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# Court Reorganization: Legislative Incursion on Judicial Independence in Ohio

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**COURT REORGANIZATION:** LEGISLATIVE INCURSION ON JUDICIAL INDEPENDENCE IN OHIO—*Geisinger v. Cook*, 52 Ohio St. 2d 51, 396 N.E.2d 477 (1977), *cert. denied*, 98 S. Ct. 1451 (1978).

## I. INTRODUCTION

Judicial systems in states throughout the United States are undergoing reorganization. Clogged court dockets are focusing attention on largely archaic court systems in many states. In some areas, systems which were established during the 19th century to meet the needs of a largely agrarian society are intact today with only slight modification.[1] Some form of court reorganization or consolidation will be necessary to cope with a vastly changed society.[2] Unification of lower courts is now imminent in several states.[3]

There are, however, problems of transition involved in court reorganization and consolidation. One danger is that the state legislature, in its zeal to reform the state court system, may invade the independence of the judiciary.[4] Legislatures can wipe out a judge's office by the act of abolishing his court. Reorganization provides the potential for political harassment of disfavored judges and for forcing jurists to become lobbyists in their own behalf.[5]

Judges should be free of direct legislative influence or control.[6] Accordingly the legislature which undertakes a reorganization is faced with the problem of how to consolidate inefficient, overlapping inferior courts without infringing upon the independence of the judiciary.

## II. FACTS

A recent case in Ohio, *Geisinger v. Cook*,[7] illustrates this problem and raises the question whether the Supreme Court of Ohio dealt

1. Judice, *Texas Judicial System: History and Modernization*, 14 S. TEX. L.J. 295, 312 (1972-73).

2. *Trial Court Consolidation in California*, 21 U.C.L.A. L. REV. 1081, 1104 & n.139 (1974).

3. *See* Gazell, *Lower Court Unification in the American States*, 16 ARIZ. ST. L.J. 653, 677 (1974).

4. To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution?

> . . . [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

THE FEDERALIST No. 51, at 320-22 (New Am. Library ed. 1961) (J. Madison).

5. Judice, *supra* note 1, at 358.

6. *See* Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975).

7. 52 Ohio St. 2d 51, 396 N.E.2d 477 (1977), *cert. denied*, 98 S. Ct. 1451 (1978).

with the situation effectively. Bruce Geisinger was the duly elected, qualified, and acting judge of the Troy Municipal Court, Troy, Ohio, having been elected for a full term of six years commencing January 1, 1975. The following year, the General Assembly of Ohio enacted a bill[8] creating the Miami County Municipal Court with territorial jurisdiction enveloping all of Miami County including the municipality of Troy.[9] This bill transferred the unfinished business of the Troy Municipal Court to the newly created Miami County Municipal Court,[10] called for the election of two full-time judges for the new court,[11] and abolished the office held by Judge Geisinger.[12] On November 4, 1975, the two new judges required by the bill were elected.

On August 21, 1975, Judge Geisinger filed a complaint in the state supreme court for a writ of prohibition against the Ohio Board of Elections, Attorney General William J. Brown, and Secretary of State Ted W. Brown, seeking to restrain the election of the two judges and to prevent Judge Geisinger's removal from office. Judge Geisinger's complaint was dismissed and he lost his judgeship. He then brought an action in the Court of Common Pleas of Miami County seeking a declaratory judgment that Amended Substitute House Bill No. 205 was unconstitutional and void. The court of common pleas denied Judge Geisinger's complaint; the court of appeals and the Supreme Court of Ohio affirmed the lower court's opinion. Certiorari was denied by the United States Supreme Court.

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8. H.B. No. 205, 1975 Ohio Legis. Bull. 243 (1975) (amended substitute bill).

9. Former Revised Code section 1901.02 provided that the Troy Municipal Court had jurisdiction within Staunton, Lostcreek, Elizabeth, Concord, and Newton townships in Miami County. That section, as amended by House Bill No. 205, now provides: "The Miami County Municipal Court has jurisdiction within Miami County . . . ." OHIO REV. CODE ANN. § 1901.02 (Page Supp. 1977).

10. Section 11 of H.B. No. 205 (amended substitute bill), 1975 Ohio Legis. Bull. 243 (1975) provides: "All causes, judgments, executions, and other proceedings pending in the municipal courts of Piqua and Troy at the close of business December 31, 1975, shall be transferred to and proceed in the Miami County municipal court as if originally instituted there."

