

THE 1968 MODERN COURTS AMENDMENT TO THE OHIO CONSTITUTION

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I. INTRODUCTION

A. *A Long Road*

We have more judges in the State of Ohio to do common pleas business than are requisite to perform all the labor of all the judicial service if it was properly distributed, but one will not work outside of his district, and another will not work outside of district, and the result is, that in certain particular localities they have not sufficient force for the service to be performed, whilst in others there is very little service performed

. . . It seems to me that the chief justice should be authorized, or some other functionary should be empowered, to detail judges or to distribute the force. . . .¹

The above excerpt is taken from an address given by Judge William West² to the Ohio Constitutional Convention held in Columbus in the year 1873.

Since the power of the Chief Justice to assign judges is one of the important provisions of Issue 3, passed in the May 1968 election, it may fairly be said that the judicial reform thus accomplished has been nearly a century in the making. With the passage of Issue 3, the 1968 Modern Courts Amendment became part of the Ohio Constitution.³ Former Chief Justice of the New Jersey Supreme Court Arthur T. Vanderbilt has pointed out that judicial reform is not for the short-winded. A review of the background of the Modern Courts Amendment will serve to confirm Justice Vanderbilt's understanding of the matter.

The passage of Issue 3 effected the first major revision of Article IV, the judicial article of the Ohio Constitution, since 1851. How did this come about? A statement by Judge Robert L. McBride of Dayton, made in 1964, sets the general tone:

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¹ J. ADEL, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 1056 (1873).

² Who was Mr. Milligan's great-grandfather.

³ Article IV, §§ 1 and 2 were amended; article IV, §§ 3, 4, 6, 7, 8, 10, 12, and 14 and article II, §§ 12 and 13 were repealed; and article IV, §§ 3, 4, 5 and 6 were enacted.

My philosophy of improvement is one of development as opposed to drastic and sudden changes. The latter may be accomplished only as a result of a ground-swell of public indignation.⁴

The judicial reform of 1968 was distinctly not a result of an outraged citizenry battering down the doors of the State House. Dissatisfaction with the present system existed, but had not reached the point of being a major issue. The reform was primarily the result of efforts by thoughtful legislators, judges, lawyers, editors and laymen who recognized that real problems existed and cooperated to work out rational solutions before major surgery became necessary.

The overall goal was well stated in a 1964 report of the Ohio Bar Association Committee on Judicial Candidates and Judicial Salaries:

Salaries alone are not a solution to the problem of judicial administration in Ohio or any other state. Regardless of the quality of the judges, a state must have a workable constitutional and legislative pattern so that the abilities of the judges can be used to their maximum.⁵

The passage of the Modern Courts Amendment is a product of years of study and work by many different groups. These included the Ohio State Bar Association, the Legislative Service Commission, the Ohio Judicial Conference and the General Assembly. Credit should also be given, of course, to the voters of the state who responded favorably when the proverbial chips were down.

B. *Hamlet Without the Prince?*

The original proposal of the Ohio State Bar Association, the somewhat revised proposal of the Legislative Service Commission, and House Joint Resolution No. 42, as introduced, all included provisions for the "Missouri plan" of selection for the Courts of Appeals and the Supreme Court. House Joint Resolution 42, as introduced, would also have allowed the legislature to provide for the Missouri plan of selection at the trial court level. The Missouri plan, sometimes referred to as the appointive-elective system, is a standard feature of model judicial articles sponsored by the American Judicature Society, the American Bar Association, and other civic minded groups, such as the League of Women Voters. This system

⁴ Letter from Robert L. McBride, Judge of Common Pleas Court, Dayton, Ohio, March 9, 1964.

⁵ Quoted in an address by Rep. William W. Milligan, Ohio Judicial Conference, May 14, 1964.

provides that a statewide, bi-partisan commission made up of lawyers and laymen be appointed by the governor. When judicial vacancies occur, the commission seeks out, recruits and nominates three qualified candidates. The governor then appoints one of the nominees to fill the vacancy. The judge then serves a six year term, after which he may run for re-election. He runs on his record, rather than against a specific opponent. It is assumed that this system would give judges greater security of tenure and allow them to spend more time on judicial duties with less time spent on political activities required by periodic contested elections. For many in Ohio, the Missouri plan was the keystone of judicial reform; and without it the drama was truly Hamlet without the Prince. For others, the Missouri plan was a nefarious scheme to deprive the electorate of an historic right.

Granting that the Missouri plan provisions were the most visible, it does not follow that they were more important than the provisions which were actually passed. Earl F. Morris, President of the American Bar Association in 1967-68 and a prime mover in Ohio's court reform movement, pointed out that four of the five major points in judicial reform were included in the Issue 3 proposal. These were local court reorganization, retirement, supervision and rule-making.⁶

The Ohio House of Representatives, in its wisdom (as we always say when disapproving), deleted the Missouri plan provisions. Following this action, the Modern Courts Committee of the Ohio Bar Association issued the following statement:

[W]e accept the decision [of the House] as an authoritative expression of opinion at the present time. We believe that in the course of time, when the advantages of the appointive elective system are better understood that the legislature and the public will be willing to adopt this plan. In this context, the narrowness of the vote on this issue can be considered encouraging.⁷

C. *Ohio State Bar Association*

The successful passage of Issue 3 required the concurrence of a number of groups and organizations. The first of these was the Ohio State Bar Association. For a number of years various committees of the Association worked on the formulation of judicial reform proposals. For a time work was centered in two such committees: one dealing with judicial selection under the chairmanship of Kenneth C. Clark of Youngstown; the second worked with problems of judi-

⁶ Address by Earl F. Morris, Ohio State Bar Association, semi-annual meeting of committees, Sheraton-Columbus Hotel, March 9, 1968.

⁷ Committee for Modern Courts in Ohio, Press Release, June 15, 1967.

cial administration under the chairmanship of Earl F. Morris of Columbus. In 1963 these two were combined as the Modern Courts Committee.⁸

The original proposal of the Modern Courts Committee, put together in 1963, included in substantial form the provisions relative to retirement, supervision and rule-making ultimately included in Issue 3 as passed. The original proposal of the Committee relative to local court reorganization was thoroughgoing. It provided that each county would have a common pleas court and no others. This would have had the effect of consolidating not only the common pleas and probate courts, but also it would have brought the municipal and county courts under the common pleas umbrella and abolished mayors' courts.

D. *Legislative Service Commission*

In 1964 the Speaker of the House appointed a Legislative Service Commission Study Committee on Judicial Administration, one of the authors serving as Chairman.⁹

The Study Committee conducted a series of hearings, both in Columbus and around the state, the most important of which was a three-day meeting held at Worthington, Ohio, June 25-27, 1964. At this meeting, Messrs. Clark and Morris, speaking for the Modern Courts Committee, presented the Ohio State Bar Association's proposals. In addition, testimony was taken from all interested parties, most particularly including representatives of the various judges'

⁸ In addition to Messrs. Morris and Clark, who were named co-chairmen, members of this committee serving over the last several years have been: Joseph Allen of New Lexington, James F. Bell of Columbus, Hon. Myron T. Brenneman of Akron, Hon. John J. Duffey of Columbus, John Eckler of Columbus, Hon. Holland M. Gary of Zanesville, Jerome Goldman of Cincinnati, Edward M. Halaby of Cincinnati, Grace Fern Heck of Springfield, Lee J. Hereth of Cincinnati, Anson Hull of Springfield, Rep. A. G. Lancione of Bellaire, Hon. Geraldine Macelwane of Toledo, Hon. George B. Marshall of Columbus, Hon. Thomas Mitchell of Jackson, Bruce I. Petric of Cincinnati, Hon. August Pryatel of Cleveland, Wilson W. Snyder of Toledo, William R. Van Aken of Cleveland, John L. Yapple of Chillicothe, and the authors of this article. Indispensable work was also carried out by Joseph Miller, Executive Director of the Ohio State Bar Association, and staff members William G. Harrington and Fred Puckett.

⁹ The other members from the Ohio House and Senate were Tom Pottenger of Harrison, Robert Levitt of Canton, Charles Jones of Hamilton, Michael Sweeney of Cleveland, Thomas Gindlesberger of Millersburg, Charles Kurfess of Bowling Green, Robert Holmes of Columbus, Bishop Kilpatrick of Warren, the late Edmund A. Sargus of St. Clairsville, Frank Pokorny of Cleveland and Ed Garrigan of Akron. The research staff assisting this Committee were Sara R. Hunter and Everett Crawford.

associations and the Ohio Judicial Conference. Among others, Chief Justice Kingsley A. Taft was present and gave the Study Committee the benefit of his views. A later hearing was held in Cleveland where, among others, Louis Peirce, speaking on behalf of the Cleveland Bar Association, testified in favor of the reform proposals.

After all the testimony was in, the Study Committee unanimously agreed on a series of propositions relative to judicial reform. In general, the conclusions of the Study Committee paralleled those of the Modern Courts Committee, with several important exceptions. For example, the original Bar Association proposal provided that all common pleas judges would be paid by the state and would be paid an equal salary. This was changed by the Study Committee on the ground that it might take some time to achieve the equalization of service desired. When this is achieved the legislature would have the authority to equalize the salaries also.

