OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE VII, SECTIONS 2 AND 3

DIRECTORS OF PUBLIC INSTITUTIONS

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VII, Sections 2 and 3 concerning directors of public institutions. 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The Commission recommends that Article VII, Sections 2 and 3 be repealed as obsolete.

Background

Sections 2 and 3 of Article VII read as follows:

> Section 2
>
> The directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the General Assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the Senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the Senate.
>
> Section 3
>
> The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.

Origin of Sections 2 and 3

In creating provisions about public institutions, the delegates to the 1850-51 Constitutional Convention were plowing new ground; no similar article or provisions were a part of the 1802 Constitution. While one apparent goal was to express support and provide for "benevolent institutions," understood as facilities for persons with diminished mental capacity as well as for the blind and deaf, the greater portion of the discussion centered on the governance of the state correctional system, the purposes of incarceration, and the operation of prison facilities and prison labor programs.[1]

Addressing proposals for Section 2, delegates immediately focused on whether directors of the penitentiary should be selected by the General Assembly, appointed by the governor, or directly elected by voters.[2] Some delegates supported allowing the General Assembly to make this determination. Others expressed that the rationale given for involving the governor – that the General Assembly had become unpopular – was not supported by fact, and, in any event, was not sufficient justification to have voters approve "every small office in the state."

Other delegates expressed that the importance of the role of directors of the penitentiary meant they should be elected, with one delegate, Daniel A. Robertson of Fairfield County, having previously supported that position in his previous role as a member of the New York Constitutional Convention in 1837, where he advocated the popular election of all public officers.[3] In fact, requiring all state offices to be elective had been a key plank in the platform of reforms advocated by Samuel Medary and others as justification for voting to hold the 1850-51 convention.[4]

Some delegates supported allowing the governor to appoint, with a requirement for obtaining the advice and consent of the Senate as a compromise measure.

Delegates then returned to the issue of how directors should be selected. G.J. Smith, a Warren County attorney, offered an amendment that would add at the close of Section 2 the words "and the question upon all nominations made by the Governor shall be taken by yeas[] and nays and entered upon the journal of the senate," which delegates approved.

D.P. Leadbetter, a Holmes County farmer, then proposed Section 3 to address how vacancies would be filled, as follows:

> The governor shall have power to fill all vacancies that may occur in the offices created by this article of the Constitution, until their successor in office shall be elected and qualified, or until the meeting of the ensuing legislature, and the successor confirmed and qualified.[5]

This addition was adopted, and the committee reported both sections back to the convention.

The discussions of Sections 2 and 3 resulted in provisions that assigned roles to the General Assembly and the governor in selecting penitentiary and benevolent institution directors, and provided a procedure for filling director vacancies in penitentiaries and benevolent institutions.

While a significant portion of the discussion dealt with the purposes of incarceration and compensation for prison labor, these topics did not culminate in a recommendation.

Although Sections 2 and 3 may seem overly concerned with how the officers of the institutions are selected, in 1850-51, a concern about legislative overreaching, as well as a related desire to elevate the role of the voter, heightened delegates' interest in the topic.[6] Indeed, a large part of the delegates' discussion about public institutions centered on which branch of government should control and regulate these institutions.

Aside from expressing general support for public institutions, the convention delegates' primary goal seems to have been to address the election-versus-appointment issue. The meandering discussion allowed delegates to express opinions on crime and punishment, racial segregation, and political power, but the discourse never ripened into a substantive policy statement or consensus for an approved recommendation. While one delegate attempted to expand the concept of "public institutions" to include a provision related to prison labor, his proposal was rejected. No other delegate appears to have attempted to propose a new amendment.

Relationship to Statutory Law

The provisions in Article VII, Sections 2 and 3 are not self-executing, and the General Assembly has adopted more detailed statutory provisions.