11. Former Revised Code section 1901.08 was amended to provide: "In the Miami County Municipal Court, one full-time judge shall be elected in 1975, and another full-time judge shall be elected in 1975, but shall serve only until December 31, 1979. One full-time judge shall be elected in 1979 . . . ." OHIO REV. CODE ANN. § 1901.08 (Page Supp. 1977).

12. Section 10 of H.B. No. 205 (amended substitute bill), 1975 Ohio Legis. Bull. 243 (1975) provided:

> The offices of the existing full-time municipal judge of the Troy Municipal Court, and the existing part-time Fremont Municipal Court are abolished by this Act, effective upon the commencement of the term of office of the full-time municipal judges who are elected respectively to the Miami County and Fremont Municipal Courts.

## III. ANALYSIS

### A. *Case Precedent*

At issue in the appeal to the Supreme Court of Ohio was the interpretation of the Ohio Constitution, article IV, section 15:

> 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.[13]

Judge Geisinger contended that this section empowered the General Assembly "to establish other courts," such as the Miami County Municipal Court, but that it could not exercise that power in a manner causing the vacation of the office of any judge. The court disagreed, distinguishing constitutional courts from legislative, or statutory, courts. The supreme court, courts of appeals, common pleas courts and probate courts are established by the Ohio Constitution[14] and are therefore constitutional courts; municipal courts are established by the legislature and are therefore legislative, or statutory, courts.

The court relied heavily on *Flinn v. Wright*,[15] in which an earlier wording of section 15[16] was interpreted to mean that the General Assembly could not directly or indirectly vacate the office of a judge of a court established by the constitution but that it could abolish courts established by the General Assembly, even though the office of a judge might be vacated.

The earlier version of section 15 which was in effect at the time of *Flinn* was the same as the present version except that it was phrased in the disjunctive instead of the conjunctive:

> The general assembly may increase, or diminish, the number of the judges of the supreme court, the number of the districts of the court of

13. OHIO CONST. art. IV, § 15.

14. OHIO CONST. art. IV, § 1 provides: "The judicial power of the state is vested in a supreme court, court of appeals, common pleas courts, probate courts and such other courts inferior to the court of appeals as may from time to time be established by law."

15. 7 Ohio St. 333 (1857). The Ohio General Assembly had passed an enactment that abolished the Criminal Court of Hamilton County. The judge who had his office terminated by the statute instituted a claim charging that the statute was in violation of the Ohio Constitution, article IV, section 15.

16. The present version is the result of revision in 1912.

> common pleas, the number of judges in any district, change the districts, of the subdivision thereof, *or* 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.[17]

*Flinn* had held that the word "such" in connection with the words "change, addition or diminution" directly refers to the changes, additions, and diminutions in the number of judges of the supreme court, the number of districts of the court of common pleas, the number of judges of any district, the districts themselves, or the subdivisions thereof. The word "such" was held not to refer to the "other courts" in the phrase "or establish other courts." Therefore the restriction against vacating the office of a judge was held not to apply to courts which were established by the legislature.

Judge McBride, in writing the *Geisinger* opinion of the Court of Appeals of Miami County, expressed doubts about the *Flinn* interpretation of section 15:

> While I personally agree that Article IV, Section 15, is "clear, concise and positive" in prohibiting the vacation of the office of any judge during his term . . . the Supreme Court of Ohio has not modified its position taken in 1857 in *State ex rel. Flinn v. Auditor*, 7 Ohio State 333, (334), that the legislature has unbridled power to abolish a statutory judicial office during the term of an incumbent elected judge. Any change in that constitutional interpretation must be made by the Supreme Court of Ohio.[18]

The *Flinn* holding was rejected in an unreported case in Hamilton County in 1970, *Niehaus, Connors and Utz v. Morr*,[19] which concerned three county judges. There the court rejected *Flinn*, saying that if it were the intention of the Supreme Court of Ohio to affirm *Flinn*, it would have done so in *Gustafson v. Krause*.[20] The supreme court in *Gustafson* was confronted with the issue of whether a judge at election time would have to indicate for which term he was seeking office.[21] In

17. OHIO CONST. art. IV, § 15 (1851, amended 1912) (emphasis added).

18. Geisinger v. Cook, No. 76-CA-25 (Ct.App. Miami County, Ohio 1976).

19. No. 235748, 236430 and 236441 (C.P., Hamilton County, Ohio, April 28, 1970). The offices of three duly elected county judges were abolished by the 107th General Assembly. The office of county judge is created by the legislature and is therefore a legislative or statutory court, not a constitutional court. The Court of Common Pleas of Hamilton County held that article IV, section 15, of the Ohio Constitution protected judges of both legislative and constitutional courts from being vacated from office.