While the Study Committee agreed that there should be but one constitutional court in each county—the common pleas court—it concluded that the power of the legislature to maintain non-constitutional courts, such as the municipal and county courts, should be continued. The Study Committee concurred in principle with the desirability of a unified court structure at the county level. On the other hand, going back to Judge McBride's dictum, it was felt that gradualism was the better part of valor. To cite one thorny but eminently practical problem, if the municipal courts were brought under the common pleas courts, what would happen to the fines which the municipalities are currently collecting?

The Study Committee's work relative to local court reorganization represented a response to the request of the judicial associations for a gradual approach to the unification of courts at the county level. The special provisions made relative to the probate courts also reflected this point of view. As things now stand, local court unification is not made mandatory by the Constitution. On the other hand, the legislature has the authority to accomplish this. It is to be hoped that over the years the General Assembly, in cooperation with the judiciary and other interested groups, will complete the establishment of a rational unified court system at the county level. This would unquestionably involve divisions of the common pleas court as appropriate. Whether and to what extent it would involve rotation of judges between divisions remains one of the major problems yet to be resolved.

On December 1, 1964, the Judicial Administration Study Com-

mittee unanimously approved a report to the legislature recommending passage of a specific constitutional amendment designed to reform the judicial system.

E. *The Legislature*

The State Senate took up the proposed resolution, which was introduced as House Joint Resolution 1, in 1965. It was first referred to the Senate Judiciary Committee and taken up for extended hearings—so extended in fact that the session was practically over by the time the Committee favorably reported the resolution out. As a result, the resolution did not get on the ballot in 1965. After the 1965 legislative session the Modern Courts Committee worked further on the proposed joint resolution. Substantive changes in the previous draft were not intended and the work consisted primarily of rearranging sections and simplifying the language. Judge Thomas A. Mitchell did much of this re-drafting work.

In 1967 a political change occurred which was helpful to the cause of judicial reform. Charles Kurfess, Robert Holmes and Robert Levitt (all former members of the Legislative Service Commission Study Committee) were promoted to the offices of Speaker, Majority Floor Leader and Chairman of the House Judiciary Committee respectively. With this background of support, House Joint Resolution 42 was introduced in the House of Representatives by Barry Levey of Middletown.¹⁰

Duly referred to the House Judiciary Committee, the joint resolution was heard and some amendments made. This was followed by favorable recommendation for passage. One significant decision of the House Judiciary Committee was to omit the following language originally included in the Study Committee proposal:

The supreme court by rule shall divide the courts of common pleas of any county having more than one judge into as many divisions as may be necessary to expedite the business of such court and shall prescribe the number of judges to sit in each division. The supreme court may change or consolidate such divisions.¹¹

The effect of the omission of this language was to leave the power to

¹⁰ Joining with him, as sponsors, were Robert Levitt of Canton, William Anderson of Cincinnati, Claude Fiocca of Akron, Edwin Hofstetter of Chardon, Joseph Kalnrad of Ravenna, Ralph Kohen, Jr. of Cincinnati, Robert Manning of Akron, John McDonald of Newark, Alan Norris of Westerville, Albert Sealy, Jr. of Dayton, Joseph Tully of Mentor, Marigene Valiquette of Toledo, George Voinovich of Cleveland and David Headley of Barberton.

¹¹ Am. S.J. Res. No. 1, "Good Friday Version," 106th Ohio General Assembly (1965).

establish divisions in the common pleas court firmly in the hands of the legislature. It may be hoped that the Supreme Court, in carrying out its new duties to supervise the court system, and the General Assembly, in its retained power to prescribe divisions in the common pleas courts, will work harmoniously to achieve the desired goal of an effective use of judicial manpower. This would include establishment of appropriate divisions of common pleas courts.

House Joint Resolution No. 42 reached the floor of the House on June 14, 1967, where the measure was ably presented by its sponsors. This was followed by a memorable debate, in which opponents of the Missouri plan succeeded, by a narrow margin, in deleting this provision from the Joint Resolution. As so amended, the Joint Resolution was passed by a clear majority.

On the Senate side of the General Assembly, William Taft, of Cleveland, took over as chief sponsor, together with co-sponsors Paul Gillmor of Old Fort, William Nye of Tallmadge and James Leedy of Wooster. Further hearings were held before the Senate Judiciary Committee under the chairmanship of Max Dennis of Wilmington. The Senate Committee made some amendments, including a provision for a modified grandfather clause to allow judges who would become 70 before the date for taking office for a new term commencing in 1971, to seek election to an additional term. On August 7, 1967, the Committee approved the Joint Resolution by a 7-0 vote.

Following action by the Senate Judiciary Committee, the measure passed to the Senate Rules Committee for a long wait. The President Pro-Tem of the Senate, Theodore Gray of Piqua, assured the nervous sponsors that the measure would be acted on favorably and that the only problem which remained was determining the date it would be placed on the ballot. Patience was, in due season, rewarded. The Senate Rules Committee acted favorably and the Senate itself gratifyingly passed the measure by a unanimous vote of 33-0. The House concurred in the Senate's amendments. On March 1, 1968, Amended Substitute House Joint Resolution No. 42 was duly signed by Speaker of the House Charles Kurfess and President of the Senate John W. Brown; and on March 8 it was filed with the Secretary of State to be placed on the ballot for the May 7, 1968, primary elections as Issue 3.

F. *Election*

The absence of any organized opposition to Issue 3 detracted somewhat from the interest in the campaign. Nevertheless, the Modern Courts Committee, with direction from Gene King of Columbus, as

publicist, put on a modest campaign. The Ohio State Bar Association furnished the basic financial support, along with contributions by local bar associations and other organizations.

Perhaps one of the most important developments in the movement for judicial reform was the evolution of the Ohio Judicial Conference. This organization is composed of all the judges in the State of Ohio. At the time of the Study Committee hearings in 1964, it took no formal position. However, at that time, a survey of Ohio judges on judicial reform was conducted, on behalf of the Ohio Judicial Conference, by Judge James McCrystal, Chairman of the Administration and General Court Committee. The result of this survey was to show that a substantial majority of the judges in Ohio favored all major points of the judicial reform proposals. This was especially true of the grant of supervisory authority and rule-making power to the Supreme Court. The majority was somewhat less in favor of the mandatory retirement provisions and the Missouri plan of selection.¹²

In any event, various judges active in the Judicial Conference were instrumental between 1964 and 1968 in bringing the Conference firmly behind the judicial reform movement.¹³

There is little question that the affirmative role played by the judges of Ohio, independently, through the separate judges' associations, and collectively, through the Ohio Judicial Conference, created the necessary margin of victory for Issue 3. It speaks well of the judges of Ohio that they were willing to support actively the effort to modernize the Ohio court system when it perhaps would have been more comfortable merely to let things go as they were.

The Ohio State Bar Association, of course, provided the driving force over the years leading toward the adoption of Issue 3. All recent Association presidents have been intimately concerned and active in their support.¹⁴

¹² Letter questionnaire to members, Ohio Judicial Conference, November 30, 1964.

¹³ Without attempting to enumerate all judges participating, the following should be mentioned: Chief Justice Kingsley A. Taft of Columbus, Hon. David Porter of Troy, Hon. John V. Corrigan of Cleveland, Hon. Harold S. Ewing of Elyria, Hon. John J. Duffey of Columbus, Hon. William Ammer of Pickaway County, Hon. Donald Ziegel of Eaton, Hon. Donald Lybarger of Cleveland, Hon. Rankin Gibson of Columbus, Hon. William Thomas of Cleveland and Hon. Walter O. Whitlach of Cleveland. Judge William Radcliff, Administrative Assistant to the Supreme Court, was always helpful to all parties concerned.

¹⁴ Matthew Smith of New Philadelphia, John Johnston of Wooster, Larry Burns

The Modern Courts Committee played its role in the campaign. The Committee members participated; but even more importantly, the county representatives in almost every county worked to achieve support from local bar associations, the local press and key voter groups. During the election campaign newspaper advertisements were prepared and distributed throughout the state, along with radio announcements and periodic news releases. No television time was purchased, since the expense involved was beyond the finances available to the Modern Courts Committee. Public endorsements came in from widely diversified groups, including the League of Ohio Law Schools, leading newspapers, television and radio stations, the Republican and Democratic state parties, the Ohio AFL-CIO, and the Ohio Chamber of Commerce.

One interesting basis of support was outlined in the Dayton Journal Herald on March 7, 1968, as follows:

The President's Commission on Civil Disorder . . . recommended 'laws sufficient to deter and punish riot conduct' while at the same time calling for reform of lower courts 'so as to improve the quality of justice. . . .' In both areas Ohio seems to be well on the way towards complying with the recommendations. . . . A measure that would reform Ohio's courts was approved by the state legislature last week.¹⁵

With the breadth of support indicated, a favorable vote certainly was to be anticipated. On the other hand, a comprehensive constitutional amendment in Maryland, with even broader apparent support, failed at the polls in the spring of 1968. The lesson from this may be that the public is willing to absorb only so much change at a time.

