OPINION NO. 68-110

Syllabus:

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.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, July 5, 1968

I have before me your request for my opinion wherein you inquire whether a judge who is currently holding office and who would be otherwise eligible for re-election, is disqualified from running for re-election in November, 1968, by the passage of Amended Substitute House Joint Resolution No. 42 at the special election held May 7, 1968, if he will have attained the age of seventy years by the time he would assume the office for such term to which he was re-elected.

There was submitted to the electors of Ohio on May 7, 1968, Amended Substitute House Joint Resolution No. 42 which included a proposal to enact Section 6 of Article IV of the Ohio Constitution and a "Schedule" which contained a limited exception from the operation of Section 6 of Article IV, supra, for certain judges.

Section 6 (C) of Article IV of the Ohio Constitution proposed by Amended Substitute House Joint Resolution No. 42 provides, in part:

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

The amendment proposed by Amended Substitute House Joint Resolution No. 42 received a majority of the votes of the electors voting on the question.

Section 1 of Article XVI of the Ohio Constitution provides, in part:

> "* * * Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. * * *"

The Ohio Supreme Court, in Euclid v. Heaton, Case No. 41178, 15 Ohio St. (2d), 65, decided June 19, 1968, held that Section 1 of Article XVI, supra, and its earlier case State, ex rel. McNamara v. Campbell, 94 Ohio St., 403, required that an amendment of Section 2, Article II to the Constitution proposed by the General Assembly pursuant to the authority of Section 1 of Article XVI, supra, became effective on May 7, 1968, the date upon which it received the votes of a majority of the electors voting on the question in the special election in which it was submitted.

The first paragraph of the syllabus in the case of State, ex rel. McNamara v. Campbell, 94 Ohio St., 403, reads:

> "A provision in a joint resolution of the General Assembly of Ohio, submitting to the electors of the state a proposed amendment to the Constitution, that the same shall not go into effect until a time later than that fixed

> by Section 1 of Article XVI of the Constitution, is inoperative and void, unless the proposition to postpone the taking effect of such proposed amendment beyond the time named in the Constitution is also submitted to the electors of the state and adopted by a majority of those voting on the proposition."

The proposal to amend Section 2 of Article IV, supra, was submitted in the same proposed constitutional amendment as the proposal to enact Section 6 of Article IV.

I can determine no difference in the method of submitting the amendment of Section 2 of Article IV and the enactment of Section 6 of Article IV to the electors. Consequently, I am constrained to conclude that Section 6 (C) of Article IV became effective upon its passage on May 7, 1968.

Section (E) of the "Schedule" of Amended Substitute House Joint Resolution No. 42 provides:

> "(E) 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 the 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."

This language was included in the text of the amendment published as required by Section 1 of Article XVI of the Ohio Constitution "once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published."

Although Section 1 of Article XVI as interpreted in State, ex rel. McNamara v. Campbell, supra, required the Court to conclude in Euclid v. Heaton, supra, that the establishment of an effective date at a date later than that fixed by Section 1 of Article XVI, was "inoperative and void, unless the proposition to postpone the taking effect * * * is also submitted to the electors of the state and adopted by a majority of those voting on the proposition," I find nothing in the laws or Constitution of Ohio nor in the McNamara case, supra, which would require that all language of a proposed amendment appear on the ballot that is submitted to the electors, in order to be operative and valid. To the contrary, Section 3505.06, Revised Code, provides, in part:

> "The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in

each polling place in some spot that is easily accessible to the voters."

Pursuant to the foregoing authority, the Secretary of State condensed the text of Amended Substitute House Joint Resolution No. 42. The pertinent language of the condensed text of the ballot submitted to the electors was:

> "* * * to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years * * *"

Pursuant to the requirement of Section 3505.06, supra, the full text of the proposed amendment was posted in each polling place. This requirement of Section 3505.06, supra, and the requirement that the full text be published for five consecutive weeks, was considered by the Ohio Supreme Court in State, ex rel. Foreman v. Brown, 10 Ohio St. (2d), 139 (1967). In the Court's opinion by Mr. Chief Justice Taft, there is quoted at page 149 from an earlier case the following language:

> "'* * * the possibility of misunderstanding seems remote especially when it is remembered that the full text of the amendment was published in at least one newspaper in each county once a week for five consecutive weeks preceding the election, and that the full text was duly posted in every polling place. Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy involved technical terms of the entire amendment, but this is the very difficulty sought to be avoided by the statute which expressly states that the "ballot need not contain the full text of the proposal" and that a "condensed text" may be substituted therefor. * * *'"

The foregoing language is equally applicable to the condensation of Amended Substitute House Joint Resolution No. 42 prepared by the Secretary of State.

