



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION ARTICLE I, SECTION 8

WRIT OF HABEAS CORPUS

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that Article I, Section 8 be retained in its present form.

Background

Article I, Section 8 reads as follows:

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body."¹ Originating in early English common law, the concept that persons should not be imprisoned contrary to law was a key aspect of the Magna Carta.² Eventually, this principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release.³ As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.⁴

From its appearance in the Magna Carta, the writ was preserved in various parliamentary enactments, and most notably was memorialized in the Habeas Corpus Act of 1679.⁵

The writ was incorporated as part of the Northwest Ordinance of 1787, in which Article 2 stated:

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall beailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.⁶

Given this history, it was natural that the writ found a home in the United States Constitution in 1789, albeit not as part of the Bill of Rights (which was added later as a set of amendments), but at Article I, Section 9.⁷ It reads:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

When the first Ohio Constitution was adopted in 1802, the writ was described in the Bill of Rights, then located in Article VIII. Section 12 of Article VIII of the first Ohio Constitution provides:

That all persons shall beailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.⁸

Like the U.S. Constitution, the 1802 Ohio Constitution used the phrase “may require,” a construction that initially survived the 1851 revision process.⁹ However, when the provision was later reported by the convention’s Committee on Revision, Arrangement and Enrollment, the phrase was changed to remove the word “may.”¹⁰ The proceedings of the convention do not reveal that there was debate on this change. As adopted, the original, signed 1851 constitution states: “The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.”¹¹ This is the wording that now appears in the Ohio Constitution as published by the secretary of state and the General Assembly.¹²

In addition to changing the manner of reference to when the writ may be suspended, delegates to the Ohio Constitutional Convention of 1851 reorganized the Bill of Rights, placing it in Article I, separating the writ of habeas corpus from the requirement of bail, and placing provision for the writ in Section 8.¹³

The statutory procedure governing application for a writ of habeas corpus is set out in R.C. Chapter 2725, allowing, at R.C. 2725.01, anyone who is “unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived” to prosecute a writ of habeas corpus to inquire into the cause of the imprisonment, restraint, or deprivation. The statutes also describe which courts may grant the writ, what an application for the writ must contain, when the writ either is not allowed or is properly granted, and the procedural rules for considering and granting a writ.

As described in the Ohio Constitution, original jurisdiction over petitions for a writ of habeas corpus is assigned to the Supreme Court of Ohio by Article IV, Section 2(B)(1)(c), and to the Ohio courts of appeals by Article IV, Section 3(B)(1)(c). Although no specific constitutional provision allows for the original jurisdiction of the state common pleas and probate courts, Article IV, Section 4(B) assigns to the General Assembly the ability to provide by law for “original jurisdiction over all justiciable matters,” while Section 4(C) creates and provides for a probate division, thus indicating that a writ of habeas corpus may also be entertained by those courts. In fact, R.C. 2725.02 provides that the writ “may be granted by the supreme court, court of appeals, court of common pleas, probate court, or by a judge of any such court.”

Amendments, Proposed Amendments, and Other Review

The Constitutional Revision Commission in the 1970s (1970s Commission), in considering whether to recommend changes to Section 8, noted that the Constitutional Convention of 1874 unsuccessfully proposed adding language that would expressly permit the General Assembly to provide by law for suspension of the writ.¹⁴ The 1970s Commission concluded that its review did not “disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language,” and so recommended no changes.¹⁵

Litigation Involving the Provision

Despite that myriad federal court cases address the writ as provided in the U.S. Constitution, relatively few Supreme Court of Ohio decisions address Article I, Section 8 of the Ohio Constitution, and still fewer hold a writ to be the appropriate remedy. The primary question for the reviewing court is whether the applicant possesses an adequate remedy in the ordinary course of law. Courts generally determine that petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ. *See, e.g. Drake v. Tyson-Parker*, 101 Ohio St.3d 210, 2004-Ohio-711, 803 N.E.2d 811; *Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086 (a writ of habeas corpus is not available to a petitioner having an adequate remedy at law by appeal to raise his claims of unlawful imprisonment). Nor is the writ available to test the validity of an indictment or other charging

instrument, or to raise claims of insufficient evidence. *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, 796 N.E.2d 528.