On election day, Tuesday, May 7, 1968, Issue 3 carried by a vote of 925,481 to 556,530.¹⁶ It carried 79 of the state's 88 counties. In short, the vote amounted to a ratification of the substantial and sustained effort towards judicial reform which had taken place.

of Coshocton, Erle Bridgewater of Athens, Roger Smith of Toledo, James Preston of Cleveland, Francis Dale of Cincinnati, and Norton Webster of Columbus. The Council of Delegates and Executive Committee of the Association uniformly supported the reform program.

¹⁵ Rothman, *Ohio Already on Path Riot Panel Favors*, Dayton Journal Herald, March 7, 1968, at 14, col. 1.

¹⁶ Summary of Joint Resolution as printed on the ballot:
Proposed Constitutional Amendment.

Administration and Organization of Ohio Judicial System.
(Proposed by Resolution of the General Assembly of Ohio)

G. Implementation

Schedule B of the Joint Resolution provided, *inter alia*:

[T]he general assembly shall enact such laws and the supreme court shall promulgate such rules as will give effect to the provisions herein.¹⁷

The scope of the implementation problem was foreseen by the legislative Study Committee:

Should any proposed constitutional amendment receive favor, a mammoth statutory revision would probably be necessary. . . .

. . . Any constitutional amendment should carry an extended effective date in order to allow adequate time for debate and decision upon implementing legislation and . . . for the establishment of an advisory body to begin the rule-making process. Hundreds of additional statutes would need to be amended in this event.¹⁸

The Supreme Court, in the case of *Euclid v. Heaton*,¹⁹ handed down June 19, 1968, ruled that the constitutional amendment was effective on adoption. It is possible that this decision may present transitional problems. It should be noted, however, that the decision did move in the direction of putting the constitutional amendment into effect. Also, any problems which may be raised by the advanced date should be only temporary. The implementing process, in any event, must be carried out. To a large extent the success of the implementation will depend on the vigor with which the Supreme Court takes the reins that have now been given it by the amended judicial article.

The authors regret that a more extended record of the history

A majority affirmative vote is necessary for passage.

Shall the Constitution of the State of Ohio be amended by amending Sections 1 and 2, enacting Section 3, 4, 5 and 6 and repealing existing Sections 3, 4, 6, 7, 8, 10, 12 and 14 of Article IV and by repealing Sections 12 and 13 of Article II as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, to equalize judges' salaries and to allow increases in compensation during term, to remove the probate court as a constitutional court and to authorize the consolidation of county probate courts and courts of common pleas?

¹⁷ Am. Subs. H.J. Res. No. 42, Schedule B (Page Supp. 1967).

¹⁸ OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT NO. 75, PROBLEMS OF JUDICIAL ADMINISTRATION 69 (1965) [Hereinafter cited as STAFF RESEARCH REPORT No. 75].

¹⁹ 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968).

of the 1968 Modern Courts amendment is not publicly available. For example, it is unfortunate that a verbatim transcript of the debate on the Missouri plan on the floor of the House is not available. The debate was carried on at a high level and would be useful to anyone who, in the future, might be concerned with the continued progress of the Ohio judicial system. What has been set out here, however, should suggest something of the scope of effort involved in a constitutional reform movement. Laws and constitutions are not produced in a vacuum, and it is well for the legal scholar to know something of the effort, procedures, and *dramatis personae* involved. The Joint Resolution has become a part of the Constitution of Ohio. It was the product of a broad effort to modernize the court system of Ohio, to make it equal to the burdens placed on it by the increasingly complex society in which we live.

II. SUPERVISION

A. *A Look Back*

Court backlogs apparently have been a problem at least since the sixteenth century. Shakespeare included in Hamlet's soliloquy "the law's delay" as one of the reasons for suicide. The problem continues to exist in twentieth century Ohio. While instant justice is not obtainable, and perhaps not desirable, reasonable dispatch in the handling of cases is a universally accepted goal. The Staff Reports of the Legislative Service Commission have pointed up the problem as it exists in Ohio. For example:

Ohio courts appear to be lacking in both organization and management. Some courts are unable to meet the demands of judicial business, despite extraordinary efforts of individual judges to correct the situation. Judges in other courts do not have sufficient business to operate on a full-time basis. While many lawyers and litigants are aware of serious congestion and delay in certain courts, there are no systematic and definitive reports as to actual court performance and the lack of this basic management tool makes evaluation of the performance and capacity of the courts more difficult.²⁰

Part of the problem in Ohio has been that there has been no one in charge of the judicial system. The more than 400 judges in the state's system have tended to operate independently. While this is desirable in the area of judicial decisions, the conclusion has been that independence in the administrative area leads to uneven and uncertain functioning of the system as a whole. Both the Ohio State

²⁰ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 5.

Bar Association and the Ohio judiciary have agreed that general supervisory power should be vested in the Supreme Court.

Such vesting of authority and responsibility is one of the main effects of the passage of Issue 3. In the past the Supreme Court has been blamed for shortcomings of other courts without the authority to do anything about it. This will now be changed. It is important to note that the new plan gives administrative authority to the Supreme Court over *all* courts of the state. To that extent, the state will now have a unified court system.

Successful operation of the new supervisory system will not be automatic. Vigorous application will be required by the Supreme Court and its administrative arm. It will be preferable, of course, for this supervisory power to be carried out, insofar as possible, in harmony with the judiciary of the state, individually and collectively.

B. *Superintendence*

The basic provision for supervision by the Supreme Court is:

[T]he supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.²¹

Under this provision ultimate administration authority is given to the Supreme Court as a whole. It is apparent, however, that the Court as a whole is not to be called on for routine administrative decisions. It will operate through the promulgation of administrative rules. It should be noted that the administrative rules are distinct from and in addition to the rules of practice and procedure which the court has the authority to issue under its "rule-making" power.

Once the administrative rules are promulgated, the responsibility for carrying out the superintending power devolves upon the Chief Justice. It may be that a given Chief Justice would prefer to delegate most of the detail involved in administration to the administrative director. Be this as it may, it is clear that the Chief Justice is responsible for the exercise of the superintending power, in conformance with the rules promulgated by the full court.

C. *Administrative Director*

One of the newly adopted provisions states:

The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the

²¹ Am. Subs. H. J. Res. No. 42, OHIO CONST. art. IV, § 5(A)(1) (Page Supp. 1967).

pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.²²

It seems likely that the key person in the day to day exercise of the superintending power will be the administrative director. Administration will be the director's only responsibility, while the Chief Justice retains his judicial duties of hearing and deciding cases and writing opinions.

Experience in other states has indicated that the maintenance of an administrative director, together with staff and facilities, does cost money. Chief Justice Taft pointed out at the Worthington hearings that the administrative office in New Jersey expended some 120,000 dollars in 1960.²³ The cooperation of the Governor's office and the legislature will be necessary to provide adequate funds for the operation of the administrative director's office. It will be important that adequate funds and staff be made available to do the necessary supervisory work. The importance of the role of the administrative director in the successful supervision of the Ohio judicial system is clear.

D. *Records*

The new record keeping provision states:

The Supreme Court may make rules to require uniform record keeping for all courts of the state. . . .²⁴

All discussions of court administration get back to the need for accurate and uniform records. The Supreme Court has specific authority to require this under the new amendment. Statistics are currently gathered, but are not deemed to be sufficient.

[Current] statistics are limited because they do not tell enough about the nature or character of the cases pending, filed, or disposed of. Numbers alone do not give the proper information necessary to determine the scope of business before the courts.

Statistics are limited further by the variety of procedures and practices. For instance, some courts consider a case awaiting decision in a higher court as still pending on the docket; other courts consider such a case closed. Moreover, figures themselves do not furnish a true measure of the business necessitating court action.²⁵

²² Am. Subs. H. J. Res. No. 42, OHIO CONST. art. IV, § 5(A)(2) (Page Supp. 1967).

²³ Committee to Study Judicial Administration, Summary of Proceedings, Fifth Meeting, June 25-27, 1964, at 8, 9.

²⁴ Am. Subs. H. J. Res. No. 42, OHIO CONST. art. IV, § 5(B) (Page Supp. 1967).

²⁵ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 11.

Even such simple universal devices as journal entries, dockets, and journals vary from court to court. More than one judge has commented on the need to standardize basic court forms and operating procedures to promote efficiency.²⁶ (Emphasis omitted)

One of the keys to the New Jersey court system is the weekly gathering and interpreting of court statistics. Each judge of the state files a weekly report showing hours in court, cases handled during the day and time given to each. If the judge reserves decision in any matter, he notes the fact on his weekly report until the matter is decided. If the office of administrative director notes that the decision is reserved an undue length of time, an inquiry to the judge for a reason usually results in its prompt disposition.²⁷

One of the more thoughtful analyses of the need for improved judicial statistics in Ohio has been given by Judge Robert L. McBride of Dayton as follows:

The advantage of rule-making and supervisory power in the Supreme Court would be uniformity in reporting statistics. Current statistics are not uniformly selected or reported. Some counties maintain open dockets which are not reported. All counties interpret the instructions to meet local conditions. All are prepared by clerks, many of whom do not understand them, or have no interest in their accuracy and the Supreme Court has no power to correct this situation. Honest figures, uniformly prepared, reflect what the courts are doing. Uniform and accurate statistics will not be available until the Supreme Court has the constitutional authority to require them. And no one can know the true condition within the courts until uniform and accurate reports are available. The convenience of electronic processing through a service center in Columbus will be within reach of the Ohio courts, if, and only if, supervisory power is vested in the Supreme Court. The judiciary has neglected the importance of uniform statistics as reflecting the business end of the administration of the courts.²⁸

It is to be hoped that under the new constitutional amendment the neglect of uniform statistics will become a thing of the past.

