the New York code of civil procedure in its heyday, there was a rule for every action of the judge from the time he entered the court house except to prescribe the exact peg on which he should hang his hat. It is enlightening to compare the results in the substantive law, where the courts had a free hand, with those in procedure and the mechanics of justice where their hands were tied. The causes of popular dissatisfaction with the administration for very much the greater part lie in the mechanics of applying the substantive law by courts and judges—the use of a mechanism which has been put beyond judicial control and beyond effective judicial employment by constitutions and by detailed statutes carrying out the spirit of constitutional provisions.

### *Unification Is Essential*

Unification of the courts would go far to enable the judiciary to do adequately much which in desperation of efficient legal disposition by fettered courts, tied to cumbersome and technical procedure, we have been committing more and more to administrative boards and commissions. Ours is historically a legal polity and the balance of our institutions will be sadly disturbed if the courts lose their place in it. If they are to keep that place they must be organized to compete effectively with the newer administrative bodies.

We are told in the Federalist that the judiciary is least able to hold its own in a competition of the three departments of government. Judges are inhibited, with respect to the will to power, by the taught tradition which requires them to refer their action on all occasions to principles, to hew to precepts established in advance of

action and to find the measure of decision by applying a traditional technique to predetermined premises. Their quest of ends is restricted by their habitual regard for means. The legislature and the executive are aggressive in their will to power. The judiciary do little more than obstruct when the department of government comes into conflict. There is nothing to be feared from making it efficient.

Unification of the courts will not do everything. There must be judges equal to their tasks and unafraid to do them. The mode of selection and tenure must be such as to insure such judges as far as may be. But no judges can achieve results such as are demanded today if they are held to the machinery of the last century. Things are done by the combined working of men and machinery. In that combination machinery is no negligible item. The right men will do much no matter what machinery is given them to work with. But our ideal must be the right men with the right machinery.

With the rulemaking power restored to them, with effective organization, with proper provisions as to selection and tenure, there is every reason to believe that the work of American courts in the period of development on which we have entered will be worthy of the beginning made without substantive law in the formative era.

## ANNEX NUMBER 3

### *Provisions of the Missouri Constitution of 1945 Relating to the Selection of Judges*

#### **NONPARTISAN SELECTION OF JUDGES**

##### *§29(a). Courts subject to plan — appointments to fill vacancies*

Section 29(a). Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the courts of appeals, the circuit and probate courts within the city of St. Louis and Jackson county, and the St. Louis courts of criminal correction, the governor shall fill such vacancies by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided.

##### *§29(b). Adoption of plan in other circuits*

Section 29(b). At any general election the qualified voters of any judicial circuit outside of the city of St. Louis and Jackson county, may by a majority of those voting on the question elect to have the judges of the courts of record therein appointed by the governor in the manner provided for the appointment of judges to the courts designated in section 29(a). The general assembly may provide the manner in which the question shall be submitted to the voters.

##### *§29(c). (1). Tenure of judges — declarations of candidacy — form of judicial ballot — rejection and retention*

Section 29(c) (1). Each judge appointed pursuant to the provisions of sections 29(a)-(g) shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 29(a)-(g) become applicable to this office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 29(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 29(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such a declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the geographic jurisdictional limit of his court, or circuit if his office is that of a circuit judge, on a separate judicial ballot, without party designation, reading:





members, one of whom shall be the presiding judge of the court of appeals of the district within which the judicial circuit of such commission or the major portion of the population of said circuit is situated, who shall act as chairman, and the remaining four members shall be chosen in the following manner: The members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number to serve as members of said commission, and the governor shall appoint two citizens, not members of the bar, from among the residents of said judicial circuit, of said commission; the terms of office of the members of such commission shall be fixed by the supreme court and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office. No member of any such commission other than the chairman shall hold any public office, and no member shall hold any official position in a political party. Every such commission may act only by the concurrence of a majority of its members. The members of such commissions shall receive no salary or other compensation for their services as such, but they shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. All such commissions shall be administered, and all elections provided for under this section shall be held and regulated, under such rules as the supreme court shall promulgate.

*§29(e). Payment of expenses*

Section 29(e). All expenses incurred in administering sections 29(a)-(g), when approved by the supreme court, shall be paid out of the state treasury. The supreme court shall verify such expense to the state auditor, who shall draw his warrant therefor payable out of funds not otherwise appropriated.

*§29(f). Prohibition of political activity by judges*

Section 29(f). No judge of any court of record in this state, appointed to or retained in office in the manner prescribed in sections 29(a)-(g), shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any political campaign.

*§29(g). Self-enforceability*

Section 29(g). All of the provisions of sections 29(a)-(g) shall be self-enforcing except those as to which action by the general assembly may be required.

## ANNEX NUMBER 4

### *Report of the Commission on Constitutional Revision (The Woodside Commission) (1959) With Respect to the Judiciary*

*Note:* In its Report, the Woodside Commission reviewed each section of the Constitution of 1874 as amended, and determined whether it considered retention in its present form, repeal, or amendment most desirable. To clarify its conclusions, it set forth the provisions of the Constitution as amended, section by section and opposite each section set forth its recommendations. New sections not having a counterpart in the present Constitution were added and given the article and section numbers which the Commission deemed appropriate.

Omitting the historical notes (See Part I, §2), the recommendations and comments of the Commission are set forth below in substantially the form in which the Report was presented.

#### ARTICLE V—THE JUDICIARY

##### **Section 6. Philadelphia and Allegheny Courts of Common Pleas**

###### *Current*

In the county of Philadelphia all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this Constitution or by law, shall be in Philadelphia vested in five distinct and separate courts of equal and coordinate jurisdiction, composed of three judges each. The said courts in Philadelphia shall be designated respectively as the court of common pleas number one, number two, number three, number four, and number five, but the number of said courts may be by law increased, from time to time, and shall be in like manner designated by successive numbers. The number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased, from time to

###### *Recommended*

(a) In the county of Philadelphia the jurisdiction and powers now vested in the several numbered Courts of Common Pleas of that county shall be vested in one Court of Common Pleas, composed of all the judges in commission in the courts, subject to changes made by law in the number of judges. Its jurisdiction and powers shall extend to all proceedings at law and in equity instituted in the several numbered courts, and shall be subject to such change as may be made by law. The president judge of the court shall be selected as may be provided by law.

(b) In the county of Allegheny there shall be one Court of Common Pleas, subject to changes made by law in jurisdiction, powers and number of judges.

time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said courts of common pleas without designating the number of the said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court, to which any suit shall be thus assigned, shall have exclusive jurisdiction thereof, subject to change of venue, as shall be provided by law.

In the county of Allegheny all the jurisdiction and powers now vested in the several numbered courts of common pleas shall be vested in one court of common pleas, composed of all the judges in commission in said courts. Such jurisdiction and powers shall extend to all proceedings at law and in equity which shall have been instituted in the several numbered courts, and shall be subject to such changes as may be made by law, and subject to change of venue as provided by law. The president judge of said court shall be selected as provided by law. The number of judges in said court may be by law increased from time to time. This amendment shall take effect on the first day of January succeeding its adoption.

### **Comments**

The recommended provision institutes the same system in Philadelphia as is now in effect in Allegheny County under the amendment of 1911. This section does away with the several numbered courts and unifies them into one Court of Common Pleas, composed of all Judges in commission in those courts, and places all the court under the jurisdiction of one President Judge. It is the Commission's opinion that this procedure will result in a more centralized administration and greater efficiency in disposing of the business of the courts in Philadelphia.

## ARTICLE V. THE JUDICIARY

### Section 7. Prothonotary of Philadelphia

#### *Current*

For Philadelphia there shall be one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said court; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county; all fees collected in said office, except such as may be by law due to the Commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket which shall contain the judgments and liens of all the said courts, as is or may be directed by law.

#### *Recommended*

REPEAL.

#### **Comments**

The section serves largely to supplement the provisions of Article V, section 6, for separate Courts of Common Pleas in Philadelphia. It provides for the office of prothonotary in relation to multiple courts. With the proposed consolidation of these courts (see preceding section and comment), it becomes inconsistent with a single court. The office of prothonotary in Philadelphia, as elsewhere, should be provided for by legislation.

## ARTICLE V THE JUDICIARY

### Section 11. Justices of the Peace and Aldermen

#### *Current*

Except as otherwise provided in this Constitution, justices of peace or aldermen shall be elected in the several wards, districts, boroughs or townships, by the qualified electors thereof, at the municipal election, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of six years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, borough, ward or district for one year next preced-

#### *Recommended*

(a) Except in Philadelphia, each county shall be divided by the Court of Common Pleas into as many justice of the peace or alderman districts as it deems necessary and proper. The districts shall be as nearly equal in population as practicable according to the last preceding United States census. After each census the Court may create new districts based on the same unit of population, and may change the boundaries of districts. In each district there shall be one justice of the peace or alderman, who shall be chosen by the

ing his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district.

electors of the district at a municipal election. He shall have been a resident of his district for at least one year next preceding his election. He shall hold office for six years from the first Monday of January after his election. A vacancy in the office of justice of the peace or alderman shall be filled by the Governor.

(b) For services rendered in judicial proceedings a justice of the peace or alderman shall receive a salary prescribed by the governing body of the county and paid by the county, and no other compensation. Fees, fines and penalties received by him in judicial proceedings shall be paid into the county treasury for the use of the county, unless otherwise provided by law.

(c) Until otherwise provided by law, justices of the peace or aldermen in any county shall have the jurisdiction and powers of the justices of the peace or aldermen in civil and criminal cases existing when this amendment becomes effective. Those then in office shall serve their then unexpired terms.

(d) Rules of procedure for the conduct of their offices, not otherwise provided for by law, shall be prescribed by the Court of Common Pleas of the County.

### Comments

The recommendation of the Commission provides for a minor judiciary system with justices of peace and aldermen serving on a salary basis. The Courts of Common Pleas are charged with the responsibility of establishing proper districts and of providing rules of procedure where not otherwise provided by law. Salaries are to be determined and paid by the county. Justices of the peace and aldermen will continue to be elected by popular vote.

The granting of dominion over the minor judiciary to the local courts can result only in an improvement in the administration of justice. The responsibility for the improvement is placed in the hands of the local courts, who are in the best position to observe the conduct of these officials, to effect desirable coordination and to exercise necessary controls.

The present fee system, providing for compensation contingent on litigation, presents the justice of the peace with the temptation to entertain and adjudicate matters frivolously, or worse, solely for financial gain. That so few of them have succumbed to the temptation speaks well for the minor judiciary generally. There are, unfortunately, those who have taken advantage of their neighbors and have spotlighted the shortcomings of the fee system.

It is expected, of course, that the establishment of new districts by the county

courts will result in a material reduction in the total number of justices of the peace and aldermen.

The Commission considered and discarded a suggestion that the minor judiciary be learned in the law. The questions that normally come before a justice of the peace are not of so technical a nature that a legal background is necessary. The several in-service training programs available to the minor judiciary are adequate.

Justices of the peace and aldermen receiving fair and adequate compensation for their services, under the jurisdiction and supervision of the courts of the county, will best serve the ends of justice in the Commonwealth.

## ARTICLE V. THE JUDICIARY

### Section 12. Magistrates Courts in Philadelphia

#### *Current*

In Philadelphia there shall be established, for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be six years, and they shall be elected on general ticket at the municipal election, by the qualified voters at large; and in the election of the said magistrates no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county; and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished.

#### *Recommended*

(a) In Philadelphia there shall be established courts, not of record, one for each one hundred thousand inhabitants. The courts shall be held by magistrates, who shall be chosen by the qualified electors at a municipal election at which no voter shall vote for more than two-thirds of the number of persons to be chosen. Population shall be determined by the last preceding United States census. A magistrate shall have been a resident of the city for at least one year next preceding his election. He shall hold office for six years from the first Monday of January after his election. A vacancy in the office of magistrate shall be filled by the Governor.

(b) For services rendered in judicial proceedings a magistrate shall receive a salary prescribed by the City Council and paid by the city, and no other compensation. Fees, fines and penalties received by him in judicial proceedings shall be paid into the city treasury for the use of the city, unless otherwise provided by law.

(c) Until otherwise provided by law, magistrates shall have the jurisdiction and powers of the magistrates in civil and criminal cases existing when this amendment becomes effective. Those then in office shall serve their then unexpired terms.

(d) Rules of procedure for the conduct of their offices, not otherwise provided for by law, shall be prescribed by the Court of Common Pleas of Philadelphia.

## Comments

The change recommended reduces the number of magistrates from the present 28 to 21, removes the jurisdictional limit of one hundred dollars, makes their salaries payable by the city and provides that rules of procedure be prescribed by the Court of Common Pleas.

The workload on the present 28 magistrates is not sufficient to merit a magistracy of that size. Data available indicates that the total work week for all 28 magistrates amounted to only about 160 hours per week. At that rate, it would seem that even the reduced number provided for in this section might be more than is needed.

No constitutional limitation is placed on the civil jurisdiction of the minor judiciary throughout the State, with the exception of the Philadelphia magistrates. There is no reason for the distinction and the matter should, as recommended, be left to the determination of the Legislature.

To further uniformity within the State's minor judiciary, rules of procedure for magistrates courts are to be prescribed by the Courts of Common Pleas, as is provided in another section for justices of the peace and aldermen.

## ARTICLE V. THE JUDICIARY

### Section 13. Fees, Fines and Penalties

#### *Current*

All fees, fines and penalties in said courts shall be paid into the county treasury.

#### *Recommended*

REPEAL.

## Comments

The provisions of this section have been incorporated in the proposed revision of Article V, Section 12 (see preceding section and comment), with limitations similar to those in the case of justices of the peace and aldermen.

## ARTICLE V. THE JUDICIARY

### Section 16. Voting for Judges of the Supreme Court

#### *Current*

Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two; candidates highest in vote shall be declared elected.

#### *Recommended*

REPEAL.

## Comments

The section was added to provide for representation on the Supreme Court of the minority political party of the Commonwealth.



The current provision has the undesirable effect of limiting the right of the elector. The repeal of the section will remove this restriction.

The General Assembly in 1957 approved Joint Resolution No. 8 which would amend this section to remove the restriction. The repeal of the section as here recommended has the same effect as the change made by J.R. 8.

## ARTICLE V. THE JUDICIARY

### Section 25. Selection of Judges

#### *Current*

Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy.

#### *Recommended*

(a) Whenever a vacancy occurs by death, resignation, removal from office or expiration of a term of office in the office of justice of the Supreme Court, judge of the Superior Court, or judge of a court of record of Philadelphia or Allegheny Counties, the Governor shall fill the vacancy by appointment from a panel of three persons learned in the law and legally qualified for the office, nominated to him by a judicial commission established and organized as herein-after provided. If none of the persons so nominated to the Governor is acceptable to him, the judicial commission shall nominate successive panels of three persons until an appointment from a panel is made by the Governor.

(b) At any municipal or general election the qualified voters of any other judicial district may, by a majority vote of those voting on the question, elect to have the judges of the courts of record of that district appointed in the manner provided for Philadelphia and Allegheny Counties. The General Assembly shall enact the laws necessary to provide for such elections.

Where the qualified voters of any other judicial district have elected to fill vacancies in the office of judge of a court of record in the manner provided for Philadelphia and Allegheny Counties, the qualified electors of the district may thereafter, at a municipal or general election, by a majority vote of those voting on the question, elect to discontinue that method of filling a vacancy in the judicial office. The General Assembly shall enact the laws necessary to provide for such election.

