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## THE NEBRASKA JUDICIAL ARTICLE: A TIME FOR REFORM

### I. INTRODUCTION

The purpose of this comment is to examine further a proposal for complete court reform in Nebraska<sup>1</sup> put forth in an article entitled *The Justice of the Peace in Nebraska*,<sup>2</sup> and to study some of the advantages of a unified court system. Such a court system would vest the judicial power of the state in one court of justice, rather than in several autonomous courts. However, this one court would be divided into courts of different levels under one administrative head.

The problem will be approached in two ways which will first indicate the need for some kind of reform, and then point to possible solutions. Initially the study will examine the history of the Nebraska judicial system by surveying the evolution of the judicial article in the Nebraska Constitution, placing particular emphasis on changes or proposed changes which point toward a more flexible and unified court system. The Model Judicial Article<sup>3</sup> proposed by the American Bar Association<sup>4</sup> will then be compared with Nebraska's present judicial article,<sup>5</sup> and also to a proposed amendment to that article recently passed by the Unicameral.<sup>6</sup>

Upon establishing the need for judicial reform, the necessity for a study commission to make final recommendations for implementing a new judicial system should become apparent. An appendix to this comment presents an outline to be followed by such a commission and provides some suggestions to expedite the research and final recommendations of that commission.

This comment does not propose adoption of a specific type of court system in Nebraska. Rather, it attempts to give a concise history of the Nebraska Judicial Article, to indicate some of the basic problems of the present court system, to study current trends and thoughts on modern court systems of other states, and to aid a study commission created by the Unicameral, should that

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<sup>1</sup> Dolan and Fenton, *The Justice of the Peace in Nebraska*, 48 NEB. L. REV. 457, 487 (1969) [hereinafter cited as Dolan and Fenton].

<sup>2</sup> *Id.*

<sup>3</sup> Hereinafter cited as M.J.A.

<sup>4</sup> SURVEY OF THE JUDICIAL SYSTEM OF MARYLAND at 83 prepared by the Institute of Judicial Administration, New York, N.Y.

<sup>5</sup> NEB. CONST. art. V.

<sup>6</sup> L.B. 476, 80th Neb. Leg. Sess. (1969) (introduced by Senator Roland Luedtke). [hereinafter cited as L.B. 476].

body seriously pursue judicial reform. In this light, the article merely attempts to emphasize the need for such a detailed study, and does not propose to discuss all the problems present in Nebraska's court system.

## II. HISTORY OF THE NEBRASKA JUDICIAL ARTICLE<sup>7</sup>

The judicial article of the first constitution in Nebraska, although much more simple than the present judicial article, was, nevertheless, quite similar.<sup>8</sup> Although the "malcontents insisted that the state was hampered by the want of courts, by the need of proper grades in the judiciary"<sup>9</sup> there were no immediate amendments to the judicial article of 1866. The first change occurred when the electors adopted a constitution proposed by the Nebraska Constitutional Convention of 1875.<sup>10</sup> Except for periodic amendments from that time and except for the large-scale amendments of the 1919-20 Constitutional Convention,<sup>11</sup> that constitution is basically the same as the one presently in existence.

While the Constitution of 1875 has proven to be workable and lasting, it was, like most constitutions, not perfect.<sup>12</sup> The court system has been the target for more of the criticism of that docu-

<sup>7</sup> See generally, J. MORTON, HISTORY OF NEBRASKA (1905-13) [hereinafter cited as MORTON], and J. OLSON, HISTORY OF NEBRASKA (2d ed. 1966) [hereinafter cited as OLSON].

<sup>8</sup> NEB. CONST. art. IV (1866) .The judicial power was vested in a "Supreme Court, District Courts, Probate Courts, Justices of the Peace, and such inferior courts as the Legislature may from time to time establish." *Id.* § 1. There were to be three justices of the Supreme Court, none of whom were designated as Chief Justice. *Id.* The justices were to act also as the judges of the district courts held in the three districts into which the state was divided. *Id.* The supreme court had only appellate jurisdiction except in cases relating to "revenue, *mandamus, quo warranto, habeas corpus,*" and impeachment. *Id.* § 3. The jurisdiction of the other courts was to be provided by law, except that the Probate Courts, Justices of the Peace, and other inferior courts had special limitations put upon them by the constitution. *Id.* § 4. The legislature could increase the number of judicial districts and supreme court justices after the year 1875. *Id.* § 8.

<sup>9</sup> Neb. State Journal, June 26, 1869.

<sup>10</sup> OLSON at 183.

<sup>11</sup> See generally I & II PROCEEDINGS OF THE CONST. CONVENTION (1919-20) [hereinafter cited as CONST. CONV.].

<sup>12</sup> Judged by the original conception of American constitutions that they should be merely the fundamental basis of government and of such statutory law as might be required in the course of time—the constitution of 1866 was long enough. But the popular distrust of representative bodies which has been increasing since that time was responsible for the incorporation in the new constitution of many provisions which otherwise would have been left to legislative enactment. See 3 MORTON at 167.

ment than any other section<sup>13</sup> and many amendments have been proposed to cure the weaknesses found therein. However, out of eleven proposed amendments to the judicial article between 1875 and the convention of 1919-20, only one was passed by the people.<sup>14</sup> The failure of these amendments was due in large part to the difficult method of amending the Constitution of 1875.<sup>15</sup> All of the amendments were passed individually by a majority of the people voting on the amendment, but failed to get the required majority of the total vote cast in the election.<sup>16</sup> The one amendment which was passed<sup>17</sup> succeeded only because of the "party circle" method of voting implemented at that time.<sup>18</sup>

The state no longer has the built-in impossibility to amend which plagued the constitutional revisionist of the earlier years, but the experience still serves to emphasize the dangers of placing too much into a constitution. The process of amendment is slow and often unrewarding, while the legislature is more responsive to the needs of the times, and can be more flexible to meet those needs.

Although the amendments proposed to alter the judicial article were unsuccessful, some were indicative of the need for a more simplified court system which would be flexible and able to meet the changing times. For example, an amendment was proposed which would have allowed the legislature to increase the number

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<sup>13</sup> Most of this criticism has been justified as the judicial article dealt in an area which should have been left to future legislation. For example, salaries, terms of the supreme court, and mandatory county judges are all covered under the article. NEB. CONST. art. VI (1875).

<sup>14</sup> NEBRASKA BLUE BOOK at 40 (1960); Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 NEB. L. REV. 580 (1960).

<sup>15</sup> NEB. CONST. art. XVIII, § 1 (1875). Amendments "shall be submitted to the electors for approval or rejection, and if a *majority of the electors voting at such election* adopt such amendments..." (emphasis added). Because of this provision if any elector voted in the election, but failed to vote on a constitutional amendment, the effect was the same as a "No" vote regardless of his feelings on the matter.

<sup>16</sup> Raymond, *Nebraska's Constitution—An Historical Study* 105 (1935). (Unpublished Doctor's thesis at Univ. of Neb. Love Library) [hereinafter cited as Raymond]. The electors apparently were not interested enough in constitutional amendments at that time to vote on them.

<sup>17</sup> LAWS OF NEBRASKA, 581 (1907). Amended Article VI, §§ 2, 4, 5, 6, and 13, by increasing the salary and number of justices on the supreme court (1908).