E. *Assignment*

The new provision relative to assignment is:

The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit

²⁶ OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT NO. 47, THE OHIO COURT SYSTEM: ITS ORGANIZATION AND CAPACITY 28 (1961).

²⁷ STAFF RESEARCH REPORT NO. 75, *supra* note 18, at 12.

²⁸ Letter from Robert L. McBride, Judge of Common Pleas Court, Dayton, Ohio, March 9, 1964.

or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.²⁹

Several points may be noted relative to these assignment provisions. One is that a common pleas judge may be assigned to sit on another common pleas court or on a court of appeals. Conversely, a court of appeals judge may be assigned to sit on another court of appeals bench or on the common pleas bench. Thirdly, provision may be made for the temporary assignment of judges to sit on any municipal or county court. The language "and upon such assignment said judge shall serve in such assigned capacity" should not be overlooked.

The Legislative Service Commission Staff Report emphasized the importance of the temporary assignment power:

The most important aspect of an effective court system is control over judicial manpower use. In Ohio the extent of the power and authority to manipulate the judicial manpower so that it is distributed to areas where needed has not been determined. . . . The most effective device for the utilization of judicial manpower is the power to assign judges to areas where the workload is high.³⁰

It is true that for some time judges have been voluntarily sitting by assignment where requested. This has been a help, but it has left a number of questions open. For example, what should be done about the judge who needs help but won't ask for it, or the judge who doesn't need help but does ask for it? Also, what should be done about the judge who has a light docket at home, but prefers to take it easy rather than sitting on cases in counties where the docket is heavy? There is no question that a specific constitutional power to assign judges to sit on other courts can and should be a major tool in breaking the docket logjam in courts where this is a problem.

F. *Tools*

In carrying out the constitutional mandate to superintend the state court system, the Supreme Court, as has been noted, can require uniform statistics and can exercise the assignment power. What other

²⁹ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 5(A)(3) (Page Supp. 1967).

³⁰ OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 47, THE OHIO COURT SYSTEM: ITS ORGANIZATION AND CAPACITY 25 (1961).

tools does the Supreme Court have for carrying out its superintending function?

There are obviously some tools that it does not have. For example, it does not have the power to determine how many judges will sit on a given common pleas court, or what divisions the court will be divided into. These remain legislative functions. It may be hoped that the legislature will take advantage of the information developed by the Supreme Court in carrying out its administrative functions. If, for example, the Supreme Court were to observe that a given court had more or less judges than it needed to carry out its duties, there would be no reason that this information could not be made available to the legislature for such appropriate action as it might see fit to take.

Another tool which the Supreme Court does not have is the selection of judges. There are countries, such as Uruguay, where the supreme court actually fills vacancies in the lower courts. At present, this function is performed in Ohio by the voters, and even if the Missouri plan were to be adopted, the Ohio Supreme Court would not play any role in judicial selection.

One tool which the Supreme Court will have under the new system is the rulemaking power. Rules can be promulgated, for example, to cover the use of temporary hearing officers to assist the court, to expand court hours or to increase court days. Rules can also be issued relative to the use of pre-trial procedures, granting of continuances, time limits on the issuing of rulings and the like. In any case, it will be up to the Supreme Court to make basic rules for efficient businesslike operation, leaving it to the local courts to make additional local rules of practice not inconsistent with the statewide rules.

A second important tool which will be available to the Supreme Court in carrying out its supervisory function, provided by the recent constitutional amendment, will be the assignment of emeritus judges. This provision allows a voluntarily retired judge to serve in a court where he is needed.

The final tool available to the Supreme Court is that of disqualification.

[The chief justice of the supreme court or any judge of that court] designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.³¹

³¹ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 5(C) (Page Supp. 1967).

When the matter of disqualification is considered, the problem is normally one of physical or mental incapacity or of unethical conduct. It is suggested that the qualification could be extended to cover the case of a judge who refused to conform to the administrative rulings of the Supreme Court. A judge who refused to maintain the required records or who refused to accept assignments should be subject to the possibility of disqualification on this account. It would be hoped that the instances where such procedure might become necessary would be rare or non-existent. Nevertheless, there should be some answer to the judge who might refuse to accept the authority of the Supreme Court to superintend the judicial system.

G. *Local Administration*

Issue 3, as passed, also made certain provisions for administration at the trial court level.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court.³²

.....

In counties having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. . . . The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.³³

It is clear that the constitutional amendment contemplates that a certain amount of the supervisory authority over the court system will be delegated to or exercised by the presiding judges of the various common pleas courts. In the past, constitutional objections have neutralized statutory attempts to grant administrative supervisory authority to one judge in the multi-judge courts. The constitutional problem has now, presumably, been taken care of. The practical problems have yet to be worked out. It is obvious that the role of the presiding judge at the county level should be carefully geared to the state administrative system so that there will be no confusion as to what the common pleas presiding judge was and was not responsible for. In any case, there should be no doubt as to where the ultimate supervisory authority is located, to wit: in the Supreme Court.

³² Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 5(B) (Page Supp. 1967).

³³ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 4(A) (Page Supp. 1967).

III. RULE-MAKING

A. *Background*

In 1922 the Chief Justice of the United States, William Howard Taft, addressed the American Bar Association as follows:

The rules and their amendments, after approval by the court, should be submitted to Congress for its action, but should become effective in six months, if Congress takes no action. In this way procedure would be framed by those most familiar with it and by those whose duty it is to enforce it. The advantage of experiment in the laboratory of the courts would furnish valuable suggestions for bettering the system. The important feature of such a system is that needed action by the commission and the court will be promptly taken and the necessary delay in a Congress crowded with business may be avoided.

Dependence upon action of Congress to effect reform and remove delays and to bring about speed in the administration of justice has not brought the best results, and some different mode should be tried. The failures of justice in this country, especially in the state courts, have been more largely due to the withholding of power from judges over proceedings before them than to any other cause; and yet judges have to bear the brunt of the criticism which is so general as to the results of present court action. The judges should be given power commensurate with their responsibility. . . .³⁴

Time has not dulled the support for rule-making power. Prior to the recent vote on Issue 3, Dean Ivan Rutledge of the Ohio State University College of Law stated:

Giving rule-making powers over Ohio courts to the Supreme Court is essential and belated. It should have been done a generation ago.³⁵

B. *Rules of Practice and Procedure*

The new provision relative to rules of practice and procedure is:

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

³⁴ Quoted in STAFF RESEARCH REPORT NO. 75, *supra* note 18, at 52.

³⁵ Committee for Modern Courts in Ohio, Press Release, April 1968.

a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force after such rules have taken effect.³⁶

Prior to this constitutional amendment, practice and procedure in Ohio have been governed by statute. While the Ohio Practice Code has served the state long and well, it has become overly complicated and disorganized. The debate over whether the legislature or the judiciary should have jurisdiction in this matter is now settled. The rule-making authority is clearly vested in the Supreme Court.

As has been noted, the Supreme Court has various kinds of rules to promulgate. Normally when the word "rule-making" is used, the subject referred to is practice and procedure. This includes procedural steps by which a lawsuit is commenced and maintained, what the parties must file in way of statements of claim or defense, the contents of such statements, and the availability to the opposing sides of devices to discover evidence in support of their respective positions.³⁷

It is anticipated that the rule-making authority will be exercised in such a way as to provide faster and less complicated court procedures.

There should now be no doubt that the authority of the Supreme Court in the rule-making area is plenary. Court action in this area supersedes contradictory legislation. The legislature retains a veto over such court-made rules, but no longer has the primary responsibility.

One limitation on the Supreme Court's rule-making was retained in the recent constitutional amendment.

No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.³⁸

Requests had been made to delete this language on the ground that it frequently happens that the Supreme Court's original jurisdiction is invoked in cases of narrow interest which might better be handled by lower courts as a matter of original jurisdiction.

³⁶ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 5(B) (Page Supp. 1967)

³⁷ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 47.

Practice and procedure in Anglo-American jurisprudence include the steps by which a controversy is brought to an "issue" and prepared for trial. Pleadings, the devices which were developed for this purpose, are traditionally defined as statements made by the parties for the purpose of defining the area of controversy. *Id.* at 48.

³⁸ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 2(B)(3) (Page Supp. 1967).

C. Federal Rules

Those who have favored rule-making authority in the court traditionally have favored the Federal Rules of Civil Procedure, at least as a basis for the state's rules of practice and procedure. The Federal Rules were first adopted in 1938, and have since become the model for some 40 state systems.³⁹

The success with which the Federal Rules have met is illustrated by the following:

Charles E. Clark, judge of the United States Court of Appeals for the Second Circuit and prominent for his many writings in the field of pleading and practice and his services as reporter to and member of the Supreme Court's Advisory Committee on Rules of Civil Procedure, made the following observations upon the twentieth anniversary of the Federal Rules in 1958:

'The measure of success which court rule making has . . . achieved is attested by the general satisfaction of judges, practitioners, and scholars with the federal system and its increasing adoption in the states. But perhaps the truest indicia of all are in the attitude of Congress. . . . Since the advent of the rules the result has been quite phenomenal. Notwithstanding many proposals, Congress has withstood all attempts to obtain passage of procedural statutes of any consequence.'⁴⁰

The underlying assumption of the Federal Rules is that a function of narrowing the issues can be better performed by pre-trial discovery rather than at the pleading stage. The purpose of pleading under the federal procedure is to give notice only of what the adverse party may expect to meet rather than to define the controversy with exactitude.

