



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION ARTICLE II SECTIONS 3, 4, 5, AND 11

MEMBER QUALIFICATIONS AND VACANCIES IN THE GENERAL ASSEMBLY

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 3, 4, 5, and 11 of Article II of the Ohio Constitution concerning member qualifications and filling vacancies in the General Assembly. 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 II, Sections 3, 4, 5, and 11 of the Ohio Constitution be retained in their current form.

Background

Article II generally concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly and the method for it conducting its business.

Article II, Sections 3, 4, 5, and 11 address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. Originally adopted as part of the 1851 constitution, the sections specifically describe residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacancy in the General Assembly. While subject to several proposals for change since 1851, only some amendments have been approved by the electorate.

Section 3, adopted in 1851 and amended in 1967, states that senators and representatives shall have lived in their districts for one year prior to their election:

Senators and representatives shall have resided in their respective districts one year next preceding their election, unless they shall have been absent on the public business of the United States, or of this State.

Delegates at the Constitutional Convention of 1851 addressed a concern, raised by Charles Reemelin of Hamilton County, that legislators were not always residents of the communities they represented. As Reemelin observed, “under a fair and equal representation,” it would be more ideal for representatives to live closer so as to have interests “more identical with [their constituents]”.¹ Thus, as adopted in 1851, the provision required legislators to live in their respective counties or districts for at least a year before their election, with the 1967 amendment only removing the reference to “counties” in order to satisfy legislative apportionment requirements.

Section 4, adopted in 1851 and amended in 1973, restricts members of the General Assembly, while serving, from holding any other public office, except as specified. The section additionally acknowledges the ethical concerns raised by legislators creating future employment for themselves, preventing General Assembly members from later being appointed to offices created or enhanced during their term of office:

No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.

Section 5, unchanged since 1851, prohibits persons convicted of embezzlement from serving in the General Assembly, and prevents persons holding money for public disbursement from serving until they account for and pay that money into the treasury:

No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury.

Delegates to the 1851 convention addressed the matter of convicted or disbursement-holding individuals being able to gain seats in the General Assembly. As originally proposed, the amendment would have read: “No person who shall be convicted of a defalcation or embezzlement of the public funds, shall be capable of holding any office of trust, honor or profit; nor shall any person holding any public money for disbursement, or otherwise, have a seat in either house of the General Assembly, until such person shall have accounted for and paid into

the Treasury all money for which he may be accountable or liable.”² However, when the discussion of the section came up, many delegates were unclear on the intended application and purpose of the proposed amendment, with delegate Peter Hitchcock of Geauga County supposing that the goal was to “disqualify any person who had been guilty of criminally appropriating the public funds” for personal intentions. Ultimately, the convention agreed to add the word “hereafter” to make the phrase “no person who shall hereafter be,” and to remove the word “defalcation.”³

Section 11, adopted in 1851 and amended in 1961, 1968, and 1973, defines how vacancies shall be filled in the Senate and House of Representatives:

A vacancy in the Senate or in the House of Representatives for any cause, including the failure of a member-elect to qualify for office, shall be filled by election by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled temporarily by election as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election. No person shall be elected to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An election to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as the case may be, affiliated with the same political party as the person last elected to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members elected to the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of election to the person so elected and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so elected shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so elected.

As initially proposed by a committee of the 1851 convention, Section 11 read “All vacancies which may happen in either House, shall as soon as possible, be filled by an election, and the

Governor shall issue the necessary writs of election according to law.”⁴ But delegate John L. Green of Ross County expressed a concern that handling the matter in this way would cause delay in the legislature’s consideration of important matters while waiting for an election to fill the vacancy.⁵ Another delegate, George Collings of Adams County, proposed to strike the words “as soon as possible,” which was approved, as well as a proposal by A. G. Brown of Athens County to eliminate the word “an” before “election.” Motions to add “prescribed by law” and a policy relating to the governor issuing “a writ of election” to fill legislative vacancies were declined.⁶ Some delegates desired to give the governor a role in filling vacancies, while others emphasized that the General Assembly should have the ability to create law to address vacancies. As adopted by voters in 1851, the provision read: “All vacancies which may happen in either house shall, for the unexpired term, be filled by election, as shall be directed by law.”