The writ is appropriate, however, to challenge the jurisdiction of the sentencing court. One example is *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 2001-Ohio-1803, 757 N.E.2d 1153, in which the petitioner was an unarmed minor who was present during a robbery-homicide. After she was bound over for trial as an adult pursuant to the mandatory bindover provision in R.C. 2151.26, she petitioned for habeas corpus relief based on uncontroverted evidence that her circumstances did not meet the statutory bindover requirement that she be armed at the time of the incident. The Supreme Court of Ohio agreed, holding that the sentencing court “patently and unambiguously lacked jurisdiction to convict and sentence her on the charged offenses when she had not been lawfully transferred to that court,” and voiding the conviction and sentence. *Id.*, 100 Ohio St.3d at 617.

The writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. *See, e.g., In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851; *Pegan v. Crawmer*, 76 Ohio St.3d 97, 1996-Ohio-419, 666 N.E.2d 1091.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Discussion and Consideration

At its meeting on January 12, 2017, the Judicial Branch and Administration of Justice Committee briefly discussed Article I, Section 8 before concluding that the long history of the writ of habeas corpus, as well as the similarities between Ohio’s provision and its counterpart in the U.S. Constitution and other states, indicates that no change should be recommended.

Action by the Judicial Branch and Administration of Justice Committee

After formal consideration by the Judicial Branch and Administration of Justice Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article I, Section 8 be retained in its present form.

Presentation to the Commission

On April 13, 2017, Janet Gilligan Abaray, chair of the Judicial Branch and Administration of Justice Committee, presented a report and recommendation for Article I, Section 8, indicating that because the history and purpose of the section continue to support its relevance, the committee was not inclined to recommend a change.

Action by the Commission

At the Commission meeting held April 13, 2017, Commission member Jeff Jacobson moved to adopt the report and recommendation for Article I, Section 8, a motion that was seconded by Representative Robert McColley. Upon a roll call vote, the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article I, Section 8 be retained in its present form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

/s/ Charleta B. Tavares
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever
Representative Jonathan Dever, Co-chair

Endnotes

¹ Bryan A. Garner, *A Dictionary of Modern Legal Usage* 395 (2d ed. 1995).

² Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959), as cited in *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

³ Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. Chi. L.Rev. 243 (1965).

⁴ *Habeas Corpus*, Black's Law Dictionary (10th ed. 2014).

⁵ 31 Car. 2, c.2, 27 May 1679, available at: http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html (last visited Dec. 21, 2016).

⁶ Northwest Ordinance of 1787, as reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 et seq. It may be found online at: Journals of the Continental Congress, 1774-1789, 32:334 (Worthington C. Ford, et al., eds., 1904-37); Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787, <http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim> (last visited Dec. 21, 2016), and additionally is available at: The Avalon Project, *Northwest Ordinance; July 13, 1787*, Lillian Goldman Law Library, Yale Law School (2008), http://avalon.law.yale.edu/18th_century/nworder.asp (last visited Dec. 21, 2016).

⁷ Additional history regarding the writ of habeas corpus may be found in *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸ Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments* 92 (Cleveland, Arthur H. Clark Co. 1912).

⁹ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 2 vols. (Columbus: S. Medary, 1851), 231.

¹⁰ *Id.* at 806, 826.

¹¹ Ohio History Connection Archives, Image of Original First Page of the Ohio Constitution of 1851. Available at: <http://cdm16007.contentdm.oclc.org/cdm/ref/collection/p267401coll32/id/16791> (last visited Dec. 21 2016).

¹² The Ohio General Assembly provides a copy of the current constitution at: <https://www.legislature.ohio.gov/laws/ohio-constitution> (last visited Dec. 21, 2016); the Ohio Secretary of State provides a copy of the current constitution at: <https://www.sos.state.oh.us/sos/upload/publications/election/Constitution.pdf> (last visited Dec. 21, 2016).

¹³ A discussion of the history of the writ of habeas corpus in the Ohio Constitution may be found in Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 97-98 (2nd prtg. 2011).

¹⁴ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 25 (Apr. 15, 1976), available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Dec. 21, 2016).

¹⁵ *Id.*