Under the code states, including Ohio, the first pleading or petition generally must contain a 'statement of facts constituting a cause of action.' . . . Confusion over 'facts' and 'conclusions' or mixtures of the two has harrassed not only law students in pleading courses; it has resulted in numerous delays and dismissals on procedural grounds, denying to the parties their opportunity to have rights considered on the merits. Absence from the Federal Rules of any requirement that only facts may be alleged in a pleading, and substitution of 'statement of claim' for 'statement of facts' and 'cause of action' in Rule 8(a) has been lauded for enabling courts to overlook form and get to the merits of dispute.⁴¹

³⁹ Unpublished Notes on Ad Hoc Committee on Implementation of the Modern Courts Amendment, prepared by William G. Harrington, Ohio Bar Association staff (1968).

⁴⁰ STAFF RESEARCH REPORT NO. 75, *supra* note 18, at 54.

⁴¹ *Id.* at 55.

A review of the index of Rules of Civil Procedure for the United States District Courts suggest the areas covered:

(I.) Scope of Rules—one form of action. (II.) Commencement of Action; service of process, pleadings, motions, and orders. (III.) Pleadings at Motions. (IV.) Parties. (V.) Depositions and discovery. (VI.) Trials. (VII.) Judgment. (VIII.) Provisional and final remedies and special proceedings. (IX.) Appeals. (X.) District courts and clerks.⁴²

Perhaps the most familiar provisions of the Federal Rules are the following:

Rule 2—There shall be one form of action to be known as 'civil action.' Rule 3—A civil action is commenced by filing a complaint with the court. Rule 8(a)—A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends. . . (2) a short and plain statement of the claim showing the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.⁴³

Most persons familiar with court procedures favor the Federal Rules over the possible alternatives. The newly elected Vice President of the Ohio State Bar Association, Bitner Browne of Springfield, has stated that he favors the Federal Rules because there has been a wealth of experience in working with them and there is a body of decisional law interpreting them.⁴⁴

D. *Scope*

The first thing to bear in mind is that the constitutional provision granting the rule-making power extends to all courts of the state. This means that it will embrace both trial and appellate procedure. The most recent Federal Rules of appellate procedure became effective July 1, 1968, and would probably be used as the basis for Ohio appellate rules in lieu of earlier versions. The use of the phrase "all courts" would presumably also include the municipal courts, county courts, and the probate division of the common pleas courts. There is no apparent reason why the rules could not be extended to cover mayors' courts. It is also clear that the new rules will cover both civil and criminal procedure.

⁴² FED. R. CIV. P. Index.

⁴³ FED. R. CIV. P. 2, 3, 8(a).

⁴⁴ Unpublished Notes on Ad Hoc Committee on Implementation of the Modern Courts Amendment, prepared by William G. Harrington, Ohio Bar Association staff, at 5 (1968).

The constitutional provision itself states that the "rules shall not abridge, enlarge, or modify any substantive right. . . ."⁴⁵ This provides a limit to the scope of the rule-making authority. There will always be cases on the borderline of substance and procedure. Since the Supreme Court, in its judicial capacity, will have the ultimate authority to determine the boundary line between procedural and substantive matters, it may be presumed that any rules promulgated by the Supreme Court will fall within the procedural rather than the substantive area. An example of the borderline area is the rules of evidence. In certain states rules of evidence are considered to be procedural, in other states substantive. Other borderline areas are: taxation of costs in a lawsuit; taxation of attorney's fees as costs; the time within which an appeal must be taken; and the subject of venue.

A review of the Federal Rules makes it clear that certain of the areas dealt with in the Federal Rules are not applicable to state courts, e.g., the rules dealing with admiralty and maritime claims. On the other hand, certain areas peculiar to the state judicial system, such as probate, should be added.

An interesting question is whether the Ohio Rules should include an appendix of forms similar to those attached to the Federal Rules.

Once the rules are adopted, the question will undoubtedly arise whether the existing code of civil procedure should be left as it is and merely invalidated by the force of the constitutional amendment, or whether it should be specifically repealed in order to avoid confusion. If the repeal approach is taken, great care will, of course, be necessary to avoid the creation of procedural gaps. In the event the repeal of conflicting statutes is decided upon, the Legislative Service Commission will doubtless be called upon to use its electronic data processing system to locate all of those sections of the Revised Code affected.

E. Implementation

Implementation of the rule-making responsibilities has already begun and it is hoped that proposed rules will be drafted in time for action in the 1969 session of the General Assembly. On July 8, 1968, Chief Justice Kingsley A. Taft announced the appointment of a committee of the Ohio Judicial Conference. This committee, to be known as the Advisory Committee on Rules of Practice and Procedure, under the Chairmanship of Judge John V. Corrigan of Cleve-

⁴⁵ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 5(b) (Page Supp. 1967).

land, is to prepare all the rules governing practice and procedure in the courts of Ohio and to present them to the Supreme Court for adoption or rejection. In its resolution, the Supreme Court suggested that the Federal Rules be used as a general model in the formation of the Ohio rules.⁴⁶

IV. MANDATORY RETIREMENT

A single sentence in the newly adopted judicial article establishes the principle of mandatory retirement for the Ohio judicial system:

No person shall be elected or appointed to any judicial office if on or before the day when he will assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years.⁴⁷

Two correlative provisions, the first relating to the assignment of retired judges and the second to retirement benefits, are also included in the same section. The former provision states:

. . . Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed on a per diem basis, in addition to any retirement benefits to which he may be entitled.⁴⁸

The latter provision states simply, "Laws may be passed providing retirement benefits for judges."⁴⁹

A. Principles of Mandatory Retirement

With the passage of Issue 3, Ohio became the 23rd state in the nation to adopt some form of mandatory retirement of judges.⁵⁰ The basic issue which mandatory retirement provisions have always raised is how to ensure the removal from the bench of aged and inefficient judges and at the same time avoid the loss of judges whose productive years may continue long after retirement age.⁵¹

Scholars of judicial administration have recognized that, al-

⁴⁶ *Ohio Judicial Conference to Draft Procedural Rules for Ohio Courts*, 41 OHIO BAR 929 (1968).

⁴⁷ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, 6(C) (Page Supp. 1967).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ AMERICAN JUDICATURE SOCIETY, 1968 SURVEY OF JUDICIAL SALARIES AND RETIREMENT PLANS IN THE UNITED STATES 86 (1968).

⁵¹ *Id.*

though no judicial system can afford the loss of a Holmes or Brandeis whose productive years continue beyond the biblical "three score and ten," mandatory retirement is one of the necessary elements of any program to improve the operation of the courts. The importance attached by court modernization leaders to the principle of mandatory retirement springs from their conclusion that it is the most practical method for dealing with the delicate problem of assuring the removal from office of those judges who by reason of physical or mental disability associated with advanced years are unable to discharge effectively the duties of judicial office.

Ohio, like every other state, has unfortunately been faced with this problem. The Study Committee in one of its reports noted:

The Committee [has] received both formal and informal testimony regarding over age judges who have stayed on the bench beyond the point where they were still effective. . . . Under present law there is no effective way of dealing with [this problem].⁵²

Judge Harold R. Medina has written generally of the problem:

One simply cannot be blind to the fact that there have been many instances of men who have remained active members of a court long after they have ceased to be able to turn out work of the same quality and quantity that is to be expected from an active member of the court.⁵³

A method for dealing with this problem in Ohio other than by mandatory retirement has been difficult to formulate and use. As the Study Committee noted, no such method existed in 1964.⁵⁴ Moreover, even though it has been possible in recent years to remove over-age judges under a procedure combining statutes and a supreme court rule, the brief experience with this procedure suggests that it is an awkward, if not impractical, method to pursue. Ohio Revised Code sections 2701.11 and 2701.12, which became effective on October 30, 1965, and Rule XXI of the Supreme Court, adopted on February 11, 1966, pursuant to the above statutes, established a procedure for the involuntary retirement of judges, *inter alia*, upon a showing of physical or mental disability.⁵⁵ However, during the two and one-half years that this procedure has been available, not one

⁵² STAFF RESEARCH REPORT No. 75, *supra* note 18, at 80.

⁵³ Quoted in Note, *Shortage of Federal Judges Is Stressed at Court Congestion Conference*, 42 J. AM. JUD. Soc'y 20, 24-25 (1958).

⁵⁴ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 80.

⁵⁵ The terms "physical disability" and "mental disability" are defined in *Ohio S. Ct. R. Prac.* XXI.

formal proceeding dealing with retirement due to physical or mental disability has been initiated.⁵⁶ The failure to use this procedure is easy to understand. With its written, sworn complaint, which must be supported by a written certificate of the state or a local bar association, an investigation, a hearing before a commission of judges that has aspects of an adversary proceeding,⁵⁷ and the possibility that any retirement order may be given public attention, the procedure is obviously designed to meet only the serious, isolated case of judicial disability and not the general problem of over-age judges.

