STATEMENT OF BERNARD G. SEGAL

ON THE PROPOSED JUDICIARY ARTICLE

BEFORE THE

PREPARATORY COMMITTEE

FOR THE

PENNSYLVANIA CONSTITUTIONAL CONVENTION

I welcome this opportunity to speak on the proposal of the Pennsylvania Bar Association relative to judicial administration, organization, selection and tenure. While time limitation will permit me to touch only upon the high spots of this suggested Amendment to the Constitution of Pennsylvania, the proposed Article in its entirety is before this Preparatory Committee and, of course, I shall be glad to answer questions as to any of its provisions.

Pennsylvania has no more pressing need than the modernization of its antiquated judicial system. Our courts are operating today under constitutional provisions adopted 94 years ago, which were designed to meet the leisurely pace of that 19th century period. The automobile, the airplane, radio, television, even electricity, were unknown. The population of Pennsylvania was only three and a half million. The number of motor vehicles registered in Pennsylvania today exceeds by more than 50% the total population of Pennsylvania at the time our present Constitution was adopted.

This population explosion, the growing complexity of our industrial and commercial life, the advent of the automobile and the resulting litigation arising out of the ever-mounting number of accidents on the highways, have combined to

create immensely increased volume and wholly different kinds of litigation from those known in 1873. The judicial setup approved then simply cannot cope with modern conditions.

Starting approximately a quarter of a century ago, there was a surge of judicial reform at both Federal and State levels. Since then 30 States have adopted important reforms in judicial organization, administration, and selection, and more latterly, in removal, discipline and compulsory retirement as well. Few States have had no Constitutional changes in the past decade in the field of the judiciary, let alone in almost a century as in Pennsylvania. While Pennsylvania Judges and lawyers have worked together to reduce to a minimum the evils existing under the present Constitutional provisions, the simple fact is that these measures, large as they have been, cannot begin to meet modern conditions. What is needed is a complete revision of Article V of our present Constitution, which stamps us as one of the most backward States in the Nation insofar as its judicial system is concerned.

If I were asked to summarize in a single sentence the objectives and the provisions of the proposed Article, I would say that it creates a modern, integrated, unified

judicial system, in which the Judges will be freed of political involvement and will be enabled to conduct their judicial duties with a maximum of independence and efficiency. In all essential respects, the provisions in the Article are no longer in the experimental stage. None of them is hypothetical. Every one has been tried and proven to be sound in other States.

The provisions in the proposed Judiciary Article may be subdivided into four classifications, as follows:

1. Judicial Administration.
2. Judicial Organization.
3. Judicial Selection and Tenure.
4. Judicial Removal, Discipline and Compulsory Retirement.

I consider first the subject of Judicial Administration.

JUDICIAL ADMINISTRATION

At present, there is no Statewide administrative supervision or control of any kind over the Courts in Pennsylvania's 59 judicial districts. Each local court operates completely independent of the others and virtually independent

of the Supreme Court as well, insofar as administration is concerned. There are 90 President Judges and approximately 225 other Judges in the 59 judicial districts. Each of these districts is virtually an independent principality. Philadelphia alone has 12 President Judges, 10 in the Courts of Common Pleas, 1 in the Orphans Court, and 1 in the County Court.

The proposed Judiciary Article provides that the judicial power of the Commonwealth shall be vested in a unified judicial system, and gives the Supreme Court general supervisory and administrative authority over all the Courts of the Commonwealth, including the power to assign Judges temporarily from one court or one district to another. However, in any judicial district having a population in excess of 500,000, i.e., the districts containing Philadelphia, Allegheny, Delaware, and Montgomery Counties, no Judge may be assigned to a district other than his own without the consent of the President Judge of his Court.

The powers of administration vested in the Supreme Court would, of course, be exercised by the Chief Justice, or by an Associate Justice deputized by him, in accordance with rules prescribed by the Court. There will be an Administrative Director and staff to assist in supervising the administration and operations of the judicial system.