(c) There shall be a judicial commission for the appellate courts, a judicial commission each for the courts of record of Philadelphia and Allegheny Counties, and a judicial commission for the courts of each judicial district which has elected to have the judges of the courts of record of that district appointed in the manner provided for Philadelphia and Allegheny Counties. Each commission shall be composed of one judge, three members of the bar selected by the members of the bar and three lay citizens. The judge and the members of the bar of each commission shall be selected in the manner and in accordance with rules prescribed by the Supreme Court. The lay citizens of each judicial commission shall be appointed by the Governor. All the members of the judicial district shall be chosen from that district, except the judge, who may be chosen from another district. During the terms of office for which members of judicial commissions have been chosen, they shall not hold any office in a political party or organization, nor, except the members who are judges, hold any elective public office. They shall not receive any salary or other compensation for their services but shall receive their necessary expenses incurred while actually engaged in the discharge of their official duties. They shall hold office for the term of *three years following the organization* of the judicial commission of which they are members and shall be eligible for reappointment or reelection. They shall act only by the concurrence of a majority of the members of the judicial commission.

(d) Each justice or judge appointed by the Governor shall hold office for a term ending the first Monday of January following the next election appropriate for his election after the expiration of twelve months following his appointment. Not less than ninety days before the expiration of the term of office of a justice or a judge appointed by the Governor, or not less than ninety days before the expiration of the term of office of an elected

judge entitled to succeed himself, the justice or judge may file in the office of the official charged with the duty of administering statewide elections a declaration of candidacy for election to succeed himself. If he does not file a declaration a vacancy shall exist at the end of his term to be filled by appointment by the Governor as herein provided. If a justice or a judge files a declaration, his name shall be submitted to the electors on a separate judicial ballot without party designation at the election immediately preceding the expiration of his term of office to determine only the question whether the justice or judge shall be retained in office. The election shall be regulated by law. If a majority vote against retaining the justice or judge, a vacancy shall exist upon the expiration of his term of office to be filled by appointment by the Governor as herein provided. If a majority vote to retain a justice or judge, he shall be deemed elected for the full term of office provided for by the Constitution or laws of this Commonwealth, unless sooner removed in the manner provided by the Constitution. At the expiration of each term, any judge entitled to succeed himself shall be eligible for retention in office by election in the manner herein provided.

(e) Any vacancy happening in any court of record in a judicial district not electing to have the judges of the courts of record appointed in the manner provided for Philadelphia and Allegheny Counties shall be filled by appointment by the Governor, to continue until the first Monday of January next succeeding the first municipal election which shall occur three or more months after the happening of the vacancy.

(f) No justice or judge of any court of record shall directly or indirectly make any contribution to or hold any office in a political party or organization, nor, while retaining judicial office, become a candidate at either a primary or general election for any other than a judicial office.

The Commission is of the opinion that the ideal judiciary is composed of competent and independent judges and, for the purpose of finding the system most likely to produce them, it has examined the methods of selection employed in other states.

In one state, judges are appointed by the Governor from a list submitted by a commission and the appointee periodically goes before the people on a separate judicial ballot. In another state, judges are appointed by the governor, subject to confirmation by a commission, and the appointee periodically goes before the people on a separate judicial ballot. In four states, judges are selected by the Legislature. In five states, nominations for the judicial office are made at political party conventions and the nominees appear on non-partisan judicial ballots at the general election. In seven states, judges are appointed by the governor and the legislature. In thirteen states, nominations are made at non-partisan primary elections, and the general election is on a non-partisan basis. In seventeen states, including Pennsylvania, nominations are made at political party primaries and the nominees appear on the ballot, opposite the party label, at the general election.

These seven methods of selecting judges fall into three general categories: the elective system, the appointive system, and the appointive-elective system. A majority of this Commission thinks that the elective system is not adequate to determine the ability of a judge. It is their belief that politicians, rather than the people, select the nominee for judicial office under this procedure and that the selection is determined not primarily on the basis of judicial ability but rather on the basis of extra-judicial considerations, such as party affiliation, membership in a particular racial or religious group, and patronage considerations. It is further thought that the elective system, requiring the judge to periodically submit himself on a party ballot to the public, tends to produce a dependent judiciary in that he must appeal for support from those who are likely to have cases before him and he must keep friendly with party bosses.

Further, the tenure of an elected judge is often tied to the fortunes of his political party and he may be retained in office, or rejected, depending upon the views of the electorate respecting national, state or local issues — which issues, important as they may be, are usually totally irrelevant to the issue of his fitness to serve as a judge. If on the basis of these extraneous considerations an elected judge is defeated, his abilities and the experience which he has gained during his term in office are lost to the people.

The majority rejected the purely appointive system for two reasons: First, partisan politics play a leading role in the selective process in that the appointing power will in nine cases out of ten appoint a member from his own party and, in so doing, will frequently yield to the political needs of his associates, or make the appointment as a reward for political service. Secondly, a judge whose tenure depends upon good behavior cannot be removed from office unless he has so abused his position as to subject himself to the impeachment process. Past experience has shown that it is virtually impossible to impeach a judge.

The Pennsylvania Plan for selection of Judges has the endorsement of the Pennsylvania Bar Association and is in many particulars similar to the constitutional amendment submitted in 1940 to the voters in the state of Missouri. The plan has

been in effect in Missouri since that time. The plan eliminates many of the defects inherent in other methods of judicial selection.

## ARTICLE V. THE JUDICIARY

### **Section 27. Dispensing with Jury Trial**

#### *Current*

The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

#### *Recommended*

The parties, by agreement filed, in any civil case, or the accused in any non-capital case, may dispense with trial by jury and submit the decision of the case to the court having jurisdiction thereof. The court shall hear and determine the case, and the judgment thereon shall be subject to appeal as in other cases.

#### **Comments**

The Commission's recommendation for Article I, Section 6 preserves the right to trial by jury in criminal cases but eliminates the constitutional grant of the right of trial by jury in civil cases, thereby empowering the General Assembly to modify the right in civil cases.

The Commission's recommended section also recognizes the capacity to waive a jury trial in non-capital criminal cases—a capacity expressly granted by the Act of June 11, 1935, P. L. 319, §2. It is to be noted that prior to the Act of 1935 the appellate courts of this Commonwealth refused to recognize the capacity of the defendant in a criminal case to waive a jury trial in the absence of statutory provision. The recommended section, therefore, recognizes constitutionally the statutory provision.

## ANNEX NUMBER 5

### *Pennsylvania Bar Association Proposed Judiciary Article (1966)*

#### **ARTICLE V. THE JUDICIARY**

##### ***Section 1—Courts***

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of a Supreme Court, a Superior Court, District Courts, Estates Courts, and Community Courts. Other courts may be established by the General Assembly but only upon prior certification of the necessity therefor by the Supreme Court.

##### ***Section 2—The Supreme Court***

(a) The Supreme Court shall consist of seven justices, one of whom shall be Chief Justice of Pennsylvania. In the absence of the Chief Justice, the member of the court senior in length of service on the court shall serve in his place.

(b) The Supreme Court shall be the highest court of the Commonwealth and shall have final appellate jurisdiction. It shall have no original jurisdiction except as may be expressly provided in this Constitution. It may assume jurisdiction of actions pending in any other court at any stage of the proceedings. It shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction. Appeals from final judgments of the District Court shall lie as of right directly to the Supreme Court only in cases of judgments imposing sentences of death or life imprisonment. In all other cases, appeals permitted by law shall be assigned by the Supreme Court, to such court, including the Superior Court, as the Supreme Court shall by rule prescribe.

##### ***Section 3—The Superior Court***

(a) The Superior Court shall consist of nine judges, except that the Supreme Court may from time to time assign additional judges from among the judges of the District Court or the Estates Court to temporary service upon the Superior Court as the business of the Superior Court may require. The number of judges of the Superior Court may be changed by the General Assembly but only upon prior certification of the necessity therefor by the Supreme Court. The Court may act in panels of three or more judges, and shall sit at such places and times as the Supreme Court shall by rule prescribe.

(b) The Superior Court shall have no original jurisdiction. It shall exercise such appellate jurisdiction, including such review of the actions of executive or adminis-

trative offices or agencies, as may be assigned to it by rule of the Supreme Court. When no other court has been designated by rule of the Supreme Court, appeals permitted by law shall be taken to the Superior Court.

(c) One of the judges of the Superior Court shall serve as its President Judge. In the absence of the President Judge the member of the Superior Court senior in length of service on the court shall act in his place.

#### **Section 4—The District and Estates Courts**

(a) There shall be one District Court for each judicial district. Initially, the number and boundaries of the judicial districts, and the number of judges to be selected from each district, shall be as at present, but the Supreme Court shall recommend from time to time to the General Assembly, such changes in the foregoing as the Supreme Court may deem advisable. The President Judge of the District Court of each judicial district shall, under the direction of the Chief Justice or such associate justice as shall be deputized by him, supervise the court's judicial business, including the assignment of the court's judges within the district.

(b) In any district in which a separate Orphan's Court presently exists there shall be a separate Estates Court which initially shall consist of the number of judges authorized to sit on the Orphan's Court of the district when this section becomes effective. The jurisdiction of the court shall continue to be the jurisdiction now exercised by the Orphans' Court of the district, unless modified by rule of the Supreme Court. In any other district there may be a separate Estates Court as the General Assembly may determine upon recommendation of the Supreme Court.

(c) In all districts except those containing separate Estates Courts, the District Courts shall have unlimited original jurisdiction in all cases except such as may be assigned exclusively to the Community Courts by rule of the Supreme Court; and in districts containing separate Estates Courts the District Courts shall have the same original jurisdiction as in other districts, except that they shall not have jurisdiction in cases over which the Estates Courts of their respective districts shall have jurisdiction.

(d) The Districts Courts shall have such powers of review of the actions of the Community Courts and of executive or administrative offices or agencies as may be provided by rule of the Supreme Court.

(e) The District Courts may exercise their jurisdiction through such appropriate divisions, including civil, criminal, and, except in districts in which there are separate Estates Courts, estates Divisions, as the Supreme Court shall by rule prescribe. There shall be a Presiding Judge for each division which may be created in any district.

#### **Section 5—The Community Courts**

(a) All existing courts not of record are abolished and shall be superseded by Community Courts which shall be courts of such limited jurisdiction and shall exercise their jurisdiction through such appropriate divisions as the Supreme Court shall by rule prescribe.

(b) The number of judges constituting the Community Courts shall be deter-

mined for each judicial district by rule of the Supreme Court. Judges of the Community Court for each judicial district shall be selected in the same manner as the judges of the District Court of such district. The President Judge of the District shall designate the places within the district where the Community Court for that district shall sit, subject to review by the Supreme Court.

(c) The President Judge of the District Court of each judicial district shall, in accordance with rules prescribed by the Supreme Court, appoint commissioners for the district to accept bail, issue warrants, or otherwise assist the judges of the Community Court of the district in the performance of their judicial duties within the district as the Supreme Court may by rule prescribe.

### ***Section 6—Qualifications of Judges and Commissioners***

(a) Justices and judges shall be citizens of the Commonwealth. Unless in any judicial district, there are less than six qualified lawyers willing to accept appointment to fill a vacancy, judges of the District Courts, Estates Courts and Community Courts shall be residents of the judicial districts for which they shall be selected and shall reside in the districts in which they serve. All justices and judges shall be members of the bar of the Supreme Court.

(b) Commissioners shall be citizens of the Commonwealth and residents of the Judicial districts for which they shall be appointed. They shall possess such additional qualifications and shall be subject to such restrictions as to activities outside their official duties, as the Supreme Court shall by rule prescribe.

### ***Section 7—Method of Selection of Judges***

(a) Whenever a vacancy occurs by death, resignation, retirement, removal from office, expiration of a term of office, or creation of an additional judgeship, in the office of justice of the Supreme Court or of judge of the Superior Court, judge of the District Court, judge of the Estates Court, or judge of the Community Court of the respective judicial districts embodying Philadelphia County and Allegheny County or of any other judicial district in which the qualified electors shall have elected to have their judges appointed in the manner provided for the respective districts embodying Philadelphia County and Allegheny County, the Governor shall fill the vacancy by appointment from a panel of persons qualified for the office, nominated to him by a Judicial Nominating Commission established and organized as hereinafter provided.

(b) In the case of a justice of the Supreme Court or a judge of the Superior Court, the statewide Judicial Nominating Commission shall nominate to the Governor six names. If the Governor fails within 60 days to make an appointment from the panel submitted to him, the Judicial Nominating Commission shall certify the same six names to the Chief Justice who shall promptly appoint one of the six nominees.

(c) In all other cases the appropriate Judicial Nominating Commission shall nominate to the Governor the names of three persons qualified for the office and residing within the judicial district in which the vacancy exists unless there are within the district less than six lawyers qualified for the office who are willing to accept appointment in which case the Judicial Nominating Commission shall nominate to the



Governor three lawyers qualified for the office regardless of their residence. If none of the persons so nominated is acceptable to the Governor, he shall so notify the Judicial Nominating Commission within 60 days of his receipt of the nominations. Upon receipt of such notification, or upon expiration of such 60-day period without such notification if no appointment has been made, the Judicial Nominating Commission shall nominate a second panel of three other persons. If none of the persons nominated in either panel is appointed by the Governor within 30 days of his receipt of the nominations in the second panel, the appointment shall be made by the Chief Justice from among the persons nominated in either panel as certified to him by the Judicial Nominating Commission.

(d) Each justice or judge appointed in the manner prescribed by sub-section (a) of this section shall hold office for a term ending the first Monday of January following the next municipal election day more than 24 months following his appointment. Not less than 120 days before the expiration of the term of office of a justice or a judge appointed by the Governor or by the Chief Justice or not less than 120 days before the expiration of the term of office of an elected justice or judge entitled to succeed himself, the justice or judge may file in the office of the official in charge of state-wide elections, a declaration of candidacy for retention to succeed himself. If he does not file such declaration, a vacancy shall exist at the end of his term to be filled by appointment by the Governor or the Chief Justice as herein provided. If a justice or a judge files a declaration, his name shall be submitted to the electors on separate judicial ballots or in a separate column on voting machines, in either case without party designation, at the municipal election immediately preceding the expiration of his term of office, to determine only the question whether he shall be retained in office. If a majority of the votes cast are against retaining the justice or judge, a vacancy shall exist upon the expiration of his term of office to be filled by appointment by the Governor or the Chief Justice as herein provided. If a majority of the votes cast are in favor of retaining a justice or a judge, he shall serve for the full term of office provided herein, unless sooner removed. At the expiration of each term any justice or judge shall be eligible for retention in office in the manner provided herein, subject only to the retirement laws then in force.

(e) In judicial districts in which judges are not to be selected in the manner prescribed by the subsection (a) of this section, vacancies in the office of judge of the District Court, of the Estates Court, if any, or of the Community Court, occurring by death, resignation, retirement, removal from office or creation of an additional judgeship shall be filled by appointment of the Governor until the first Monday of January succeeding the first municipal election which shall occur three or more months after the happening of the vacancy. In all such districts elections of judges for full terms to fill vacancies however caused shall be held on municipal election days.

(f) At any municipal or general election, the qualified voters of any judicial district other than those embodying Allegheny and Philadelphia Counties may, by a majority vote of those voting on the question, elect to have the judges of their district appointed in the manner provided for the respective districts embodying Philadelphia County and Allegheny County.

