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PROPOSED LEGISLATION—HOUSE BILL 10—OFFICE OF JUDGE—VACANCY LESS THAN ONE YEAR—WHERE GOVERNOR MAY APPOINT JUDGE FOR UNEXPIRED TERM—UNCONSTITUTIONAL—IN CONFLICT WITH CONSTITUTION OF OHIO—ARTICLE XVII, SECTION 2, ARTICLE IV, SECTION 13.

SYLLABUS:

A law which provides that a vacancy for a period of less than one year in the office of a judge be filled by the Governor for the remainder of the unexpired term is in conflict with Section 2 of Article XVII and Section 13 of Article IV of the Constitution of the State of Ohio and therefore is unconstitutional.

COLUMBUS, OHIO, February 14, 1939.

HON. WILLIAM H. DEDDENS, *Chairman of Codes Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication wherein you request my opinion as to the constitutionality of House Bill No. 10, which bill is at the present time under consideration by the Codes Committee of the House of Representatives.

Said proposed bill reads as follows:

Section 1. That section 142 of the General Code of Ohio be amended to read as follows:

Sec. 142. If the office of a judge becomes vacant by reason of the expiration of the term of the incumbent, and a failure to provide for the filling thereof **1** at the preceding election, such vacancy shall be filled by appointment by the governor or if such office becomes vacant for any cause and the term of such vacancy is for a period of less than one year, such vacancy shall be filled by the governor for the remainder of the unexpired term. If the period of vacancy is for a longer time than one year a successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty

days after such appointment. The person so appointed or elected shall hold the office until a successor is elected and has qualified.”

Section 2 of Article XVII of the Constitution of the State of Ohio reads, so far as is pertinent to your inquiry, as follows:

“Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law.”

Section 13 of Article IV of the Constitution of the State of Ohio reads as follows:

“In case the office of any Judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the Governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened.”

Both of the above sections provide for the manner of filling vacancies in elective offices. Section 2 of Article XVII applies generally and Section 13 of Article IV applies to judges only. It will be noted however that both sections contain identical language with reference to the appointment by the Governor, to wit: “until a successor is elected and qualified”.

The reason for the appointment being made in this manner is obvious. An elective office is one to be filled by the people. It is not to be filled by any other authority except to the extent necessary to prevent a lapse. In other words it was the manifest intention of the framers of the Constitution of the State of Ohio to provide for appointment to elective offices only for such time until the people could express their choice by ballot.

It will be noted from the above sections that if the vacancy occurs thirty (30) days or less before the proper election, then the Governor may make an appointment under which the appointee shall serve until the people elect a successor at the first proper election for the office to be filled, and if the vacancy occurs more than thirty (30) days before such election is to be held, then the Governor may appoint a person to fill the

vacancy, but such appointee may only serve until the people have opportunity to exercise their right to elect a judge.

House Bill No. 10, supra, provides:

“* * * if such office becomes vacant for any cause and the term of such vacancy is for a period of less than one year, such vacancy shall be filled by the governor for the remainder of the unexpired term. * * *”

This language is in direct conflict with the language of both sections above quoted and consequently it is my opinion that if such bill is enacted into law such law would be unconstitutional.

Respectfully submitted,

THOMAS J. HERBERT,
Attorney General.