The reason for centralized administration of our Courts is apparent. No one would think of operating a State-wide business with 90 Vice Presidents, each in charge of his own branch, each a completely autonomous authority, without direction and supervision by a President and a Board of Directors. Neither would anyone suggest that each head of the more than 20 departments in our State Government and of the more than 100 Boards and Commissions, should be autonomous, free of supervision and direction by the Governor.

Although adapted to the needs of Pennsylvania, incorporating suggestions made during discussions over the last five years, these provisions derive primarily from the Model Judicial Article for State Constitutions promulgated by the American Bar Association in 1962 after a unanimous vote of its House of Delegates.

Provisions for the centralized assignment of Judges by the Supreme Court, similar to those in the proposed Article exist in every State bordering Pennsylvania, except perhaps Delaware where they are more limited. They prevail in Alaska, Arkansas, California, Colorado, Connecticut, Florida, Kansas, Louisiana, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, South Dakota, and in Illinois

where, however, since there are only five judicial districts, all of them very large, the provision is the same as is proposed for our four largest districts, i.e., that assignment must have the consent of the Chief Judge of the District.

I have heard it argued that the unified judicial system is needed in some counties of the Commonwealth, but not in others. Frankly, I cannot understand that argument at all. The Courts of Common Pleas and the Orphans' Court of Pennsylvania are not local or county courts. They are State courts; the salaries of their Judges are paid out of the State treasury; and like other State employes, Judges are members of the State Employes Retirement Fund. In some small judicial districts there are too many Judges; in others there would seem to be too few. Above all, what hurts one county in Pennsylvania judicially, hurts every county in Pennsylvania. Each is inextricably interwoven with the others.

It would seem to be almost axiomatic that a great State like Pennsylvania should not have as loose and inefficient a system of administration of its courts as exists anywhere, one which has been abandoned by the large number of States which I have listed.

JUDICIAL ORGANIZATION

Important and greatly needed changes are proposed as to virtually all of the Courts, including the jurisdiction of the Supreme Court and enlargement of and permissible basic procedural changes in the operation of the Superior Court.

In each judicial district, there will be only one trial court. In Philadelphia, this will replace the present 11 trial courts, and in Allegheny County the present 3 trial courts. However, where a separate Orphans' Court presently exists, it will continue, although as indicated earlier, the Chief Justice will have the power to assign Orphans' Court Judges to sit in other courts.

This brings me to the subject of Magistrates in Philadelphia, Aldermen in other cities, and Justices of the Peace in boroughs and townships.

There are approximately 4000 Aldermen and Justices of the Peace in Pennsylvania. In 1962, a Committee of the Pennsylvania Bar Association sent questionnaires to the Justices of the Peace of the State. Of the 1,213 Justices of the Peace who replied, only 422 had completed high school, 183 had attended but had never completed their high school work, 121 had gone to grade school only, and 7 had not even completed grade school. Only 7 were lawyers. The highest number were skilled laborers. Next in order came real estate or insurance agents, and then housewives. Approximately 80% of the Justices of the Peace held "court" in their homes.

I shall not describe conditions involving Philadelphia Magistrates since I understand that District Attorney Arlen Specter, who has played so large a role in investigating this situation, has given you the details of the abysmal conditions existing in the magisterial courts in Philadelphia

and the resulting conviction of several Magistrates for criminal offenses resulting in jail sentences.

As to Justices of the Peace, there is the vicious fee system under which they retain as their own, the ~~fines~~ costs imposed upon persons brought before them. This means that a Justice of the Peace who curries the favor of the police in his vicinity will take in as much as $20,000 or $30,000 a year as compensation for his part-time services.

Like the Magistrates, Justices of the Peace are an anachronism in our judicial system.