<sup>18</sup> Raymond at 110. The party circle method allowed a voter to vote for everything on his party's ticket by merely placing an X in his party's circle on the top of the ballot. Thus, if the parties placed the constitutional amendment on both ballots the amendment was sure to get the required majority of votes cast in the election.

of supreme court and district judges.<sup>19</sup> This exposed the need for more flexibility, since the supreme court docket at that time was considerably backlogged. Another proposal gave the legislature power to set salaries of the supreme and district court judges,<sup>20</sup> thus recognizing the problems of setting a salary by constitutional provisions in a time of increasing prosperity. The changes sought by these proposed amendments were not to be realized until almost twenty-five years later.

The legislature of 1917 recognized the need for further overhaul of the state government than was possible through the process of piece-meal amendment to the 1875 constitution, and submitted a proposal to the electorate calling for a constitutional convention. In 1918, that proposal was endorsed by the people.<sup>21</sup> Forty-one amendments which had been approved by the voters and incorporated into the constitution by a committee appointed for that purpose<sup>22</sup> were adopted by the convention; the amendment to the judicial article alone contained twenty changes.

Some changes were rather significant for purposes of this comment, definitely calling attention to the need for a more unified and modern court system in Nebraska. An amendment to section one eliminated police magistrates as constitutional courts, and provided that the legislature could substitute other courts for those designated as justice of the peace courts. This removal exemplifies the desire for fewer constitutional courts and the need for flexibility in allowing the legislature to meet the changes brought about by a fluctuating population and case load. However, it still failed to provide for a unified court of the type discussed *infra*.

Section two was amended to provide for divisions of the supreme court in order to expedite the hearing of cases in times of severe backlog. A provision allowing the supreme court to appoint district court judges to sit on the supreme court in divisions was incorporated, calling attention to two ideas prevalent in a unified court system: administrative power given to the supreme court; and transferability of judges from court to court in order to assist where they are needed.

The amendment to section eight was also indicative of the desire to allow the supreme court more administrative power. The court was given the power to hire more clerical help, in addition to the clerk of the court, and also to recommend a budget to the legislature.

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<sup>19</sup> 1895 Session Laws, Proposed amendment to § 11, at 434.

<sup>20</sup> *Id.* § 13, at 435.

<sup>21</sup> OLSON at 272-273.

<sup>22</sup> *Id.* at 276.

Section eleven pertains to the legislative power to change the boundaries of the judicial districts, the number of districts, and the number of judges. The amendment to this section allowed the legislature to change these specifications more often than every four years, the limitation imposed by the prior section. Although this amendment indicates a desire for more flexibility, a two-thirds majority is still required for any change. When compared to modern judicial systems of other states which allow the supreme court to change the number of court judges without prior legislative approval, this limitation is quite strict indeed.

Amendment to section twelve also bolstered the administrative power of the supreme court. The old section called for legislative approval before district court judges could hold court for each other. The amendment gave the supreme court the power to order the judges to sit for each other, which indicates a major change in attitude toward a more unified court system in the state.

One characteristic of a simplified court system flexible enough to meet the demands of the times is to have the salaries of the judges set by law rather than by the constitution. In 1920, an amendment to section thirteen adopted this characteristic.

The last amendment emphasizing a trend toward unification of the courts during the 1919-20 convention was the amendment to section twenty-five which gave the supreme court power to promulgate rules of practice and procedure for all the courts, consistent with the laws on the matter. The supreme court was additionally charged with the responsibility of certifying recommended amendments to the general laws governing practice and procedure, indicating a growing confidence in the court's ability to administer its own policies.

The above amendments proposed by the convention and finally adopted by the people clearly emphasize a desire and trend toward a more unified, flexible, and stronger court system. However, not all of the significant proposals of the convention were finally adopted and presented to the people. The convention found itself besieged by proposals to alter the then existing court system of the state. There were more proposals to change the court system than any other single part of the constitution.<sup>23</sup> Because of the many

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<sup>23</sup> Mr. Heasty, Chairman of the Judiciary Committee, I CONST. CONV. at 993: "I think perhaps the judicial department had a greater number of proposals referred to it than any other committee of this convention ... fifty-nine different proposals were presented."

proposals,<sup>24</sup> and because of the general mood of conservatism,<sup>25</sup> the Judiciary Committee asked that the submitted proposals be indefinitely postponed and in their place submitted its own complete proposal to the Committee on the Whole.<sup>26</sup> An examination of several of the postponed proposals reveals that despite the conservative mood of the convention, there existed a strong desire to overhaul the Nebraska court system more thoroughly than was actually done.

Although the proposals were varied they all uniformly stressed the need for change. Those concerning the basic court structure ranged from placing the judicial power of the state in one supreme court, and such other inferior courts as established by law,<sup>27</sup> to vesting that power in a supreme court, district courts, justices of the peace, and police magistrates.<sup>28</sup> One of the more far-reaching proposals was Proposal 143, designed to simplify the court system and to give more power to the supreme court in regulating judicial affairs.<sup>29</sup>

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<sup>24</sup> *Id.* at 994.

<sup>25</sup> OLSON at 276. "The general spirit of the convention was distinctly conservative."

<sup>26</sup> I CONST. CONV. at 676.

<sup>27</sup> *Id.* at 69, proposal 27.

<sup>28</sup> *Id.* at 141, proposal 95; *see also*, proposal 166 at 243, power vested in supreme court, district court, and other inferior courts; and proposal 293 at 379, the power would have been vested in a supreme court, district court, county court, and other inferior courts.

<sup>29</sup> *Id.* at 202, proposal 143. "Proposal to amend Article VI of the Constitution to read as follows: Section 1. The judicial power of this state shall be vested in a supreme court, district court, and in such other courts, inferior to the district courts as may be created by law. The Legislature may alter or abolish any of such courts inferior to the district courts as now exist and confer their powers and jurisdiction upon other courts. To secure a more simple, speedy and effective administration of justice, it shall be the duty of the Legislature at its first regular session after the adoption of this amendment by the people to appoint a commission to study and report on needed changes in the law and rules governing civil procedure. Upon the report of such committee the Legislature shall enact a brief and simple civil practice act for the regulation of procedure in the supreme court, district courts and all inferior courts which may be created by law. Thereafter, from time to time at intervals of not less than six years, the Legislature shall appoint a commission to consider and report what further changes, if any, there shall be in the law and rules governing civil procedure. The Legislature shall act on the report of each such commission by a single bill, and the Legislature shall not otherwise, or at any other time, enact any law prescribing, regulating or changing the civil procedure, unless the supreme court empowered to make and amend civil practice rules shall certify that legislation is necessary. After the adoption of the civil practice rules by the Legislature under the requirements of the first paragraph of this

Another proposal having some of the aspects promulgated in a unified court system, would have had the supreme court justices elected from candidates nominated by the bar association,<sup>30</sup> thus indicating a desire for a merit selection plan. Still another would have provided for horizontal transfer of judges at the county level,<sup>31</sup> thus equalizing the case load and providing for expeditious hearing of all cases. The vertical transfer of judges from the county level to the district court level was also proposed,<sup>32</sup> which stressed the need for qualified judges at all levels and for eliminating absolute autonomy. One final proposal gave the district court probate jurisdiction, and the county court was to be merely one of limited jurisdiction.<sup>33</sup> This proposal would have established one of the basic characteristics of a unified system: a court of complete general trial jurisdiction. These proposals are by no means all-inclusive of those introduced espousing a modern view, and although not adopted they are indicative of the need for more unification and simplification in our court system. Indeed, because these proposals were so numerous in such a conservative atmosphere, such a need should be obvious.

