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SPRINGFIELD

November 1, 1972

FILE NO. S-526

CONSTITUTION:
Retention of judges

COPY

Honorable John E. Holland
State's Attorney
Edwards County
Albion, Illinois 62806

Dear Mr. Holland:

I have your letter wherein you state in part:

"Considerable confusion exists among the County Clerks of the Second Judicial Circuit, relative to the method of computing the vote for Circuit Judges in the November 7 election. The County Clerk of Edwards County has requested that I secure the Attorney General's opinion, with reference to the matter, so that it may be circulated among the Clerks prior to election date.

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There are eleven Judges listed on the separate Judicial ballot in the Second Judicial Circuit. The question relates to the requirement of law, as to the affirmative vote of three-fifths of the electorate voting on the question.

> Question: Is the three-fifths requirement, as set forth above, computed as to the total number of votes cast, or is it computed as to the number of votes cast for or against retention of each individual Judge listed on the ballot?"

Section 12(d) of article VI of the Illinois Constitution of 1970 reads as follows:

> "(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. <u>The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election</u>." (Emphasis added)

A study of the last sentence of section 12(d) reveals that a resolution of your inquiry depends upon the construction of the phrase "affirmative vote of three-fifths of the electors

voting on the question." If "question" means retention of each, individual judge, then, of course, such judge, in order to be retained in office, must receive an affirmative vote that amounts to three-fifths of the total vote cast for and against that particular judge. However, if "question" means retention of a class of judges, e.g., all of the judges seeking retention in a particular circuit, then, each, individual judge, in order to be retained in office, must receive an affirmative vote that amounts to three-fifths of the total vote cast for and against that judge upon whom the greatest number of persons voted.

It is a well recognized canon of constitutional construction that the chief purpose sought to be attained is the intention of the framers. (American Breeders Assn. v. Fullerton, 325 Ill. 323). The intent and meaning of the constitution is to be determined from the language used in its provisions. (Graham v. Dye, 308 Ill. 283; People v. Stevenson, 281 Ill. 17). Thus, construction of the last sentence of section 12(d) of article VI must be with the idea of ascertaining the intent of the framers of the constitution and the understanding of the People

who ratified it. This intent cannot be garnered by viewing one sentence separate and apart from the remaining provisions of the section. For a proper understanding of the last sentence of section 12(d), the entire section must be read and construed as a whole. In People v. Barber, 348 Ill. 40, the Illinois Supreme Court was called upon to construe certain provisions of section 11 of article VI of the Illinois Constitution of 1870. At page 47, the court states as follows:

> "Section 11 refers particularly to the creation of appellate courts by the General Assembly and prescribes their jurisdiction, and the whole section, rather than a mere phrase, must be read to properly understand its meaning."

Viewing section 12(d) as a whole, we see that in the first sentence it is stated that if a particular judge, whether a supreme, appellate or circuit judge, wishes to seek retention in office, then, he must file a declaration of candidacy with the Secretary of State. Here, the singular is used in referring to judges seeking to be retained in office.

The third sentence of section 12(d) dramatically reveals that the question of retention of judges centers on each,

individual judge. This sentence reads as follows:

> "* * * The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. * * *"

It is clear on the face of the above quoted sentence that the "question" referred to is the retention of each, individual judge. It is only logical to conclude that the "question" referred to in the last sentence of section 12(d) would also be the retention of each, individual judge. Such a construction is in harmony with the maxim of constitutional construction which states that the language and words of the constitution will be given effect according to their usual and ordinary signification. (City of Springfield v. Edwards, 84 Ill. 626; Austin v. Healy, 376 Ill. 633). As was stated in the case of People v. Stevenson, 281 Ill. 17 at page 26:

> "* * * The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions. As a constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding. The

> language and words of a constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention."

Applying the plain meaning test in construing section 12(d), and reading it as a whole, it is clear that the phrase "affirmative vote of three-fifths of the electors voting on the question" refers to the retention of each, individual judge. Thus, in order for a particular judge to be retained in office he must receive an affirmative vote amounting to three-fifths of the total vote cast, for and against, that particular judge.