20. 5 Ohio Op. 436 (Ct. App. Cuyahoga County 1936), *aff'd*, 131 Ohio St. 97, 1 N.E.2d 937 (1936).

21. This case involved the court of common pleas and the issue arose when the legislature converted the election of the judges in Cuyahoga County from a group race

the course of deciding the issue the court considered the nature of the legislative power to create or diminish the office of a legislative judge and held that the legislature may abolish the office of legislative judges but may not, in the process, vacate the office of an incumbent judge.

> When an additional judgeship is created in the exercise of this power, the office is a legislative and not a constitutional office and is not subject to the rule of continuity applicable to constitutional offices. In fact the legislature under the power to diminish, has express authority upon the required concurrence of its members, to abolish the continuity of the office created by it at any time, provided that such abolishment shall not vacate the office of the incumbent judge.[22]

In the Hamilton County case, Judge Schnieder held that:

> Such courts which are established by the Legislature may be abolished at any time by the Legislature.
>
> However, the language of Article IV, Section 15, of the Constitution (as amended September 3, 1912), is clear, concise and positive, and reads in part as follows: "But no such change, addition or dimunition shall vacate the office of any judge."[23]

### *B. The Constitutional Language*

The Supreme Court in *Geisinger* did not have to follow the 1857 *Flinn* decision.[24] It could have instead followed the reasoning of the 1936 *Gustafson* case. Indeed, the *Flinn* decision rested on an interpretation of the previous, unamended section 15 of article IV of the Ohio Constitution; *Gustafson* dealt with the present, amended version of section 15, as does the *Geisinger* case. A careful look at the grammatical construction of section 15 favors the *Gustafson* interpretation[25]

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in which all participated to single and separate races for each office to be filled. Thus all but one office to be filled were of a statutory and not constitutional origin. When the legislature creates judgeships under the power given in article IV, section 15 "to increase beyond one or diminish to one the number of judges of the Common Pleas court in any county" the offices created are legislative and not constitutional.

22. 5 Ohio Op. 436, 439 (Ct. App. Cuyahoga County 1936), *aff'd*, 131 Ohio St. 97, 1 N.E.2d 937 (1936).

23. Niehaus, Connors and Utz v. Morr, No. 235748, 236430 and 236441 (C.P. Hamilton County, Ohio, April 28, 1970).

24. The court said that it had also followed *Flinn* previously in *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 423, 49 N.E. 404, 405 (1898). However, *Jennings* was dealing with the termination of the employment of firemen, which, of course, is quite distinguishable from the vacation of an incumbent judge from his office during his term.

25. "[R]elative and qualifying or modifying words, phrases, and clauses should be referred to the word, phrase, or clause with which they are grammatically connected." 73 AM. JUR. 2d *Statutes* § 229 (1974).

that the pronoun, "such," refers to the complete series of infinitive phrases of the sentence:

> Laws may be passed 1) to increase or diminish the number of judges of the Supreme Court, 2) to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, *and* 3) 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.[26]

Therefore, "no *such* change, addition or diminution shall vacate the office of any judge" would refer to: 1) judges of the supreme court, 2) judges of the court of common pleas, *and* 3) judges of other courts established by the legislature.[27]

### *C. The Intent Behind the Constitutional Provisions*

The court in *Geisinger* discussed the debates at the constitutional convention in 1912 concerning the amendment of section 15 of article IV, saying that the probable motive was simply to guarantee to each county at least one common pleas court judge.[28] The authors of the amendment did indeed discuss the need for at least one common pleas judge in each county.[29] They did not, however, discuss whether or not they intended to have the judges of the "other courts" protected by the savings clause[30] and there is no reason to believe that they intended any less than the literal meaning of their words: "no such change, addition, or diminution, shall vacate the office of any judge."[31]

Furthermore, the constitutional concern for preventing legislative removal of incumbent judges is expressed in another section of the Ohio Constitution. Article IV, section 23, provides that a local court consolidation "shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was

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26. OHIO CONST. art. IV, § 15 (emphasis and numerals added).