The judicial article has been amended only rarely since the 1919-20 constitutional convention; however, some of these amendments are of much importance in the progression toward a more modern, unified court system. In 1958, the juvenile court was added to the constitution.<sup>34</sup> Although the existing juvenile court system in the state was improved, the amendment was not in accord with a unified court system. One main characteristic of that system is to have specialized judges, rather than specialized courts.<sup>35</sup> This section does, however, leave much to the discretion of the legislature.<sup>36</sup>

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section, the power to alter and amend such rules and to make, alter and amend civil practice rules shall vest and remain in the courts of the state to be exercised by the judges of the supreme court as the Legislature shall provide. From time to time the supreme court shall investigate the expenses, costs, and charges of the various courts of the state and make recommendations to the Legislature with a view to change or reduction thereof."

<sup>30</sup> *Id.* at 119, proposal 66.

<sup>31</sup> *Id.* at 207, proposal 146.

<sup>32</sup> *Id.* at 115, proposal 53.

<sup>33</sup> *Id.* at 163, proposal 117.

<sup>34</sup> NEB. CONST. art. V, § 27.

<sup>35</sup> See text accompanying footnotes 55-60 *infra*.

<sup>36</sup> *E.g.*, the legislature will determine the number of courts to be established, the terms, qualifications, salary, and selection method of judges.



Perhaps one of the more significant changes which indicates a move toward a court system better equipped to handle the changing population and problems of modern society is the 1960 amendment.<sup>37</sup> This amendment provides for county judicial districts of two or more counties with the selection of one county judge for the district. The amendment also provides for "one or more" county judges rather than merely one, as the section had provided prior to amendment. This provision tends to eliminate autonomous courts at the county level, in every county. In addition, the amendment indicates that where the caseload demands, more than one judge can be used in one court, rather than establishing a new court in every instance. However, the amendment also displays a lack of forethought since it allows only one judge per county judicial district. This limits the use of these districts only to those counties which are sparsely populated, while they could just as easily be utilized in two or more densely populated counties by having "one or more" judges. This system would allow more efficient administration of these lower courts, one of the primary goals of a unified court system.

Two other amendments to the judicial article have been adopted in recent years dealing with the selection<sup>38</sup> and possible removal<sup>39</sup> of judges. Both are important to a modern judicial system. Section twenty-one is the "guts" of the new merit system of selection of judges for the supreme court, district courts, and such other courts as provided by law. Under this system, a judicial nominating commission offers names to the Governor whenever there is a vacancy in a judicial office, and the Governor is to select the judge from this list of names. Thereafter, the judge runs on his merit, unopposed on the ballot, three years after his selection and every six years thereafter. This amendment is important as it recognizes one of the inherent problems of the courts today—security in office for a judge—and helps to alleviate that problem. As long as a judge is "doing a good job," he should have little fear of being replaced.

The amendment concerning removal sets up a Commission on Judicial Qualifications to review the qualifications and actions of the judges in office. The Commission recommends dismissal to the supreme court if it is felt that there exists good cause. This amendment recognizes the problem of the extra responsibility placed upon the court system when it receives more administrative authority,

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<sup>37</sup> NEB. CONST. art. V, § 15.

<sup>38</sup> In 1962, sections 4, 5, 7, 10, 15, 20, and 21 were amended to provide for a merit system for the selection of judges.

<sup>39</sup> In 1966, sections 28, 29, 30 and 31 were added to the constitution to provide for a Commission on Judicial Qualifications.

more security for judges, and more independence, all of which are inherent in a unified system. These qualities, although admirable, demand some sort of checking device. The Commission on Judicial Qualifications helps to provide that check; to complete the task requires the unified court system.

L.B. 476<sup>40</sup> closely resembles a unified court system in Nebraska, through which the state has the power to establish a modern judicial system. This recent enactment will be discussed further in comparison with the Model Judicial Article and the present Nebraska Judicial Article, *infra*.

### III. THE MODEL JUDICIAL ARTICLE, THE NEBRASKA JUDICIAL ARTICLE, AND L.B. 476: A COMPARISON

The Model Judicial Article contains many of the characteristics of a modern unified court system, and as such it will serve as a useful means of comparing the Nebraska judicial system with current trends in judicial reform. Relevant sections of the M.J.A. will be set out in their entirety and each section will be followed by comments and a comparison with the appropriate section of the Nebraska article. In turn this will be followed, where appropriate, by a comment on L.B. 476.

#### SECTION 1: THE JUDICIAL POWER.

The judicial power of the State shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals, one Trial Court of General Jurisdiction known as the District Court, and one Trial Court of Limited Jurisdiction known as the Magistrate's Court.

Nebraska also vests its judicial power by section one.<sup>41</sup> It does not, however, vest the power in "one court of justice," but rather in four separate constitutional courts—supreme court, district courts, county courts, and justice of the peace courts—and "such other courts inferior to the supreme court as may be created by law."<sup>42</sup> Lack of unification in the court, in addition to being the most obvious difference between the M.J.A. and Nebraska's judicial article, is also one of the most obvious weaknesses of the state's

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<sup>40</sup> This proposed amendment was just recently passed by the 1969 Nebraska Unicameral, and will go before the voters in November, 1970. The amendment would eliminate the justice of the peace court as a constitutional court, place the supreme court as the administrative head of all courts in the state, and allow for an administrator of the courts.

<sup>41</sup> NEB. CONST. art. V, § 1.

<sup>42</sup> *Id.*

present court structure. Most changes and proposals in other states concerning court systems today deal with adoption of a single court divided into different jurisdictional levels.<sup>43</sup> "One of the major goals of any constitutional revision should be to de-localize the courts and weld them into a unified system."<sup>44</sup> This goal is achieved by the M.J.A. By placing the courts under one administrative head,<sup>45</sup> the disadvantages of autonomous courts are eliminated.

A system of separate, autonomous courts established by the constitution presents certain problems which are not easily solved.

Experience shows that even with the best of plans it is important not to go into much detail in authorizing or requiring certain courts. . . . Certainly a constitution is not the place for details which, if they work badly, can only be removed or improved by the slow and sometimes painful process of constitutional amendment. Authority to set up a modern organization and responsibility for doing it and doing it effectively are the main points to be attended to.<sup>46</sup>

As has already been indicated in Part II, Nebraska has suffered from excessive detail in its judicial article throughout its history. A unified court, with only the minimum of detail in its creation, is much more flexible to meet the changing needs and problems of a modern society. The four-level system set out in the M.J.A. may even be too detailed for Nebraska, since the state may not need an intermediate appellate court with the number of cases presently heard in the state each year.<sup>47</sup> This is one area which should be carefully studied by a commission. Perhaps Nebraska would do

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<sup>43</sup> REPORT OF THE JUDICIAL STUDY COMMISSION, Indiana; SURVEY OF THE JUDICIAL SYSTEM OF MARYLAND, prepared by the Institute of Judicial Administration, New York; PRELIMINARY REPORT TO THE LEGISLATIVE COMMISSION FROM THE SUBCOMMITTEE FOR STUDY OF THE NEVADA COURT STRUCTURE, prepared by the Legislative Counsel Bureau (1968); REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION (Pa. 1964); THE RHODE ISLAND COURTS, A SURVEY (1967), prepared by the Institute of Judicial Administration, New York.

<sup>44</sup> SURVEY OF THE JUDICIAL SYSTEM OF MARYLAND at 6 prepared by The Institute of Judicial Administration, New York, N.Y. [hereinafter cited as SURVEY OF MARYLAND].