With the adoption of Issue 3, however, Ohio has joined those states which have recognized that the best and most practical solution to the general problem is to impose compulsory retirement on all judges at an age when, in the usual case, it is not unreasonable to ask the individual judge to step down and permit his duties to be assumed by a younger man.

Fixing the proper age to impose retirement has, nevertheless, been a further problem and illustrates the difficulty of being not only fair to the individual judge, but also responsive to the needs of the entire judicial system. Although a 1951 report of the Ohio State Bar Association's Committee on Judicial Administration and Legal Reform noted that 70 was the "logical age" for mandatory retirement in the judiciary,⁵⁸ a later report in 1961 by the same association's Judicial Reorganization Committee recognized that "[N]o one age, whether it be 65, 70, or 75, will be an entirely satisfactory one upon which to base retirement. . . ."⁵⁹ In eventually fixing mandatory retirement at age 70, Ohio has adopted the most common age limitation.⁶⁰ It should be noted, however, that even though 70 is the age mentioned in the text of the mandatory retirement provision, 73 will be the effective, median age of retirement for all Ohio judges.⁶¹

⁵⁶ Private Communication, Hon. William Radcliffe, Administrative Assistant, Ohio Supreme Court, July, 1968.

⁵⁷ OHIO S. CT. R. PRAC. XXI.

⁵⁸ *Ohio Judicial Conference to Draft Procedural Rules for Ohio Courts*, 24 OHIO BAR 253, 279 (1951).

⁵⁹ *Report of Judicial Reorganization Committee*, 34 OHIO BAR 465, 473 (1961).

⁶⁰ See *Summaries of Judicial Salaries and Retirement Plans*, 47 J. AM. JUD. Soc'y 129, 129-155 (1963).

⁶¹ Since all judges are presently elected to six-year terms, some judges would be eligible to be re-elected after they have passed their 69th birthday but before they have reached their 70th birthday and thus could continue to serve a full term when they would be between 75 and 76. Other judges, having just reached their 70th birthday, would not be eligible to be re-elected. The median age of those retiring on account of the new provision should, therefore, be close to age 73.

B. *The Effects of Mandatory Retirement in Ohio*

1. The Effective Date of the Provision

The recent constitutional amendment, including of course the mandatory retirement provision, was intended to become effective on January 10, 1970.⁶² Certain incumbent judges, however, were intended to be exempt from the immediate application of its terms. The Schedule of House Joint Resolution No. 42 provided in part:

Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and provisions of division (C) of section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court.⁶³

In short, any judge who as of December 31, 1969, would not be eligible, because of the mandatory retirement provision, to stand for re-election in 1970 for a term beginning in 1971 was nevertheless to be eligible to be re-elected in 1970 to one additional term. However, the decision by the Ohio Supreme Court on June 19, 1968, in the case of *Euclid v. Heaton*,⁶⁴ raised immediately a serious question as to whether incumbent judges who were 70 or older might run for judicial office in the November, 1968, general election and/or assume office for terms beginning in January, 1969.

The Secretary of State was prompt to realize the possible impact of the *Heaton* case on the candidacies of such judges in the November, 1968, general election, and requested an opinion on this point from the Attorney General. In his letter to the Attorney General the Secretary of State noted that:

The draftsmen of the resolution presumed, of course, that the subject provisions of the amendment would take effect January 10, 1970, and indicated that judges holding office on December

⁶² Am. Subs. H.J. Res. No. 42 OHIO CONST. art. IV, § 6 (Page Supp. 1967). Effective Date and Repeal provides:

If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, and existing sections 1 and 2, and sections 3, 4, 6, 7, 8, 10, 12 and 14 of Article IV of the Constitution of Ohio shall be repealed from such effective date. Paragraph (B) of the Schedule and the repeal of sections 12 and 13 of Article XI adopted in 1851, shall become effective immediately upon the adoption of this amendment by the electors of this state.

⁶³ Am. Subs. H.J. Res. No. 42, Schedule, Paragraph (E) OHIO CONST. art IV § 6 (Page Supp. 1967).

⁶⁴ 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968).

31, 1969, would be eligible to be re-elected for one additional term as judge of the same court.⁶⁵

Referring indirectly to the *Heaton* case, the Secretary of State then noted that "there would seem to be no authority whereby incumbent judges who have now passed the age of 70 would be eligible for re-election at this time."⁶⁶

The Attorney General was equally prompt in his response to the Secretary of State. In an opinion rendered on July 5, 1968, he held that such incumbent judges could continue as candidates in the November, 1968, general election. The syllabus of his opinion reads:

A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.⁶⁷

Although the opinion by the Attorney General reaches a result that is plainly in harmony with the intention expressed by the draftsmen of the Joint Resolution, it may nevertheless fail to head off future litigation to settle the question of the propriety of septuagenarian incumbent judges continuing on the November, 1968 ballot. No such litigation had been initiated, however, at the time this article was submitted for publication.**

2. To Whom the Provision Is Applicable

Considerably less confusion exists as to whom the mandatory retirement provision is applicable. It is applicable to persons elected or appointed to "any judicial office"; and, accordingly, it covers all courts, including both the constitutionally-created courts and the legislatively-created courts. One possible problem of application, however, is posed by the existence of mayors' courts in which certain mayors of municipal corporations having neither a police court nor a municipal court exercise limited criminal jurisdiction.⁶⁸

C. *The Assignment of Retired Judges*

Many of the proposals calling for the mandatory retirement of judges in state judicial systems have contained the complementary

⁶⁵ Unpublished letter from Secretary of State Ted W. Brown to Attorney General William B. Saxbe, June 25, 1968.

⁶⁶ *Id.*

⁶⁷ 1968 OHIO ATT'Y GEN. OPS. 110.

** No litigation was commenced prior to the November, 1968 election and several septuagenarian judges were elected to terms beginning in January, 1969 [Ed.].

⁶⁸ OHIO REV. CODE ANN. §§ 1901.01 *et seq.* (Page 1953).

feature of post-retirement service by those judges able to render continued, effective judicial service.⁶⁹ Post-retirement service by voluntarily retired "senior judges" is also a well-known feature of the federal judiciary.⁷⁰ The purpose of incorporating a similar provision in the Joint Resolution was not only to ease the transition of judges from fulltime, active status to retired status, but also to provide a pool of experienced, able judges who may be assigned by the Chief Justice to serve temporarily when and where needed.⁷¹

Several features of the newly adopted provision for post-retirement service are worthy of note. First, it is applicable to both judges who have been retired because of age, and judges who have retired voluntarily irrespective of age. A judge who was originally appointed or elected to judicial office but later fails to be re-elected should not, however, be considered to have retired "voluntarily."

Second, assignment for post-retirement service must be made with the consent of the retired judge. Thus, the Chief Justice may call upon only those emeritus judges who voluntarily agree to accept service. Moreover, this *qualified* assignment power by the Chief Justice is separate and distinct from his *absolute* power to assign an active judge of the courts of appeals and courts of common pleas to sit temporarily in a court of appeals or a court of common pleas other than that in which he regularly holds court.⁷² Also, the absolute assignment power of the Chief Justice is limited to the active judges of only two courts, the courts of appeals and the courts of common pleas, while the qualified assignment power as to retired judges extends to former judges who have served on any court.

Third, the assignment power for post-retirement service permits the Chief Justice to assign a retired judge to courts other than the one in which he actively served prior to retirement. For example, a retired judge who had served on both a municipal court and a court of common pleas could be assigned to serve not only on either of those courts but also on a court of appeals or even on a county court.

Fourth, any retired judge who accepts such an assignment will receive, on a *per diem* basis, the established compensation of the

⁶⁹ Letter from Robert L. McBride, Judge of Common Pleas Court, Dayton, Ohio, March 9, 1964. See Garwood, *Judicial Selection and Tenure—The Model Article Provisions*, 47 J. AM. JUD. Soc'y 21, 26-29 (1963). See, e.g., MICH. CONST. art. 6, § 23; WIS. STAT. ANN. §§ 253.195, 247.13 (Supp. 1968).

⁷⁰ 28 U.S.C. § 294 (1964).

⁷¹ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 38.

⁷² Am. Subs. H.J. Res. No. 42, art. IV, § 5(A)(3) (Page Supp. 1967).

office to which he is assigned in addition to any retirement benefits to which he may be entitled. This provision was plainly intended to reward and encourage voluntary post-retirement service by emeritus judges and to eliminate any possible question that their retirement benefits would in any way be affected by the acceptance of such service.