Amendments, Proposed Amendments, and Other Review

Sections 3, 4, 5, and 11 all date to the 1851 constitution. As discussed below, Sections 3 and 11 were amended in the 1960s before undergoing revision in the 1970s. During that era, the Ohio Constitutional Revision Commission (1970s Commission) studied Article II in depth and made extensive recommendations concerning the qualifications of members of the General Assembly, their compensation, and how to fill vacancies in the General Assembly when necessary.⁷

Section 3 (Residence Requirements for State Legislators)

In 1967, voters approved, by a margin of 59.17 percent to 40.83 percent, a state legislative district apportionment amendment that included amending Section 3 to replace a reference to the legislators’ places of residence as “counties,” with a reference to their districts.⁸ The Legislative-Executive Committee of the 1970s Commission considered whether to change the provision, focusing on whether to recommend a requirement for a candidate to be a resident of the district for a certain period of time prior to election, and a requirement that a candidate maintain residency in that district throughout his or her term. Seeking to allow a candidate the opportunity to change residency prior to election, the committee recommended the following language:⁹

Senators and Representatives shall have resided in their respective districts on the day that they become candidates for the general assembly, as provided by law, and shall remain residents during their respective terms unless they are absent on the public business of the United States or of this State.¹⁰

However, the recommendation failed to achieve the support of a two-thirds majority of the full 1970s Commission, resulting in no recommendation for change being adopted.¹¹ The general concern was that the proposed amendment would alter the constitution beyond its scope, removing the secretary of state’s authority to require a legislator to be an elector of a district. A further concern was that having no residency requirement for the duration of the legislator’s term likely would lead the matter of representation to become a campaign issue.¹²

Section 4 (Dual Office and Conflict of Interest Prohibited)

Recognizing the definitional problems in the previous version of Section 4, which prevented persons “holding office under the authority of the United States” or holding “any lucrative office under the authority” of the state of Ohio, from serving in the General Assembly, the Legislative-Executive Committee of the 1970s Commission recommended replacing the ambiguous and outdated phrases with a reference to holding “public office.”¹³ The committee considered the definition of public officer expressed in case law, but ultimately recognized that the General Assembly has the authority to define public office by statute.¹⁴ The full 1970s Commission accepted the committee’s recommendation, eliminating a previous exemption for township officers and justices of the peace, and adding an exemption for officers of the United States armed forces.¹⁵

The 1970s Commission also recommended the repeal of Article II, Section 19, and the placement in Section 4 of Section 19’s prohibition on a legislator being appointed to a public office that either was created or had its compensation increased during the legislator’s term of office or for one year thereafter.¹⁶ The 1970s Commission noted that the Citizens Conference on State Legislatures favored including a period of time in the language.¹⁷ In recommending these changes, the 1970s Commission asserted the revisions essentially were non-substantive, noting the “wisdom of prohibiting public conflicts” of interest.¹⁸

The recommendations regarding Section 4 were part of a package of revisions that included changes related to Article II, Sections 4, 6, 7, 8, 9, 11, 14, 16, 17, 18, 19, and 25.¹⁹ Presented to voters on May 8, 1973, the issue passed by a vote of 680,870 to 572,980.²⁰

Section 5 (Who Shall Not Hold Office)

Section 5 currently reads the same as it did when first adopted in 1851. The provision prevents persons convicted of embezzlement from holding public office, and requires persons holding public money for disbursement from serving on the legislature until they have accounted for the money and paid it into the treasury. The 1970s Commission recommended the repeal of Section 5, considering it unnecessary due to the establishment of other qualifications for service in the General Assembly, and from a belief that such matters should be left to statutory law.²¹ Moreover, the 1970s Commission observed that Article V, Section 4, declaring felony convicts to be ineligible for public office; and Article XV, Section 4, requiring elected officials to possess the qualifications of an elector; sufficiently articulated the ability of the General Assembly to prescribe qualifications for holding office.²² Thus, the 1970s Commission determined Section 5 was obsolete.²³ However, the voters rejected the measure at the polls on May 8, 1973 by a margin of 61.55 percent to 38.45 percent.²⁴

Section 11 (Filling Vacancy in House or Senate Seat)