Last week I sat for two days in Leningrad in the Peoples Court, the trial court of general jurisdiction provided for by the Constitution of the Union of Soviet Socialist Republics. Three Judges presided. Only one of them was a lawyer. The other two were lay representatives of various segments of the public--labor unions, government employe unions, various social organizations. The two lay members could outvote the one professional Judge in the course of the trial or on the final decision. As far as I know, the Socialist countries are the only ones which, like Pennsylvania and the dwindling number of States in this Country, have lay Judges deciding legal questions and presiding in the courts of the land.

The simple fact is that in a modern court system, there is no room for individuals to preside in courts of justice who have neither the training nor the experience to enable

them to read and understand, let alone interpret and enforce, the laws involved in the cases which come before them. Aldermen, Justices of the Peace, and Magistrates are part of a system which was outworn before this century began. Unless the entire system is scrapped, no amount of house cleaning will have any lasting effect.

Under the proposed Judiciary Article, Magistrates, Aldermen, and Justices of the Peace will be abolished, and full-fledged courts called Community Courts will be created in their place. These will be part of Pennsylvania's statewide judicial system and will be conducted by Judges selected in the same way and required to have the same qualifications as Judges in other trial courts.

I have been told by Judges whose opinions I respect, of the beneficial neighborhood chores which some Justices of the Peace perform. They are said to be close to the people. I suggest that laudable though this may be these are not the functions of judicial officers. Commissioners, for whom the proposed Article provides and who will be permitted to accept bail, issue warrants, or otherwise assist the Judges of the Community Courts, should be able, more appropriately and with better supervision, to perform whatever beneficial acts such Justices of the Peace presently perform.

The substitution of courts for Magistrates, Aldermen, and Justices of the Peace started in this Country more than a quarter of a century ago, but there has been a virtual

explosion in the number of States which have taken this action during the past few years, and the additional number which are scheduled to do so within the next year or two. Such offices have already been abolished in every State bordering Pennsylvania, except Delaware, and even in Delaware, the system was completely overhauled in 1965, the Justices of the Peace being placed under the supervision of the Chief Justice of the Supreme Court and required to be governed by rules promulgated by the Supreme Court. The minor judiciary has been eliminated in Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Virginia, Washington, and Wisconsin. It is significant that the Constitutions of our two newest States--Hawaii and Alaska--do not even make reference to Magistrates, Aldermen, or Justices of the Peace.

So much for the organization of the courts.

JUDICIAL SELECTION AND TENURE

I consider next the subject of the non-partisan selection of Judges.

Admittedly, Pennsylvania's present system of judicial selection is practically entirely a political one. We are one of the 9 States--only one of them a large industrial, agricultural, and commercial State like ours, i.e., Texas--which still elect all of their Judges and require them to run for

office on a partisan political ballot. Indeed, only 6 others have this system for any of their Judges. The overwhelming majority of States have abandoned entirely partisan, political election of their Judges.

I should like to dispose of the notion that the election of Judges is traditional in this Country. That is not the fact. In the first place, the Constitution of the United States has never provided for election of Judges. Moreover, appointment of Judges and tenure during good behavior were provided in the Constitutions of every one of the original States, even before the adoption of the Constitution of the United States in 1787. It was not until more than 60 years later that popular election and limited tenure for Judges temporarily became the vogue.

I should also like to correct the popular misconception that the election of Judges is a democratic institution in use in democratic nations around the world. Entirely to the contrary, the arresting fact is that the only places in the world, outside of the minority of remaining States in this Country, where Judges are still elected in the Soviet Union and its satellite nations. And does this sound familiar? In the Soviet Union, in actual practice Judges must be approved by the political party leaders in each nominating group before they can run for the office of Judge.

Another generally held notion is that it is the voters who make the selection. This is wholly unrealistic. Actual statistics demonstrate that more than one-half of the

Judges now sitting in the courts of Pennsylvania began their judicial careers by appointment of the Governor, not election. Even where judicial vacancies are filled initially by election, everyone knows that the selection of the candidates is made either by the Chairman of the prevailing political party or by the political committee or committees of the judicial district.