27. The Supreme Court of Ohio, in contrast, reasoned in *Geisinger*:

> Since 1912, Section 15 has directed that "no such change, addition or diminution shall vacate the office of any judge." The word "such," relative to the phrase "change, addition, or diminution," guides us to changes, additions, or diminutions theretofore mentioned. This reference is to the number of the judges of the Supreme Court and the number of the judges of the common pleas courts in any county. The changes, additions, and diminutions do not relate to "other courts" which the General Assembly may see fit to establish.

52 Ohio St. 2d at 55.

28. *Id.* at 54.

29. 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO (1912), at 1399.

30. *Id.* at 1397-1403.

31. OHIO CONST. art. IV, § 15.

elected."[32] This suggests, as Judge Geisinger argued,[33] that the spirit and intent of the Ohio Constitution and its amendments call for article IV, section 15, to be interpreted as prohibiting the vacation of the office of any judge, including a municipal judge, during his term.

The term for one of the full-time judges to be elected in 1975 precisely coincided with the unexpired term of Judge Geisinger.[34] This fact raises the crucial question of whether the legislature may vacate the office of any unfavored statutory judge by creating and substituting another judicial office with a term identical in length to the unexpired term of the incumbent and with similar duties. The court of appeals in its *Geisinger* opinion answered that question by saying: "If this be so, there is no limit to legislative control over a majority of the members of the judiciary in the State by the use of any subterfuge that avoids removal by impeachment under Article IV, Section 17."[35] The framers of the Ohio Constitution provided a legitimate procedure to be used when impeachment[36] or removal from office[37] is deemed necessary; a judge may only be removed from office upon the filing of a complaint and after the opportunity to be heard.

Recognizing this potential for political abuse in a similar situation, a New Jersey court held that a city council could not be allowed, even

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32. Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten percent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such county the same person shall serve as judge of the court of common pleas, *judge of the municipal court*, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.
OHIO CONST. art. IV, § 23 (as amended Nov. 2, 1965) (emphasis added).

33. Brief for appellant at 18, Geisinger v. Cook, No. 76-CA-25 (Ct. App. Miami County, Ohio 1976).

34. *See* notes 11 and 12 *supra*.

35. Geisinger v. Cook, No. 76-CA-25.

36. Judges may be removed from office, by concurrent resolution of both houses of the general assembly, if two-thirds of the members elected to each house, concur therein; but, no such removal shall be made, except upon complaint, the substance of which shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.
OHIO CONST. art. IV, § 17.

37. Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.
OHIO CONST. art. II, § 38.

for economical reasons, to terminate the appointment of a magistrate during his term of office:

> The public, of course, is vitally concerned with the cost of government. But it is equally concerned with the integrity of the local courts. Their independence from local influence is furthered by security in office, and there can be no doubt . . . that the Legislature intended to protect the local courts from political interference.[38]

The office of magistrate in New Jersey is analogous to the office of municipal judge in Ohio in that it is a statutory judgeship rather than a constitutional judgeship. The defendant city had said that it was on the horns of a dilemma, that it needed only two magistrates but was saddled with four since a New Jersey statute provided that a magistrate shall serve "until his successor is appointed and qualified."[39] The court interpreted the quoted phrase as having been designed by the legislature to assure that the office will be occupied and not vacated until the appointment of a successor. Since the legislature authorizes appointments of additional magistrates "as the need may appear,"[40] the court held that the city could, if it wished, resolve that the need no longer existed. The office of the magistrate would cease to exist at the end of the incumbent's term. The action of the city then would "not conflict with the legislative purpose to assure judicial independence during the stipulated term of office."[41]

## IV. ALTERNATIVES FOR THE LEGISLATURE

Legislatures can accomplish the goal of court consolidation and modernization without at the same time removing unimpeached, incumbent judges from office. Some states have streamlined and consolidated state judicial systems and at the same time enacted transitional provisions that safeguard the independence and integrity of the affected judgeships. At least two mechanisms are used. The legislature can permit the present court and judgeship to continue for the balance of the incumbent judge's term or provide a timetable for consolidations to coincide with the incumbent judge's term. Alternatively, the

38. Kreiger v. Jersey City, 27 N.J. 535, 543, 143 A.2d 564, 568 (1958).

39. "Each municipal court shall have a judge who shall be known as the municipal magistrate. He shall serve for a term of three years from the date of his appointment and until his successor is appointed and qualified." N.J. STAT. ANN. § 2A:8-5 (1964).