(g) Where the qualified voters of any judicial district have elected to fill vacancies in the office of judge in the manner provided for the respective districts embodying Allegheny and Philadelphia Counties, the qualified electors of the district may there-

after, at a municipal or general election, by a majority vote of those voting on the question, elect to discontinue that method of filling judicial vacancies.

(h) Any question presenting the foregoing option shall be placed upon the ballot in any judicial district by petition which shall be in such form as shall be prescribed by the officer of the Commonwealth having supervision over elections. Any such petition shall be filed with such officer. It shall be signed by not less than 200 qualified electors of the judicial district. The manner of signing such petitions, the time of circulating them, the affidavits of the persons circulating them and all other details not contained herein shall be governed by the general laws relating to the signing of nominating petitions for the office of Governor.

### **Section 8 – Judicial Nominating Commissions**

(a) There shall be a single state-wide Judicial Nominating Commission for the Supreme and the Superior Courts, and separate Judicial Nominating Commissions for each of the districts in which judicial vacancies are to be filled in the manner provided by subsection (a) of the preceding section. Each such Commission shall be composed of one justice or judge, three members of the bar selected by the members of the bar and three lay citizens. The justice or judge and the members of the bar on each Commission shall be selected in the manner and in accordance with rules prescribed by the Supreme Court. The lay citizens on each Judicial Nominating Commission shall be appointed by the Governor. Members of the Judicial Nominating Commission for the Supreme and the Superior Courts shall be chosen from the Commonwealth at large, and members of the Judicial Nominating Commission for a judicial district shall be chosen from that district except that the justice or judge may be chosen from outside the district.

(b) The members of each Judicial Nominating Commission shall serve for terms of three years, staggered except in the case of the justice or judge on the commission, so that two members, one selected by the bar and the other appointed by the Governor, shall be selected each year. Of the first members selected following the effective date of this section, two, one selected by the bar and one appointed by the Governor, shall be selected for one-year terms and two other members selected by the bar and by the Governor respectively, shall be selected for two-year terms. Vacancies in the membership of any Judicial Nominating Commission shall be filled for the balance of a term by the same appointing power as appointed the member whose place has become vacant. No member of a Judicial Nominating Commission shall serve for more than two successive three-year terms on that Commission, but may be reappointed or re-elected after a lapse of one year. The members of each commission shall elect one member to serve as chairman for a term of one year, but no person shall serve as chairman for more than three years in succession. Each commission shall act only with the concurrence of a majority of all its members.

(c) During the terms of office for which members of the Judicial Nominating Commissions have been chosen, they shall not hold any office in a political party or organization, nor except for the members who are justices or judges, shall they hold any public office or appointment for which they receive salary or other compensation. They shall not be compensated for service on the commission, but shall be reimbursed for travel and other expenses necessarily incurred in the discharge of their official duties.

**Section 9—Appointments by the Governor and  
by the Chief Justice Under this Article**

The Governor and the Chief Justice shall have full responsibility for all appointments made by them, respectively, under this article. They shall make such appointments solely on the basis of merit regardless of the political affiliations of the appointees. The Governor's and Chief Justice's appointments under this article shall not require the consent of the Senate.

**Section 10—Tenure of Judges; Method of Selection of  
Chief Justices, President Judges and Presiding Judges**

(a) When the qualified electors of the state-at-large or of the appropriate judicial district have voted to retain them, justices of the Supreme Court, and judges of the Superior Court, of the District Courts and of the Estates Courts shall serve for terms of not more than 10 years as the General Assembly shall from time to time prescribe. The tenure of any judge shall not be affected by changes in judicial districts or by the reduction of the number of judges.

(b) The Chief Justice of Pennsylvania shall be elected for a term of five years by the statewide Judicial Nominating Commission and shall always be eligible for re-election. A member of the court may resign the office of Chief Justice without resigning from the court.

(c) The President Judge of the Superior Court, and the President Judge of the District Court, and the President Judge of the Estates Court, if any, for each judicial district, shall be appointed by the Chief Justice of Pennsylvania and shall serve in such capacity at his pleasure.

(d) The President Judge of the Community Court for each judicial district and the Presiding Judge of any divisions of the District Court shall be appointed by the President Judge of the District Court for the district and shall serve at his pleasure.

**Section 11—Compensation and Retirement of Judges**

(a) Justices and judges shall receive compensation paid by the Commonwealth as prescribed by law, which shall not be diminished during their terms of office unless by general law applying to all salaried officers of the Commonwealth.

(b) Justices and judges shall be retired at such age, not less than 72 years for justices of the Supreme Court and judges of the Superior Court, and not less than 70 years for all other judges, as shall be provided by the General Assembly. Notwithstanding the expiration of the term for which a justice or a judge was last elected, his retirement, resignation or removal from office for physical or mental disability, he shall receive such compensation as shall be prescribed by the General Assembly. A former judge may, with his consent, be assigned by the Chief Justice to render such judicial service as may be prescribed by rule of the Supreme Court.

**Section 12—Removal, Suspension and Discipline of Judges**

(a) Any justice or judge who shall become a candidate for an elective non-judicial office, or who shall be convicted of misbehavior in office by a court of competent jurisdiction, or who shall be disbarred as a member of the bar of the Supreme Court, shall automatically forfeit his judicial office.

(b) A justice of the Supreme Court may be retired by the Governor upon certification by the statewide Judicial Nominating Commission, after appropriate hearing, that such justice is so physically or mentally incapacitated as substantially to prevent him from performing his duties.

(c) The Supreme Court may, in accordance with rules prescribed by it, after notice and hearing by such tribunal as it may by rule designate or establish, retire any judge, other than a justice of the Supreme Court, who is so mentally or physically incapacitated as substantially to prevent him from performing his duties.

(d) Justices and judges shall be subject to removal by impeachment. No justice or judge against whom impeachment proceedings are pending shall exercise any of the duties of his office until he has been acquitted.

(e) Any judge may also be removed from office, suspended without pay, or otherwise disciplined for misconduct in office, neglect of duty, violation of any canon of legal or judicial ethics adopted by the Supreme Court, conduct which shall prejudice the proper administration of justice, or such other grounds as General Assembly may provide. Such removal or discipline shall be by the Supreme Court after notice and a hearing by such tribunal as the Supreme Court may by rule designate or establish. Proceedings for removal, suspension, or discipline may be initiated by the Supreme Court on its own motion or on petition of the Judicial Council or of any bar association.

### ***Section 13—Non-Judicial Duties and Prohibited Activities***

(a) No duties, other than judicial duties, shall be imposed by law upon any court or upon any of the justices or judges thereof, nor shall any power of appointment be conferred upon any court or upon any justice or judge thereof except such as relates to the exercise of the judicial power of this Commonwealth or the administration of the courts as provided in this article.

(b) No justice or judge shall directly or indirectly make any contribution to or hold any office in a political party or organization, nor while retaining judicial office shall become a candidate at either a primary or general election for any office other than a judicial office, except that a judge running for election or re-election in a district in which judges are nominated and elected as candidates of political parties, shall be permitted to contribute to the political party or organization conducting his campaign, and excepting also contributions made by any justice or judge to the political campaign of a member of his family.

(c) No justice or judge shall practice law or engage in any other employment for compensation, except that he may receive compensation as a lecturer, teacher, or author, as an officer of a non-profit professional organization, as a fiduciary of the estate of a member of his family, and as a member of the national guard or a reserve component of the armed forces of the United States while on inactive duty.

### ***Section 14—Administration of Courts***

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts of this Commonwealth, including the temporary assignment of judges from one court or district to another, but in judicial districts containing populations in excess of 500,000 a judge of the District Court or of the Estates

Court or of the Community Court shall not be assigned to a district other than his own without the consent of the President Judge of his court. The powers of administration vested in the Supreme Court shall be exercised by the Chief Justice, or by an associate justice deputized by him, in accordance with rules prescribed by the Supreme Court. The Chief Justice shall appoint an administrative director and staff, who shall assist the Chief Justice or the associate justice deputized by him, in supervising the administrative operations of the judicial system and shall serve at his pleasure.

(b) The Supreme Court shall have power to prescribe rules in all civil and criminal actions and proceedings for all courts, governing administration, practice and procedure, including rules of evidence, appeals, appellate jurisdiction including time for appeals, and the issuance of all writs necessary or appropriate in aid of the jurisdiction of the respective courts. These rules shall have the force and effect of law and shall suspend all statutes inconsistent therewith.

### ***Section 15—Clerks of Court, Court Personnel***

(a) There shall be such Clerks of Court and such other non-judicial personnel as shall be necessary for the effective performance of the judicial work of the Commonwealth. The clerks of the District Courts, of the Estates Courts, and of the Community Courts, their assistants and other non-judicial court officers within each judicial district shall be appointed by the judges of the respective courts of that district, until such time as the Supreme Court shall otherwise provide in accordance with rules prescribed by it.

(b) The Supreme Court may prescribe a merit system for appointment, promotion, removal, discipline, and suspension of non-judicial personnel in the judicial system and may provide for exempt categories. The Supreme Court may administer the merit system through an administrative director, or may provide for its administration by other appropriate agencies of the Commonwealth or its political subdivisions, who shall be required to render necessary assistance to the court.

### ***Section 16—Judicial Council***

(a) The Supreme Court shall establish a Judicial Council consisting of such number of members and selected in such manner as the Supreme Court may by rule prescribe.

(b) The Judicial Council shall conduct studies for improvement of the administration of justice and for law reform, and shall make reports and recommendations to the Supreme Court and to the General Assembly at intervals of not more than two years. The Judicial Council shall perform such other duties as may be prescribed in this article or assigned to it by rule of the Supreme Court.

### ***Section 17—Implementation of This Article***

The General Assembly shall enact all laws which may be necessary to implement the provisions of this article.

## ANNEX NUMBER 5A

### *Pennsylvania Bar Association Alternate Proposal for Section 7, of Its Proposed Judiciary Article*

As noted in the Pennsylvania Constitutional Revision Handbook (1966) of the Pennsylvania Bar Association, the proposed Section 7 incorporated in Annex 5, supra, was attacked as being discriminatory against the two largest counties of the Commonwealth. Section 7 as presented in annex 5 makes the Bar's judicial selection plan mandatory for Philadelphia and Allegheny Counties but leaves the matter up to local option as to other counties in the State. The alternate plan presented below is designed to make the judicial selection plan statewide in its applicability.

#### **Section 7. Method of Selection of Judges**

(a) Whenever a vacancy occurs by death, resignation, removal from office, expiration of a term of office, or creation of additional judgeships, in the office of justice of the Supreme Court or of judge of the Superior Court, judge of the District Court, judge of the Estates Court or judge of the Community Court, the Governor shall fill the vacancy by appointment from a panel of persons qualified for the office, nominated to him by a Judicial Nominating Commission established and organized as hereinafter provided.

(b) In the case of a justice of the Supreme Court or a judge of the Superior Court, the State-wide Judicial Nominating Commission shall nominate to the Governor six names. If the Governor fails within sixty days to make an appointment from the panel submitted to him, the Judicial Nominating Commission shall certify the same six names to the Chief Justice who shall promptly appoint one of the six nominees.

(c) In all other cases the appropriate Judicial Nominating Commission shall nominate to the Governor the names of three persons qualified for the office and residing within the judicial district in which the vacancy exists unless there are within the district less than six lawyers qualified for the office who are willing to accept appointment in which case the Judicial Nominating Commission shall nominate to the Governor three lawyers qualified for the office regardless of their residence. If none of the persons so nominated are acceptable to the Governor, he shall so notify the Judicial Nominating Commission within sixty days of his receipt of the nominations. Upon receipt of such notification, or upon expiration of such sixty-day period without such notification if no appointment has been made, the Judicial Nominating Commission shall nominate a second panel of three other persons. If none of the persons nominated in either panel is appointed by the Governor within thirty days of

his receipt of the nominations in the second panel, the appointment shall be made by the Chief Justice from among the persons nominated in either panel as certified to him by the Judicial Nominating Commission.

(d) Each justice or judge appointed in the manner prescribed by subsection (a) of this section shall hold office for a term ending the first Monday of January following the next municipal election day more than twenty-four months following his appointment. Not less than one hundred twenty days before the expiration of the term of office of a justice or a judge appointed by the Governor or by the Chief Justice or not less than one hundred twenty days before the expiration of the term of office of an elected justice or judge entitled to succeed himself, the justice or judge may file in the office of the official in charge of State-wide elections, a declaration of candidacy for retention to succeed himself. If he does not file such declaration, a vacancy shall exist at the end of his term to be filled by appointment by the Governor or the Chief Justice as herein provided. If a justice or a judge files a declaration, his name shall be submitted to the electors on separate judicial ballots or in a separate column on voting machines, in either case without party designation, at the municipal election immediately preceding the expiration of his term of office, to determine only the question whether he shall be retained in office. If a majority of the votes cast are against retaining the justice or judge, a vacancy shall exist upon the expiration of his term of office to be filled by appointment by the Governor or the Chief Justice as herein provided. If a majority of the votes cast are in favor of retaining a justice or a judge, he shall serve for the full term of office provided herein, unless sooner removed. At the expiration of each term any justice or judge shall be eligible for retention in office in the manner provided herein, subject only to the retirement laws then in force.

## ANNEX NUMBER 5B

### *Pennsylvania Bar Association Proposed Judiciary Article As Amended July, 1967 at Bedford Springs*

Note: At the Summer meeting of the Pennsylvania Bar Association held in July 1967 at Bedford Springs, the Association voted to replace old Section 12 on removal, suspension and discipline of judges with the following:

#### **Section 12. Removal, Discipline and Compulsory Retirement of Judges:**

(a) There shall be a Judicial Qualifications Commission to be composed of two judges of the Superior Court, and three judges of the District Courts from different Judicial Districts, to be selected by the Supreme Court; two members of the bar to be selected by the members of the bar; and two lay citizens to be selected by the Governor. The judges and the members of the bar shall be selected in the manner and in accordance with rules prescribed by the Supreme Court.

The members of the Judicial Qualifications Commission shall serve for terms of four years, the selection of the first members following the effective date of this Section to be staggered as follows: one judge of the Superior Court, one member of the bar, and one lay member shall be selected for two-year terms, and one judge of the Superior Court, one member of the bar, and one lay member shall be selected for four-year terms: one judge of the District Court shall be selected for a term of two years, one for a term of three years, and one for a term of four years. A vacancy in the membership of the Commission shall be filled for the balance of the term by the same appointing power as selected the member whose place has become vacant. No member of the Commission shall serve for more than one full four-year term on the Commission, but he may be reappointed or re-elected after a lapse of one year. The members of the Commission shall elect one member to serve as Chairman for a term of one year. The Commission shall act only with the concurrence of a majority of all its members.

During the terms of office for which members of the Judicial Qualifications Commission have been chosen, they shall not hold any office in a political party or organization nor, except for the members who are judges, shall they hold any public office or appointment for which they receive salary or other compensation. They shall not be compensated for service on the Commission, but shall be reimbursed for travel and other expenses necessarily incurred in the discharge of their official duties.

(b) In accordance with the procedure prescribed in subsection (c) of this Section, any justice or judge may be removed from office or otherwise disciplined for



misconduct in office, neglect of duty, failure to perform his duties, violation of any canon of legal or judicial ethics adopted by the Supreme Court, or other conduct which prejudices the proper administration of justice; and any justice or judge may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, of a permanent character. Any justice or judge who becomes a candidate for an elective nonjudicial office shall be removed from judicial office.