<sup>45</sup> See text accompanying footnotes 96-103 *infra*.

<sup>46</sup> POUND, PRINCIPLES AND OUTLINES OF A MODERN UNIFIED COURT ORGANIZATION at 2, printed by the American Judicature Society. [hereinafter cited as POUND, PRINCIPLES AND OUTLINES].

<sup>47</sup> Dolan and Fenton at 486. "The only reservations we would express about the Illinois court plan as applied to Nebraska are that it . . . provides for an appellate court. . . . Too, the Nebraska appellate case load may not necessitate a separate court of appeals."

well with a three-level system<sup>48</sup> or even a two-level system.<sup>49</sup> This latter system would work extremely well in Nebraska by utilizing the present constitutional provision to set up divisions of the supreme court.<sup>50</sup> If the case load were to prove too great, the divisions could be organized on a permanent basis, perhaps even with specialized divisions as is suggested for the lower courts.<sup>51</sup> Of course the court would have to be required to sit *en banc* to settle any differences<sup>52</sup> between the divisions, and to settle any questions concerning the constitution.<sup>53</sup> These problems are ones which should be resolved by a commission after detailed study as to Nebraska's needs on the appellate level.

Regardless of the number of levels of a unified system, it still has advantages over this state's present multi-court system.

The fundamental characteristic of the new system is that there is to be "one court" and only one. This basic principle is designed (a) to eliminate the confusion of courts now existing below the superior court; (b) to minimize jurisdictional disputes that take up judicial time without reaching the merits of the case; and (c) to provide for efficient judicial administration so as to minimize delay and cost in the trial of suits.<sup>54</sup>

The particular advantages enumerated will be discussed in more detail as the appropriate section of the M.J.A. is presented.

The Nebraska judicial article allows the legislature to establish a new court at its discretion, which only adds to the confusion because of the multitude of courts<sup>55</sup> and jurisdictional questions involved. Instead of organizing a completely new court when the

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<sup>48</sup> *Proposed Judicial Article to Amend the Indiana Constitution* § 1, printed by the Indiana Judicial Study Commission, Indianapolis, Indiana (1966).

<sup>49</sup> *Legislative Counsel Bureau, Preliminary Report to the Legislative Commission from the Subcommittee for Study of the Nevada Court Structure*, Appendix A, p.1. Proposed Article 6 of the Nevada Constitution, section 1.

<sup>50</sup> NEB. CONST. art V, § 2. "Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court, to constitute two divisions of the court of five judges in each division."

<sup>51</sup> See text accompanying footnotes 71-74 *infra*.

<sup>52</sup> If specialized divisions were organized there should be a minimum of differences.

<sup>53</sup> See also, *The Case for a Two-Level Court System*, 50 JUDICATURE 185 (Feb. 1967).

<sup>54</sup> Comment, *Court Reform—Suggested Legislative Action Under the 1962 Constitutional Amendment*, 42 N.C.L. REV. 858 (1964).

<sup>55</sup> Nebraska now has numerous autonomous courts with different trial jurisdiction.

need arises, it would be much simpler to have one or two trial courts with specialized judges. This situation of a special court for every problem, which exists today in Nebraska, was discussed by Roscoe Pound:

Instead of setting up a new court for every new task we could provide an organization flexible enough to take care of new tasks when those to which they were assigned cease to require them. The principle must be not *specialized courts* but *specialized judges*, dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it.<sup>56</sup>

Pound's idea is relatively simple: it allows a judge to sit in the area of his expertise while there is a sufficient number of cases in that area to keep him busy, but would allow him to hear cases in other legal areas when needed. Flexibility of this type is not realized in a system of multi-courts where the judge of one court is not permitted to hear cases in another specialized court. This use, or rather misuse, of judicial personnel is indefensible in the modern era of efficient business administration. The judicial department would do well to emulate the business practices of the commercial world applicable to the courts, which can be done only with constitutional authorization to have better and more efficient judicial administration.

Not only the courts, but lawyers and litigants as well are severely affected by the lack of efficiency inherent in the multi-court system. This has been borne out by judicial study commissions in other states.

A cumbersome system of courts leads to the inefficient use of judicial manpower, and to confusion and the waste of time, effort, and money on the part of litigants and their lawyers in attempting to find a proper forum for their cases.<sup>57</sup>

It has also been stated that:

A bewildering patchwork of courts with overlapping jurisdiction, unsupervised operations and, often, ill-trained judicial personnel has created congested dockets and costly delays which deprive the people of prompt, fair and equal justice under law.<sup>58</sup>

It should be apparent that the unified court system provided for in section one of the M.J.A. offers certain advantages over the multi-court system provided in the corresponding section of Nebraska's present judicial article. This section alone suggests

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<sup>56</sup> POUND, PRINCIPLES AND OUTLINES at 2.

<sup>57</sup> SURVEY OF MARYLAND at 11.

<sup>58</sup> REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION at 93 (Pa. 1964).

the need for a comprehensive study of Nebraska's court system. The study would disclose the cost to the state in terms of wasted money, wasted manpower, and loss of respect for the courts, caused by the many autonomous courts established under the judicial article.

Section one of L.B. 476 vests the judicial power just as the present section, but eliminates justice of the peace courts. The amendment stopped short of establishing a three-level system of courts for the state by retaining the right of the legislature to set up "such other courts as may be created by law,"<sup>59</sup> which allows the legislature to retain, and even increase, the many autonomous lower courts already present in the state.

Despite the weakness of the amendment in retaining the right of the legislature to establish additional lower courts, the amendment does, in effect, unify the courts of the state by the addition of an administration clause in section one. This clause gives "general administrative authority over all courts in this state" to the supreme court with such authority "exercised by the Chief Justice" in accordance with rules established by the supreme court.<sup>60</sup> By allowing the Chief Justice administrative powers over all courts of the state, the possibilities of less confusion on the lower court level, and more efficient administration of the lower courts exist.

## SECTION 2: THE SUPREME COURT.

*Par. 1. Composition.* The Supreme Court shall consist of the Chief Justice of the State and (four) (six) Associate Justice of the Supreme Court.

*Par. 2. Jurisdiction.*

*A. Original Jurisdiction.* The Supreme Court shall have no original jurisdiction, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.

*B. Appellate Jurisdiction.* Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal

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<sup>59</sup> NEB. CONST. art. V, § 1.

<sup>60</sup> L.B. 476, § 1. In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed.

Basically the M.J.A. and the Nebraska article are quite similar in this section. Both deal with the physical make-up of the court and its jurisdiction. However, there are some important differences. The most obvious difference is the provision in the Nebraska article allowing the supreme court to sit in divisions.<sup>61</sup> This provision was inserted into the Nebraska Constitution at the 1919-20 convention<sup>62</sup> to help prevent the backlogging of cases in the supreme court, and may well be left in any new article adopted for Nebraska, since it does help prevent the need of an intermediate court of appeals.

In certain cases, those "involving the constitutionality of a statute, and all appeals from conviction of homicide"<sup>63</sup> the supreme court must sit *en banc*. The court may also "review any decision rendered by a division of the court."<sup>64</sup> This provision maintains uniformity in the decisions of the divisions. As suggested earlier, Nebraska could put these divisions on a permanent basis, and with a general trial court, could become the first state with a two-level unified court system—the ultimate in modern state court reform.<sup>65</sup>

The model article, by eliminating original jurisdiction, allows the supreme court to act in the capacity for which it exists, as an appellate court, and utilizes the fact finding facilities of the trial court. The result of this situation should be the more efficient disposition of cases.