And, in any event, can anyone doubt that the average voter who goes to the polls knows nothing about the candidates for Judge and when he leaves the polls, cannot even remember the names of the persons who ran for this high office. Voters generally are interested in the candidates for United States Senator or Governor or Mayor. The Judges on the ballot simply follow the tide.

This has been demonstrated by actual polls of voters. Thus, one of the best known of the professional agencies conducting such polls found some years ago that ten days after the election, in New York City not more than 1% of the voters polled could remember the name of the Judge whom they had just elected to the highest judicial post in the State, and in the City of Buffalo, not a single voter polled could remember the name. In a rural county, only 1% of those polled could name the Chief Judge in question, and only 4% could name even one of the several judicial candidates who had run in the election.

Last fall, I had occasion to speak in Oklahoma City just before the general election, in which several Supreme Court Justices and Trial Judges were to be elected. A poll

was taken which demonstrated that 74% of the voters questioned could not name a single candidate for the office of Judge; 11% could name just one of the 7 candidates; and only 8% could name half of the candidates. Out of 456 persons interviewed at random, only 1 person could name all 7 candidates.

In any event, how is the average voter to appraise such large questions as legal training, trial practice, and judicial temperament? One might as well submit to the general electorate, the selection of the Medical Director or Chief Surgeon or Senior Psychiatrist of a State or municipal hospital.

It is time for Pennsylvania to follow the lead of most of the States of the Country and abolish the political election of Judges. It is an incongruity for a Judge, who can have no political platform, to be required every 10 years to conduct a political campaign. His place is in the courtroom not at a street corner rally. And unless he is a man of large wealth, where is the money for judicial campaigns to come from? Obviously, campaign funds must be given to the Judge by political party leaders, or, as is usually the case, by lawyers who practice before him in his court.

As Mayor Lindsay of New York recently said in a blistering attack on the popular election of Judges:

> "The tawdriness of the whole exercise demeans the man and the court of justice he serves."

The simple fact is that far from being effectuated or enhanced, the democratic process is subverted by the spectre of political campaigns for Judges.

Little wonder then, that 34 States have abandoned or rejected the system of political election of Judges entirely and, as I have indicated, in only 9 States in the entire Country, including Pennsylvania, are all the Judges still selected in this way.

The proposed Judicial Article proposes a nonpartisan plan for the selection and tenure of Judges. The plan has been tried and tested. It was originally advanced by the American Judicature Society a half century ago, and it has been approved and sponsored by the American Bar Association since 1939. Starting with its adoption for the appellate courts and certain large city courts in Missouri in 1940, it has operated successfully in various States, and is emerging as the modern answer to the yearning of citizens to take and keep their Judges out of politics and at the same time to retain some power on a merit basis to determine whether a Judge shall be returned to the Bench upon completion of his term.

Under this Article, all Justices or Judges of the Appellate and Trial Courts in Pennsylvania will be appointed by the Governor from panels submitted by the Nominating Commissions--a single panel of 6 for the Supreme and the Superior Courts, and a panel of 3 for other courts with a second panel if the Governor requests. If the Governor does not make the appointment within certain fixed time limits, the Chief Justice will be empowered to make the appointment from the names on the panel or panels which had been submitted to the Governor.

After a Justice or a Judge has been appointed, he remains in office for not less than two years, after which time, his name is submitted to the electors at the next municipal election on a separate nonpartisan judicial ballot, or in a separate column on voting machines, without party designations. The only question to be voted upon is whether the Judge shall be retained in office.

Ten years later, the Judge comes before the voters again in the same manner.

Each Judicial Nominating Commission will consist of one Justice or Judge, three members of the Bar selected by the Bar, and three lay citizens appointed by the Governor.