D. Retirement Benefits

All proponents of mandatory retirement have recognized that provision for adequate, even liberal, retirement benefits is a necessary corollary. The newly adopted judicial article expressly grants to the legislature the power to provide retirement benefits and thus affirms the intention of the draftsmen and the electorate to deal positively with this matter.⁷³ The present retirement program simply permits judges, like other elected officials, to join the Public Employee Retirement System.⁷⁴ Concern has been expressed, however, that the present judicial retirement system is neither adequate nor fair, particularly when applied to those judges who begin their service comparatively late in life and now may face mandatory retirement after a relatively few years of judicial service.⁷⁵

Several new approaches have been suggested to meet the financial problems of the retired judges in Ohio: (1.) A separate fund within the framework of the Public Employees Retirement System could be created to increase benefits for retired judges; (2.) A completely separate system or fund with the same objective could be established; and (3.) Funded retirement systems could be abandoned entirely and retirement benefits—as well as judicial salaries—could be paid from regular state appropriations.⁷⁶

While the substance or merit of any new or revised program for judicial retirement benefits is outside the scope of this article, it is hoped that the General Assembly will in the years ahead meet this situation by enacting appropriate laws to provide retirement benefits for Ohio judges which will fairly and reasonably reflect the peculiar problems posed both by the brevity of judicial careers in some instances and, now, by mandatory retirement in all cases.

⁷³ *Id.* § 6(C).

⁷⁴ See OHIO REV. CODE ANN. §§ 145.01 *et seq.* (Page 1953), especially § 145.20 for statutes governing formation and operation of the Public Employees Retirement System.

⁷⁵ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 40.

⁷⁶ *Id.* at 41.

V. COURT ORGANIZATION

Section 1 of the recently amended judicial article vests the judicial power of the state as follows:

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law.⁷⁷

Two significant amendments of the present organization of the Ohio judicial system were adopted by the passage of Issue 3. First, the jurisdiction of the probate courts was transferred to newly-created probate divisions of the courts of common pleas; and, second, the General Assembly was authorized to create courts inferior to the supreme court, in contrast to its earlier power to create only courts that were "inferior to the courts of appeal."⁷⁸ The latter provision would also permit the General Assembly to reorganize the entire Ohio judicial system by repealing at some future date those statutes which created legislative courts.

A. *The Probate Court Becomes a Division of the Common Pleas Court*

Although Section 1 of the recently amended judicial article removed the probate court as a constitutional court, it would be erroneous to conclude that probate jurisdiction, as Ohioans (both lawyers and laymen) have long known it, has been eliminated. The Joint Resolution also created a "probate division" of the courts of common pleas as follows:

Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts.⁷⁹

Also, the Schedule provided that all probate judges were to become judges of the courts of common pleas.⁸⁰ Thus, one constitutional court, the common pleas court, remains in each county. In short, what has happened is this: probate jurisdiction has been transferred

⁷⁷ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV § 1 (Page Supp. 1967).

⁷⁸ OHIO CONST. art. IV, § 1 (Page 1953) (Repealed by Modern Courts Amendment).

⁷⁹ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV § 4(C) (Page Supp. 1967).

⁸⁰ Am. Subs. H.J. Res. No. 42, Schedule, Paragraph (D) OHIO CONST. art. IV § 4 (Page Supp. 1967).

from separate, constitutional courts to divisions of the courts of common pleas; but the transfer is not self-executing. The passage of Issue 3 clearly requires early legislative implementation, particularly in light of the Supreme Court's decision in the *Heaton* case holding that the amendment became effective upon adoption. The need is for the General Assembly to enact legislation restating, or if it so desires, modifying and amending the jurisdiction of the new probate divisions of the courts of common pleas.

The constitutional jurisdiction of the former probate courts was stated in recently repealed Section 8 of the judicial article:

The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licences and for the sale of land by executors, administrators, and guardians and such other jurisdiction, in any county or counties, as may be provided by law.⁸¹

Also, the General Assembly did undertake to modify the jurisdiction of the probate courts in accordance with the constitutional grant to it to create "such other jurisdiction." It has done so principally by amending from time to time the basic statute relating to probate jurisdiction.⁸²

Whether the General Assembly will conclude merely to grant the new probate division the same probate jurisdiction formerly lodged in the constitution or whether it will fully consider further amendments, either enlarging or condensing such probate jurisdiction, is of course a matter for the General Assembly to determine. Whatever the ultimate legislation may be, the General Assembly should recognize its duty to implement fully the transfer of probate jurisdiction from the probate courts to the probate divisions.

B. *The Possible Creation of New Courts at the Appellate Level*

The General Assembly has been empowered since 1912 to create courts that were "inferior to the courts of appeal."⁸³ In accordance with such constitutional authority the General Assembly has established municipal courts,⁸⁴ county courts,⁸⁵ mayors' courts,⁸⁶ two

⁸¹ OHIO CONST. art. IV, § 8 (Page 1953) (Repealed by Modern Courts Amendment).

⁸² See OHIO REV. CODE ANN. § 2101.24 (Page 1953).

⁸³ OHIO CONST. art. IV, § 1 (Page 1953) (Repealed by Modern Courts Amendment).

⁸⁴ OHIO REV. CODE ANN. §§ 1901.01 *et seq.* (Page 1953).

⁸⁵ OHIO REV. CODE ANN. §§ 1907.01 *et seq.* (Page 1953).

⁸⁶ OHIO REV. CODE ANN. §§ 1905.01 *et seq.* (Page 1953).

juvenile courts⁸⁷ and one police court.⁸⁸ The Joint Resolution, however, amended the grant of constitutional authority to the General Assembly by eliminating the phrase, "inferior to the courts of appeal," and substituting the words, "inferior to the supreme court." Thus, the legislature now has the power to establish new courts which would be on the same level as the courts of appeals.

The change in Section 1 to permit the creation of new courts by the General Assembly at the appellate level was made in response to suggestions that there might exist in the Ohio judicial system a need for specialized courts similar to those existing in the federal system, such as a tax court, a court of claims or an administrative appeals court, which would function on the same level as the courts of appeals.⁸⁹ For example, the need for specialized courts at the appellate level was recognized by the Modern Courts Committee of the Ohio State Bar Association in its report to the Council of Delegates in November, 1964,⁹⁰ and by the Study Committee in its December, 1964, report to the Ohio Legislative Service Commission.⁹¹

While it is interesting to speculate what the General Assembly's reaction to proposed legislation seeking to create a tax court or a court of claims or an administrative appeals court might be, consideration of the merits or the ultimate outcome of such proposals falls outside the scope of this article. It is sufficient to state that the General Assembly now has the power to create such new courts if it is its pleasure to do so.

C. *The Future of Court Organization in Ohio*

While the sponsors of the Joint Resolution recognized that a need in Ohio might exist for the creation of specialized courts, they were also keenly aware of the short-comings and deficiencies of the organization of the present judicial system. Many of these deficiencies arise from a single source: the multiplicity of courts of original jurisdiction in Ohio.

In its 1964 report, the Study Committee, after describing the number and complexity of municipal, county, juvenile, and police courts which existed in Ohio as courts of original jurisdiction in addition to the courts of common pleas, and at that time also the probate courts, noted that:

⁸⁷ OHIO REV. CODE ANN. §§ 2151.01 *et seq.* (Page 1953).

⁸⁸ OHIO REV. CODE ANN. §§ 1903.01 *et seq.* (Page 1953).

⁸⁹ STAFF RESEARCH REPORT NO. 75, *supra* note 18, at 72.

⁹⁰ *Report of Modern Courts Committee*, 37 OHIO BAR 1249, 1253 (1964).

⁹¹ STAFF RESEARCH REPORT NO. 75, *supra* note 18, at 72.

[E]ach county has at least two trial courts of original jurisdiction, each of which is autonomous, separate from, and wholly independent of other courts in the county. . . .

The result of such an arrangement is that procedure is governed not only by the innumerable sets of individual rules of court but a variety of scattered statutes in chapters dealing with individual courts, all of which must be examined if the improvement of judicial administration is to be uniform throughout the state. The inflexibility of this structure requires apportionment of judicial business among courts not according to need but by arbitrary monetary limits. Inequities, overlapping jurisdiction and duplication of court facilities and personnel are inherent features of such an arrangement.⁹²

In urging the need for greater and more efficient court organization in Ohio the Study Committee concluded:

The courts of Ohio often are referred to as the 'Ohio judicial system.' The collection of independent courts and judges with overlapping powers and jurisdictions which now operates in Ohio can hardly be referred to as 'a system.'⁹³

It was in an effort to meet this situation head-on that the Modern Courts Committee of the Ohio State Bar Association first recommended, and included in its final draft of an amended judicial article, the proposal thought by many scholars of judicial organization and administration to be the most effective—the creation of a unified court system.⁹⁴ Specifically, the proposal called for a single court of original jurisdiction at the local level operating through divisions.⁹⁵ The consequences of such a change made in a single stroke would indeed have been sweeping. The entire original jurisdiction of the courts in the state would have been constitutionally vested in the courts of common pleas; the General Assembly would have had no power to create additional courts. Also, the Supreme Court was empowered under that proposal to divide the court of common pleas into as many divisions "as might be necessary to expedite the business of the Court," thus making it possible for the courts of common

⁹² *Id.* at 14-15.

⁹³ *Id.* at 12.

⁹⁴ For example, in 1953 Chief Justice Vanderbilt wrote:

The first essential of a sound judicial establishment is a simple system of courts, for the work of the best bench and bar may be greatly handicapped by a multiplicity of courts with overlapping jurisdictions.

Vanderbilt, *The Essentials of a Sound Judicial System*, 48 Nw. U.L. REV. 1, 2 (1953).

⁹⁵ *Report of Committee for Modern Courts in Ohio*, 37 OHIO BAR 371, 378 (1964).

pleas to operate through divisions handling probate, juvenile, domestic relations, criminal and small claim and other matters.