Original jurisdiction is expressly excluded because appellate courts lack fact finding facilities.... The purpose to be accomplished by original jurisdiction can easily be achieved by using either the appellate or superintending power. The writs... which can now be issued originally by the Supreme Court, could under this proposal, be filed as original actions in the trial court and reviewed by the Supreme Court on appeal.<sup>66</sup>

A final difference, which allows the supreme court to determine the rules for appeals, "insures the independence of the judiciary and makes for more efficient government by placing the rule-making power in the branch of government most experienced with such

<sup>61</sup> NEB. CONST. art. V, § 2.

<sup>62</sup> See text accompanying footnotes 21 and 22 *supra*.

<sup>63</sup> NEB. CONST. art. V, § 2.

<sup>64</sup> *Id.*

<sup>65</sup> See, *The Case for a Two-Level State Court System*, 50 JUDICATURE 185 (Feb. 1967).

<sup>66</sup> Sneed, *A Proposed Judicial Article For Oklahoma*, 36 OKLA. B.A.J. 2218, 2219 (1966).

matters.”<sup>67</sup> This provision reflects one of the characteristics of a unified system: an independent judiciary which is well run.

### SECTION 3: THE COURT OF APPEALS.

The Court of Appeals shall consist of as many divisions as the Supreme Court shall determine to be necessary. Each division of the Court of Appeals shall consist of three judges. The Court of Appeals shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the State and it may be authorized by Rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

Nebraska has no provision in its judicial article for an intermediate court of appeals, and for the most part, one is not needed, considering the present number of cases presently being heard on appeal.<sup>68</sup>

### SECTION 4: THE DISTRICT AND MAGISTRATE'S COURTS.

*Par. 1. Composition.* The District Court shall be composed of such number of judges as the Supreme Court shall determine to be necessary, except that each district shall be a geographic unit fixed by the Supreme Court and shall have at least one judge. Every Judge of the District and Magistrate's Courts shall be eligible to sit in every district.

*Par. 2. District Court Jurisdiction.* The District Court shall exercise original general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the Magistrate's Court by the Supreme Court rules. The District Court may be authorized, by rule of the Supreme Court, to review directly decisions of the State Administrative agencies and decisions of Magistrate's Courts.

*Par. 3. Magistrate's Court Jurisdiction.* The Magistrate's Court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the Supreme Court shall designate by rule.

Several sections of the Nebraska article are encompassed in this section of the M.J.A. One of the most significant changes, indeed one of the most significant differences in the whole of the two articles, is the difference in jurisdiction of the trial courts.

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<sup>67</sup> *Id.*

<sup>68</sup> Dolan and Fenton at 486. However, this is another example of the need for a study commission to determine just what is the appellate caseload in Nebraska.



The model article gives the district court complete general trial jurisdiction, limited only by supreme court rules. This differs from the Nebraska article in several respects. First, the Nebraska constitution itself limits the district court's jurisdiction. Exclusive jurisdiction in "probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship, appointment of guardians, and settlement of their accounts"<sup>69</sup> is given to the county court, removing such cases from the original jurisdiction of the district courts.<sup>70</sup> Second, in Nebraska any constitutional limitations placed upon the courts is done by the legislature, not the supreme court. Third, there are no dollar or subject limits placed upon the jurisdiction of the lower courts by the M.J.A.

Placing jurisdictional limits on courts by constitutional mandate evokes uncertainty with respect to which court shall hear a particular case. This uncertainty generates litigation concerning the limitations, and thus delays litigation on the merits. Delay increases the expense of a lawsuit, and additionally consumes valuable court time, the time of attorneys, and the time of litigants.<sup>71</sup> The supreme court could institute simple and clear rules of jurisdictional limitations which would free courts of this problem. Since in a unified court system there is but one Court of Justice in the state, the only real jurisdictional question should be whether the state court system has jurisdiction. For example, it "may be error to try certain cases in the district court,"<sup>72</sup> but only error. If a case is brought in the wrong division, the remedy is simply a motion to transfer to the right division, and no dismissal results.<sup>73</sup> Under the M.J.A.'s unified court plan, the major consideration for the supreme court in making its rules is that the magistrate's courts handle the relatively small cases, thus reducing the case load of the district courts in order for the larger cases to be heard. This procedure allows keeping the smaller cases at a level at which the litigants may afford to bring the case to trial and yet obtain quality justice.

The district court may be set up with specialized divisions to cope with special problems without regard to dollar amounts, such as juvenile cases, probates, and divorce cases. Establishment in this manner would give a judge an opportunity to specialize, yet would

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<sup>69</sup> NEB. CONST. art. V, § 16.

<sup>70</sup> *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962); *In re Donlen's Estate*, 145 Neb. 370, 16 N.W.2d 731 (1944); *In re Estate of Reikofski*, 144 Neb. 735, 14 N.W.2d 379 (1944).

<sup>71</sup> Comment, *Court Reform—Suggested Legislative Action Under the 1962 Constitutional Amendment*, 42 N.C.L. REV. 858 (1964).

<sup>72</sup> *Id.* at 469.

<sup>73</sup> *Id.* at 880.

not deny a litigant access to one court for his whole litigation because of a jurisdictional question with respect to merely a part.

Another significant difference in the two sections is that under the M.J.A. the supreme court determines the boundaries and number of districts, and the number of judges, rather than having this determination made by the legislature as in Nebraska.<sup>74</sup> This difference emphasizes the concept of judicial independence and administration inherent in a unified court system. With the supreme court able to make the changes in the judicial districts and the number of judges, the system becomes more efficient, and flexible, allowing the system to keep pace with fluctuating case loads. "The number of District Court judges and magistrates must be flexible to permit adjustment to new conditions."<sup>75</sup> Not only is the power to make these changes vested in the legislature in Nebraska, but a concurrence of two-thirds of the legislature is required<sup>76</sup> which makes change even more difficult. Recent problems within the state indicate that this method is entirely too slow<sup>77</sup> and highlight the need for a system more conducive to the changing times.

There are checks which may be relied upon to guard against an abuse of the power given a supreme court justice under the M.J.A. and other similar articles. "One is his clearly defined responsibility both for what he does and lets his subordinates do and for what he omits to do."<sup>78</sup> Another is the power of removal by impeachment,<sup>79</sup> and a third, which is probably most important, is the legislative control of the purse strings. While these three factors should prevent a supreme court from abusing its powers or mismanaging the court system, it should still meet all the present needs of the court.

A third important change made by the M.J.A. in this section is that both horizontal and vertical transfers of judges are allowed, at both levels of trial courts. In Nebraska, on the other hand, only horizontal transfers at the district court level are allowed,<sup>80</sup> except for the allowance of district court judges to sit on a division of the supreme court. The Nebraska position is understandable due to the autonomous nature of its lower courts, and the fact that non-lawyer

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<sup>74</sup> NEB. CONST. art. V, § 11.

<sup>75</sup> Sneed, *A Proposed Judicial Article for Oklahoma*, 36 OKLA. B.A.J. 2218, 2220 (1966).

<sup>76</sup> NEB. CONST. art. V, § 11.

<sup>77</sup> Editorial, *Omaha World Herald*, Mar. 10, 1969.

<sup>78</sup> POUND, *PRINCIPLES AND OUTLINES* at 16.