It was my privilege to serve as Chairman of the Judicial Nominating Commission established by Governor Scranton by Executive action when 5 new judgeships were created for Philadelphia by the General Assembly in 1963. The Commission consisted of 3 laymen, 3 lawyers, and a Judge. I can report to you that the Judge and the lawyers on the Commission considered the 3 laymen to be of substantial help in the Commission's deliberations and determinations. Another significant circumstance was that lawyers who theretofore and subsequently had been unwilling to have their names considered for appointment or election consented to have the Judicial Nominating Commission submit their names on the panel which went to the Governor. The 5 appointments which Governor Scranton made from the panel submitted by the Commission were greeted with uniform praise by Judges, lawyers and the mass media.

The first State to adopt the merit plan for selection and tenure of Judges was Missouri in 1940. By Constitutional amendment, it inaugurated this new system to apply to its two appellate courts of statewide jurisdiction and also to the courts in its largest city, St. Louis, and its largest county which includes the other large city in the State, Kansas City. A Constitutional amendment is now pending to make the system mandatory in the selection of the other Judges in the State.

The plan has operated extremely successfully in Missouri during the past 26 years.

There are now 15 States which have merit plans for selection or tenure, or both, for some or all of their Judges (Alabama, Alaska, California, Colorado, Florida, Illinois, Iowa, Kansas, Minnesota (by executive action of the Governor), Missouri, Nebraska, New York (as to New York City by executive action of the Mayor), Oklahoma, Utah, and Vermont) and 8 in which the plan applies to both selection and tenure (Alaska, Colorado, Florida, Iowa, Kansas, Missouri, Nebraska, and Oklahoma). In addition, by Executive Action of the Governor, Puerto Rico has a nonpartison merit plan for judicial selection.

I should like to make one thing clear. It is true elsewhere, as it is here, that despite the shortcomings of the system of political election of Judges, by and large we get good Judges in Pennsylvania, many of them learned, conscientious and hard-working. But, by the same token, it is true that not all of our Judges in Pennsylvania are working hard, and not all

of them are of the quality or exhibit the zeal in the practice of their official duties which the effective administration of justice requires and to which the public is entitled. And, unfortunately, the shortcomings of the few lead to dragnet criticism of the judiciary as an institution and of Judges generally.

One further point.

The provisions as to the merit plan of selection and tenure in the proposed Judicial Article which we have submitted apply to all the judicial districts in the State. However, we have submitted an alternate provision limiting this method of selection to the Supreme and the Superior Courts and to the local courts in Philadelphia and Allegheny Counties, with local option in each Judicial District to adopt the Judicial Nominating Commission plan, or having adopted it, thereafter to discontinue it. Of course, our preference is for the Statewide application of the plan.

JUDICIAL REMOVAL, DISCIPLINE AND COMPULSORY RETIREMENT

I have already spoken of the general level of competence and diligence of the Judges in our State. However, especially in view of the unprecedented demands which modern conditions make upon the Judge, the adverse reaction which lawyers receive from their clients, which the mass media reflect, and which the public feels towards the Judge who continues to preside in the courtroom after he is so feeble that he can scarcely travel alone, or the Judge who for other reasons simply cannot or will not perform the functions of his office, is beyond my powers of description. It is regrettable, but grimly true, that one bad Judge can undo the efforts of a hundred excellent Judges, and this is greatly accentuated during these days when factors beyond the control of any Judge, like those causing delays of four or five years in the trial of a case in Philadelphia, create general dissatisfaction with our judicial system. In summary, even a very few unfit Judges constitute a serious impediment to the efficient administration of justice.

In Pennsylvania today, we have a single method of removal, i.e., impeachment.

One need not delve very deeply into the virtually complete nonuse of the impeachment process for the removal of members of the judiciary, or of the problems which would be created for the General Assembly if it had to sit, first as an

impeaching body in the House, and second as a convicting body in the Senate, to realize that this vehicle is virtually worthless to meet the problems created by the aged, the infirm, or even the corrupt Judge. That the impeachment process has proved inadequate, inequitable, impracticable, and ineffective insofar as the judiciary is concerned is now too well established to require debate. Nevertheless, since it has been in the Federal Constitution and most of the State Constitutions from the beginning--impeachment is now provided for in 48 of the 50 States--it is retained in the proposed Judiciary Article.