Article VII, Section 2 references "directors of the penitentiary" but does not create that role. The phrasing of Article VII, Section 2 suggests that the referenced positions already exist. Thus, its primary purpose, as well as that of Section 3, is not to create the roles but to describe how the roles are to be filled.

Under current statutory law, the most analogous position to that of the "directors of the penitentiary" is possibly the director of the department of rehabilitation and correction, a statutory department head role identified in R.C. 121.03, at subsection (Q). R.C. Chapter 5120 relates to the Department of Rehabilitation and Correction (DRC), providing under R.C. 5120.01 that the director is the executive head who has the power to prescribe rules and regulations, and who holds legal custody of inmates committed to the DRC. While R.C. Chapter 5145 generally concerns "the penitentiary," its current focus is on details related to managing the prison population, rather than the role of the director of the penitentiary.

In relation to Article VII, Section 3, R.C. 3.03 provides specific instructions for the governor's exercise of the power to appoint to fill a vacancy in office, with the advice and consent of the Senate.[7]

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission), recommended the repeal of Sections 2 and 3, finding them to be obsolete. As the committee of the 1970s Commission noted, the sections derived from a time when nearly all appointing power was vested in the legislature, so that the provisions were deemed necessary to allow a transfer of that

power to the governor, with the advice and consent of the Senate. However, the 1970s Commission observed that the office of the directors of the penitentiary is no longer in existence. The Commission report further noted that, by the 1970s, the only state institution that could be considered a "benevolent institution," the Ohio Soldiers' and Sailors' Orphans' Home, was governed by a statutory five-member board of trustees appointed by the governor with the advice and consent of the Senate. Thus, neither Section 2 nor Section 3 was deemed to be necessary for the state to carry out functions related to the incarceration of prisoners or the support of state "benevolent institutions."

Litigation Involving the Provision

In re Hamil, 69 Ohio St. 2d 97, 437 N.E.2d 317 (1982), invited the Supreme Court of Ohio to consider whether a "benevolent institution" included a private psychiatric facility. In that case, the juvenile court found a 13-year-old charged with delinquency to be a mentally ill person in need of hospitalization at a state facility. When the superintendent at the state facility determined a more appropriate placement was at a private facility, the court ordered the juvenile's private placement and further ordered that the state would be responsible for the full expense of his care, with reimbursement by his parents to the extent of their insurance coverage and ability to pay. On appeal, the Court held the juvenile court had acted beyond the scope of its jurisdiction in ordering the state to pay the cost of care of a juvenile in a private psychiatric hospital.

Acknowledging Article VII, Section 1's requirement that state institutions of this kind "shall always be fostered and supported," the Court interpreted this mandate as indicating the state's "strong responsibility to care for citizens placed in its public institutions." *Id.,* 69 Ohio St. 2d at 99, 431 N.E.2d at 318. However, the Court observed that, historically, the phrase "benevolent institution" has been used to refer to state-owned and operated institutions, not private institutions. *Id.,* 69 Ohio St. 2d at 100, 431 N.E.2d at 318. Therefore, the Court found, "no justification exists * * * for imposing a similar duty upon the state to care for persons confined to privately operated facilities over which the state has no control." *Id.,* 69 Ohio St. 2d at 99, 431 N.E.2d at 318.

Presentations and Resources Considered

Furderer Presentation

On March 9, 2017, the Education, Public Institutions, and Local Government Committee heard a presentation by Darin Furderer, who is a corrections analyst at the Correctional Institution Inspection Committee, on the leadership arrangements for correctional facilities and the use of the term "director."

Mr. Furderer noted the title of "director" is not used to refer to the head of the penitentiary. He added that the DRC currently uses the term "warden" to refer to a person in charge of an adult correctional facility, and the Department of Youth Services uses the term "superintendent" to refer to a person in charge of a youth correctional facility.

Discussion and Consideration by the Education, Public Institutions, and Local Government Committee

The Education, Public Institutions, and Local Government Committee noted that the governor appoints a "director" of DRC, who is the head of the department rather than the head of the penitentiary. The DRC director then appoints the persons who run the correctional facilities.