<sup>79</sup> M.J.A., section 6, par. 4 *infra*.

<sup>80</sup> NEB. CONST. art. V, § 12.

judges are allowed to sit at county and justice of the peace levels. Under the M.J.A., all judges are required to be lawyers<sup>81</sup> and the courts are unified into one court system.<sup>82</sup>

The advantages of transferring judges should be obvious. Overloading of cases on one judge or district may be curtailed, thus saving much expense and delay. The ability to transfer vertically as well as horizontally gives the supreme court more judges from which to choose when one court is overloaded, allowing a better selection based upon qualifications of the judge, rather than necessity.

#### SECTION 5: SELECTION OF JUSTICES, JUDGES, AND MAGISTRATES.

*Par. 1. Nomination and Appointment.* A vacancy in the judicial office in the State, other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the Judicial Nomination Commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the Chief Justice or the Acting Chief Justice from the same list. Magistrates shall be appointed by the Chief Justice for a term of three years.

*Par. 2. Eligibility.* To be eligible for nomination as a justice of the Supreme Court, judge of the Court of Appeals, judge of the District Court, or to be appointed as a Magistrate, a person must be domiciled within the State, a citizen of the United States, and licensed to practice law in the courts of the State.

In 1962, Nebraska adopted an amendment closely resembling the selection method presented in the M.J.A. sections five, six, and ten.<sup>83</sup> There is, however, one difference warranting discussion. Nebraska has no constitutional provision requiring that judges be lawyers,<sup>84</sup> which is a major weakness of the Nebraska judicial article. This weakness was pointed out by Pound:

A...source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent....The notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of

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<sup>81</sup> M.J.A., section 5, par. 1 *infra*.

<sup>82</sup> *Id.* section 1 *supra*.

<sup>83</sup> NEB. CONST. art. V, § 21.

<sup>84</sup> *Id.* sections 7, 10, 15, 18. *But cf.* NEB. REV. STAT. (Reissue 1964): § 24-202, requiring admission to bar as qualification to sit on supreme court; § 24-301 requiring bar admission for district court judge; and § 24-501.01 requiring admission to bar for judge of county with 16,000 or more population or of county judicial districts.

the United States....It is felt in extravagant powers of juries, lay judges of probate and legislative or judicial law making against stare decisis....<sup>85</sup>

The lower courts are closest to the people and need to have personnel who are just as qualified for their job on the bench as do the higher courts.

It is a fundamental principle of due process that a justice, having the power to deprive a person of his liberty or property, must have a working knowledge of the law since the guarantee of due process of law requires that every man have his day in court and the benefit of general law....Thus a justice of the peace who bases his decisions on common sense rather than on the law may not meet the demand for procedural due process.<sup>86</sup>

The amount of money involved in a particular case does not necessarily determine the degree of difficulty of arriving at a just result,<sup>87</sup> and those who seek justice in the lower courts surely are deserving of judges who are as capable as those with the "more important" cases.

Why...should thugs and felons be given the full benefit of our best judicial facilities, while ordinary good citizens who have fallen afoul of the law in relatively minor ways are heard by second-class judges in second-class surroundings....I would like to have the courage to predict that in another 27 years not only will fee-paid untrained justices of the peace be a thing of the past, so also will the whole concept of a "lower" court for "lesser" cases. We have no second-class citizens; we should have no second-class courts.<sup>88</sup>

One of the basic goals of any judicial system is to promulgate respect for law and order. The lower courts need to "have dignity of setting, high standards of performance, and competent judges,"<sup>89</sup> since "[n]o judicial system is stronger than the degree of public confidence in it and that unless there is confidence in the lower courts—the ones with which most citizens come in contact—the entire structure is weak."<sup>90</sup>

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<sup>85</sup> POUND, *THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE* at 8, address delivered at the annual convention of American Bar Association in 1906, reprinted from the *Journal of the American Judicature Society*.

<sup>86</sup> Dolan and Fenton at 462.

<sup>87</sup> Winters, *Current Trends in Court Reform*, 50 *JUDICATURE* 310 (May 1967).

<sup>88</sup> *Id.* at 312.

<sup>89</sup> REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION at 96 (Pa. 1964).

<sup>90</sup> SURVEY OF MARYLAND at 5.

## SECTION 6: TENURE OF JUSTICES AND JUDGES.

*Par. 1. Term of Office.* At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter, so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the Supreme Court, the electorate of the entire State shall vote on the question of approval or rejection. In the case of judges of the Court of Appeals and the District Court, the electorate of the districts or district in which the division of the Court of Appeals or District Court to which he was appointed is located shall vote on the question of approval or rejection.

*Par. 2. Retirement.* Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The Chief Justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the State.

*Par. 3. Retirement for Incapacity.* A justice of the Supreme Court may be retired after appropriate hearing, upon certification to the governor, by the Judicial Nominating Commission for the Supreme Court that such justice is so incapacitated as to be unable to carry on his duties.

*Par. 4. Removal.* Justices of the Supreme Court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the Supreme Court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, during his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office, in, a political party or organization, or take part in any political campaign.

Section twenty-one of the Nebraska article corresponds with paragraph one of this section of the M.J.A. In addition, Nebraska adopted an amendment in 1966 to its judicial article which added sections twenty-eight through thirty-one, providing for the formation of a Judicial Qualifications Commission,<sup>91</sup> and the procedure for removal from office of the judges of the state.<sup>92</sup> These provisions will not be discussed, since the purpose of this comment is merely to discuss the structural makeup of the court system and the courts' personnel rather than the actions of those persons once they have a position. It is submitted, however, that either the sections of M.J.A. or Nebraska's article would be well implemented into any judicial reform in Nebraska.

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<sup>91</sup> NEB. CONST. art. V, §§ 28 and 29.

<sup>92</sup> *Id.* at §§ 30 and 31.

## SECTION 7: COMPENSATION OF JUSTICES AND JUDGES.

*Par. 1. Salary.* The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the State government other than the governor.

*Par. 2. Pensions.* Provision shall be made by the legislature for the payment of pensions to justices and judges who have served ten years or more, and their widows, the pension shall not be less than fifty percent of the salary received at the time of the retirement or death of the justice or judge.

*Par. 3. No Reduction of Compensation.* The compensation of a justice, judge, or magistrate shall not be reduced during the term for which he was elected or appointed.

Financial security is a large factor in obtaining competent judicial officers and in providing them with job security. Both the M.J.A. and the Nebraska article allow the legislature to set the salaries of judges, which allows the salaries to keep pace with inflation without having to go through the cumbersome process of constitutional amendment. However, the Nebraska article does not offer the same security as the M.J.A. Although the constitution is not the place to set a dollar amount for a salary, it can, nevertheless, establish a salary base.<sup>93</sup> The model article does exactly that by requiring a salary to be at least that equal to any officer of the executive branch other than the governor. It also disallows any lowering of the salary while the judge is in office, thus preventing an economic boycott of sorts to force a person out of office. The study commissions of other states have recognized that the financial security of a judicial position is important in attracting the most qualified personnel.<sup>94</sup> They have additionally recognized that no judge should be on a fee basis, such as the justice of the peace in Nebraska.<sup>95</sup>

## SECTION 8: THE CHIEF JUSTICE.

*Par. 1. Selection and Tenure.* The Chief Justice of the State shall be selected by the Judicial Nominating Commission from the members of the Supreme Court and he shall retain that office for a

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<sup>93</sup> Sneed, *A Proposed Judicial Article for Oklahoma*, 36 OKLA. B.A.J. 2218, 2222 (1966).