I have not heard anyone argue that additional provisions are not required. The real question is not whether there should be a change, but rather what the change should be and how it should be accomplished.

Section 12 of the proposed Judiciary Article adopts what I believe has emerged as the most effective method and the one which I think represents the call of the future.

Under this plan, a continuing Commission, the Judicial Qualifications Commission, is created, consisting of five Judges, two from the Superior Court and three from the District Courts of different Judicial Districts, to be selected by the Supreme Court; two members of the Bar to be selected by the members of the Bar; and two lay citizens to be selected by the Governor. Thus, a majority of the Commission will consist of Judges.

The Commission is charged with the responsibility of keeping itself fully informed of facts and circumstances relating

to members of the judiciary, insofar as the same may relate to misconduct in office, neglect of duty, failure to perform their duties, violation of any canon of legal or judicial ethics adopted by the Supreme Court, or other conduct prejudicing the proper administration of justice, or disability seriously interfering with the performance of their duties, which is, or is likely to become, of a permanent character; and to receive complaints or reports, formal or informal, from any source, pertaining to such matters.

The Article further provides that any Justice of Judge who becomes a candidate for an non-judicial office shall be removed as Judge, and any Justice or Judge who is convicted of misbehavior in office, or disbarred as a member of the Bar of the Supreme Court, automatically forfeits his judicial office.

The fact that a complaint has been filed with the Commission, and the Commission's investigation, deliberation, and conclusions on the case, are completely secret, except, of course, if the Commission's decision is appealed to the Supreme Court.

If after investigation the Commission deems it necessary, it may order a hearing to be held before it, or may request the Supreme Court to appoint three Justices or Judges of the Courts of Record as Special Masters to hear and take evidence in the matter and report thereon to the Commission. If after hearing and considering the Record and Report of the Masters, the Commission finds good cause therefor, it must recommend to the

Supreme Court the removal, discipline, or compulsory retirement of the Judge.

The Supreme Court is required to review the Record, may permit the introduction of additional evidence, and may either order removal, discipline, or compulsory retirement, or wholly reject the recommendation.

The Commission Plan was first adopted in California by Constitutional Amendment in 1960, at the behest of the Chief Justice, the State Judicial Council, the Legislature, the State Bar, and the State Conference of Judges. By agreement of Judges, lawyers, lay leaders, and the mass media, unanimous as far as I have been able to discover and as far as the written material discloses, the plan has been eminently successful during the past 6 years in that State, which has the largest judicial system in America. California has more than 1000 judges. By the end of 1964, the Commission had received 344 complaints against Judges, only 118 of which required investigation. Of special significance is the fact that during the 4 year period, 26 Judges voluntarily resigned or retired while under investigation. In 1966, 9 Judges retired or resigned while complaints against them were being investigated by the California Commission.

The California Plan has also had salutory and highly beneficial side effects. The very existence of a continuing Commission has acted as a deterrent to the occasional arbitrary or recalcitrant Judge, has minimized absences from judicial

duties for extended periods, has provided a medium through which the disgruntled litigant might air his grievances however unmerited, and has enabled the Commission, by discreet suggestion, to achieve the discontinuance of practices not serious enough to warrant removal or suspension but significant enough to effect adversely the administration of justice in the courts.

The surge toward the Commission Plan is apparent from the fact that during the past year and a half the voters of 4 states (Texas, Colorado, Florida and Nebraska) have followed the California lead and have adopted such a plan. Moreover, the Commission plan is currently under active consideration in 19 other states.

Mr. Chairman, in concluding I wish to reiterate the gratification of the Pennsylvania Bar Association at the work of this Preliminary Committee and of its distinguished Chairman, who is doing as much as any man in the Commonwealth to effect the vital changes needed in our present Constitution and whose leadership has been a heartening stimulus to us all.

Thank you.