(c) The Judicial Qualifications Commission shall keep itself as fully informed as may be of facts and circumstances relating to justices or judges, insofar as the same may bear upon any of the grounds for removal, discipline, or compulsory retirement; shall receive complaints or reports, formal or informal, from any source pertaining to such matters and shall make such preliminary investigations as it may determine.

The Judicial Qualifications Commission may, after such investigation as it deems necessary, order a hearing to be held before it concerning the removal, discipline, or compulsory retirement of a justice or a judge, or the Commission may in its discretion request the Supreme Court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the Commission. The Commission's orders for the attendance or testimony of witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings in the District Court of Dauphin County.

If, after hearing or after considering the record and report of the masters, the Commission finds good cause therefore, it shall recommend to the Supreme Court the removal, discipline, or compulsory retirement, as the case may be, of the justice or judge.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal, discipline, or compulsory retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for compulsory retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired under Section 11 (b) of this Article. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with the proceedings before the Judicial Qualifications Commission or masters appointed by the Supreme Court, pursuant to this section, shall be confidential, and the filing of papers with and the giving of testimony before the Commission or the masters shall be privileged; provided that, upon being filed by the Commission in the Supreme Court, the record loses its confidential character.

The Supreme Court shall by rule provide for procedure under this section before the Judicial Qualifications Commission, the masters, and the Supreme Court.

No justice or judge shall sit as a member of the Commission or the Supreme Court in any proceeding involving his own removal, discipline, or compulsory retirement.

(d) Any justice or judge who shall be convicted of misbehavior in office by a court of competent jurisdiction, or who shall be disbarred as a member of the bar of the Supreme Court, shall automatically forfeit his judicial office.

(e) This section is alternative to and cumulative with the provisions for impeachment for misbehavior in office contained in Article VI, Sections 4, 5, and 6. No justice or judge against whom impeachment proceedings are pending shall exercise any of the duties of his office until he has been acquitted.

## ANNEX NUMBER 6

### *ABA Model State Judicial Article (1962)*

Section 1. *THE JUDICIAL POWER.* The judicial power of the State shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals, one Trial Court of General Jurisdiction known as the District Court, and one Trial Court of Limited Jurisdiction known as the Magistrates' Court.

*Committee comment:* It is contemplated to set up by this section a single unified judicial system with a single court of original jurisdiction. This follows the recommendation of advocates of judicial reform from Pound to Vanderbilt. And this is one of the recommendations made by the American Bar Association in 1938. It is a reflection of the unfortunate experiences too many states have had with multiple courts of original jurisdiction.

Thirteen states with large populations and consequently with an extremely busy judicial system now provide for an intermediate appellate court. It is expected that more and more states will find this kind of a court to be a real aid in dealing with problems of congestion in the appellate system. The Model Judicial Article, therefore, provides for such a court.

The titles of the trial courts may, of course, vary from jurisdiction to jurisdiction. The ones chosen here are merely for purposes of example.

### Section 2. *THE SUPREME COURT.*

Par. 1. *Composition.* The Supreme Court shall consist of the Chief Justice of the State and (four) (six) Associate Justices of the Supreme Court.

*Committee comment:* The question of the number of justices is not one which has an ideal solution and the number may vary from state to state. The experience of the United States Supreme Court would indicate that any number above nine has passed the point of diminishing returns. On the other hand, the number must be large enough to divide the tasks sufficiently to give the justices ample time for reflection and deliberation in the preparation of opinions.

The Committee is of the view that the number of justices should be fixed by the Constitution to avoid such suggestions as that of McReynolds when he was Attorney-General, adopted by President Franklin D. Roosevelt in his court-packing plan, to increase the number of justices in order to effect a change in the substance of the Court's opinion.

The Committee is of the opinion that the Supreme Court should not sit in divisions, but has not made provisions to prohibit it. Such a practice has been utilized by several state jurisdictions. Its main purpose is, of course, to allow the high court to increase the number of cases which it can hear in order to

overcome or prevent delay and congestion. It must be recognized, however, that decisions by divisions, even if provided for by the Constitution, will not have the same force and effect as a decision of the whole Court. Moreover, sitting in divisions creates the possibility of minority views on the Court becoming controlling doctrine because of the accident of the make-up of a division. It is the Committee's belief, therefore, that while divisions could be utilized for clearing temporary congestion or delay, an intermediate appellate court and/or a limitation on the Supreme Court's appellate jurisdiction are more appropriate long-term remedies.

## Par. 2. *Jurisdiction.*

A. *Original jurisdiction.* The Supreme Court shall have no original jurisdiction, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.

*Committee comment:* It is the view of the Committee that no original jurisdiction be imposed on the high court. That court lacks facilities for the fact finding process inherent in every question of original jurisdiction. References to masters and referees, in the pattern of the United States Supreme Court, do not seem so adequate or desirable as requiring the case to enter the judicial system by way of the trial court.

Silence on the question of the issuance of writs has generally been interpreted as authorizing the Supreme Court to issue original writs. It is proposed to eliminate this power for the same reasons that call for the elimination of original jurisdiction. By way of its appellate jurisdiction, the high court can review all grants or denials of writs below and can properly, in the extraordinary cases, remove a case from the lower court to the high court even before judgment on the petition for the writ has been made by the lower court.

B. *Appellate jurisdiction.* Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review the sentence imposed.

*Committee comment:* The only categories of cases in which the Committee felt that it was necessary to impose compulsory jurisdiction were those involving the life of the defendant and those involving liberty of the defendant for an extensive period of time. Most high courts now exercise this power in capital cases. For this purpose the Committee was unable to rationalize a distinction between capital cases and long-term sentences of imprisonment.

As to all other matters it was believed that the appellate power should be exercised in accordance with the demands of the times. On the question whether this allocation of power should be in the Court or in the legislature, the Committee chose the Court for several reasons. Among others, these reasons included: (1) the fact that such power in the Court would enhance the independence of the judiciary; (2) the fact that it would place the power to

meet current problems in the hands of those most likely to be expert in the subject; (3) the fact that the rule making power was more flexible than the legislative power in its capacity to meet the demands of judicial administration.

The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which that power has been put by the Court of Criminal Appeals in England. Recognizing the possibility of undesirable imposition on the appellate processes, the Committee thought it desirable to leave the Court with the power to limit the categories of cases in which sentences would be reviewed.

Section 3. *THE COURT OF APPEALS.* The Court of Appeals shall consist of as many divisions as the Supreme Court shall determine to be necessary. Each division of the Court of Appeals shall consist of three judges. The Court of Appeals shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the State and it may be authorized by rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

*Committee comment:* The necessity for intermediate courts of appeal, already existent in thirteen states and likely to become necessary in others, was the reason the Committee felt that provision should be made in the Constitution for their creation. The primary function of such a court would be to hear appeals in cases which the Supreme Court should not be expected to handle because of the importance of its business. The jurisdiction of the court of appeals has, therefore, been framed in the same terms, except for the Supreme Court's compulsory jurisdiction, as is the jurisdiction of the Supreme Court itself. The same reasons exist for allotting the power to the Supreme Court rather than the legislature to specify the jurisdiction.

#### Section 4. *THE DISTRICT AND MAGISTRATE'S COURTS.*

Par. 1. *Composition.* The District Court shall be composed of such number of divisions and the District and Magistrate's Courts shall be composed of such number of judges as the Supreme Court shall determine to be necessary, except that each district shall be a geographic unit fixed by the Supreme Court and shall have at least one judge. Every judge of the District and Magistrate's Courts shall be eligible to sit in every district.

*Committee comment:* The number of District Court judges and magistrates and District Court divisions must be flexible in order to allow for adjustment to new conditions. The authorization to provide for "divisions" was thought desirable in terms of the need for specialized courts, such as probate and divorce courts. But it was also thought to be desirable that these specialized courts be manned by judges whose functions need not be confined to such courts. Thus, all branches will be administered as one court with no conflicts of jurisdiction and no waste of judicial manpower.

The Committee believed that the Supreme Court would be the most expert body to decide how many judges and magistrates are required in each district.

The authority of a district judge and magistrate to sit in any district is complementary to the authority of the Chief Justice to assign judges anywhere in the most efficient use of judicial manpower.

**Par. 2. District Court Jurisdiction.** The District Court shall exercise general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the Magistrate's Court by the Supreme Court rules. The District Court may be authorized, by rule of the Supreme Court, to review directly decisions of State administrative agencies and decisions of Magistrate's Courts.

**Par. 3. Magistrate's Court Jurisdiction.** The Magistrate's Court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the Supreme Court shall designate by rule.

*Committee comment:* It was the Committee's view that cases involving minor matters such as traffic offenses and small claims should be delegated to magistrate's courts, and that this would be necessary to avoid an unreasonably large number of district judges with general original jurisdiction. It was also thought that where the districts covered a large geographic area or temporary congestion occurred in any district, magistrates might appropriately be used to relieve the district court of undue burdens. Because of the need for flexibility in the use of such courts it was deemed best to leave the terms and conditions of the magistrate's court jurisdiction in the control of the Supreme Court by rule.

#### Section 5. *SELECTION OF JUSTICES, JUDGES AND MAGISTRATES.*

**Par. 1. Nomination and Appointment.** A vacancy in judicial office in the State, other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the Judicial Nominating Commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the Chief Justice or the Acting Chief Justice from the same list. Magistrates shall be appointed by the Chief Justice for a term of three years.

*Committee comment:* The method of selecting judicial officers of all but the lowest courts here proposed follows essentially the American Bar Association plan recommended in 1937. The provision directing the Chief Justice to appoint where the governor fails to act is designed to prevent a stalemate between the governor and the nominating commission which has occurred in States using this system.

The importance of removing the process of judicial nomination from the political arena is probably the most essential element in any scheme for adequate judicial reform.

Because the exigencies of the calendar will vary so much, the Committee thought that great freedom was necessary in the appointment of magistrates. This meant a necessity for rapid appointment and comparatively short tenure. The power of appointment was, therefore, placed in the Chief Justice. It was also felt, however, that the tenure had to be long enough to attract competent lawyers to accept appointment.

Par. 2. *Eligibility.* To be eligible for nomination as a justice of the Supreme Court, Judge of the Court of Appeals, Judge of the District Court, or to be appointed as a Magistrate, a person must be domiciled within the State, a citizen of the United States, and licensed to practice law in the courts of the State.

*Committee comment:* The requirements of citizenship and membership in the bar are those which are usually demanded in the States. The Committee is of the view that no other qualifications should be specified. The selection procedure will provide all other necessary safeguards, at the same time allowing the nominating commission the broadest opportunity to secure nominees of the highest calibre.

## Section 6. *TENURE OF JUSTICES AND JUDGES.*

Par. 1. *Term of Office.* At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter, so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the Supreme Court, the electorate of the entire State shall vote on the question of approval or rejection. In the case of judges of the Court of Appeals and the District Court, the electorate of the districts or district in which the division of the Court of Appeals or District Court to which he was appointed is located shall vote on the question of approval or rejection.

*Committee comment:* This provision also follows the American Bar Association plan. The periods between appointment and election and between election and re-election have no ideal duration. They must be long enough to permit the character of the judge's work to become known, long enough so that competent persons will not reject appointment for fear of hasty rejection by the electorate. But it must be short enough to remove reasonably promptly judges who are not performing their functions adequately.

Par. 2. *Retirement.* Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The Chief Justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the State.

*Committee comment:* Most States have a fixed retirement age. The Committee is of the opinion that the legislature should be free to fix a retirement age, so long as it does not reduce it below sixty-five.

The Committee has reluctantly chosen a fixed retirement age rather than indefinite tenure because it is of the view that the interests of sound administration of justice will be better served by the possibility of retiring competent judges than by risking the continuance in office of judges with truly limited capacities.

Par. 3. *Retirement for Incapacity.* A justice of the Supreme Court may be retired after appropriate hearing, upon certification to the governor, by the Judicial Nominating Commission for the Supreme Court that such justice is so incapacitated as to be unable to carry on his duties.

*Committee comment:* This provision follows the Alaska plan to have an independent body make the determination whether a high court judge has become incapacitated while in office. The nominating commission seems to be a logical agency to charge with this responsibility. The difficulties which seem

to arise when this power is put in the hands of fellow judges are avoided by this process.

**Par. 4. Removal.** Justices of the Supreme Court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the Supreme Court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, during his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.

*Committee comment:* The first two sentences of this section derive from the New Jersey and Puerto Rican Constitution. The impeachment process is not utilized with reference to lower court judges because it is the Committee's view that the Supreme Court, in its supervisory capacity over the judicial system, is better qualified and the more logical body to determine the issues than is the legislature.

The last two sentences are for the purpose of requiring that the judge devote his full time to his job as judge and to remove all judges from politics to the extent possible. Several jurisdictions have had the sorry spectacle of a judge running for the governorship, accepting contributions from lawyers, etc., while retaining his judicial office.

Certainly this is conduct unbecoming a judicial officer and hardly compatible with the idea of the safeguarding the judicial system from political ravages. The last clause of the last sentence is taken from the Missouri Judicial Article Par. 29 No. f.

## **Section 7. COMPENSATION OF JUSTICES AND JUDGES.**

**Par. 1. Salary.** The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the State government other than the governor.

*Committee comment:* Certainly one of the greatest drawbacks to securing an adequate judiciary has been the niggardly salaries which most of the States pay to their judicial officers. While the Committee was cognizant of the fact that the Constitution of the State is not the appropriate place to fix salaries in terms of dollars and cents, it was the hope of the Committee that the lower limit set forth in this section would afford some base for more adequate compensation for judges.

**Par. 2. Pensions.** Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the case of justices and judges who have served ten years or more, and their widows, the pension shall not be less than fifty per cent of the salary received at the time of the retirement or death of the justice or judge.

*Committee comment:* Again, the Committee understood that the pension program could not be spelled out in the Constitution. It has endeavored nevertheless to fix a floor on such pensions so that the requirement of a pension does not become meaningless.



Par. 3. *No Reduction of Compensation.* The compensation of a justice, judge or magistrate shall not be reduced during the term for which he was elected or appointed.

*Committee comment:* This is the usual provision for the protection of judicial independence by removing the legislative power to reduce the salaries of judges while in office. Without such a provision all attempts to secure tenure of office would be futile.

## Section 8. *THE CHIEF JUSTICE.*

Par. 1. *Selection and Tenure.* The Chief Justice of the State shall be selected by the Judicial Nominating Commission from the members of the Supreme Court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of Chief Justice without resigning from the court. During a vacancy in the office of Chief Justice, all powers and duties of that office shall devolve upon the member of the Supreme Court who is senior in length of service on that court.

*Committee comment:* Many alternatives presented themselves on the question of the proper agency for appointing the Chief Justice. The Committee sought an agency outside the Court itself to avoid contributing to politics and factions within the Court. To avoid political intervention, the power was not vested in the governor. The nominating commission was thought to be the most knowledgeable and non-political alternative. Tenure of office was also thought necessary to the effective functioning of the judicial administration of the courts of the State. The evils of constant rotation of the office of Chief Justice have been only too cogently demonstrated by experience.

Par. 2. *Head of Administration Office of the Courts.* The Chief Justice of the State shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid the administration of the courts of the State. The Chief Justice shall have the power to assign any judge or magistrate of the State to sit in any court in the State when he deems such assignment necessary to aid the prompt disposition of judicial business, but in no event shall the number of judges and justices exceed the number of justices provided in section 2. The administrator shall, under the direction of the Chief Justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary administrative functions relating to the courts.