<sup>94</sup> See, THE REPORT OF THE JUDICIAL STUDY COMMISSION at 25 (Ind.). "Recruitment of judicial personnel seems to depend upon the relative attractiveness of a judicial position in relation to the attractiveness of being an attorney. The attractiveness of a judicial position largely depends upon two factors, the personal involvement required by the selection process and the security offered by the tenure plan."

<sup>95</sup> REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION at 93 (Pa. 1964). "The unsupervised fee system of compensation gives justices of the peace and others a monetary interest in every case that comes before them."

period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of Chief Justice without resigning from the court. During a vacancy in the office of Chief Justice, all powers and duties of that office shall devolve upon the member of the Supreme Court who is senior in length of service on that court.

*Par. 2. Head of Administration Office of the Courts.* The Chief Justice of the State shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid the administration of the courts of the State. The Chief Justice shall have the power to assign any judge or magistrate of the State to sit in any court in the State when he deems such assignment necessary to aid in the prompt disposition of judicial business, but in no event shall the number of judges and justices exceed the number of justices provided in section 2. The administrator shall, under the direction of the Chief Justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary administrative functions relating to the courts.

While there are some parts of paragraph one which do not correspond with any section of the Nebraska article, the differences are not relevant to this comment. However, paragraph two is of greater significance. In order for a unified system to work well and run efficiently, there must be a central administrative head with power to act.<sup>96</sup> This central head is provided for in the model article, but not under Nebraska's present system. It is this lack of central administration for the courts which has proven to be a major weakness of the Nebraska system, as there is no one place in the state where information on the courts may be obtained.<sup>97</sup>

Today's courts must be run in a fashion similar to a modern business, adopting the appropriate business techniques and machines which are available for use.

Scientific management is needed in a modern court no less than in a modern factory. With no one responsible there is no incentive to progress in the clerk's office. Much that could be done to reduce costs in litigation and the expense of operating the courts remains undone because it is no one's business to see it done. . . . Organization of the non-judicial administrative business of the courts calls for complete and efficient supervision, under rules of court, which is best to be obtained by unification of the judiciary as a whole, with responsible headship, charged with supervision of the subordinate supervising and superintending officers.<sup>98</sup>

The power to head the judicial branch of the government in an administrative capacity calls for more than merely a shifting of judges, as is made clear by the above passage. The administrator

<sup>96</sup> POUND, PRINCIPLES AND OUTLINES at 11-12.

<sup>97</sup> Dolan and Fenton at 460.

<sup>98</sup> POUND, PRINCIPLES AND OUTLINES at 12.

would have many other duties, for example, directing the compilation of statistics of the administration of justice in the state,<sup>99</sup> preparation of a budget, supervision of court personnel and facilities, determining calendar procedures to expedite handling of cases, arranging hours of court and vacation time, suggesting improvements in the judicial system as a whole, and checking on dozens of other chores.<sup>100</sup>

It is apparent that the administration of the judicial department calls for someone other than clerks, "although clerks under proper direction and control may do much. . . . [Administrative duties] call for strong men with clear responsibility laid upon them to preclude their falling into perfunctory routine or allowing abuses to grow up through their inertia."<sup>101</sup> Any serious attempt at judicial reform in Nebraska must certainly consider this important factor: a central administration of the courts in the state.

L.B. 476 is considered primarily as an amendment to remove justice of the peace courts from the constitution, and to open the door for a judicial study commission on the Nebraska court system.<sup>102</sup> While these purposes are certainly worthwhile, the bill's strongest point is the addition of a general administrative power in the supreme court.<sup>103</sup> Standing alone, this provision could provide the vehicle for unification of the state court system without any further change in the lower courts. Some problems inherent in a multi-court system will remain without more being done, but many other problems can be cured by this general administrative provision, for example, individual court autonomy, a lack of central judicial information, and inequitable case loads among the lower courts. In addition, the provision for an administrative director will help utilize modern business techniques in the judicial department for more efficient administration of justice in the state.

#### SECTION 9: RULE MAKING POWER.

The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

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<sup>99</sup> *Id.* at 6.

<sup>100</sup> SURVEY OF MARYLAND at 41.

<sup>101</sup> POUND, PRINCIPLES AND OUTLINES at 11.

<sup>102</sup> II JUDICIAL COMMITTEE, 80th Neb. Leg. Sess., March 25, p. 1 (1969).

<sup>103</sup> See note 60 *supra*.



Section twenty-five of the Nebraska article is similar to this provision, but does not go as far in allowing the supreme court to set the rules, as any rules promulgated by the court must be in accordance with the laws established by the legislature. The supreme court should have absolute "power to prescribe rules of practice, procedure, evidence and judicial administration for the entire judicial system."<sup>104</sup> This emphasizes the underlying ideal of judicial independence, a basic ideal of the unified system.

#### SECTION 10: JUDICIAL NOMINATING COMMISSIONS.

There shall be a Judicial Nominating Commission for the Supreme Court and one for each division of the Court of Appeals and the District Court. Each Judicial Nominating Commission shall consist of seven members, one of whom shall be the Chief Justice of the State, who shall act as chairman. The members of the bar of the State residing in the geographic area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the State, from the residents of the geographic area for which the court or division sits. The terms of office and compensation for members of a Judicial Nominating Commission shall be fixed by the legislature, provided that not more than one-third of a commission shall be elected in any three-year period. No member of a Judicial Nominating Commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a State judicial office so long as he is a member of a Judicial Nominating Commission and for a period of five years thereafter.

Section ten is not significantly different from the corresponding part of section twenty-one of the Nebraska article to warrant discussion in this comment.

There are other sections in the Nebraska article which do not have a corresponding section in the M.J.A. These sections are either examples of too much detail in a constitutional article, or are adequately taken care of by the general administration power of the model article.<sup>105</sup>

#### IV. CONCLUSION

Although Nebraska has shown some progress in the area of judicial reform in its history, as the foregoing has shown there have been no full-scale reforms in the judicial system to compare with that in other states. This comment has attempted to highlight the need for reform in Nebraska, and to suggest remedial alternatives to the present system.

<sup>104</sup> SURVEY OF RHODE ISLAND at 42.

<sup>105</sup> NEB. CONST. art. V, § 3 (terms of the supreme court); § 8 (clerk & reporter); § 22 (state to sue or be sued); § 26 (effect of amendments on judges in chambers); and § 27 (juvenile court).

It is apparent that lack of a unified court system in the state is the cause of many problems, the extent of which is not known. It is also apparent that the lack of qualified judicial personnel results in many injustices in the state, and the extent of these injustices is similarly unknown. Further, lack of a central administrative power for the judicial department causes an incalculable loss of efficiency and progression. There are other problems existing which demand attention, and this article has attempted to indicate or expose them. The detailed study needed to provide a solution to these problems should be undertaken by a judicial study commission under the auspices of the legislature. L.B. 476 has been but a single stride in this direction of reform; much more is needed.

*Thomas D. Sutherland '70*

## APPENDIX

## OUTLINE FOR JUDICIAL STUDY COMMISSION\*

## I. Introduction:

One of the main purposes of this comment is to aid a study commission should one be appointed to study the prospects of judicial reform in Nebraska. Study commissions have been of much aid to other states which have considered judicial reform<sup>1</sup> and, in fact, have been the instigating factor of reform in many instances.<sup>2</sup> The outline presented here is very simplified and is by no means exhaustive of the many areas which should be researched in a study of the judicial system of the state, or of the questions which should be asked. It is meant to merely serve as a catalyst for the research of such a commission.