Section 11, relating to how the two chambers of the General Assembly fill vacant seats, has been amended three times since 1851.²⁵ The 1851 version of Section 11 reads: “All vacancies which may happen in either House shall, for the unexpired term, be filled by election, as shall be

directed by law.”²⁶ After being successfully presented to voters as a legislatively-referred amendment on November 7, 1961, the detailed procedures set forth in Section 11 applied only to vacancies in the Senate.²⁷ Vacancies in the House were still to be “filled by election as shall be directed by law.”²⁸ The 1968 version of Section 11, which made the procedure to fill vacancies the same in both houses, was legislatively proposed and adopted by the electorate on May 7, 1968 by an overwhelming majority vote of 1,020,500 for and 487,938 against.²⁹

The 1970s Commission called its recommendation to amend Section 11 to eliminate inconsistencies between the procedures for election and for appointment “corrective,” rather than substantive.³⁰ Thus, the 1970s Commission advocated revising the language adopted by the 1961 and 1968 amendments in favor of more precise terms, ultimately using the word “elected” in place of “appointed.”³¹ As with the changes to Sections 3 and 4, the recommended change to Section 11 was adopted by voters as part of the package of ballot issues proposed on May 8, 1973.

Litigation Involving the Provisions

Only two Supreme Court of Ohio cases related to Sections 3, 4, 5, or 11 have been issued since the review of these sections by the 1970s Commission.

In *State ex rel. Husted v. Brunner*, 123 Ohio St. 3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, the Supreme Court of Ohio addressed a case that arose when the secretary of state canceled a state legislator’s voter registration on the grounds that the extensive time he was spending in Columbus in the service of the General Assembly meant he was no longer a resident of his home county for voting purposes. In concluding that the legislator’s home county remained his residence for voting purposes, the Court analyzed the requirements of Section 3, noting that the provision “ensures that a state legislator’s absence from the district on official duties does not jeopardize his or her right to claim a full year’s residence in the district.” *Id.* at ¶ 29. Thus, the Court held the legislator was eligible to remain on the poll books as a registered elector in Montgomery County. *Id.* at ¶ 35.

In *State ex rel. Meshel v. Keip*, 66 Ohio St.2d 379, 423 N.E.2d 60, the Court considered a claim that the state controlling board had unlawfully transferred rail transportation appropriations. Among other arguments, relator had asserted that the controlling board’s actions were unconstitutional because six of its seven members also were legislators, in violation of Article II, Section 4. Specifically, relator claimed that Section 4’s prohibition on legislators from holding public office during their term prevented legislators from serving on the controlling board. The Court disagreed, observing that, for controlling board members to be holding a public office, the controlling board must be said to exercise some portion of the state’s sovereign power. The Court found that the controlling board did not exercise independent power in the disposition of public property or have the power to incur financial obligations on behalf of the county or state, and so legislators did not violate Section 4 by simultaneously serving on the controlling board. *Id.*, 66 Ohio St.2d at 387-88, 423 N.E.2d at 66.

Presentations and Resources Considered

Hollon Presentation

On July 14, 2016, Steven C. Hollon, executive director, described to the Legislative Branch and Executive Branch Committee that Sections 3, 4, 5, and 11 deal with residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacant seat of the General Assembly. Mr. Hollon suggested that, because these provisions cover related subject matter, they could be reviewed together and addressed in a single report and recommendation.

Discussion and Consideration

In discussing Article II, Sections 3, 4, 5, and 11, the Legislative Branch and Executive Branch Committee determined the revision of the sections in the 1970s adequately addressed any previous concerns. The committee further considered that the sections continue to appropriately and effectively guide the legislature's organization and operation, and so should be retained.

Action by the Legislative Branch and Executive Branch Committee

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on December 15, 2016 to issue a report and recommendation recommending that Article II, Sections 3, 4, 5, and 11 be retained in their present form.

Presentation to the Commission

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 3, 4, 5, and 11. She said the report indicates the committee's recommendation that the sections be retained in their current form. She said the report further describes that these sections address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. Originally adopted as part of the 1851 constitution, she said the report states that the sections specifically describe residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacancy in the General Assembly.