Recognizing that the full text of the amendment proposed by Amended Substitute House Joint Resolution No. 42, including the Schedule, was published for five consecutive weeks preceding the election as required by the Constitution and the full text was posted at each polling place as required by Section 3505.06, supra, I conclude that the condensation "properly described" and included the "Schedule" and that the "Schedule" became effective immediately upon passage.

Accordingly, an anomalous situation exists: A constitutional provision is effective, which specifically makes ineligible for re-election at the election in November, 1968, a judge currently holding office who will have attained the age of seventy years by the time he will assume office for such term, while exempting from its provisions judges who are holding office on December 31, 1969, and who would be otherwise eligible for re-election in 1970 for a term beginning in 1971, by permitting such judges to be re-elected for one additional term. I recognize that the reason for this anomoly was the intention of the General Assembly that

the constitutional amendment proposed by Amended Substitute House Joint Resolution No. 42 was not to be effective until January 10, 1970, and the necessarily incidental intention that it was not to apply to judges running for re-election in 1968.

You do not ask about the eligibility of a candidate for election to judicial office at the election in November, 1968, who will attain the age of seventy years who is not running for re-election either because he was appointed to the judicial office or because he is not an incumbent and, therefore, I express no opinion on the validity of such candidacy.

The "Equal Protection" clause, Section 1 of Article XIV of the United States Constitution provides, in part, that:

> "* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted this requirement to guarantee that "all persons shall be treated alike under like circumstances and conditions." Yick Wo v. Hopkins, 118 U.S., 356. The Equal Protection clause prohibits the Ohio Constitution from disqualifying some judges from running for re-election who have attained the age of seventy years while permitting others of the same age to run for re-election without some reasonable basis for making the distinction.

There is nothing inherent in holding judicial office on December 31, 1969, which would reasonably justify allowing such judge who would be seventy before he assumed office to run for re-election for one additional term while denying to a judge who holds judicial office after May 4, 1968, but before December 31, 1969, the same right to run for re-election if he would be seventy before he assumed office for the term to which he was re-elected.

Consequently, either Division (E) of the Schedule is invalid because it is an unreasonable preference of some judges or Section 6 (C) of Article IV is invalid because it works an unreasonable disqualification of similarly situated judges. It is clear that the people of Ohio could provide in the Ohio Constitution that no one who has attained the age of seventy years is eligible to run for judicial office. It is equally clear that there is no requirement that the Ohio Constitution have any limitation as to age of judicial candidates for re-election.

Given this choice of inherently permissible alternatives, I must be guided by the intention of the General Assembly of Ohio in proposing to the electors of Ohio, Amended Substitute House Joint Resolution No. 42 and the intention of the majority of the electors of Ohio in adopting it. It is clear from a reading of the exception contained in Division (E) of the "Schedule," supra, and the effective date of January 10, 1970, of the Resolution that the General Assembly intended that any person holding judicial office who attained the age of seventy years on or before December 31, 1969, would be eligible for re-election to one term. In consideration of the fact that the full text was published once a week for five consecutive weeks prior to the election and a copy of the full text was posted at each polling place I conclude that those electors voting for the proposal intended that the incumbent judges on or before December 31, 1969, would be eligible for re-election.

The "Effective Date and Repeal" division of Amended Substitute House Joint Resolution No. 42 provides, in part:

> "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, * * *"

Inasmuch as it is not constitutionally permissible to conclude that a judge who holds judicial office on or after May 4, 1968, but prior to December 31, 1969, may not run for re-election if he would attain the age of seventy years before he would assume office for the term to which he was re-elected while concluding that a judge who holds office on December 31, 1969, is eligible to run for re-election even though he would attain the age of seventy years before assuming office, I do conclude that the disqualification of judges running for re-election contained in Section 6 (C) of Article IV is not effective until January 1, 1970.

Accordingly, it is my opinion and you are advised that 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.