It is also a maxim of constitutional construction that where the consequences of a particular construction of a constitutional provision would render its operation mischievous, that construction should be avoided, provided the provision is susceptible to a different construction. (People ex rel. Stickney v. Marshall, 6 Ill. 672, 688). As pointed out earlier, by viewing the last sentence of section 12(d) separate and apart from

the rest of section 12(d) it is possible to arrive at two constructions of said sentence. However, one construction produces mischievous results and should be avoided. For example, if a particular judge in a class of judges had to seek retention in office on the basis of receiving an affirmative vote amounting to three-fifths of the highest total vote, for and against, a particular judge in the class, then, this would mean that the retention of each judge would be affected by happenstance and publicity rather than on the merits of his individual judicial record. If one judge happened to receive some adverse or favorable publicity that would cause his total vote to be abnormally large this would decrease the chances of other judges, however competent, of being retained in office. It is elementary that a judge should be retained or rejected on the basis of his record and not on the basis of the record of some other judge. It would be pernicious, to say the least, to allow the retention of one judge to be adversely affected by the fact that another judge's candidacy attracted an unusual number of voters.

Where the words employed in a constitution, when taken in their ordinary signification, embody a definite meaning, which

involves no conflict with other parts of the same instrument, the court has no authority to refer to extrinsic matters to show that a different meaning was intended. (Hills v. City of Chicago, 60 Ill. 86). With regard to section 12(d) of article VI, the constitutional debates and a commentary by a noted scholar reveal a result which is not inconsistent with the plain meaning of section 12(d). On the contrary, these materials support the view that the affirmative three-fifths vote is to be tabulated on the basis of the total vote cast for each, individual judge. Delegate Fay, in discussing the provisions of the Committee on the Judiciary that eventually became section 12(d) stated, as follows:

> "Now we decided -- both the majority and the minority -- we decided to keep retention -- the minority, as I said, in one form and the majority in another; but we decided to keep retention, and one reason we did so is that we haven't had it in this state very long. It just went into effect in 1964. There have only been, at most, three elections under it. The people have not had much experience with it; but we do feel, on the basis of Knuppel statistics, that we should raise the percentage to 60 per cent."
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> 3 Sixth Ill. Const. Con., verbatim transcripts, p. 2399 (1972).

The Knuppel statistics referred to in the above quote can be located in Appendix D of the Committee Proposals of the Committee on the Judiciary. (6 Sixth Ill. Const. Con., Comm. Rep., p. 1160 (1972)). These statistics reveal that the retention of judges, under the Constitution of 1870 as amended in 1962, was based upon each, individual judge receiving an affirmative vote amounting to a majority of the total vote cast for or against that judge.

It was, thus, the intent of the Convention that the retention provision in the Constitution of 1870 as amended appear substantially the same in the Constitution of 1970. Cohn, Judicial Changes, 1970 Const., 1971 Ill. L. F., pp. 371, 397.

Section 11 of article VI of the Illinois Constitution of 1870 was amended in 1962 to read as follows:

> "Not less than six months prior to the general election next preceding the expiration of his term of office, any judge previously elected may file in the office of the Secretary of State a declaration of candidacy to succeed himself, and the Secretary of State, not less than 61 days prior to the election, shall

> certify such candidacy to the proper election officials. At the election the name of each judge who has filed such a declaration shall be submitted to the voters, on a special judicial ballot without party designation, on the sole question whether he shall be retained in office for another term. The elections shall be conducted in the appropriate judicial districts, circuits, counties and units. The affirmative votes of a majority of the voters voting on the question shall elect him to the office for another term commencing the first Monday in December following the election. Any judge who does not file a declaration within the time herein specified, or, having filed, fails of reelection, shall vacate his office at the expiration of his term, whether or not his successor, who shall be selected for a full term pursuant to Section 10 of this Article, shall yet have qualified.
>
> Any law reducing the number of judges of the Appellate Court in any District or the number of Circuit or associate judges in any circuit shall be without prejudice to the right of judges in office at the time of its enactment to seek retention in office as hereinabove provided." (Emphasis added)

Again, it is clear on the face of this provision that the affirmative vote of a majority of the electors needed to retain a judge was a majority of the total cast for or against "him" - that individual judge. The major change in the new constitutional provision was the requirement that each

judge receive an affirmative vote of three-fifths instead of a majority.

In conclusion, section 12(d) of article VI of the Illinois Constitution of 1970 requires that a judge receive an affirmative vote of three-fifths of the electors voting on the question in order to be retained in office. I am of the opinion that the three-fifths requirement is to be computed on the basis of the number of votes cast for or against retention of each, individual judge.

Your inquiry pertained to the retention of circuit judges only, however, the construction of section 12(d) outlined in this opinion applies to the retention of appellate and supreme court judges. Thus, any appellate or supreme court judge seeking retention in office must receive an affirmative vote amounting to three-fifths of the total vote cast for or against that individual judge.

Very truly yours,

ATTORNEY GENERAL