The Modern Court Committee's proposal, however, was the subject of considerable criticism, principally on the ground that it was "too much, too soon." The Study Committee, for example, while fully aware of the need for greater organization in the Ohio judicial system, nevertheless favored a more gradual approach: rather than constitutionally limit the courts in Ohio to a unified three-tiered system—a supreme court, courts of appeals and courts of common pleas, it recommended the establishment of those courts as the only constitutional courts and the continuance of the grant of power to the General Assembly to establish (and thus to eliminate if it became its pleasure) the courts it had created since 1912, i.e., the municipal courts, the county courts, the juvenile courts, the mayors' courts and the police court. In short, if the General Assembly were to conclude that further court unification was in order and that the jurisdiction now exercised by legislatively-created courts could more effectively and efficiently be exercised by divisions of the courts of common pleas, it may accomplish such a result without further amendment of the constitution. Thus, the Joint Resolution proposed by the Study Committee contained the language of the present article. The Modern Courts Committee, while not in total agreement with the criticism directed to its proposal for immediate unification of the courts of original jurisdiction did, "in the interest of preserving and gaining the broadest possible base of support for a court modernization plan for Ohio . . .," urge full support of the Study Committee's proposal.⁹⁶

With the transfer of probate jurisdiction to the courts of common pleas a first tentative but perhaps highly significant step toward court unification in Ohio has been made. While the transition from "probate court" to "probate division" has not and will not be entirely free of a certain amount of confusion, many observers of the Ohio judicial system will be watching with great interest the operation of the new probate division. If the transition is successfully made, we may expect in the years ahead that proposals to transfer the jurisdiction of the legislatively-created courts to divisions of the courts of common pleas will receive wide-spread consideration. If the General Assembly were to respond favorably to such a proposal, Ohio would be in the forefront of those states⁹⁷ which have acted upon

⁹⁶ *Id.* at 1252.

⁹⁷ *E.g.*, Illinois, Michigan, New Jersey.

the principle that the best way to incorporate more efficient methods of court organization and administration into a state-wide judicial system is to adopt a unified court system.

VI. MISCELLANEOUS AMENDMENTS

Several miscellaneous amendments to the judicial article contained in the Joint Resolution are worthy of mention and discussion.

A. *Reversal of a Case by the Supreme Court on Constitutional Grounds*

The Joint Resolution amended the judicial article to provide simply that, "A majority of the Supreme Court shall be necessary . . . to render a judgement."⁹⁸ A unique provision in old Section 2 of the article had required:

No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of a court of appeals declaring a law unconstitutional and void.⁹⁹

Adopted by the Constitutional Convention of 1912, the former provision thoroughly aroused the ire of former Chief Justice Carrington T. Marshall some 16 years later. His opinion in the case of *Board of Education of City School District of Columbus v. Columbus*, permitted the result that in one appellate district a statute could be declared unconstitutional and void while in another it could be declared constitutional and valid.¹⁰⁰ Such a result was plainly distasteful to the Chief Justice. He concluded sadly, "It would be difficult to describe or even imagine a more deplorable situation."¹⁰¹

Deplorable or not, the situation continued. In 1930 the United States Supreme Court rebuffed an attack made against the former provision on the ground that it violated the protections of the due process and equal protection clauses and the guaranty of a republican form of government found in the federal constitution.¹⁰² The most widely known recent application of the former provision resulted in the situation where, for several years, the Fair Trade Act¹⁰³ was

⁹⁸ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 2(A) (Page Supp. 1967).

⁹⁹ OHIO CONST. art. IV, § 2 (Page 1953).

¹⁰⁰ 118 Ohio St. 295, 160 N.E. 902 (1928).

¹⁰¹ *Id.* at 299, 160 N.E. at 903.

¹⁰² State *ex rel.* Bryant v. Akron Metropolitan Park Dist., 120 Ohio St. 464, 166 N.E. 407 (1929), *aff'd* 281 U.S. 74 (1930).

¹⁰³ OHIO REV. CODE ANN. §§ 1333.29 *et seq.* (Page 1953).

valid and enforceable in Cuyahoga County¹⁰⁴ but not in Franklin County.¹⁰⁵ If not deplorable, the situation was at least one which practically all lawyers and judges felt was long overdue for correction; and the proposal to eliminate the language of the former provision provoked little or no opposition. The result is that the newly amended judicial article permits the Supreme Court to reverse a case on constitutional grounds by a simple majority.

The Supreme Court made prompt use of the new language. In the *Heaton* case¹⁰⁶ the majority of the Supreme Court, on June 19, 1968, applied the new provision to four cases involving the constitutionality of the "prosecutor's appeal" statutes.¹⁰⁷ The Court, Chief Justice Taft dissenting, held that the Joint Resolution had become effective when the Secretary of State certified the official results of the May 7, 1968, primary election, and reversed a finding of constitutionality by a court of appeals by a 5-2 vote. The majority of the Court reached this result on the ground that unless an issue as it appeared on the ballot contained a separate question as to delaying its proposed effective date beyond the date of the election, the constitutional amendment became effective immediately and was controlling as it appeared on the ballot.¹⁰⁸

B. "What's in a Name?"

The newly amended judicial article amends the designation of the six members of the Supreme Court other than the chief justice. Previously referred to as "judges,"¹⁰⁹ they are now called "justices."¹¹⁰

C. Compensation of Judges

Of considerably more interest to the judges of Ohio and perhaps to the public also than the new form of address for the members of

¹⁰⁴ *Hudson Distrib., Inc. v. Upjohn Co.*, 117 Ohio App. 207, 176 N.E.2d 236 (1961), *aff'd* 174 Ohio St. 487, 190 N.E.2d 460 (1963), *aff'd* 377 U.S. 386 (1964).

¹⁰⁵ *Bulova Watch Co., Inc. v. Ontario Store of Columbus, Ohio, Inc.*, 86 O.L. Abs. 585, 176 N.E.2d 527 (Ct. App. 1961). The matter was eventually laid to rest in 1967 when a 4-3 majority of the Supreme Court upheld the constitutionality of the Act. *Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

¹⁰⁶ *Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968).

¹⁰⁷ OHIO REV. CODE ANN. §§ 2945.67 *et seq.* (Page 1953).

¹⁰⁸ The court held that this construction was compelled by State *ex rel.* *McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916). 15 Ohio St. 2d at 74-75, 238 N.E.2d at 796.

¹⁰⁹ OHIO CONST. art. IV, § 2 (Page 1953).

¹¹⁰ Am. Subs. H.J. Res. No. 42, OHIO CONST. art. IV, § 2(A) (Page Supp. 1967).

the Supreme Court is the repeal of an old provision prohibiting any increase in judicial salaries during term.

As judicial salaries in Ohio have in recent years been adjusted upward with more frequency, and more new judgeships have been created, the former provision has in too many instances resulted in an anomalous and basically unfair situation. A judge elected to a new term of an existing or newly created judgeship may be entitled to receive the benefits of a recent salary increase while a colleague, who may have served longer on the bench but is in the midst of his term, is not. It was the desire of all proponents of the Joint Resolution to correct this situation. The Study Committee report, for example, noted that its members:

[W]anted to make it possible for all members of a court to receive their new salaries as changes are made in order to prevent having the great salary discrepancies among members of a single court.¹¹¹

With the passage of the Joint Resolution and the decision of the *Heaton* case, the problem has been met with both a fundamental fairness and dispatch.

VII. CONCLUSION

The recently amended judicial article contains the most sweeping and significant amendments since the adoption of the 1851 constitution. Its passage by the General Assembly in February, 1968, and by the electorate in May, 1968, came after almost a decade of analysis and study by the bar, the legislature and the judiciary. The size of the majority given to Issue 3 in May, 1968, reflects both the basic soundness of the proposal and the success of the educational efforts directed to the electorate by these groups. Yet much remains to be accomplished.

Initially, there is the matter of implementing the changes which have been made. A legislative program to implement and complement the new amendments must be enacted "with all deliberate speed." Although originally intended to become effective January 10, 1970, the Joint Resolution's hastened effective date, as determined by the Supreme Court in the *Heaton* case, plainly suggests the need for prompt, yet fully considered, action by the General Assembly. Implementation is likewise required promptly by the Supreme Court itself, and as noted above, it has already begun the task of implementing its new rule-making powers. This must include

¹¹¹ STAFF RESEARCH REPORT No. 75, *supra* note 18, at 81.

both rules of practice and procedure and also administrative rules designed to carry out its supervisory responsibility.

Lastly, after an opportunity has been given to the Ohio judicial system to absorb and work out the changes required by the Joint Resolution, a further evaluation of the system will surely be made by judges, lawyers, political leaders and the public to determine whether additional improvements in the system—such as further court unification or an appointive method of judicial selection—should be considered to meet both the demands of the citizens of Ohio and the highest standards of judicial organization and administration. Regardless of what the future may hold for the Ohio judicial system, the Joint Resolution which was enacted by the General Assembly, approved by the electorate and given prompt effect by a decision of the Supreme Court, all within a period of 111 days in the spring of 1968, may long be remembered as a major milestone on the road toward providing Ohio with a judicial system second to none.