*Committee comment:* The vesting of administrative authority in the Chief Justice follows the recommendation of the American Bar Association. The desirability of the concept has been proved by the experience in the New Jersey system which adopted such a method of administering its courts.

Section 9. *RULE MAKING POWER.* The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

*Committee comment:* The vesting of the rule making power in the Supreme Court has long been an objective of those interested in judicial reform. This is another of the recommendations of the American Bar Association. Rule making power over all the courts of the States is already exercised to a large

degree in 28 States. Several states provide that the judicial council should fulfill this function, but the Committee thinks that the Supreme Court, because of its responsibility for the operation of the judicial system, is the proper body of experts to advise it in the formulation of rules.

The provision giving to the Supreme Court the power to promulgate rules of evidence is a more controversial issue than the other rule making powers. In only eight states does the Supreme Court have control over rules of evidence, and in most of these states the power is conferred by statute rather than by the Constitution. The Committee follows the recommendation of the American Bar Association as most consistent with the proper concept of rules of evidence as procedural and most conducive to the effective administration of justice in the court system.

The last sentence of Section 9 contains language broad enough to authorize the Supreme Court to deal with either an integrated or an unintegrated bar of the State in connection with supervision of its members, discipline of its members, and other regulation or supervision of the bar. The language is broad enough to permit the Supreme Court to order an integrated state bar to be organized as was done in Wisconsin. If it is preferred that an integrated bar be a constitutionally created corporation, the following sentences may be added to Section 9.

"The State Bar of \_\_\_\_\_ is a public corporation, having, as an agency of the Supreme Court, perpetual existence and succession. Membership in it shall be a condition precedent to practicing law in this State. The Supreme Court by appropriate orders may provide for its organization and its regulation and supervision."

**Section 10. JUDICIAL NOMINATING COMMISSION.** There shall be a Judicial Nominating Commission for the Supreme Court and one for each division of the Court of Appeals and the District Court. Each Judicial Nominating Commission shall consist of seven members, one of whom shall be the Chief Justice of the State, who shall act as chairman. The members of the bar of the State residing in the geographic area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the State, from the residents of the geographic area for which the court or division sits. The terms of office and compensation for members of a Judicial Nominating Commission shall be fixed by the legislature, provided that not more than one-third of a commission shall be elected in any three-year period. No member of a Judicial Nominating Commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a State judicial office so long as he is a member of a Judicial Nominating Commission and for a period of five years thereafter.

*Committee comment:* The proposed Judicial Nominating Commission also follows the American Bar Association plan, which recommended that the list of nominees be made by an independent agency. The make-up of the Commission could be a combination of a number of variables.

The Committee feels, however, that no group should have fixed representation and that all appropriate interests in the State can be represented through appointments as provided in this section. Provision is made for the participation of non-lawyers in the selection process. The disqualifications are self-explanatory.

## ANNEX NUMBER 7

### *Judiciary Article of the Model State Constitution of the National Municipal League*

#### Article VI

#### THE JUDICIARY

##### **Introductory Comment**

The judiciary article reflects, on the basis of additional experience, elaborations or modifications of principles established in earlier editions of the *Model*. Main emphasis is on establishment of a unified judicial system, free from a mass of separately established constitutional courts of frequently overlapping jurisdiction and free from constitutionally imposed rigidities and technical procedural difficulties which still characterize court structures and judicial administration.

When a great variety of separate courts are established by the constitution and when the jurisdiction of each is constitutionally defined, court reform often becomes either a matter of piecemeal constitutional amendment, or is not attempted at all because of the difficulties involved in integrating existing courts into any kind of rational scheme, or in abolishing courts whose judiciary and other personnel have obtained a vested interest in their continuation, even though they may have outlived their usefulness. This is especially true in many states in which the courts provide a major source of political patronage. A judicial system which lacks proper integration and unified administration is costly to the state because it is uneconomical to run and to the litigants because of the creation of procedural difficulties, delay and consequent added legal expenses.

The judiciary article emphasizes the unity of the court system by establishing an integrated system with three levels of courts of general statewide jurisdiction. The system encompasses a general court expected to be the trial court, an appellate court expected to be the court of intermediate appeal and a supreme court expected to be the court of ultimate state appeal. Each of these except the supreme court may be divided into geographical departments, or into functional divisions, i.e., civil, criminal, domestic relations, probate, etc., as may be necessary. To avoid rigidities, the jurisdiction of each is not constitutionally defined but is left to be fixed by law except that in certain designated matters of constitutional importance—legislative districting and gubernatorial succession—the supreme court has original jurisdiction. The supreme court also has an express grant of appellate jurisdiction in cases raising constitutional issues under the state constitution or the Constitution of the United States. Inferior courts of limited jurisdiction may be established by the legislature, but a brake is placed on the haphazard establishment of a multitude of ill-coordinated

lower courts by the requirement that all state courts must be uniform throughout the state. The lower courts, particularly when created by the constitution, have been especially troublesome in the reorganization of judicial systems.

In states with a relatively low volume of appellate business, there may be no need for intermediate appeals, and all appeals could be taken from the trial court (general court) directly to the supreme court. In those states all reference to the intermediate appellate level could be omitted because the requirement of "due process" is certainly satisfied by the opportunity for one appeal from every decision. If the volume of appellate work is considerable, however, intermediate courts of appeal serve to expedite business and may be used, under appropriate rules of court, to operate as a sifting device so that only the truly major issues may be appealed to the supreme court. In the absence of a provision for an intermediate appellate tribunal, with appellate case loads increasing, some states have occasionally found it necessary to split the supreme court into two or more separate panels to dispose of more cases. Difficulties with this procedure may begin to arise, however, when conflicts in decisions require a hearing by the full court to avoid uncertainty in the law. When the volume of appellate work warrants the cost, a court of intermediate appeals should be authorized in the constitution.

The chief judge of the supreme court, as administrative head of the judicial system, may assign judges freely within each level of the court system and, for temporary service, he may assign judges from one level to another. In his house-keeping functions he is assisted by an administrative director whom he appoints with the approval of the supreme court. Further in aid of a unified administration and to advance flexibility of the system, the supreme court is granted power to make rules both to govern the administration of all courts and to govern practice and procedure in civil and criminal cases. These rules are to have the force of law and may be changed only by a two-thirds vote of all the members of the legislature.

The *Model* takes a firm position for an appointive judiciary holding office, after an initial term of seven years, during life or good behavior. There is considerable, if not unanimous, agreement that an appointive judiciary is preferable to an elective one because it enhances judicial independence and because a judicial candidate cannot — and usually does not — run for office in the same manner as candidates for legislative and executive office. Moreover, the attributes that make for good judicial qualifications and temperament are not appropriate subjects for meaningful public debate or for a considered vote of the electorate. The election of judges is thus commonly based on irrelevant considerations such as party label rather than on any considered judgement as to qualifications for judicial office. This is especially the case when a candidate runs for statewide judicial office or for judicial office in a large metropolitan center where he is not likely to be known by any substantial portion of the members of the bar, let alone by any substantial portion of the general public.

Because of the general dissatisfaction with a "straight" elective system of judicial selection, either partisan or nonpartisan, many attempts have been made to gain the advantages of an appointive system while retaining the form of an elective one. This is true in varying degrees of the "Missouri Plan," the "Stimson Plan" and the plan in the fifth edition of the *Model State Constitution* (1948) which had been developed by the American Judicature Society. In every one of these plans, the

designation of judicial candidates has been formalized in such a way as to make the subsequent election—be it to place a judge on the bench or to determine whether after service of a short initial term he is to be retained for a longer term—a less important part of the entire process because it only ratifies some prior screening of candidates.

It does not advance the aims of democratic self-government, of course, to retain the mere form of judicial election if the appointive features are the truly significant and determinative ones. Hence, two alternative provisions are proposed: The first, patterned on the federal system and on the systems in Hawaii and New Jersey, providing for gubernatorial appointment with the advice and consent of the legislature; and the second, patterned in part on the Missouri system and on that proposed by the American Bar Association and the American Judicature Society, providing for gubernatorial appointment from a list of names submitted by a separately constituted judicial nominating committee.

To enhance judicial independence further, office is to be held during good behavior after reappointment following an initial term of seven years. In this respect the *Model* follows the New Jersey constitution. In New Jersey, reappointment for life has been virtually automatic, but the initial term of seven years does permit the elimination of inefficient or unsuitable judges whose deficiencies would not suffice for removal for cause.

**Section 6.01. Judicial Power.** The judicial power of the state shall be vested in a unified judicial system, which shall include a supreme court, an appellate court and a general court, and which shall also include such inferior courts of limited jurisdiction as may from time to time be established by law. All courts except the supreme court may be divided into geographical departments or districts as provided by law and into functional divisions and subdivisions as provided by law or by judicial rules not inconsistent with law.

### Comment

The words “unified judicial system,” derived from the Puerto Rican constitution, have been chosen to express the intent of the article explicitly. Other sections carry out this intent by requiring that the jurisdiction of each of the courts “shall be uniform in all geographical departments or districts of the same court” (sec. 6.03); in providing for a single administrative head and organization for the entire system, and for freedom of assignment of judges at each level (sec. 6.05); in providing for a consolidated budget (sec. 6.06); and in authorizing the promulgation of a single set of rules to govern the administration, practice and procedure of the courts (sec. 6.07).

States in which the volume of appellate litigation is comparatively light may wish to eliminate all references, in this and other sections, to the appellate court. (See Introductory Comment to Art. VI, *supra*, p. 78).

Although there is ample authority in section 6.01 for the establishment of inferior courts of limited jurisdiction, provision should not result in the uncontrolled and random development of multiple lower courts of diversified jurisdiction because section 6.03 imposes a requirement of uniformity of jurisdiction “in all geographical departments or districts of the same court.” Thus, the principle of a unified judicial system has been extended into the lower court structure. In consequence, it is unlikely that more than one, or at the most two, statewide inferior courts of limited jurisdiction would be created.

The section authorizes the division of all courts (other than the supreme court) into geographical departments or districts. These geographical divisions of the courts are to be made by law and are therefore expected to have some permanence—though they may, of course, be changed by law if the need should arise. The section also authorizes the division of the courts into “functional divisions and subdivisions” and provides that such functional divisions (i.e., civil, criminal, probate, domestic relations, etc.) may be created “by law or by judicial rules not inconsistent with law.” This is expected to add a considerable measure of flexibility to the system, because it will enable the courts, by a simple change in the rules, to create, combine or abolish functional parts of courts so as to adapt the system promptly to changing needs and to the changing pressure of the volume of litigation in different areas of the law. It should be noted that section 6.03, which requires uniformity of jurisdiction in all geographical departments of the same court, does not require uniformity of jurisdiction of the functional divisions in different geographical departments. A general court sitting in, and with geographic jurisdiction over, a heavily populated city or metropolitan department would be able, therefore, to have a greater number and greater variety of functional parts than a largely rural department of the same court, where a relatively low volume of litigation might make such specialization of function useless and unnecessary.

**Section 6.02. Supreme Court.** The supreme court shall be the highest court of the state and shall consist of a chief judge and        associate judges.

### **Comment**

The section establishing the supreme court as the highest court of the state deliberately leaves blank the number of associate judges. The number “four,” “six” or “eight” ought to be inserted, depending on a number of considerations. The object is to provide a supreme court with an odd number of judges, five to nine in number, so as to avoid, as far as possible, an even division of the court. As to the precise size, a balance must be struck between the desirable aims of having a tribunal large enough to assure an adequate range of views and yet not so large as to interfere with meaningful and close deliberation. A five- to nine-man court meets both aims. The volume of litigation likely to reach the highest tribunal should also be considered. Usually one judge is assigned the responsibility of writing the majority opinion and, unless the number of judges is adequate to share the burden, each judge will have to carry an excessive case load, which tends to produce delay if not deterioration of the quality of written opinions. This, in turn, may have adverse effects on the legal system as a whole because inadequate opinions may fail to supply desired guidance to the lower courts.

A limiting consideration in setting the size is the expense of a large tribunal—which may well be a factor in smaller states. Aside from added judges’ salaries, a larger tribunal can become quite costly if adequate staff services for each additional judge, such as law clerks and secretaries, and maintaining appropriate office accommodations are taken into account.

**Section 6.03. Jurisdiction of Courts.** The supreme court shall have appellate jurisdiction in all cases arising under this constitution and the Constitution of the United States and in all other cases as provided by law. It shall also have original jurisdiction in cases arising under subsections 4.04(b) and 5.08(e) of this constitu-

tion and in all other cases as provided by law. All other courts of the state shall have original and appellate jurisdiction as provided by law, which jurisdiction shall be uniform in all geographical departments or districts of the same court. The jurisdiction of functional divisions and subdivisions shall be as provided by law or by judicial rules not inconsistent with law.

### **Comment**

In defining the jurisdiction of the courts, it has been the aim to permit complete flexibility consonant with the protection of the unified character of the judicial system and the special constitutional status of the supreme court. Hence, with the exceptions to be noted, all courts are to have original and appellate jurisdiction as provided by law, as long as such jurisdiction is uniform in all geographical departments of the same court. The jurisdiction of functional divisions may be set by law or by judicial rules not inconsistent with law, thus allowing diversity as between functional divisions of the same court in different geographical departments (see, in this connection, pertinent notes in sec. 6.01 at p. 81).

The special position of the supreme court is recognized in that it is expressly granted appellate jurisdiction in all cases "arising under this constitution and the Constitution of the United States," and original jurisdiction in matters of legislative districting and gubernatorial succession, subsections 4.04(b) and 5.08(e), which involve issues wherein a single and final adjudication seems best designed to meet the ends of justice without unnecessary delay. These special constitutional reservations of jurisdiction, both appellate and original, protect the supreme court against the possibility of legislative interference with the court's traditional and necessary power of judicial review. Without this special reservation of jurisdiction in constitutional cases, the legislature would be in a position to deny the supreme court the power to review state law or state action for compliance with state or federal constitutional requirements. The power of judicial review should be given express recognition in the state constitution not only because it is a traditional power of the courts but also because it is the most significant safeguard of American constitutional government.

#### **Section 6.04 Appointment of Judges; Qualifications; Tenure; Retirement; Removal.**

(a) The governor shall appoint, with the advice and consent of the legislature, the chief judges and associate judges of the supreme, appellate and general courts. The governor shall give ten days' public notice before sending a judicial nomination to the legislature or before making an interim appointment when the legislature is not in session.

#### **ALTERNATIVE: Subsection 6.04(a). Nomination by Nominating Commission.**

The governor shall fill a vacancy in the offices of the chief judges and associate judges of the supreme, appellate and general courts from a list of nominees presented to him by the appropriate judicial nominating commission. If the governor fails to make an appointment within sixty days from the day the list is presented, the appointment shall be made by the chief judge or by the acting chief judge from the same list. There shall be a judicial nominating commission for the supreme court and one commission for the nomination of judges for the court sitting in each geographical department or district of the appellate court. Each judicial nominating commission shall consist of

seven members, one of whom shall be the chief judge of the supreme court, who shall act as chairman. The members of the bar of the state in the geographical area for which the court or the department or district of the court sits shall elect three of their number to be members of such a commission, and the governor shall appoint three citizens, not members of the bar, from among the residents of the same geographical area. The terms of office and the compensation for members of a judicial nominating commission shall be as provided by law. No member of a judicial nominating commission except the chief judge shall hold any other public office or office in any political party or organization, and no member of such a commission shall be eligible for appointment to a state judicial office so long as he is a member of such a commission and for five three two years thereafter.

