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LEGISLATION PROPOSING TO INCREASE THE NUMBER OF JUDGES OF COURTS OF APPEALS, PROBATE COURTS, MUNICIPAL COURTS, OR COUNTY COURTS REQUIRES ONLY THE CONCURRENCE OF A MAJORITY OF ALL THE MEMBERS ELECTED IN EACH HOUSE OF THE LEGISLATURE AS PROVIDED IN SECTION 9 OF ARTICLE II, OHIO CONSTITUTION, REQUIRING A TWO-THIRDS VOTE IN CERTAIN INSTANCES, DO NOT APPLY TO SUCH LEGISLATION—§9 ARTICLE II, OHIO CONSTITUTION.

SYLLABUS:

Legislation proposing to increase the number of judges of courts of appeals, probate courts, municipal courts, or county courts requires only the concurrence of a majority of all the members elected in each house of the legislature as provided in Section 9 of Article II, Ohio Constitution, and the provisions of Section 15 of Article IV, Ohio Constitution, requiring a two-thirds vote in certain instances, do not apply to such legislation.

Columbus, Ohio, May 4, 1961

The Ohio Senate, State House
Columbus, Ohio

To the Senate:

Senate Resolution No. 52, requesting my opinion, reads as follows:

“Requesting the Attorney General for a written opinion as to whether the concurrence of more than a majority of the members of each house is necessary in order to enact legislation increasing the number of judges in court of appeals districts, probate courts, county courts, and municipal courts.

“WHEREAS, Under Section 109.13 of the Revised Code, the Attorney General, when requested by resolution, is required to furnish his written opinion on questions of law to either house of the General Assembly; and

“WHEREAS, Section 15 of Article IV of the Constitution of Ohio, as adopted by the voters of the State of Ohio on September 3, 1912, provides:

“Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided; and

“WHEREAS, Section 6 of Article IV of the Constitution creates courts of appeals and provides that ‘laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges’; Section 7 of Article IV creates probate courts and provides that each court shall be ‘. . . holden by one or more judges, as the general assembly may determine by law . . .’; and the General Assembly, by appropriate legislation pursuant to Section 1 of Article IV, has created municipal courts and county courts; and

“WHEREAS, Some members of the Senate are concerned about the application of the two-thirds rule of Section 15, Article IV of the Constitution of Ohio to the passage of legislation increasing the number of judges in courts of appeals, probate courts, county courts, municipal courts, and any other courts the General Assembly creates; therefore be it

“RESOLVED, That the members of the Senate of the 104th General Assembly of Ohio do hereby adopt this Resolution and, in accordance with Section 109.13 of the Revised Code, request your written opinion on the following proposition:

“How many members of each house must concur in order to enact legislation increasing the number of judges in courts of appeals, probate courts, municipal courts, and county courts? and be it further

“RESOLVED, That the Clerk of the Senate of the 104th General Assembly of Ohio transmit forthwith a properly authenticated copy of this Resolution to the Attorney General of Ohio, the Honorable Mark McElroy.”

Preliminary to considering the specific question, it appears advisable to review the constitutional requirement as to the number of votes ordinarily required to pass a bill in the legislature. In this regard, Section 9 of Article II, Ohio Constitution, provides that “no law shall be passed in either house, without the concurrence of a majority of all the members elected thereto.” Thus, saving a special constitutional provision, only a majority vote is required to enact legislation. One special constitutional provision providing an exception is that found in Section 1c of Article

II, Ohio Constitution, which required a two-thirds vote for a bill to take effect immediately (emergency bill), another is the provision of Section 16 of Article II, Ohio Constitution, requiring a three-fifths vote to pass a bill over the governor's veto, and another is that found in Section 15 of Article IV, Ohio Constitution, requiring a two-thirds vote in certain instances (which exception will be discussed later).

As to the vote required to increase the number of judges in courts of appeals, Section 6 of Article IV, Ohio Constitution, reads in part:

"The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which there shall be a court of appeals consisting of three judges. *Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges.* In districts having additional judges, three judges shall participate in hearing and disposition of each case * * *."

(Emphasis added)

It would appear that under this section only a majority vote is required to increase the number of judges of a court of appeals district. In stating that laws may be passed, the language can only mean that laws may be passed as other laws are ordinarily passed pursuant to Section 9 of Article II, *supra*, requiring a *majority* vote.

Section 7 of Article IV, Ohio Constitution, relative to probate courts, reads in part:

"There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one or more judges *as the general assembly may determine by law* * * *."

(Emphasis added)

Again, the use of the words "as the general assembly may determine by law" can only be interpreted to mean that a law to increase the number of judges would be subject to the *majority* vote provision of Section 9 of Article II, *supra*.

There is no provision in the Ohio Constitution for either municipal courts or county courts. Section 1 of Article IV, Ohio Constitution, however, allows for the establishment of certain courts, reading:

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

(Emphasis added)

Pursuant to this authority, the legislature has created municipal courts and county courts (Chapters 1901. and 1907., Revised Code). Having authority to create the courts, it follows that the legislature may determine the number of judges allowable in such courts. And absent any special provision to the contrary, legislation increasing the number of judges in such courts requires only the majority vote provided for in Section 9 of Article II, *supra*.

Senate Resolution No. 52, *supra*, raises the question whether the provisions of Section 15 of Article IV, Ohio Constitution, can be construed to affect the vote required to increase the number of judges in court of appeals districts, probate courts, county courts, and municipal courts, said Section 15 reads as follows :

“Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.”

(Emphasis added)

While, under the provisions of the above section, a two-thirds vote is required in order to increase or diminish the number of judges of the supreme court and to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, there is no reference to any special vote being required to increase the number of judges in court of appeals districts, probate courts, county courts, and municipal courts, and I am unable to see how the section could be read to apply to an increase in the number of judges in any of these courts. As stated in *State v. Wright*, 7 Ohio St., 333 at page 336, by Brinkerhoff, J. :

“The general provision of the constitution is, that a concurrence of a majority of the members elected to each house shall be sufficient for the enactment and the repeal of laws. The cases where it is otherwise provided in the constitution, are exceptional in their character, and ought not, we think, to be extended by construction.”

And in *Mendelson v. Miller* (1911), 11 N.P. (N.S.) 586 (Common Pleas Court of Cuyahoga County), in considering whether a bill increasing the number of judges of a municipal court required a two-thirds majority, the

court, at page 581, referred to the constitutional provision providing for enactment of legislation by majority vote, and said:

“the only limitations of this general power of a mere majority must be express limitations found in the Constitution; and there are none bearing on the question here involved.”

In specific answer to the question raised in Senate Resolution No. 52, *supra*, therefore, it is my opinion and you are advised that legislation proposing to increase the number of judges of courts of appeals, probate courts, municipal courts, or county courts requires only the concurrence of a majority of all the members elected in each house of the legislature as provided in Section 9 of Article II, Ohio Constitution; and the provisions of Section 15 of Article IV, Ohio Constitution, requiring a two-thirds vote in certain instances, do not apply to such legislation.

Respectfully,

MARK McELROY

Attorney General