40. "In every municipality having in 1948 or thereafter a population of more than 200,000, the governing body of such municipality may provide for the appointment, as the need may appear, of not more than three additional magistrates of a municipal court of such municipality." N.J. STAT. ANN. § 2A:8-6 (1967).

41. 27 N.J. 535, 544, 143 A.2d 564, 569 (1958).

legislature can provide for judges whose courts have been superseded to succeed to the first vacant judgeship in the new court.

Legislatures in California and New York have used plans of the latter type. In California, the statute provided:

> Whenever the territory of a judicial district (herein called the annexed district) is annexed to a judicial district theretofore having a municipal court (herein called the annexing district), a judge of a court partly or wholly superseded thereby shall, if eligible, succeed to the first vacant judgeship on such municipal court, whether such vacancy then exists or occurs within two years thereafter through the creation of a new judgeship or otherwise.[42]

New York has also carefully provided that no judge will be vacated from office by the abolition of courts during court consolidation.

> c. The legislature shall provide by law that the justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was elected or appointed, be judges of the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article and for such district as the legislature may determine.
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> d. The legislature shall provide by law that the justices of the court of special sessions and the magistrates of the city magistrates' courts of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was appointed, be judges of the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen provided, however, that each term shall expire on the last day of the year in which it would have expired except for the provisions of this article.[43]

The alternative of continuing the present judicial office for its term has previously been used in court consolidation in Ohio. A model is a 1921 statute abolishing the superior court of Cincinnati. The General Assembly carefully protected the office of the incumbent judges until the termination of their terms.

> SECTION 1. The court of record heretofore established within the city of Cincinnati, and the county of Hamilton, styled "the superior court of Cincinnati," shall continue until the termination of the term of office of those judges already thereto elected.
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> SECTION 2. Upon the termination of the term of office by death, resignation, removal or expiration of the present term, for which said

42. CAL. GOV'T CODE § 71083 (West 1976).
43. N.Y. CONST. art. 6, § 35.

judges were severally elected, the vacancy created thereby in either or any of said offices shall not be filled either by election or appointment.

SECTION 3. Upon the termination of the term of said judges by death, resignation, removal or expiration of the present term of office the court shall be abolished, and the causes then pending in said court and all records shall be transferred to the court of common pleas of Hamilton County, Ohio which shall have power and jurisdiction to hear and determine them . . . .

. . . .

SECTION 5. Nothing in this act shall be construed to affect in any wise the present incumbents elected by virtue of any acts, or parts of acts hereby repealed, either in their compensation, powers, duties or obligations, except as provided in section six hereof or otherwise for and during the term of office for which said judges were severally elected.[44]

The policy arguments behind this type of alternative were set out by the Supreme Court of Mississippi. That court was addressing a similar instance of court consolidation and stated:

[I]t is true that a judge or chancellor cannot be dispensed with, and left unprovided with a district for the performance of his functions; it follows that existing judges and chancellors, for whom no districts are provided by the act, are entitled to continue on duty, as before, in their formerly existing districts, which, as to them and for this purpose, still exist during their term. This view maintains the validity of the act as to the provisions it contains, and the right of judges and chancellors for whom districts are not made by it to continue in their former districts, regarding the provisions of the act as to time; and thus the act will have effect to accomplish the legislative purpose to rid the state of supernumeraries, hindered for a time in part, but soon to be relieved by mere efflux of time of all obstacles to its complete operation.[45]

## V. CONCLUSION

Court modernization is a commendable goal. So too is the preservation of the independence of the judiciary. Though the legislature certainly has the power to modify the system of statutory courts to meet changing societal needs, the legislature should not direct judges in these courts in the performance of their duties. To allow an incumbent judge to be removed from office without a proper impeachment proceeding provides an opportunity for improperly influencing judges. It is a precedent capable of abuse. In Ohio there are constitutional limitations on legislative changes in judicial offices which should be adhered to.

44. 1921 Ohio Laws 354 (1921).
45. Price v. Anderson, 65 Miss. 410, 4 So. 96, 97 (1888).

Modernization of court systems can and is being accomplished without infringement on judicial independence and at little or no additional cost or delay. A careful drafting by the legislature can provide for the consolidations to coincide with the termination of the offices of the incumbent judges; or, if that proves impractical, the incumbent judges whose courts are being abolished could be transferred to the newly created judgeships for the remainder of their terms.

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