(b) No person shall be eligible for judicial office in the supreme court, appellate court and general court unless he has been admitted to practice law before the supreme court for at least \_\_\_\_\_ years. No person who holds judicial office in the supreme court, appellate court, or general court shall hold any other paid office, position of profit or employment under the state, its civil divisions or the United States. Any judge of the supreme court, appellate court or general court who becomes a candidate for an elective office shall thereby forfeit his judicial office.

(c) The judges of the supreme court, appellate court and general court shall hold their offices for initial terms of seven years and upon reappointment shall hold their offices during good behavior. They shall be retired upon attaining the age of seventy years and may be pensioned as may be provided by law. The chief judge of the supreme court may from time to time appoint retired judges to such special assignments as may be provided by the rules of the supreme court.

(d) The judges of the supreme court, appellate court and general court shall be subject to impeachment and any such judge impeached shall not exercise his office until acquitted. The supreme court may also remove judges of the appellate and general courts for such cause and in such manner as may be provided by law.

(e) The legislature shall provide by law for the appointment of judges of the inferior courts and for their qualifications, tenure, retirement and removal.

(f) The judges of the courts of this state shall receive such salaries as may be provided by law, which shall not be diminished during their term of office.

### **Comment**

(a) The *Model* follows a straight appointive system as in the federal judiciary, Hawaii and New Jersey, at least in courts of general jurisdiction. The reasons for the reliance on an appointive rather than an elective judiciary have been stated prominently in the general introduction to this article (*supra*, p. 79). The publicity given to judicial appointments by the governor will give great assurance of proper selections. It should be noted, too, that appointments initially will be for seven years, to be followed by reappointment for life. Thus, after initial appointments and reappointments, judicial appointments will become relatively infrequent so that considerable public attention can be given each. To allow for public discussion before a nomination is sent to the legislature for its consent, ten days' public notice is required.

The alternative provision also provides for appointment rather than election but requires the governor to make appointments from a list of nominees presented to him by the judicial nominating commission for the particular



court. If the governor fails to make an appointment from the list submitted within 60 days, the chief judge makes an appointment from the same list. Separate judicial nominating commissions for the supreme court and for the judges of each court in each and every geographical department are provided for. Each judicial nominating commission is to consist of the chief judge, who is to be its chairman, and of three attorneys elected by all the members of the bar of the particular geographic area, and three citizens, residents of the area, not members of the bar, appointed by the governor. Members of judicial nominating commissions are to hold no other public office or party office and are to remain ineligible for judicial office while members of the commission and for a number of years thereafter.

Alternative proposals for judicial appointment are presented because of a division of informed opinion. Proponents of gubernatorial appointment with the advice and consent of the legislature point to the success of the system in the federal judiciary and in the states which have adopted it. Critics of straight gubernatorial appointment concede it has generally resulted in better choices than have elective systems but claim party affiliation carries undue weight when left to the governor with the advice and consent of the legislature. The critics further contend that an appointive system could produce better judges if considerations of party affiliation were ruled out and if factors of experience and aptitude for judicial office were the sole considerations. The result of their criticism is, in the main, embodied in the alternative provision for gubernatorial appointment from among qualified names submitted by a nominating commission. Essentially, the provision included in the *Model* is a slight adaptation of what has become known as the Missouri-ABA Plan of judicial selection. The plan in its most recent form has been incorporated in a model judiciary article for state constitution approved by the ABA House of Delegates at its 1962 meeting and reproduced in the *Journal of the American Judicature Society* (April 1962), pages 280-282. This plan, by providing that every judge is "subject to approval or rejection by the electorate" every ten years, retains some formal aspects of electing the judiciary while at the same time making the nominating process the truly significant phase. The elective feature of the ABA Plan has not been adopted here for the reasons referred to earlier.

While it is true that the alternative tends to minimize considerations of party and while it is true that nominating commissions have an opportunity to investigate judicial qualifications in a more dispassionate and private manner than does the legislature, judicial nomination by commissions raises a number of other questions.

First, it should be noted that in a large state with many geographic divisions of the court system there may be dozens of nominating commissions, with the chief judge of the supreme court chairman of each. This may impose a considerable burden upon him. The very fact of the number of nominating commissions as well as the fact that they will normally carry on their deliberations in private create additional problems. While local nominating commissions may be expected to know judicial candidates from their localities and while an examination of qualifications in private may give rise to worthwhile evaluations, the close local control combined with the secrecy of deliberation and the absence of public involvement may make it possible for nominations to be controlled by narrow, self-seeking cliques. Thus, while there can be little doubt that a judicial nominating commission for the supreme court will func-

tion well and honestly because of the great interest in its work, there may be some doubt as to whether the work of a judicial nominating commission in naming to judicial office a judge in a relatively obscure and small geographic department of the state's judicial system will engender the same degree of interest to avoid its deliberations from becoming concerned with the partisanship of narrow regional or professional interests rather than with the benefit to the judicial system. If an interest in the quality of the judicial system and its judges is stimulated and maintained throughout the state, this need not happen. Undoubtedly, too, if this interest is stimulated and maintained, a governor and a legislature dominated by the governor's party need not be overwhelmingly guided by considerations of party.

Each of the two systems proposed is likely to bring with it an improvement compared to an elective judiciary. Straight gubernatorial appointment with the advice and consent of the legislature recommends itself to the National Municipal League because of the high degree of visibility. The alternative recommends itself to members of the bar because of the more searching and private evaluation of judicial qualifications it makes possible. Given responsible administration, both appointive systems can be expected to improve the judiciary.

(b) Any number of years of practice of law between five and ten presumably would be a reasonable eligibility requirement. The provision includes a more or less standard conflict of employment clause prohibiting judges from holding other paid employment by the state, its divisions or the United States. Note that this would not exclude judges from purely honorific or unpaid positions such as, for instance, members of school boards or other similar state or local agencies. The legislature would, of course, be free to bar judges from holding such unpaid positions. The subsection provides that judges who become candidates for elective office thereby forfeit judicial office in order to avoid even the appearance of judicial and political conflicts of interest. This is in line with the more recent state constitutions of Hawaii, Alaska and New Jersey.

(c) Although judicial life tenure is desirable to foster judicial independence, the initial term of seven years provides an opportunity to release judges who could not be dismissed on charges but who, nevertheless, are not thought worthy of a life term. It is the normal expectation that judges who have performed adequately will be reappointed for a full term. Retirement at age 70 is mandatory and the provision presumes that an adequate system of pensions for judges will be established. Retired judges may be appointed for special assignments by the chief judge in accordance with the rules of the supreme court.

The intention of the retirement provision is to provide for compulsory retirement at a time of reduced capacity but to make it possible to use good talents and experience for special and temporary assignments.

(d) As a double check upon the honesty and efficiency of the judiciary, two methods for removal of judges are provided—impeachment and removal by the supreme court for cause. Since the supreme court may remove judges of the appellate and general court for cause, impeachment would not be normally used to remove judges of the latter courts. (In this connection, see Comment to sec. 4.19, *Impeachment*, p. 63.)

(e) As has been explained (*supra*, p. 81), these inferior courts will be uniform throughout the state.

(f) Judicial salaries are to be fixed by statute, the only limitation, which is intended to enhance judicial security and independence, being the requirement that a judge's salary may not be diminished during his term of office.

**Section 6.05. Administration.** The chief judge of the supreme court shall be the administrative head of the unified judicial system. He may assign judges from one geographical department or functional division of a court to another department or division of that court and he may assign judges for temporary service from one court to another. The chief judge shall, with the approval of the supreme court, appoint an administrative director to serve at his pleasure and to supervise the administrative operation of the judicial system.

### **Comment**

A court system which administers justice and renders equitable decisions may nevertheless be inadequate if inefficient administration leads to confusion and congested court calendars lead to years of delay.

A court system consists of a great deal more than highly qualified judges. It is a large organization that employs many, sometimes thousands of, persons—clerks, bailiffs, stenographers, guards, probation officers, etc.—and maintains numerous court buildings and law libraries. It must keep huge permanent files, systems of accounts for the collection of fines and fees, and it must provide a vast administrative machinery to keep court papers flowing in the proper channels. All this requires administrative oversight and, in an integrated court system, it also requires unified administrative planning at the top.

The chief judge of the supreme court, as the highest and most influential officer of the court system, logically should be the responsible administrative head. While, as in some states, he may be advised in matters of administration by some judicial council or conference, good administrative practice demands that a single officer have ultimate responsibility.

The chief judge of the supreme court is given the power to assign judges to serve where the need is greatest. This power is essential to equalize workloads and to prevent calendars from getting years behind in some parts of the state—usually in the metropolitan centers—while courts in other areas may be idle. The section limits the power of assignment to some extent in that assignment from a lower to a higher court or from a higher to a lower court may be for temporary service only. Thus an appellate court judge may be only temporarily assigned to serve as a trial court judge and vice versa. On each level, however, assignments may be made freely between geographic departments and between functional divisions.

Administration is a major responsibility and a chief judge who must also carry a full judicial load cannot discharge both functions without adequate assistance. An administrative director is therefore provided. The office has proved its value in a number of states. The duties of the administrative director usually will include the formulation of the consolidated budget, development of personnel standards and office procedures, collection of statistics and other responsibilities delegated by the chief judge.

**Section 6.06. Financing.** The chief judge shall submit an annual consolidated budget for the entire unified judicial system and the total cost of the system shall be paid by the state. The legislature may provide by law for the reimbursement to the state of appropriate portions of such cost by political subdivisions.

#### Comment

For improved management made possible by a unified judicial system, the state is to pay for the costs, thus doing away with the widespread practice of having separate local courts maintained and paid for locally. Since burdens may be greater in some parts of the state than in others, and in view of the fact that local sharing of costs may be part of a state's financial structure, the *Model* allows the legislature to provide for reimbursement to the state by political subdivisions of portions of the cost.

**Section 6.07. Rule-making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by a two-thirds vote of all members.

#### Comment

To place responsibility for judicial administration where it properly belongs, the supreme court is granted rule-making power. This means of judicial rule-making provides flexibility and adaptability whereas, when provisions for practice and procedure are provided by the legislature alone, they frequently become outmoded and unresponsive to the needs of the system. Where legislative promulgation of rules of practice and procedure is relied upon, such matters often are considered of relative unimportance in comparison to the pressures of substantive lawmaking. Needed changes fail to be adopted, less because of opposition than because the legislature is not sufficiently interested. To guard against untrammelled judicial rule-making, such as any possible tendency of rules to invade the area of substantive law, the legislature is granted authority to change them by special majority.

## ANNEX NUMBER 8

### *Statement of Montgomery County Bar Association in Support of Retention of Continued Existence of Separate Orphans' (or Estates) Courts*

There is now pending before the legislature twelve resolutions for Constitutional reform sponsored by the Pennsylvania Bar Association. One of these twelve — being Resolution No. 5 — deals with certain reforms to the Judiciary branch of our state government. The Montgomery County Bar Association wishes to point out to you, our legislative representatives one area of Resolution No. 5 in which it is proposed to abolish all separate orphans' courts except those in Philadelphia and Allegheny Counties. Resolution No. 5 if enacted in its present form would abolish the separate Orphans' Court of Montgomery County. The Montgomery County Bar unanimously supports the retention of the Orphans' Court of Montgomery County. We invite your attention to the following facts which we strongly feel justify the retention of separate orphans' or estates courts.

From the time of William Penn there has been *an* orphans' court in every judicial district in Pennsylvania. The Constitution of 1874 provided for a *separate* orphans' court in every county with a population exceeding 150,000, and in any other county where established by an act of the legislature. There are now 20 such *separate* courts with their own judges.

The volume of work and complexity of problems confronting orphans' courts have increased enormously through the years. In an age where specialization has become inevitable and essential to administer justice efficiently, the wisdom of providing separate courts to deal with estates has been proven, and they are current with their business.

As Resolution No. 5 to amend the Judiciary Article of the Constitution was drafted originally, *all* orphans' courts would be abolished. Their jurisdiction would be mingled with that of the (then) common pleas courts, where back-logs already exist. Later, by action of the Committee, only, the draft was amended to provide *separate* "Estates Courts" in Philadelphia and Allegheny Counties. Before reaching the initial conclusion to abolish *all* orphans' courts no survey was made, or statistics compiled, or facts of any kind found.

*By subsequently amending the Resolution to preserve separate Orphans' (Estates) Courts in Philadelphia and Allegheny Counties the need for continuing such a specialized court was recognized.* What the committee failed to do was to apply the same yardstick to other counties now having separate courts as well.

By any standard, Montgomery County's separate Orphans' Court should be preserved. Philadelphia's six judges amount to one per 333,333 of its 2,000,000 popula-

tion. Allegheny County's four judges amount to one per 407,000 of its 1,628,000 population. Montgomery County has but one judge for its 1,628,000 population. Montgomery County has but one judge for its more than 520,000 inhabitants and the Montgomery County Planning Commission projects that the population of the county will be 590,000 by 1965, and 678,000 by 1970. The business of the Orphans' Court of Montgomery County has increased steadily since its creation in 1901, and in 1963 included the processing of 944 accounts, 671 miscellaneous petitions and 358 adoptions. Our orphans' court judge in addition to his routine adjudications held 109 hearings and rendered 49 written opinions. The volume and importance of one phase of the business is illustrated by the fact that inheritance tax appraisals in 1963 totalled \$167,660,858.93 and tax of \$6,022,884.84 was paid to the Commonwealth. This was not an exceptional year; for example in 1960 appraisals totalled \$276,890,-699.67 and in 1961 a tax of \$7,613,312.41 was paid.

*There is not one single reason which would justify the existence of a separate orphans' or estates court in Philadelphia and Allegheny Counties which does not apply with even more force in Montgomery County!*

An important point wholly ignored by the proponents of abolition of all orphans' courts is the consequence of such a drastic change on the administration of justice:

- (1) All applicable statutes, recently and laboriously revised, would have to be revised again; and with dual provisions for both district courts and estates courts.
- (2) The Pennsylvania Rules of Civil Procedure, the Supreme Court Orphans' Court Rules and ALL local rules of Court—Common pleas and orphans'—would have to be revised.
- (3) Where would wills be probated, trust instruments be filed, records kept, dockets transferred and revised?

The confusion would be nothing less than appalling. By any pragmatic test the whole idea is naive and unworkable.

So we urge you as our legislative representatives to vote *YES* in favor of the retention of separate Orphans' Courts (by whatever name they may be called) in all counties of Pennsylvania in which such courts now exist.

## ANNEX NUMBER 9

### *Report of the Governor's Commission on Constitutional Revision (1964)*

The Governor's Commission on Constitutional Revision was appointed by Governor Scranton in December 1963. At that time, the proposal of the Pennsylvania Bar Association for constitutional revision of the Judiciary Article took a different form than the one adopted in 1966 (See Annex No. 5) although basically, there is little difference between them. The Commission, under the chairmanship of William A. Schnader, a former Attorney General of the Commonwealth, adopted the then existing Bar proposal in the following language:

It would be impossible without making this Report unduly lengthy to refer to every modification we are recommending but we are calling attention to some of the outstanding proposals, as follows:

8. Completely reorganizing the judicial machinery of this State in such a way as

(a) no longer to have judges of the Supreme and Superior Courts and of all the courts in Allegheny and Philadelphia Counties, elected on a partisan political basis. Nominating Commissions composed of 3 laymen, 3 lawyers and one judge would nominate candidates from whom the Governor would be compelled to make appointments to fill vacancies. The appointed judge would serve at least two years and then be obliged to run for the full ten-year term against his record, — not against another candidate. If he lost the election there would be a vacancy and the appointive process would take over. In other judicial districts there would be local option to adopt the new system;

(b) to render the Supreme Court the administrative head of all courts in Pennsylvania, thus giving the State a unified court system;

(c) to eliminate magistrates, aldermen and justices of the peace and to substitute for them Community Courts presided over by judges who would be members of the Bar of the Supreme Court;

(d) to prohibit the assignment of any non-judicial duties to a judge;

(e) to forbid a judge to take any part of or make any contribution to a political party or organization.