Committee members agreed the sections appear to be obsolete, noting that they focus on who appoints the heads of these institutions, an issue that has been settled for a long time and is not relevant to any present procedure.

Action by the Education, Public Institutions, and Local Government Committee

After formal consideration by the Education, Public Institutions, and Local Government Committee on April 13, 2017, and May 11, 2017, the committee voted unanimously to recommend repeal of Article VII, Sections 2 and 3.

Presentations to the Commission

On May 11, 2017, and on June 8, 2017, Ed Gilbert, chair of the Education, Public Institutions, and Local Government Committee, presented a report and recommendation for Article VII, Sections 2 and 3, indicating the history and purpose of the provision, describing the presentation to the committee, and discussing the committee's deliberations on the question of whether the sections were obsolete.

Action by the Commission

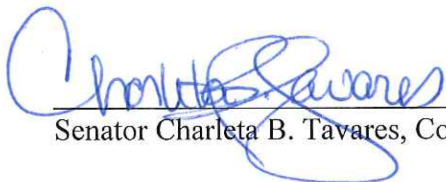
At the Commission meeting held June 8, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VII, Sections 2 and 3, a motion that was seconded by Commission member Karla Bell. Upon a roll call vote, the motion passed, by a vote of 23 in favor, with none opposed, and seven absent.

Conclusion

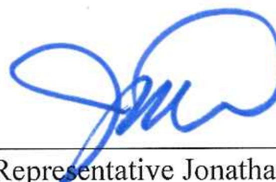
The Ohio Constitutional Modernization Commission recommends that Article VII, Sections 2 and 3 be repealed as obsolete.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on May 11, 2017, and June 8, 2017, the Commission voted to adopt the report and recommendation on June 8, 2017.



Senator Charleta B. Tavares, Co-chair



Representative Jonathan Dever, Co-chair

Endnotes

[1] An analysis of this debate, including a table of the participating delegates and an excerpt of the proceedings, is contained in a memorandum provided to the Committee. *See* O'Neill, Article VII (Public Institutions) at the 1851 Constitutional Convention (August 23, 2016). The discussion, in full, may be found in Ohio Convention Debates, pages 539-49, available at http://quod.lib.umich.edu/m/moa/aey0639.0002.001?view=toc (last visited Aug. 23, 2016).

[2] As originally introduced, Section 2 provided as follows:

> The Directors of the Penitentiary, and the Trustees of the Benevolent Institutions, now elected by the General Assembly of the State, with such others as may be hereafter created by subsequent Legislative enactment shall, under this constitution, be appointed by the Governor, by and with the advice and consent of the Senate.

[3] *See* David M. Gold, *Judicial Elections and Judicial Review: Testing the Shugerman Thesis,* 40 Ohio N. L. Rev. 39, 51 (2013).

[4] *See* Barbara A. Terzian, *Ohio's Constitutional Conventions and Constitutions,* in The History of Ohio Law 40, 52 (Michael Les Benedict and John F. Winkler, eds., 2004).

[5] Currently, Section 3 provides: "The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified."

[6] As Steinglass and Scarselli note: "Over the course of five decades under the first constitution * * * the people began to see the legislature as the source of many, if not most, of the problems of government, and the new constitution reflected this general distrust of legislative power. * * * [T]he new constitution took the appointment power away from the General Assembly. All key executive branch officers became elected officials, as did all judges." Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 35 (2nd prtg. 2011).

[7] R.C. 3.03 provides:

> When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a regular session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report

the appointment to the next regular session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made. A person appointed by the governor when the senate is not in session or on or after the convening of the first regular session and more than ten days before the adjournment sine die of the second regular session to fill an office for which a fixed term expires or a vacancy otherwise occurs is considered qualified to fill such office until the senate before the adjournment sine die of its second regular session acts or fails to act upon such appointment pursuant to section 21 of Article III, Ohio Constitution.