II. Composition of Commission: A study commission will only produce results in direct proportion to its members' qualifications. For this reason, serious thought should go into the qualifications of the members, and the power the commission would have.

A. Members: The commission should be of a size which is conducive to doing research on a large scale and still not so large as to be cumbersome.

1. Lawyers: The largest percentage on the commission should be persons who are admitted to practice before the bar of the state. These people will have had practical experience in the courts and will know some of the problems which exist. However, the number of lawyers should be limited so that other representative groups will not be excluded from the commission.

2. Judges: Some judges should be on the commission in order to get the perspective of a person who has been on both sides of the fence.

3. Laymen: Utilization of laymen on the commission is imperative to help build respect for the courts.

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\* Many of the ideas expressed in this outline have been derived from studying the reports of study commissions of other states. Some of the reports used which were especially helpful are cited in note 43 *supra*.

<sup>1</sup> Winters, *Current Trends in Court Reform*, 50 JUDICATURE 310 (May, 1967). Speaking of the modern trend to have a judicial reform: "this boom did not come about by accident... chiefly, it is due to the series of citizens' conferences on court modernization conducted by the American Judicature Society in cooperation with the Joint Committee, bar associations, judicial councils and other organizations."

<sup>2</sup> *Court Reorganization Reforms*, 50 JUDICATURE 292 (May 1967). "In several instances these proposals for reform are the results of thorough study by committees appointed as a result of state citizens' conferences co-sponsored by the American Judicature Society. Such studies help to define a state's particular judicial weaknesses and to then find the most appropriate solutions. They have the further advantage of providing evidence of the need for reform for those who are inclined not to question the adequacy of their state's existing court system."

**B. Permanent Staff:** The bulk of the clerical work involved in a study of this magnitude calls for a full-time staff. There should be an Executive Secretary to organize the commission and to expedite the work. The secretary should be aided by whatever staff is needed to collect the data, handle the correspondence, compile statistics, keep records, and complete the final result in report form.

**C. Powers of the Commission:** The scope of the commission's powers to search for and compile data should be explicit, yet should be broad enough to allow it to complete the task involved without being bound by restriction.

**III. Utilizing Outside Assistance:** Nebraska is not the first state to consider judicial reform. Therefore, there is much outside assistance available to a study commission.

**A. American Judicature Society:** A letter to R. Stanley Lowe, Associate Director of the American Judicature Society, 1155 East Sixtieth Street, Chicago, Illinois, 60637, yielded much advice and information for this Comment. A study commission should find the same cooperation. Also, the Society aids in setting up Citizens Conferences and its experience should prove to be invaluable. The Society's director for Nebraska is Professor David Dow of the Nebraska College of Law, Lincoln, Nebraska.

**B. The American Bar Association.**

**C. The Institute of Judicial Administration,** 40 Washington Square South, New York, N.Y., 10012. The Institute has conducted studies for other states.

**D. Other States:** Other states which have already held study commissions on judicial reform are of invaluable aid to a new study commission. They have already tried and proved, or disproved, most of the avenues of study available to such a commission.

**E. Persons in the State:** There are many persons in Nebraska who will not be on the commission, but who will be vitally interested in its work. These persons should be available for opinions and suggestions.

1. **Judge Survey:** A survey could be made of the judges in the state at the outset of the commission's study to solicit advice and opinions.

2. **Lawyer Survey:** A similar survey of the lawyers in the state should garnish much valuable assistance.

3. **Layman Survey:** For a different viewpoint, the laymen of the state should not be forgotten. Selection of the persons to send a survey to would be more difficult for this group, however.

4. **Personal Interviews:** Members of the above groups could be selected for personal interviews, as well as for written surveys. A personal interview will often provide more information than a written survey because it is more bilateral.

5. **Sounding Board of Judges or Lawyers:** The commission could also appoint a panel of either lawyers or judges to serve as a sounding board throughout the period of study for ideas which the commission has. This will give an idea of how such proposals will be accepted by the people of the state if offered in the final recommendation.

**IV. History of the Judicial Article:** Usually the best place for the actual research to begin in a study of this type is with the history of the subject matter. This comment provides a concise history on the Judicial Article

of the Nebraska Constitution which should prove helpful in this area.<sup>3</sup> The history was presented in this comment because it was found that there is no other compiled history available on the judicial article.

V. Court System at work in Nebraska Today: This section is the most important part of the study the commission will be making. It also will prove to be the most difficult because of the lack of any central deposit of information on the courts of Nebraska. The study should be designed to discover what the courts are and are not doing, and what are the strengths and weaknesses of the present system. The study could be divided into the following general areas to help expedite the research.

A. Courts:

1. The number and type of courts in Nebraska today.
2. Caseload equality of the present courts.
  - a. Of courts of the same jurisdiction.
  - b. Of courts of different jurisdictions.
  - c. Increases or decreases in any particular type of cases in recent years.
3. Backlog in the present courts.
  - a. Number of cases held over each year.
  - b. Time required from filing to issue for different courts, and for each different class of cases.
  - c. Time required from issue to judgment for different courts, and for each different class of cases.
  - d. Time that should be required from filing to issue, and from issue to judgment.
4. Ratios of:
  - a. Population to Court.
  - b. Lawyers to Court.
  - c. Population to Lawyers.
  - d. Area in square miles to Court.
  - e. Growth rate of population to Caseload growth rate.
5. Relationship of one Court to Another:
  - a. What are the similarities and differences of jurisdiction?
  - b. Are the judges transferable horizontally? Vertically?
6. Terms of the different courts.

B. Judges:

1. Study the qualifications that present judges have in order to find out what type of person chooses to become a judge.
  - a. Age.
  - b. Years in Practice.
  - c. Salary while practicing law.
  - d. Specialty, if any.
  - e. Evaluation of the person's fitness to be a judge.
2. What attracted the present judges to become a judge?
3. What will attract more qualified judges at all levels?
4. What is the average tenure of a judge? Do they feel security in the office?
5. What are the retirement ages and benefits?
6. What are the selection requirements for different judges?
7. What, if any, are the political influences on different judges?

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<sup>3</sup> See Part II *supra*.

**C. Court Administration:**

1. Who administers the business of the courts of different levels?
  - a. Amount of man hours necessary at different courts.
  - b. Duplication of effort in courts which could be done more efficiently.
  - c. Qualifications of the administrative personnel.
2. What modern equipment and business methods are utilized? What methods could be utilized that are not?
3. What control is there over the judges? By whom is it exercisable?
4. What control is there over the other judicial personnel? By whom is it exercisable?
5. Finances of the Court.
  - a. Where does the money to operate come from?
  - b. How much is spent on the courts of Nebraska?
    - i. Compare courts of different jurisdictions.
    - ii. Compare courts of same jurisdiction.
    - iii. What is the cost per case for different types of cases?
    - iv. What financial benefits have other states experienced after judicial reform?

**VI. Current Trends in Judicial Reform:** The commission should study what other states are doing, or have done, to handle the problems which it finds in the present Nebraska system.

**VII. Recommendations:** The result that the commission sends to the legislature should be a strong recommendation for any judicial reform needed in the state. It also should include the proper method of implementing any reforms accepted. The method of change will prove nearly as important as the actual changes recommended, if those changes are to accomplish all that is intended.