This proposal would also eliminate the eight [now ten] separate Common Pleas Courts and the County Court in Philadelphia. And in Allegheny County it would eliminate the Common Pleas Court, the County Court and the Juvenile Court. In both of these counties, there would be a District Court which would perform all the functions heretofore performed by the abolished courts. Orphans' Courts would be renamed Estates' Courts and outside of Allegheny and Philadelphia Counties, their work would be merged with the work of the District Courts except that the Supreme Court could recommend to the Legislature the establishment of a separate Estates' Court in any Judicial District.

## **\*\*ARTICLE V. THE JUDICIARY**

### **Section 1 — Courts**

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of a Supreme Court, a Superior Court, District Courts, Estates Courts, and Community Courts. Other courts may be established by the General Assembly but only upon prior certification of the necessity therefore by the Supreme Court.

### **Section 2—The Supreme Court**

(a) The Supreme Court shall consist of seven justices, one of whom shall be Chief Justice of Pennsylvania. In the absence of the Chief Justice, the member of the Court senior in length of service on the court shall serve in his place.

(b) The Supreme Court shall be the highest court of the Commonwealth and shall have final appellate jurisdiction. It shall have no original jurisdiction except as may be expressly provided in this Constitution. It may assume jurisdiction of actions pending in any other court at any stage of the proceedings. It shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction. Appeals from final judgments of the District Court shall lie as of right directly to the Supreme Court only in cases of judgments imposing sentences of death or life imprisonment. In all other cases, appeals permitted by law shall be assigned by the Supreme Court to such court as the Supreme Court shall by Rule prescribe.

### **Section 3—The Superior Court**

(a) The Superior Court shall consist of nine judges, except that the Supreme Court may from time to time assign additional judges from among the judges of the District Court or the Estates Court to temporary service upon the Superior Court as the business of the Superior Court may require. The number of judges of the Superior Court may be changed by the General Assembly but only upon prior certification of the necessity therefor by the Supreme Court. The Court may act in panels of three or more judges, and shall sit at such places and times as the Supreme Court shall by Rule prescribe.

(b) The Superior Court shall have no original jurisdiction. It shall exercise the appellate jurisdiction assigned to it by Rule of the Supreme Court. When no other court has been designated by Rule of the Supreme Court, appeals permitted by law may be taken to the Superior Court.

(c) One of the judges of the Superior Court shall serve as its President Judge. In the absence of the President Judge the member of the Superior Court senior in length of service on the court shall act in his place.

### **Section 4—The District and Estates Courts**

(a) There shall be one District Court for each judicial district. Initially, the number and boundaries of the judicial districts, and the number of judges to be elected from each district, shall be as at present, but the Supreme Court shall recommend from time to time to the General Assembly, such changes in the foregoing as the Supreme Court may deem advisable. The President Judge of the District Court of each judicial district shall, under the direction of the Chief Justice, supervise the



Court's judicial business, including the assignment of the Court's judges within the district.

(b) In the districts embodying Allegheny and Philadelphia Counties, respectively, there shall be a separate Estates Court which initially shall consist of the number of judges authorized to sit on the Orphans' Courts of those counties, respectively, when this Section becomes effective. The jurisdiction of these Courts shall continue to be the jurisdiction now exercised by the Orphans' Courts of those two counties respectively, unless modified by Rule of the Supreme Court. In any other districts, there may be separate Estates Courts as the General Assembly may determine upon recommendation of the Supreme Court.

(c) In all districts except those containing separate Estates Courts the District Courts shall have unlimited original jurisdiction in all cases except such as may be assigned exclusively to the Community Courts by Rule of the Supreme Court; and in districts containing separate Estates Courts the District Courts shall have the same original jurisdiction as in other counties, except that they shall not have jurisdiction in cases over which the Estates Courts of their respective districts shall have jurisdiction.

(d) The District Courts shall have such powers of review as may be provided by Rule of the Supreme Court of the actions of the Community Courts and as long as their offices continue to exist of magistrates, police magistrates, aldermen, justices of the peace and traffic courts and of administrative officers or agencies.

(e) The District Courts may exercise their jurisdiction through such appropriate divisions, including civil, criminal, and, except in districts in which there are separate Estates Courts, estates divisions, as the Supreme Court shall by Rule prescribe. There shall be a Presiding Judge for each division which may be created in any district.

### **Section 5 — The Community Courts**

(a) The Community Courts shall be courts of such limited jurisdiction and shall exercise their jurisdiction through such appropriate divisions as the Supreme Court shall by Rule prescribe.

(b) The number of judges constituting the Community Courts shall be determined for each judicial district by Rule of the Supreme Court. Judges of the Community Court for each judicial district shall be selected in the same manner as the Judges of the District Court of such district. The President Judge of the District Court for each judicial district shall designate the places within the district where the Community Court for that district shall sit, subject to review by the Supreme Court.

(c) The President Judge of the District Court of each judicial district may, in accordance with Rules prescribed by the Supreme Court, appoint Commissioners for the district to accept bail, issue warrants, or otherwise assist the judges of the Community Court of the district in the performance of their judicial duties within the district as the Supreme Court may by Rule prescribe.

### **Section 6 — Qualifications of Judges and Commissioners**

(a) Justices and judges shall be citizens of the Commonwealth. Judges of the District Courts, Estates Courts and Community Courts shall be residents of the judicial districts for which they shall be selected and they shall continue to reside

in the districts in which they serve. All justices and judges shall be members of the Bar of the Supreme Court.

(b) Commissioners shall be citizens of the Commonwealth and residents of the judicial districts for which they shall be appointed. They shall possess such additional qualifications and shall be subject to such restrictions as to activities outside their official duties, as the Supreme Court shall by Rule prescribe.

### **Section 7—Method of Selection of Certain Judges**

(a) Whenever a vacancy occurs by death, resignation, removal from office, expiration of a term of office, or creation of additional judgeships, in the office of Justice of the Supreme Court or of Judge of the Superior Court or of Judge of the District Courts, Judge of the Estates Courts, or Judge of the Community Courts of the respective districts embodying Philadelphia County and Allegheny County, the Governor shall fill the vacancy by appointment from a panel of three persons legally qualified for the office, nominated to him by a Judicial Nominating Commission established and organized as hereinafter provided. If none of the persons so nominated is acceptable to the Governor, he shall so notify the Judicial Nominating Commission within sixty days of his receipt of the nominations. Upon receipt of such notification, or upon expiration of such sixty-day period without such notification if no appointment has been made, the Judicial Nominating Commission shall nominate a second panel of three other persons. If none of the persons nominated in either panel is appointed by the Governor within thirty days of his receipt of the nominations in the second panel, the appointment shall be made by the Chief Justice from among the persons nominated in either panel.

(b) At any municipal or general election, the qualified voters of any other judicial district may, by a majority vote of those voting on the question, elect to have the judges of their district appointed in the manner provided for the respective districts embodying Philadelphia County and Allegheny County.

Where the qualified voters of any other judicial district have elected to fill vacancies in the office of judge in the manner provided for the respective districts embodying Philadelphia County and Allegheny County, the qualified electors of the district may thereafter, at a municipal or general election, by a majority vote of those voting on the question, elect to discontinue that method of filling judicial vacancies.

Either of the foregoing questions shall be placed upon the ballot in any judicial district by petition which shall be in such form as shall be prescribed by the officer of the Commonwealth having supervision over elections. Any such petition shall be filed with such officer. It shall be signed by not less than 200 qualified electors of the judicial district. The signing of such petitions, the time of circulating them, the affidavits of the persons circulating them and all other details not contained herein shall be governed by the general laws relating to the signing of nominating petitions for the office of Governor.

(c) There shall be a single Judicial Nominating Commission for the Supreme and the Superior Courts, and separate Judicial Nominating Commissions for each of the districts in which judicial vacancies are to be filled in the manner provided by Subsection (a) of this Section. Each such Commission shall be composed of one judge, three members of the Bar selected by the members of the Bar of the district, and three lay citizens. The judge and the members of the Bar on each Commission shall

be selected in the manner and in accordance with Rules prescribed by the Supreme Court. The lay citizens on each Judicial Nominating Commission shall be appointed by the Governor. Members of the Judicial Nominating Commission for the Supreme and the Superior Courts shall be chosen from the Commonwealth at large, and members of the Judicial Nominating Commission for a judicial district shall be chosen from that district except that the judge may be chosen from outside the district.

During the terms of office for which members of the Judicial Nominating Commissions have been chosen, they shall not hold any office in a political party or organization, nor, except for the members who are judges, shall they hold any public office or appointment for which they receive salary or other compensation. They shall not be compensated for service on the Commission, but shall be reimbursed for travel and other expenses necessarily incurred in the discharge of their official duties.

The members of each Judicial Nominating Commission shall serve for terms of three years, staggered except in the case of the Judge on the Commission, so that two members, one selected by the Bar and the other appointed by the Governor, shall be selected each year. Of the first members selected following the effective date of this Section, two, one selected by the Bar and one appointed by the Governor, shall be selected for one-year terms and two other members selected by the Bar and by the Governor respectively, shall be selected for two-year terms. Vacancies in the membership of any Judicial Nominating Commission shall be filled for the balance of the term by the same appointing power as appointed the member whose place has become vacant. No member of a Judicial Nominating Commission shall serve for more than two successive three-year terms on that Commission, but he may be reappointed or reelected after a lapse of one year. The members of each Commission shall elect one member to serve as Chairman for a term of one year, but no person shall serve as Chairman for more than three years in succession. Each Commission shall act only with the concurrence of a majority of all its members.

(d) Each justice or judge appointed from the panel shall hold office for a term ending the first Monday of January following the next appropriate election held more than twenty-four months following his appointment. Not less than one hundred twenty days before the expiration of the term of office of a justice or a judge appointed by the Governor or by the Chief Justice or not less than one hundred twenty days before the expiration of the term of office of an elected justice or judge entitled to succeed himself, the justice or judge may file in the office of the official in charge of statewide elections, a declaration of candidacy for election to succeed himself. If he does not file such declaration, a vacancy shall exist at the end of his term to be filled by appointment by the Governor or the Chief Justice as herein provided. If a justice or a judge files a declaration, his name shall be submitted to the electors on a separate judicial ballot, without party designation, at the election immediately preceding the expiration of his term of office, to determine only the question whether he shall be retained in office. If a majority of the votes cast are against retaining the justice or judge, a vacancy shall exist upon the expiration of his term of office, to be filled by appointment by the Governor or the Chief Justice as herein provided. If a majority of the votes cast are in favor of retaining a justice or a judge, he shall be deemed elected for the full term of office provided herein, unless sooner removed. At the expiration of each term any justice or judge entitled to succeed himself shall be eligible for retention in office by election in the manner provided herein.

(e) The General Assembly shall enact the laws necessary to provide for the elections of justices or judges prescribed in this Article.

### ***Section 8—Election and Tenure of Judges, Method of Selection of Chief Justices, President Judges and Presiding Judges***

(a) Justices of the Supreme Court and Judges of the Superior Court shall be elected by the qualified electors of the State at large for terms of ten years. Judges of the District Courts and of the Estates Courts shall be elected by the qualified electors of their respective judicial districts for terms of ten years. Judges of the Community Court shall be elected for terms of not more than ten years as the General Assembly shall from time to time prescribe. The tenure of any justice or judge shall not be affected by changes in judicial districts or by the reduction of the number of judges.

(b) Whenever a vacancy occurs by death, resignation, removal from office, or creation of additional judgeships in the office of judge of the District Court, of the Estates Court, if any, or of the Community Court for any district in which vacancies are not to be filled in the manner prescribed by Section 7 (a) hereof, the vacancy shall be filled by appointment by the Governor, the appointee to serve until the first Monday of January next succeeding the first municipal election which shall occur three or more months after the happening of the vacancy.

(c) The Chief Justice of Pennsylvania shall be elected for a term of five years by the members of the Supreme Court and shall always be eligible for reelection. A member of the Court may resign the office of Chief Justice without resigning from the Court.

The President Judge of the Superior Court, and the President Judge of the District Court, and of the Estates Court, if any, for each judicial district, shall be appointed by the Chief Justice of Pennsylvania and shall serve in such capacity at his pleasure.

The President Judge of the Community Court for each judicial district and the Presiding Judge of any division of the District Court shall be appointed by the President Judge of the District Court for the District and shall serve at his pleasure.

### ***Section 9—Compensation and Retirement of Judges***

(a) Justices and judges shall receive compensation paid by the Commonwealth as prescribed by law, which shall not be diminished during their terms of office unless by general law applying to all salaried officers of the State.

(b) Justices and judges shall be retired at such age, not less than seventy years, and with such retirement compensation, as shall be provided by the General Assembly. Notwithstanding the expiration of the term for which they were last elected, or their retirement or resignation prior thereto, retired justices and judges may, with their consent, be assigned by the Supreme Court to render such judicial service as may be prescribed by Rule of the Supreme Court.

### ***Section 10—Removal, Suspension and Discipline of Judges***

(a) Any justice or judge who shall become a candidate for an elective non-judicial office, or who shall be convicted of misbehavior in office by a court of com-

petent jurisdiction, or who shall be disbarred as a member of the Bar of the Supreme Court, shall automatically forfeit his office.

(b) A justice of the Supreme Court may be retired by the Governor upon certification by the Judicial Nominating Commission for the Supreme and Superior Courts, after appropriate hearing, that such Justice is so mentally or physically incapacitated as substantially to prevent him from performing his duties.

(c) The Supreme Court may, in accordance with Rules prescribed by it, after notice and a hearing by such tribunal as it may by Rule designate or establish, retire any judge, other than a Justice of the Supreme Court, who is so mentally or physically incapacitated as substantially to prevent him from performing his duties.

(d) Justices and judges shall be subject to removal by impeachment. No justice or judge against whom impeachment proceedings are pending shall exercise any of the duties of his office until he has been acquitted.

(e) Any judge may also be removed from office, suspended without pay, or otherwise disciplined for misconduct in office, neglect of duty, violation of any canon of legal or judicial ethics adopted by the Supreme Court, conduct which shall prejudice the proper administration of justice, or such other grounds as the General Assembly may provide. Such removal or discipline shall be by the Supreme Court after notice and a hearing by such tribunal as the Supreme Court may by Rule designate or establish. Proceedings for removal, suspension, or discipline may be initiated by the Supreme Court on its own motion or on petition of the Judicial Council or of any Bar Association.

### ***Section 11 — Non-judicial Duties and Prohibited Activities***

(a) No duties, other than judicial duties, shall be imposed by law upon the courts or upon any of the justices or judges thereof, nor shall any power of appointment be conferred upon them except such as relates to the exercise of the judicial power of this Commonwealth or the administration of the courts as provided in this Article.