Ms. O'Neill continued that the report outlines the changes recommended by the Constitutional Revision Commission in the 1970s, as well as amendments to the sections. She said the report also describes related litigation, as well as documenting the committee's discussion and consideration of the sections. She said the report expresses the committee's conclusion that the sections continue to appropriately and effectively guide the legislature's organization and operation, and so should be retained in their current form.

With regard to Section 11, which prescribes the procedure for filling vacancies, Commission member Charles Kurfess asked whether anyone has raised the issue of filling a vacancy if the

individual member whose departure caused the vacancy was elected in some capacity other than as a member of the Republican or Democratic Party. He noted that the current trend is for more candidates to run as independents, but the current provision does not seem to be designed for that situation.

Senator Bill Coley said he is not aware of any member who did not caucus with someone, so that, even in the United States Congress, where members are elected as independents, they choose to caucus with one party caucus or the other. He said a situation in which someone was truly independent and did not caucus with anyone and then left, that would pose a quandary. But, he said, under the current rules, if an independent caucuses with a party, it would be up to that party to replace that person.

Commission member Jeff Jacobson disagreed, indicating that the replacement would depend on what the person was elected as. He noted an example in which a Democrat was elected but joined the Republican Party after being elected; indicating that if that person had left the Democratic Party would have chosen his replacement.

Mr. Kurfess said, as he reads it, what the member does after he gets to the legislature does not affect which party replaces the legislator if there is a vacancy.

Co-chair Jonathan Dever suggested that question could be put to the Legislative Branch and Executive Branch Committee to determine how it might be addressed.

Action by the Commission

At the Commission meeting held April 13, 2017, Legislative Branch and Executive Branch Committee Chair Fred Mills moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by Commission member Bob Taft. 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 II, Sections 3, 4, 5, and 11 be retained in their present form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and 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 *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), 102.

² *Id.* at 163-164.

³ *Id.* at 258; Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments*. (Cleveland: Arthur H. Clark Co., 1912), 110.

⁴ *Report of the Debates, supra*, at 163.

⁵ *Id.* at 230.

⁶ *Id.* at 232.

⁷ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 1, Administration, Organization, and Procedures of the General Assembly (Dec. 31, 1971). Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf> (last visited Oct. 12, 2016). See also, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report (June 30, 1977). Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 12, 2016).

⁸ Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 13 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

The amendment removed the word “counties” so that Section 3 reads “shall have resided in their respective districts.”

⁹ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 1, 39 (Jan. 8, 1970). Available at: <http://www.lsc.ohio.gov/ocrc/v1%20pgs%201-548%20meetings%20beginning%201-8-1970.pdf> (last visited Sept. 23, 2016).

¹⁰ *Id.*, Vol. 2 at 1096.

¹¹ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Proceedings Research, *supra*, at 42.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 20; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 100.

¹⁶ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 17-20; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 97-100.

¹⁷ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 22; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 102.

¹⁸ *Id.*

¹⁹ The ballot language asked whether Article II, Sections 4, 6, 7, 9, 11, 14, and 16 should be amended, whether Sections 8 and 15 should be enacted, and whether Sections 8, 15, 17, 18, 19, and 25 should be repealed, with the goal of providing qualifications for members of the General Assembly, allowing each house to choose its own officers and rules of proceeding, requiring annual legislative sessions and allowing special sessions, and providing for procedures for passing and enacting legislation.

See [https://ballotpedia.org/Ohio Procedures of the General Assembly, Amendment 6 \(May 1973\)](https://ballotpedia.org/Ohio_Procedures_of_the_General_Assembly,_Amendment_6_(May_1973)) (last visited Oct. 6, 2016), citing the *Toledo Blade*, May 7, 1973, <https://news.google.com/newspapers?id=8QhPAAAAIIBAJ&sjid=RAIEAAAAIIBAJ&pg=7444,4723240&hl=en> (last visited Oct. 6, 2016).

²⁰ Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 14 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

²¹ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 23; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 103.

²² *Id.*

²³ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 24; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 104.

²⁴ Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 14 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

²⁵ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 26; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 106.

²⁶ *Id.*

²⁷ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 37; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 117.

See <https://www.law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/vacancies2.jpg> (last visited Oct. 12, 2016)(providing the full text of the 1961 proposed amendment to the Constitution).

²⁸ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 37; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 117.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*