(b) No justice or judge shall directly or indirectly make any contribution to or hold any office in a political party or organization, nor, while retaining judicial office, shall he become a candidate at either a primary or a general election for any office other than a judicial office.

(c) No justice or judge shall practice law or engage in other gainful pursuit, but this prohibition shall not prevent lecturing, teaching, writing or acting as an officer of a non-profit professional organization. Nor shall he hold any other office or appointment of trust or profit under the United States or this Commonwealth or any political subdivision thereof, except inactive service in the armed forces.

### ***Section 12 — Administration of Courts***

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts of this Commonwealth, including the temporary assignment of Judges from one court or district to another. The powers of administration vested in the Supreme Court shall be exercised by the Chief Justice, in accordance with Rules prescribed by the Supreme Court. The Supreme Court shall appoint an administrative director and staff, who shall assist the Chief Justice in supervising the administrative operations of the judicial system and shall serve at his pleasure.

(b) The Supreme Court shall have power to prescribe Rules in all civil and crim-

inal actions and proceedings for all courts, governing administration, practice and procedure, including rules of evidence, appeals, appellate jurisdiction including time for appeals, and the issuance of all writs necessary or appropriate in aid of the jurisdiction of the respective courts. These rules shall have the force and effect of law and shall suspend all statutes inconsistent therewith.

### **Section 13—Clerks of Court. Court Personnel**

(a) There shall be such Clerks of Court and such other non-judicial personnel as shall be necessary for the effective performance of the judicial work of the Commonwealth. The Clerks of the District Courts, or of the Estates Courts, their assistants, and other non-judicial personnel within each judicial district shall be appointed by the judges of the District Court or of the Estates Court, as the case may be, of that district, until such time as the Supreme Court shall otherwise provide in accordance with Rules prescribed by it.

(b) The Supreme Court may prescribe a merit system for appointment, promotion, removal, discipline, and suspension of non-judicial personnel in the judicial system and may provide for exempt categories. The Supreme Court may administer the merit system through an administrative director, or may provide for its administration by other appropriate agencies of the State or political subdivisions, who shall be required to render necessary assistance to the Court.

### **Section 14—Judicial Council**

(a) The Supreme Court shall establish a Judicial Council consisting of such number of members and selected in such manner as the Supreme Court may by Rule prescribe.

(b) The Judicial Council shall conduct studies for improvement of the administration of justice and for law reform, and shall make reports and recommendations to the Supreme Court and to the General Assembly at intervals of not more than two years. The Judicial Council shall perform such other duties as may be prescribed in this Article or assigned to it by law or by Rule of the Supreme Court.

## **SCHEDULE**

That no inconvenience may arise from changes in Article V of the Constitution of the Commonwealth, and in order to carry the same into complete operation, it is hereby declared that:

1. This amended Article, except as otherwise provided herein, shall become effective on the 31st day of December of the year next succeeding its adoption; and the tenure of the Chief Justice and of Justices of the Supreme Court and of Judges of the Superior Court then in office shall not be affected by this Article. Judges of the Superior Court shall be eligible for reelection.

2. The Courts of Oyer and Terminer and General Jail Delivery, Quarter Sessions of the Peace, the County Court of Philadelphia, the County Court of Allegheny County, the Juvenile Court of Allegheny County, the separate Courts of Common Pleas of Philadelphia County, and except as otherwise provided in this Article, the Orphans' Courts, are abolished, and their jurisdiction and powers shall be exercised by the District Court provided by this Article. The tenure of judges of the abolished courts shall not be affected by the abolition of the same, and the judges

thereof are hereby constituted for the remainder of their respective terms as judges of the District Court or in Allegheny and Philadelphia Counties, judges of the Estates Court, as the case may be, in their present respective judicial districts and shall be eligible for reelection as judges thereof.

3. The justices of the peace's, aldermen's, and magistrates' courts, the Traffic Court of the City of Pittsburgh, the Police Magistrates of the City of Pittsburgh, and the Traffic Court of the City of Philadelphia are abolished effective at the expiration of three years after the remainder of this Article becomes effective and the terms of office of the incumbent judges thereof shall then terminate. Subsequently the jurisdiction and powers of the aforesaid courts shall be exercised by the Community Court provided by this Article until otherwise provided, by Rule of the Supreme Court of Pennsylvania.

4. The Board of Claims and the Board of Arbitration of Claims shall continue to exercise the jurisdiction now provided by law until otherwise provided by the General Assembly but shall not be deemed courts forming part of the judicial system created by this Article.

5. (a) The offices of Clerk of the Court of Quarter Sessions of the Peace, of Oyer and Terminer, and of Clerk of the Orphans' Court, and the office of Prothonotary are abolished.

(b) The present Prothonotaries of the Common Pleas Court shall become clerks of the District Court within their respective districts for the balance of their terms, subject to the provisions of this Article.

6. (a) All causes and proceedings pending in the courts of record not continued by this Article, except those pending before the Board of Claims and the Board of Arbitration of Claims, shall be transferred to the District Court, or when appropriate, to the Estates Court, which shall have authority to dispose of all actions so transferred or to enforce any judgment, order, sentence, or decree henceforth or heretofore imposed with the same force and authority as if such actions had originally been within the jurisdiction of the transferee Court and been commenced herein. All dockets, books, records, documents, or other papers in the possession of the clerks of the courts of record whose existence is not continued shall be transferred to the clerks of the District Courts or when appropriate, of the Estates Court.

(b) All matters pending before justices of the peace, aldermen and magistrates, the Traffic Courts of the Cities of Philadelphia and Pittsburgh and the Police Court of the City of Pittsburgh shall be transferred to the Community Courts, which shall have the authority to dispose of all transferred actions or to enforce any judgment, order or sentence heretofore entered or imposed.

All books, records, documents, and papers in the possession of those courts shall be transferred to the Community Courts of their respective districts.

Section 2. The existing Article V of the Constitution of the Commonwealth of Pennsylvania, which reads as hereinafter set forth, is hereby repealed.

## ANNEX NUMBER 10

### *American Bar Association Canons of Judicial Ethics*

#### PREAMBLE

In addition to the Canons for Professional Conduct of lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its view respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

#### ANCIENT PRECEDENTS

"And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it." — Deuteronomy, I, 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous." — Deuteronomy, XVI, 19.

"We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it." — Magna Charta, XLV.

"Judges ought to remember that their office is *jus dicere* not *jus dare*; to interpret law, and not to make law, or give law." . . .

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue." . . .

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions thought pertinent." . . .

"The place of justice is a hallowed place; and therefore not only the Bench, but



the foot place and precincts and purprise thereof ought to be preserved without scandal and corruption." . . . — Bacon's Essay "of Judicature."

### ***Judicial Canon 1. Relations of the Judiciary.***

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

### ***Judicial Canon 2. The Public Interest***

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

### ***Judicial Canon 3. Constitutional Obligations***

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

### ***Judicial Canon 4. Avoidance of Impropriety***

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

### ***Judicial Canon 5. Essential Conduct***

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

### ***Judicial Canon 6. Industry***

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

### ***Judicial Canon 7. Promptness***

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

### ***Judicial Canon 8. Court Organization***

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and

other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

#### ***Judicial Canon 9. Consideration For Jurors and Others***

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

#### ***Judicial Canon 10. Courtesy and Civility***

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

A judge should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

#### ***Judicial Canon 11. Unprofessional Conduct of Attorneys and Counsel***

A judge should utilize his opportunities to criticize unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

#### ***Judicial Canon 12. Appointees of the Judiciary and Their Compensation***

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

#### ***Judicial Canon 13. Kinship or Influence***

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

#### ***Judicial Canon 14. Independence***

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

### **Judicial Canon 15. Interference in Conduct of Trial**

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

### **Judicial Canon 16. Ex Parte Applications**

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

### **Judicial Canon 17. Ex Parte Communications**

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

### **Judicial Canon 18. Continuances**

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the pub-

lic interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

### ***Judicial Canon 19. Judicial Opinions***

In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

### ***Judicial Canon 20. Influence of Decisions Upon the Development of the Law***

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

### ***Judicial Canon 21. Idiosyncrasies and Inconsistencies***

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of

punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

#### ***Judicial Canon 22. Review***

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

#### ***Judicial Canon 23. Legislation***

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

#### ***Judicial Canon 24. Inconsistent Obligations***

A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

#### ***Judicial Canon 25. Business Promotions and Solicitations for Charity***

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

#### ***Judicial Canon 26. Personal Investments and Relations***

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

### ***Judicial Canon 27. Executorships and Trusteeships***

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

### ***Judicial Canon 28. Partisan Politics***

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities. Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

### ***Judicial Canon 29. Self-Interest***

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

### ***Judicial Canon 30. Candidacy for Office***

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

### ***Judicial Canon 31. Private Law Practice***

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practises law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should never practice in the court in which he is judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practice law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

### ***Judicial Canon 32. Gifts and Favors***

A judge should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment.

### ***Judicial Canon 33. Social Relations***

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him, be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.

### ***Judicial Canon 34. A Summary of Judicial Obligation***

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

### ***Judicial Canon 35. Improper Publicizing of Court Proceedings***

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated

to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

### ***Judicial Canon 36. Conduct of Court Proceedings***

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness.



# ANNEX NUMBER 11

## SALARIES OF STATE COURT ADMINISTRATIVE AND RELATED OFFICERS (Grouped according to scope of assignment)

Scope of Assignment: Statewide

Titles: Administrative Director, Judicial Administrator, Judicial Statistician, Executive Secretary of [Judicial Conference] [Judicial Council], Administrative Assistant, Chief Legal Executive Assistant.

|                           |                           |                            |
|---------------------------|---------------------------|----------------------------|
| Alaska.....\$21,000       | Kentucky.....\$11,400     | Oklahoma.....\$10,000 to   |
| Arizona.....12,500        | Louisiana.....15,000      | 10,900                     |
| Arkansas.....15,000       | Maryland.....20,000       | Oregon.....11,400          |
| California.....30,000     | Massachusetts.....18,000  | Puerto Rico.....16,000     |
| Colorado.....14,400       | Minnesota.....20,000      | Rhode Island.....10,530 to |
| Connecticut.....10,760 to | Michigan.....20,000       | 12,194                     |
| 15,080                    | Missouri.....6,800        | Tennessee.....12,000       |
| Hawaii.....15,800         | New Jersey.....20,000     | Virginia.....15,000        |
| Illinois.....25,000       | New Mexico.....11,000     | Washington.....15,000      |
| Iowa.....15,500           | New York.....34,500       | Wisconsin up to.....20,000 |
| Kansas.....12,000         | North Carolina.....19,500 | United States.....27,000   |

Average salary.....\$16,741

Median salary.....\$14,400

## ANNEX NUMBER 12

### *Model Act to Provide for an Administrator for the State Courts as Amended\**

#### AN ACT

[Providing for the Creation and Operation of the Office of Administrator of Courts.]

*Comment:* In the proposed amendments to follow no provision is included comparable to Section 5, Judicial Conference, of the Model Act. It is felt that provision for a judicial council or judicial conference is properly the subject of a separate law or rule of court. (Enacting Clause)

**SECTION 1.** In this Act, unless the context otherwise requires, "Court" means any tribunal recognized as a part of the judicial branch of government including any tribunal having jurisdiction in traffic cases. [. . . insert name of any court to be excluded.]

*Comment:* This section establishes the scope of the act at the outset and shifts the burden of restriction to individual states that adopt it. In some states consideration should be given to the necessity of specifically mentioning justices of the peace, magistrates and other officers and tribunals which may not be a "court" or a part of the judicial branch. Approval of this section removes the necessity for Section 6 of the Model Act.

**SECTION 2.** The Office of Administrator of Courts is created with an administrative director who shall be the head thereof.

**SECTION 3.** The administrative director is appointed by and serves at the pleasure of the [the court of last resort]. He shall devote full time to his official duties to the exclusion of engagement in any other business or profession for profit. [His salary shall be fixed by [the court of last resort] in an amount not to exceed the minimum salary of any judge of court with primary state appellate jurisdiction.]

*Comment:* In some states compensation may be required to be fixed in some other manner and appropriate changes made in this section.

**SECTION 4.** The administrative director, with the approval of [the court of last resort], shall appoint and fix the compensation of such assistants as are necessary to enable him to perform his duties.

*Comment:* See comments to Section 3.

\*This is a 1960 revision of the Model Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1948.

**SECTION 5.** The administrative director shall, under the supervision and direction of [the court of last resort]:

(a) Formulate and submit to the [court of last resort] recommendations for the improvement of the judicial system, including traffic case procedure.

*Comment:* The traffic case procedure should include one statewide form of complaint or information and summons, issuances of which are subject to quarterly audit by the administrative director. An annual report of the director to the court of last resort and to the legislature should include a statistical resume of these audits as well as a list of all courts and tribunals with jurisdiction to hear and determine traffic violation cases.

(b) Examine the administrative and business methods and systems employed in the offices of the clerks of court and other offices related to and serving the courts and make recommendations for necessary improvement.

(c) Collect and compile statistical data and other information on the judicial work of the courts and on the work of other offices related to and serving the courts and publish periodic reports with respect thereto.

(d) Examine the state of the dockets and practices and procedures of the courts and make recommendations for the expedition of litigation.

(e) Prepare and submit budget estimates of state appropriations necessary for the maintenance and operation of the judicial branch.

(f) File requests for permission to spend funds appropriated for the judicial branch and approve all vouchers for the expenditure of such funds.

(g) Secure and maintain accommodations and purchase, exchange and distribute equipment and supplies for the judges, clerks, and other offices, officers, and employees of the courts supported by state appropriations.

(h) Collect and compile statistical data and other information on the expenditures and receipts of the courts and related offices and publish periodic reports.

(i) Consult with and assist the clerks of court, and other officers and employees of the courts and of offices related to and serving the courts.

(j) Investigate complaints with respect to the operation of the courts and make such recommendations as may be appropriate.

[(k) Act as secretary of the judicial [council, conference] and for the committees thereof.]

(l) Perform such additional duties as may be assigned by rule of the [court of last resort].

(m) Prepare and publish an annual report on the work of the courts and on the activities of the administrative office of the courts.

*Comment:* Section 5 is a complete restatement of Section 3 of the Model Act defining the powers and duties of the administrative director of the courts.

The sphere of his duties is broadened. Subsection (l) leaves the door open for the performance of services in addition to those specifically enumerated.

**SECTION 6.** All judges, clerks of court, and other officers or employees of the courts and of offices related to and serving the courts shall comply with all requests made by the administrative director for information and statistical data relative to the work of the courts and of such offices and relative to the expenditure of public moneys for their maintenance and operation.

The [court of last resort] may provide by rule for the enforcement of this section.

SECTION 7. The administrative director shall use a seal approved by the [court of last resort]. Judicial notice shall be taken of the seal.

SECTION 8. The authority of the courts to appoint administrative or clerical personnel is not limited by any provision of this Act.

SECTION 9. This Act may be cited as the Model Court Administrator Act.

[SECTION 10. The following acts and parts of acts are hereby repealed:

- (a)
- (b)
- (c)

*(Enumeration)*

*Comment:* The repeal section contemplates possible repeal and reenactment rather than amendment and to this effect and for purposes of original enactment the amendment may be considered as an independent act.

Care should be exercised to exclude any "Judicial Conference" law from repeal unless it is so intended.

SECTION 11. This [amendatory] Act shall take effect on .....